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THE
ATLANTIC REPORTER,
VOLUME 62

CONTAINING ALL THE REPORTED DECISIONS OF THE

Supreme Courts of MAINE, NEW HAMPSHIRE, VERMONT, RHODE ISLAND,
CONNECTICUT, and PENNSYLVANIA; Court of Errors and Appeals,
Court of Chancery, and Supreme and Prerogative Courts
of NEW JERSEY; Supreme Court, Court of Chancery,
Superior Court, Court of General Sessions, and
Court of Oyer and Terminer of DELAWARE;
and Court of Appeals of MARYLAND.

PERMANENT EDITION.

DECEMBER 21, 1905—APRIL 12, 1906.

WITH TABLES OF ATLANTIC CASES PUBLISHED IN VOLS. 77, CONNECTICUT REPORTS; 99, MAINE REPORTS;
100, MARYLAND REPORTS; 66, NEW JERSEY EQUITY (31 DICK.) REPORTS; 71, NEW JERSEY LAW
(42 VROOM) REPORTS; 310, 311, PENNSYLVANIA REPORTS; 25, 26, RHODE ISLAND
REPORTS; 77, VERMONT REPORTS.

ALSO, ADDITIONAL TABLES FOR VOLS. 77, CONNECTICUT REPORTS; 99, MAINE REPORTS; 100, MARYLAND
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REPORTS; 310, 311, PENNSYLVANIA REPORTS; 25, 26, RHODE ISLAND REPORTS;
77, VERMONT REPORTS

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ST. PAUL:
WEST PUBLISHING CO.

1906.

Law Library

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³ Resigned April 1, 1905.

⁴ Appointed July 5, 1905.

⁵ Became Justice June 21, 1905.

⁶ Resigned July 7, 1905.

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GEORGE M. POWERS.

WILLARD WESBERRY MILES.²

¹Died November 7, 1905.

²Appointed November 29, 1905.

•

COURT RULES.

COURT OF CHANCERY OF NEW JERSEY.

The following was promulgated as rule 222 on November 25, 1905:

Rule 222. RECEIVERS OF PARTNERSHIP.

Receivers appointed or directed to wind up the affairs of a partnership or pay its debts, shall give notice of their appointment, and notice to creditors to present their claims. These notices shall be similar (*mutatis mutandis*) to the notices required to be given by assignees under the general assignment act, and shall be published and mailed in the same manner. The court may, by special order, make other or different directions as to the notices to be given or the time or manner of their publication.

At the expiration of three months from the time of appointment, the receiver shall file a list of the claims presented and proved. The receiver or any creditor or other person

interested, may except to the allowance of the whole or any part of any claim presented, of which exception notice shall be given to the claimant, and thereupon order shall be taken for adjudication upon the claim. The court may, by special order, make other or different directions as to the time or manner of presenting the list of claims.

This rule shall not apply to receivers directed to continue a partnership business, unless by special order.

On the same day the Chancellor altered rule 4 by adding, at the end of the first paragraph, the following:

"And except, further, that the Tuesdays whereon the regular term of the court is opened, shall not be motion days at the Chancery Chambers at Newark."

SUPREME COURT OF RHODE ISLAND.

Rules of Practice.

On the seventeenth day of July, A. D. 1905, the following rules were adopted by the Supreme Court of the state of Rhode Island and Providence Plantations, in session at Providence, to regulate the practice in actions and proceedings in said court, all other rules theretofore existing being rescinded:

ATTORNEYS AND COUNSELLORS.

1. Any person desiring to be admitted to the bar may file his petition in the clerk's office setting forth:

First.—That he is a citizen of the United States, or has filed his declaration of intention to become a citizen; that he resides in this state; that he is over twenty-one years of age; and that he intends, if admitted, to practice law in this state.

Secondly.—Either that he has received a classical education and has studied law two years in the office of an attorney and coun-

sellor at law, or two years in some law school in the country and the office of an attorney and counsellor, six months of which time of study, at least, shall in all cases have been in the office of an attorney and counsellor in this state;

Or that, not having received a classical education, he has studied law three years in the office of an attorney and counsellor at law, or three years in some law school in the country and the office of an attorney and counsellor, six months of which time of study, at least, shall have been in the office of an attorney and counsellor in this state;

Or that, having been admitted to the bar in some one of the United States, he has practiced law therein for more than three years and has studied law in the office of an attorney and counsellor in this state for the term of six months;

Or that, having been admitted to the bar in some one of the United States, he has practiced law for more than ten years.

Such petition shall be endorsed by an attorney and counsellor of this court, who shall certify that the petitioner is of good moral character and, in his opinion, a suitable person for admission to the bar. Upon filing such petition the petitioner shall pay to the clerk a fee of ten dollars: Provided, that in case an applicant is unsuccessful in his first application he shall be required to pay, upon the filing of any subsequent petition, the sum of five dollars only.

2. Any person entering the office of an attorney and counsellor in this state as a student of law shall file forthwith, with the clerk, a certificate from such attorney that the student has begun a course of study in his office; and the term of study of such student for the purpose of these rules shall be computed from the time of the filing of such certificate in the clerk's office.

3. Unless otherwise specially ordered, all petitions for admission to the bar shall be referred to a board of bar examiners of five members, appointed by the court. The members of the present board shall hold office for the term of five years from the date of their several appointments; and hereafter one member shall be appointed annually on the third day of March for the term of five years. The court may remove any examiner at its pleasure and fill any vacancy in said board.

4. The board of bar examiners shall investigate and verify the allegations in the petitions referred to them, shall ascertain the character, qualifications, and attainments of the several petitioners, and, unless otherwise specially ordered, shall subject the petitioners to examination as to their knowledge of law, and shall report to the court upon each petition, with such recommendation as they shall think proper.

If the board report that the petitioner is qualified and recommend his admission, then, unless the court otherwise order, he shall be admitted as an attorney and counsellor at law of this court, and as such shall be entitled to practice law in all the courts of this state.

5. The board of bar examiners shall determine the time and place of all examinations for admission to the bar, and shall notify the clerk of the time and place so fixed at least twenty days before the time for each examination; and said clerk shall publish in some one or more of the daily newspapers printed in the city of Providence, for the space of ten days before the time so fixed, a notice of such time and place and a list of the names and residences of the several applicants whose petitions shall have been referred to said board for action at the coming examination. Said board may make rules for their organization, conduct, and government, subject to the approval of the court.

Such compensation as the court shall de-

termine shall be allowed and paid to the members of the board by the clerk of the court, from the fees received by him, under the provisions of rule 1.

6. Every person who is admitted as an attorney and counsellor shall take in open court the following engagement:

"I, ———, do solemnly swear (or affirm) that I will demean myself as an attorney and counsellor of this court, and of all other courts before which I may practice as an attorney and counsellor, uprightly and according to law, and that I will support the Constitution and laws of this state, and the Constitution of the United States."

7. Members of the bar of other states not residing in this state will be permitted on motion to conduct or argue any case on trial in the courts of this state as heretofore, but no nonresident can be recognized as an attorney in any case for the purposes of endorsing writs, filing answers or pleas, or issuing or receiving notices or agreements.

8. Complaints against members of the bar for unprofessional conduct shall be made in writing and shall set forth specifically the facts upon which the charge is based. Such complaints when filed with the clerk will be referred for examination and report thereon to a standing committee of five members of the bar appointed by the court. The members of the present committee shall hold office until the expiration of their respective terms of appointment, and vacancies as they occur hereafter will be filled by appointments for the term of three years.

The members of this committee will be excused from attendance in court when necessary to fulfill engagements previously made to attend meetings of this committee.

FILING AND ENTERING PETITIONS, APPEALS, ETC., AND NOTICE THEREON.

9. Notice on petitions for trials or new trials in which notice is necessary shall be by citation issued by the clerk as of course, when the petition is filed, returnable at a time requested by the petitioner, not less than ten nor more than twenty days after the issue thereof, unless some other special notice shall be ordered by the court. Such citation shall be served at least ten days before the return-day, and the cause shall be placed by the clerk on the calendar of the court for hearing by the court on the return-day, of the citation, except that in vacation the citation shall be returnable on the first day on which the court will be in session, if said day shall not occur within twenty days from the date of citation.

Cases in which the Supreme Court and superior court have original concurrent jurisdiction shall not be filed or received by the clerk of the Supreme Court without leave of the court. Such matters may be called up

in open court, without previous filing, upon the question whether the court will entertain jurisdiction.

The clerk is authorized to place other proceedings, original or appellate, in which the statute does not provide for notice upon the calendar of the court when requested by the moving party, upon the question of the notice to be given adverse parties of the pendency of proceedings.

Every appeal, petition, complaint, or other application in writing to the court shall have the name of the attorney presenting the same endorsed thereon; and every paper filed in any case, excepting notes, deeds, or other documentary evidence, shall also have endorsed thereon the name and number of the case and a brief designation of the character of the paper. The only proof of the time of filing any paper shall be the file-mark of the clerk.

DOCKETING.

10. All cases shall be docketed and numbered consecutively in the classes to which they respectively belong, except that the court may order a new series of numbers when it is deemed to be desirable. The classes will include the following:

- (1) Constitutional Questions.
- (2) Miscellaneous Petitions and Appeals.
- (3) Bills of Exceptions, etc.
- (4) Equity.

Petitions for extraordinary and prerogative writs and processes, and all appeals except appeals in equity, shall be docketed under "Miscellaneous Petitions and Appeals."

Bills of exceptions, petitions for trials and new trials, actions in which agreed statements of fact have been filed, motions in arrest of judgment, and all questions certified from lower courts in actions or criminal proceedings shall be docketed under "Bills of Exceptions, etc."

Proceedings in equity originally entered in the Supreme Court, appeals in equity, causes in equity certified to Supreme Court, and cases stated for opinions shall be docketed under "Equity."

ASSIGNMENT OF CASES.

11. Assignments of cases for hearing may be made by agreement of parties for Monday, Wednesday, and Friday of each week during the session, except that cases will not be assigned for hearing on legal holidays, nor on Good Friday, Commencement Day at Brown University, and the two days before and the two days after Christmas Day.

AFFIDAVITS.

12. In all petitions for new trials in which affidavits are admissible, the petitioner shall file his affidavits at least five days before the day set for hearing; and in case counter

affidavits are admissible said counter affidavits shall be filed at least three days before the day of trial, unless otherwise allowed by the court.

BILLS OF EXCEPTIONS, ETC.

13. Every petition for allowance of a bill of exceptions or for determining the correctness of a transcript of testimony in this court shall be verified by affidavit accompanying the petition, setting forth in full the rulings upon which the exceptions are based or the grounds of objection and all facts material thereto, and the petitioner shall within twenty-four hours after the filing of his petition deliver to the adverse party or his attorney of record a copy of the same and the affidavits annexed thereto. The adverse party may file counter affidavits within ten days after receiving the copies aforesaid, and the court may grant further time to the petitioner to reply in its discretion; and thereafter the petition shall stand for assignment and hearing on motion of either party.

If the papers in the case shall not have been transmitted to this court upon the filing of the petition, the court will order the same transmitted when the exceptions are allowed.

ARGUMENTS AND BRIEFS.

14. Forty-eight hours, at least, before the day for which any case is assigned for trial, each party shall file with the clerk of the court, for the opposite party, each of the justices, and the reporter, a printed or typewritten brief, signed by the counsel presenting it, which shall contain (1) a brief and concise statement of the case, (2) the specific questions raised, duly numbered, and (3) the points made, together with the authorities relied on in support thereof. In cases where it may be necessary for the court to go into an examination of record evidence, each party shall briefly specify in his brief the leading facts which he deems established by the evidence, with a reference to the pages where the evidence of such facts may be found. In case the briefs are typewritten, they shall be on good paper and distinctly legible. No tissue-paper briefs will be received. The size of the paper shall be eight inches by ten, with not less than one inch margin on each side. The size of type to be used in printing briefs shall be that used in the text of Rhode Island Reports, as near as may be.

For the purpose of preservation and convenience of reference they shall be bound on the left side of the front page and not at the top.

A party in default shall not be heard, except by leave of court.

AGREEMENTS.

15. All agreements of parties or attorneys touching the business of the court shall be

in writing, or they will be considered of no validity.

AMENDMENTS.

16. When the court shall allow amendments to any of the pleadings in a cause, they shall be embodied in a fair copy of the whole paper as amended, which shall then be substituted for the original.

The court will allow slight amendments, which do not affect legibility, to be made on the face of the original paper.

MOTIONS.

17. On the first Monday in every month on which the court is in session the court will hear motions for assignment of cases and for other purposes, before taking up the calendar for the day.

In case the first Monday of the month falls on a legal holiday, motion-day shall be the

next day on which the court shall be in session.

TAKING OUT TRANSCRIPTS OF EVIDENCE.

18. Either party may take out the transcript of evidence, upon leaving receipt therefor, to be kept for the period of three weeks, unless the case at the time of taking out transcript shall be assigned for trial, in which event the transcript may be kept for one-half the period elapsing between the time of taking out and the date on which the case is assigned for trial: Provided, that the transcript shall not be retained by either party for a period longer than three weeks; and provided, further, that a transcript of evidence shall not be taken out a second time by the same side, except by consent of parties, until the other side has had an opportunity for three days of taking out same.

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THE ATLANTIC REPORTER.

VOLUME 62.

BOARD OF TRUSTEES OF SCHOOL FOR INDUSTRIAL EDUCATION IN CITY OF HOBOKEN v. MAYOR, ETC. OF HO- BOKEN et al.

(Court of Chancery of New Jersey. Nov. 8,
1905.)

1. TRUSTS — PUBLIC CORPORATIONS — CONVEY- ANCES.

Certain donors offered to contribute funds for the erection of a free city public library building, provided that accommodations be at the same time given for the city's industrial education department and that the city would raise the balance of the funds necessary to erect the building. This offer was accepted by a resolution of the city council, and thereafter the site was purchased by the donors and conveyed to the city by a plain bargain and sale deed containing no restrictions. *Held*, that the city took title under such deeds on the trusts contained in the offer of donation.

2. CHARITIES — ENFORCEMENT — JURISDICTION IN EQUITY.

Where a library and mechanical education building was erected by a city in part from funds derived from a charity, subject to certain restrictions, a bill to regulate the use of such building was within the jurisdiction of equity as a bill to establish and enforce a charitable use.

3. SAME—GIFTS—PUBLIC BUILDINGS.

A gift of funds for the erection of a free public library building, to be used for a library and for industrial education in a city by the city's board of trustees of schools for industrial education and its free library board, constituted a valid gift for charitable uses; neither the city nor the two boards of trustees being prohibited by legislative or constitutional provision from taking property for charitable uses.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Charities, § 30.]

4. SAME—USE OF BUILDING.

Where a building was erected by a city with the proceeds of a charity for the construction of a free public library and mechanical education building, to be controlled by the city's board of trustees of schools for industrial education and by the trustees of the city's free public library, the "assembly room" on the third floor of the building was subject to joint use of both the library and school, while the "class room" in the basement was for the exclusive use of the school.

Bill by the board of trustees of schools for industrial education in the city of Hoboken against the mayor and common council of such city and the city's trustees of the city's public library to regulate the use of the pub-

lic library and an industrial education building. Decree for complainant.

Black & Drayton, for complainants. J. F. Minturn, for defendants.

GARRISON, V. C. This is a bill filed by the board of trustees of schools for industrial education in the city of Hoboken against the mayor and common council of the city of Hoboken and the trustees of the free public library of the city of Hoboken. The city is, of course, a municipal corporation created by the Legislature, and the other parties are each public corporations of this state created and existing under appropriate legislation. The subject-matter of dispute is the regulation of the use of a building which was erected under the following circumstances:

On the 26th day of March, 1895, the following letter was sent and received: "Hoboken, N. J. March 26, 1895. Edward Russ, Esq., Chairman on Sites, Free Public Library—Dear Sir: On behalf of my mother, Mrs. Martha Stevens, and my sister-in-law, Mrs. John Stevens, and myself, I beg to acquaint you with the fact that we are willing to donate to the city of Hoboken in land and cash a sum not exceeding \$28,000 towards the erection of a free public library building by the free public library trustees of the city of Hoboken, providing that accommodations at the same time be given for the proper accommodation of the industrial education department of the city of Hoboken, and providing that the city of Hoboken will raise the balance of the amount necessary to erect such buildings as may meet our approval for the above object, and providing that this offer must be accepted before the 1st day of July of this year, and that the deed of conveyance shall contain such restrictions as will insure the accomplishment of the above-named objects. The site of said building to be selected by the library trustees. Yours respectfully, Richard Stevens."

Thereupon the city took action as follows: City council received a report, dated April 24, 1895, as follows: "To the Honorable the Mayor and Council of the city of Hoboken—Gentlemen: Your special committee, ap-

pointed at the request of the board of trustees of the free public library to confer with the members of the said board in regard to the communication of Mrs. Martha Stevens, Mrs. John Stevens, and Mr. Richard Stevens to the board of trustees of the free public library, offering to donate land or cash to the value of \$28,000 for the purpose of erecting a free public library building and school for manual training, would respectfully report that they have had a conference with the donors, committee of the board of trustees of the free public library, and a committee of the board of the manual training of industrial education, and would recommend the adoption of the following: 'Resolved, that the generous and public-spirited offer of Mrs. Martha Stevens, Mrs. John Stevens, and Mr. Richard Stevens be accepted under the conditions and restrictions mentioned in their communication dated March 28, 1895, and presented to this council March 27, 1895.' J. H. Timken, Edw. Offerman, A. Sturken, Committee."—and passed the resolution just quoted. Thereafter a site was selected by the library trustees, and the land was purchased by Mrs. Stevens, and by a deed dated the 7th of January, 1896, was conveyed to the mayor and council of the city of Hoboken. This deed is a plain bargain and sale deed, with no provisions or restrictions. Under these circumstances I find that the city took this title upon the trusts expressed in the writings above quoted.

Plans were then prepared under the joint supervision of the library trustees and the school trustees, and those plans were submitted to the donors and were by them approved. These plans provided for a building which, although under the one roof should practically contain two separate structures—one for the use of the library, and one for the use of the industrial school. The entrance to the library part of the building is upon one street, and that to the industrial school is upon another street. The various rooms on the plans have the purposes for which they are intended indicated by appropriate language; most of the rooms intended for the use of the school being marked "Class Room," and those for the use of the library being marked "Stack Room," or similar descriptive terms. There is one room upon the top floor of the building which is marked "Assembly Room."

There is no contention before me in this suit as to the use of any other rooms than the one in the basement, marked on the plans "Class Room," and the room on the top floor, marked "Assembly Room." The donors paid \$17,719.40 for the land, and paid over the balance in cash. The remainder of the cost was raised upon bonds issued under legislative authority. The building was built according to the plans, and has since been occupied by the library trustees in their portion and by the industrial school trustees

in their portion. Neither body has had occasion to use the assembly room excepting at the dedicatory exercises, and upon that occasion they joined in its use. The room marked "Class Room" in the basement has not been put to practical use by either party until just before the beginning of this suit; the library trustees having used it as a storeroom. The school trustees now need this room for their school purposes. Their right to use this room is disputed by the library trustees. Each side asserts the right to use the assembly room and the right of each is denied by the other. On the 12th of November, 1903, a deed was executed by the proper officers of the city of Hoboken, conveying the title to this property to the trustees of the free public library. This deed was based upon a resolution authorizing it, passed by the city council, which resolution was, upon certiorari, set aside by the Supreme Court. The opinion of the Court will be found in *Keuffel v. Mayor, etc.*, of Hoboken, 59 Atl. 20.

I am of opinion that this bill should be considered as a bill to establish and enforce a charitable use, which, of course, is a well-recognized head of equity jurisprudence. "The primitive and inherent powers of a court of equity in this domain are sui generis, and of a very extensive character, * * * in full vigor in the hands of the chancellor of this state." *Beasley, C. J.* in *Hesketh v. Murphy*, (Ct. Err. & App. 1882) 36 N. J. Eq., at page 307. No special technical words are necessary to establish a charitable use or trust. If the words of donation specify some definite purpose which is regarded by the law as charitable, or for some general purpose which the law regards as charitable, that is sufficient. 5 Am. & Eng. Enc. of Law (2d Ed.) p. 912 et seq. This donation was clearly a gift for charitable uses. A library has been held to be the proper subject of a charitable use (*Brown v. Pancoast* [Runyon, Ch.; 1881] 34 N. J. Eq. 321; *George v. Braddock* [Ct. Err. & App.] 45 N. J. Eq., 757, 18 Atl. 881, 6 L. R. A. 511, 14 Am. St. Rep. 754); as have schools (*Stevens v. Shippen*, 28 N. J. Eq. 487; *Green v. Blackwell* [N. J. Ch.] 35 Atl. 375; *Hyde's Ex'rs v. Hyde*, 64 N. J. Eq. 9, 53 Atl. 593). Municipal corporations and public corporations are held to have power to take property for charitable uses, unless disenabled by positive legislation. *Dillon's Municipal Corporations* (4th Ed.) § 566 (436) et seq., p. 661 et seq.; 5 Am. & Eng. Enc. of Law (2d Ed.) p. 922. Neither the municipal corporation nor the two public corporations involved in this suit are so disenabled by any legislative or constitutional prohibition brought to my attention or within my knowledge. I therefore conclude that by the donation, its acceptance, and the subsequent acts of the parties, a charitable use was created, and the building erected is for the use of the free public library and the in-

dustrial school in accordance with the intention of all of the parties, as indicated upon the plans.

It only remains, then, to determine the terms, limitations, or conditions of the trust. In this case these are readily ascertainable from the written papers expressing the trust and the joint and mutual actions of the parties. The building was intended to be used jointly in its separable parts by the free public library and the industrial school, and with respect to every part of the building, excepting the assembly room, its intended use was indicated in advance and was agreed upon by all the parties in interest. With respect to the assembly room, I find that it was intended to be used by each of the two corporate occupants of the building as their necessities required; that neither has an exclusive right, but each has a right. The class room in the basement was undoubtedly intended for the school, and to the extent, at least, that it is required for school purposes, is within the exclusive control of the school trustees.

I will advise a decree to define and enforce the charitable trust in accordance with the above-expressed views.

DOREMUS et al. v. MAYOR ETC., OF PATERSON et al.

(Court of Chancery of New Jersey. Oct. 30, 1906.)

1. EQUITY—CROSS-BILL—DEFINITION.

A cross-bill is one brought by the defendant against the plaintiff (and other parties, if necessary) in another suit touching the same matter, either to obtain discovery of facts in aid of the defense to the original bill, or to obtain full relief to all parties touching the matters of the original bill.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 446-449.]

2. SAME—NEW FACTS—SCOPE OF BILL.

Only such new facts are properly pleaded in a cross-bill as are necessary for the court to have before it in deciding the question raised in the original suit and to enable the court to do complete justice to all the parties in respect to the cause of action pleaded in the bill.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 447, 448.]

3. SAME—INAPPLICABLE ALLEGATIONS.

Where an original bill was filed against a city to restrain a nuisance consisting of the pollution of a river, a cross-bill filed by the city, in which it admitted the nuisance, but averred that a certain water company had unlawfully diverted for the benefit of another city water which would otherwise have flowed past defendant city and helped to dilute its sewage, and that another water company had constructed a dam across the river below defendant city, which prevented the passage of sewage down the stream, was fatally defective, as pleading matters not germane to the original bill.

4. SAME—MULTIFARIOUSNESS.

Such cross-bill, seeking to make the water companies parties defendant, was demurrable for multifariousness.

5. SAME—MISJOINDER OF PARTIES.

The cross-bill was also demurrable for misjoinder of parties.

6. WATERS AND WATER COURSES—POLLUTION—DEFENSES—INDEPENDENT WRONGDOERS—CONTRIBUTION.

In a suit to restrain a city from polluting a water course, it was no defense that the acts of certain others contributed to cause the nuisance complained of; there being no contribution between independent wrongdoers.

7. SAME—ANSWER.

Where, in a suit to restrain the further pollution of a water course by a city, complainants stated their damages calculated on the basis of the injuries being permanent, and defendant admitted the nuisance, its answer failing to state whether the taking of complainant's property rights was to be perpetual or only temporary, and, if the latter, for what time the taking was to continue, was fatally defective.

Bill by Henry W. Doremus and others against the mayor and alderman of the city of Paterson and others. On application to strike defendant's cross-bill. Granted.

See 52 Atl. 1107; 55 Atl. 804; 57 Atl. 548; 61 Atl. 396.

Sherrerd Depue, for complainants. George S. Hilton, for defendant.

STEVENS, V. C. This is an application to strike out a cross-bill under rule 213. A cross-bill is a bill brought by the defendant against the plaintiff (and, if necessary, other parties) in another suit touching the same matter. Dan. Ch. Pr. (6th Am. Ed.) 1548. It is brought either (1) to obtain a discovery of facts in aid of the defense to the original bill or (2) "to obtain full relief to all parties touching the matters of the original bill." Story, Eq. Pl. § 389. "It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original independent suit. The cross-bill is auxiliary to the proceeding in the original suit, and a dependency upon it. * * * If its purpose be different from this, it is not a cross-bill, though it may have a connection with the said general subject." *Stonemetz Printers' Co. v. Brown & Co.* (C. C.) 46 Fed. 851. "The new facts which it is proper for a defendant to introduce into a pending litigation by means of a cross-bill are such, and such only, as it is necessary for the court to have before it in deciding the question raised in the original suit, to enable it to do full and complete justice to all the parties before it in respect to the cause of action on which complainant rests his right to aid or relief. If a defendant, in filing a cross-bill, attempts to go beyond this and to introduce new and distinct matter, not essential to the proper determination of the matter put in litigation by the original bill, although he may show a perfect case against either the complainant or one or more of his codefendants, his pleading will not be a cross-bill, but an original bill." *Krueger v. Ferry*, 41 N. J. Eq. 436, 5 Atl. 452; *Id.*, 43 N. J. Eq. 295, 14 Atl. 811.

Judged by these rules, the cross-bill filed in the present case cannot be sustained. The original bill is, in the language of the

Court of Errors and Appeals (*Doremus v. Paterson*, 61 Atl. 396), "a bill to restrain the further pollution of the river," but "it tenders to the city the opportunity of avoiding the issuance of the writ by making compensation to the complainant for the injury which will accrue to their property by the continued discharge of sewage into the stream." It is, in other words, an injunction bill to restrain a nuisance. The cross-bill admits the nuisance, but it avers (1) that the East Jersey Water Company has unlawfully diverted, for the benefit of the city of Newark, water which would otherwise have flowed past Paterson and helped to dilute its sewage; (2) that the Dundee Water Company has constructed a dam across the Passaic river below Paterson, and has by so doing formed Dundee Lake, with the effect of rendering its current more sluggish, and so retarding or preventing the passage of the sewage down the stream. It seeks, on the authority of *Green v. Stone*, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577, to make the East Jersey Water Company, the city of Newark, and the Dundee Company parties. The attempt is based upon a misconception of the rule in that case. Its effect would be to involve the complainants in three distinct controversies with which they have absolutely no concern: (1) Whether, as against Paterson, the East Jersey Water Company may take the upper waters of the Passaic for the purpose of supplying the inhabitants of Essex and Hudson counties with pure water. (2) Whether, as against Paterson, Newark is illegally appropriating the waters of the Pequannock. (3) Whether, as against Paterson, the Dundee dam is an illegal structure. Not only would the cross-bill, if sustained, compel the complainant to litigate these distinct questions in one suit, but it would involve the city of Newark in a controversy over the Dundee dam, a question with which it has no concern; and it would involve the Dundee Company in a controversy respecting the use by Newark of the waters of the Pequannock, a question utterly distinct from the question whether the dam is a lawful structure. If Paterson had filed an original bill against these parties, it would have been demurrable on the ground of multifariousness and misjoinder. This cross-bill, original, certainly, as to the new parties brought in, is equally so. It would, if permitted to stand, subject complainants to an interminable litigation over questions with which they have no concern, and would amount to a practical denial of justice. If proved it would be no answer to the charge of nuisance. The defense, if such it can be called, would seem, also, to be obnoxious to the well-settled rule that, as between independent wrongdoers, there is no contribution. I think that the bill should be stricken out.

The city of Paterson has with its cross-bill filed an answer, and the complainants apply to strike out portions of it for insufficiency.

I understand that the first objection, viz., that the defendant does not elect whether it will submit to an injunction or make compensation, is admitted to be well taken, and that the answer will be amended in that particular.

The second objection is that the answer does not declare whether the taking of the complainants' property rights is to be perpetual, or only temporary; and the third objection is that, if the answer is to be construed as declaring that the taking is to be temporary, then it does not declare for what period of time the taking is to continue. I think these objections are valid. The complainants, in their bill, state their damages "calculated upon the basis of said injuries being permanent." This statement necessitates a counter statement by Paterson of whether it intends for an indefinite time in the future to pollute the waters of the Passaic, or whether it intends to stop polluting them within a definite period. If it intends to stop, it should so aver, and it should designate a time beyond which the pollution will cease. Thus only can the complainants' damages be definitely ascertained, if the injury is to be computed on this basis. It is self-evident that, if the nuisance is to come to an end in 5 or 10 years, the damages given will be less than they would be if the nuisance is to last for 50 or 100 years. Only by naming a definite time is it possible to compute them on any other theory than that of a permanent injury, and it is only fair to complainants that they should be informed before trial what Paterson's position is on this very important question.

The last objection is too indefinite to merit attention. *Leslie v. Leslie*, 50 N. J. Eq. 155, 24 Atl. 1029; *Doane v. Lumber Co.*, 59 N. J. Eq. 142, 45 Atl. 537.

SCHLICHER et al. v. KEELER et al.
(Court of Chancery of New Jersey, Oct. 31, 1905.)

1. DESCENT AND DISTRIBUTION — ADVANCEMENT—EVIDENCE.

Intestate died seised of a homestead worth \$15,000, leaving seven children as his heirs at law, having previously conveyed to complainant, who was one of them, a city lot worth \$10,000 by a bargain and sale deed for a nominal consideration. Complainant disclaimed that the transfer was made in consideration of services, and there was evidence that intestate told the attorney who was present when the deed was executed that, as complainant had taken care of him, he wanted to do something for her right away in excess of what he intended to do for the rest of the family. *Held*, that such conveyance to complainant constituted an advancement.

Bill for partition by Mary E. Schlicher and another against Charles Keeler and others. Case referred to master.

A. S. Applegate and G. O. Vanderbilt, for complainants. Hommann & Stricker and J. V. B. Wyckoff, for defendants.

BERGEN, V. C. Charles Keeler died in October, 1900, seised of a farm, near Trenton, on which he resided at the time of his death. He left as his heirs at law seven children, of whom the complainant is one, who files her bill of complaint, praying partition of the lands. In July, 1899, her father conveyed to the complainant a valuable lot of land on Willow street, in Trenton, worth, according to the undisputed evidence in the cause, \$10,000. George W. Keeler, one of the children, has answered, and charges that the real estate so conveyed to the complainant was intended by their father as an advancement, and that she is not in equity entitled to the equal undivided one-seventh part of the remaining lands left by their father, but to such part only as may be necessary to equalize the shares of the respective owners after charging her with the value of the lands previously transferred to her. It was urged on the argument that the answer is not so framed as to present the precise question the court is asked to determine; but, as the evidence offered by both parties was directed to the real issue between them, I will permit the defendants to amend their answer, so that the issue tried may be presented by the record.

The testimony shows that the homestead is fairly worth \$15,000, and that it is all of the real property of which Charles Keeler died seised. It thus appears that the father had conveyed to this daughter a large proportion of his landed estate, although she was but one of seven children, and it does not appear that she paid any consideration therefor. At the conclusion of the argument I expressed my conviction that the transfer of the Willow street property was intended as an advancement, and further consideration has strengthened that conclusion. A conveyance of land in consideration of natural love and affection, or for a nominal consideration, by a parent to his child, has been held to be an advancement within our statute, unless a contrary intention is made to appear, and the presumption arising from such conditions overcome. *Speer v. Speer*, 14 N. J. Eq. 240; *Hattersley v. Bissett*, 51 N. J. Eq. 597-601, 29 Atl. 187, 40 Am. St. Rep. 532. This complainant expressly disclaimed that the transfer was made in consideration of services rendered to her father, and testified that her services to her father were given without the expectation of payment, and there is no proof of any claim of that character, nor of any accounting between them when the transfer was made. It was manifestly a conveyance in consideration of the grantor's affection

for his daughter, prompted, perhaps, by a desire to greatly prefer her in the distribution of his estate. Bearing on the question of intention is the fact proven in this cause that shortly before his death the father undertook to convey to one of his sons the homestead property, which constituted the residue of his real estate. This effort was unsuccessful, because, as declared by our courts, the deed was not properly delivered to become effective; but the attempt, though void in law as an efficient method, nevertheless discloses a determination on his part to place the remainder of his lands beyond the possibility of the daughter's inheritance.

The only other testimony I consider it necessary to refer to is that of Mr. Hamill, the attorney who was present when this deed was executed, who, while unable to recall the words used by the grantor at the time, testified that according to his recollection Mr. Keeler said in substance that, as Mary (the complainant) had taken care of him and nursed him, he wanted to do something for her right away in excess of what he intended to do for the rest of the family. In another part of his testimony Mr. Hamill said that Mr. Keeler declared that he wanted Mary to have something in addition to the others. Accepting Mr. Hamill's statement of impressions remaining in his mind regarding a conversation had six years ago as a substantial reproduction of what was said, it is entirely consistent with the theory that it was intended as an advancement, and does not tend to overcome the presumption that a gift of this character is an advance to a probable inheritor. The provision being made was in excess of what the other children could possibly inherit, and it was something in addition to what the others would get. Her share of the estate, without preference, would have been one-seventh of \$25,000, while under the advancement she has \$10,000, a substantial excess over, or an addition to, any sum the other children will take.

There will be a reference to a master in the usual form, who, among matters, shall ascertain the interests of the respective parties, and also what amount should be charged against the share of the complainant in this cause on account of the advancement to her of the Willow street lot. The master will also take an account of the rents, issues, and profits derived from the lands sought to be partitioned by the tenants in common, who are or have been in possession, and what amount, if any, should be charged against the respective shares of such tenants.

BAYARD v. BANCROFT et al.

(Court of Chancery of Delaware. Nov. 6, 1905.)

1. INJUNCTION—RESTRICTIVE COVENANTS IN DEED—ENFORCEMENT.

The grantor in a conveyance of property "for the sole use and behoof of a public park" is entitled to enjoin a violation of the terms of the grant by diverting the property to some other purpose than that of a park, irrespective of any question of damage.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 124.]

2. MUNICIPAL CORPORATIONS—DIVERSION OF USE OF PARK—RIGHTS OF ABUTTING OWNERS.

A landowner abutting upon land dedicated to the uses of a public park is entitled to invoke the intervention of a court of equity to prevent the diversion of such land from the use to which it has been dedicated, provided he will receive some special, tangible, practical damage from such diversion that differs in kind from the damage received by the public at large and by any individual as a citizen and taxpayer.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1542.]

3. SAME—GROUNDS—INJURY TO PUBLIC PARK—CHARACTER OF DAMAGE SUFFERED.

An owner of land abutting on a public park is not entitled to enjoin the construction of a street railway through the park in such a manner as to be visible from his doorstep and offend his artistic sensibilities by its unsightly poles and appurtenances and the marring of beauteous grassy knolls, where he does not claim that such construction will result in any depreciation in the value of his property or in any pecuniary damage whatever.

Bill for injunction by Thomas F. Bayard against William P. Bancroft and others, constituting the board of park commissioners of the city of Wilmington, and the People's Railway Company. On motion for preliminary injunction. Denied.

Thomas F. Bayard, in pro. per. William S. Hilles, for respondents.

NICHOLSON, Ch. A motion for a preliminary injunction in this cause was argued on bill and answer September 11, 1906, and on September 18th an amended bill was filed, in which the allegation of injury or detriment contained in the original bill was amplified. To this the People's Railway Company, respondent, filed its answer, and the amended pleadings were submitted by counsel without further argument.

It would be useless for me to state at length the whole case presented by the pleadings, as it is essentially the same as that presented in the suit of Samuel Bancroft, Jr., against the same defendants, except that the present suit is concerned only with one of the tracts of land mentioned and described in that cause, and is brought by an abutting landowner, instead of a grantor. The opinion, which was filed on the 28th of August last past, with the order denying the motion for a preliminary injunction, in the suit brought by Mr. Bancroft set forth in detail all the facts involved and the questions raised in that cause.

Samuel Bancroft, Jr., v. William P. Bancroft et al. (Del. Ch.) 61 Atl. 689.

The question to be considered in the case before me at the very outset was vigorously argued by respondent's counsel, and if his contention be correct it will be decisive of the pending motion. The question to which I refer is whether the complainant has any standing in a court of equity as an abutting landowner upon the allegation of injury contained in his bill. He alleges, and it is not denied, that he is the sole owner in fee of a lot of land situated on the southerly corner of Red Oak Road and Greenhill avenue, which abuts upon the parcel of land which William P. Bancroft and wife did, on the 28th of September, 1899, convey unto the mayor and council of the city of Wilmington "for the sole use and behoof of a public park," and that he, the said complainant, derived his title thereto by fee-simple deed from the Woodlawn Company, dated May 5, 1904, which company in turn derived its title from the said William P. Bancroft after he had made his conveyance to the municipality for park purposes as set out above.

The complainant's allegation of damage or detriment is contained in the sixteenth paragraph of the bill as amended, and is as follows:

"(16) That your orator avers that it would be detrimental and unjust to him as a citizen and abutting owner upon the said parcel of the said park land if the said People's Railway Company is allowed to place, install, and operate its line of railway upon the said park land mentioned in paragraph 5 of this bill, for the following reasons: (a) That the installation and operation of the said railway would destroy the use of said parcel of land in so far as it traversed the same by destroying the same for park purposes. (b) That the installation and operation of said railway upon said parcel of land would be an unsightly object in the said park, and in so far as the use and beauty of the said park is destroyed the rights and pleasures of your orator as an abutting owner would be interfered with. (c) That the property of your orator as an abutting owner is enhanced by reason of the fact that his said property abuts upon the said parcel of land which was given solely for park purposes, and that any use other than that of a park purpose, more especially the proposed use by the said railway company, would destroy the rights and pleasures of your orator as an abutting owner. (d) That your orator by a valid contract and purchase became the owner of the said abutting parcel with the idea and intention that he should have forever all the rights and pleasures of an abutting owner upon said parcel of land in accordance with the terms and conditions under which the said parcel of land became a part of the park system, so that the installation and operation of the said railway upon the said parcel of land would be a perpetual interference and

abridgement of your orator's pleasure and vested rights as an abutting owner in the said land. (e) That your orator as an abutting owner upon the aforesaid parcel of park land would, if the said railway company was allowed to install and operate the line of railway over the said parcel, be irreparably injured, in that the said parcel of land in the park system would be subjected to the use and occupation by the said railway, contrary to the terms and conditions under which the said parcel of land became a part of the park system. (f) That upon the installation and operation of the said railway upon the said park land your orator as an abutting owner would be forever and irreparably prevented from enjoying the beauties and pleasures of the said park land for the proper purposes for which it was given, so long as the said railway was allowed to keep its rails, poles and wires and to operate its cars over and upon the said parcel of land."

In response to this paragraph of the bill, the People's Railway Company, respondent, denies in its answer all the allegations serialim, and alleges that "it is not the province of a court of equity to protect pleasures," and "that it is not informed what rights of the complainant are interfered with," concluding as follows: "And this defendant generally denies that any property rights of the said complainant would in any way be affected, abridged, or interfered with by the construction of the said line of railway, and this defendant further denies that there is anything contained in the said sixteenth paragraph of the said complainant's bill which entitles him to the relief prayed for therein."

The complainant has also filed an affidavit which contains the following allegations: "That the said proposed use of the said parcel of the park system by the defendant the People's Railway Company is plainly within sight of the abutting property owned by the said complainant, and that the said complainant can by standing upon his front doorstep plainly see a large portion of the said railway which runs through the parcel of the park aforesaid, and that the proposed mode of constructing and operating the line of railway will cause the digging of a 12-foot trench or cut within the immediate view of the said complainant's property, and thus transform what is now a grassy knoll of great beauty into a disfigured mound, with all the unsightly appurtenances which a trolley road using the overhead wire would require."

If the complainant be correct in his contention that the construction and operation of the said line of railway would be in violation of the terms of the conveyance by which the mayor and council of Wilmington became seised of the above-mentioned parcel of land, conveyed by William P. Bancroft "for the sole use and behoof of a public park," it would follow necessarily

that the grantor, the said William P. Bancroft, would be entitled to the intervention of a court of equity to enjoin such violation of the terms of the grant, irrespective of any question of damage. William P. Bancroft, however, not only refuses so to do, but as a member of the board of park commissioners, respondent in this suit, has given his assent to the occupation of the park by the said railway.

This right of a grantor to invoke the strong arm of the Court of Chancery to prevent any violation of the terms and conditions of covenants contained in the conveyance of his estate is one of the fundamental principles of the common law, a corollary of the theory of conveyances, and there is no analogy or likeness whatever between the rights of a grantor and the rights of an abutting owner in such a case as the present. The said William P. Bancroft had made his conveyance for park purposes before he had conveyed to the Woodlawn Company, from which the complainant took his conveyance, and there is no privity of contract between the complainant and the board of park commissioners, nor any theory of covenant of any sort affecting the relations of the board of park commissioners or People's Railway Company, respondent, and the complainant, whatever may be the situation of the complainant as regards the Woodlawn Company and William P. Bancroft.

It is well settled, however, that a landowner abutting upon land dedicated in any way to the uses of a public park is entitled to invoke the intervention of a court of equity to prevent the diversion of the said land from the use to which it was dedicated; but the sole ground upon which is based his standing in court, the claim which entitles him to ask for relief, is uniformly held to be that he will receive some special damage from the total or partial destruction of such public use that differs in kind from that received by the public at large, by any individual as citizen and taxpayer. It is not necessary, of course, that the damage should be great; but there must be some injury of the tangible, practical kind that courts recognize as damage. In order to determine, therefore, the right of the complainant to bring his suit, it is only necessary to consider whether he has alleged and proved such special damage.

I have examined with care every case cited by counsel, as well as many more, and in every case in which the application of an abutting landowner for an injunction was sustained, it was proved to the satisfaction of the court, or admitted, that the act enjoined amounted to the practical destruction of the park as a park, and that in consequence of such diversion or destruction considerable pecuniary damage would result to the abutting owner bringing the suit by reason of the reduction

in value of his abutting property. See *Morris v. Sea Girt Land Improvement Co.*, 88 N. J. Eq. 304. In a note at the end of the case are collected a great number of cases upon the general question. In *Woods on Street Railways*, p.—, other cases are collected in a note. Complainant cites, amongst other cases, *Le Clercq et al. v. Trustees of Gallipolis*, 7 Ohio, 218, pt. 1, 28 Am. Dec. 641; *Warren v. Mayor of Lyons City*, 22 Iowa, 351; *Commissioners of Franklin County v. Carrie R. Lathrope*, 9 Kan. 453. The case of *Tulk v. Moxhay*, 11 Beavan, 571, is an interesting and instructing case upon the general subject. In the case of *Equitable Guarantee & Trust Co. v. Donahoe* (Del. Ch.) 45 Atl. 586, the Chancellor, in the course of a review of the development of the jurisdiction of the Court of Chancery, says: "The English and American equitable jurisprudence is a unique system, a complex interweaving of principle and precedent, of reason and experience. It has progressed by slow and careful steps, guided always by a careful observation of the practical consequences of what had been done already. And in no department has the adherence to precedents been so marked, in no sphere of action does it behoove the equity judge to be so careful 'to keep within the ancient mere-stones,' as when there is question of wielding the tremendous power of the injunction process."

In the allegations of injury made by the complainant, which I have quoted above at length, he carefully refrains from alleging that any depreciation in the value of his abutting property, or that any pecuniary damage whatever, would result to him from the construction and operating of the railway upon the park lands in the manner indicated. Neither does he allege or claim that any such injury or detriment would result to him as abutting landowner as would be recognized to be such by the average man, whose judgment in the matter of damage is after all the standard set by the court. The Court of Chancery has never used the tremendous power of the injunction process to protect artistic sensibilities. An extension of its power into that domain would be most dangerous. Its mode of exercise would vary with the kind and degree of cultivation possessed by the individual Chancellor in matters of taste, for it is the subject of everyday observation that there are many specimens of landscape gardening and of architecture, to say nothing of sights and sounds and odors in general, which, while pleasing and agreeable to many men, are offensive in the extreme to others.

It is in evidence that the projected railway, after passing down the Rockford Road, curves along the outside edge of the park, just within its boundary line, at a distance of 657 feet from the front of complainant's

house, the abutting property, at its nearest point of approach. And during this part of its course, as alleged in the affidavit above quoted, it "is plainly in sight of the abutting property owned by the said complainant, and that the said complainant can by standing upon his front doorstep plainly see a large portion of the said line of the said railway which runs through the parcel of the park aforesaid." The affidavit, as we have seen, then alleges the unsightliness of its poles and appurtenances and the marring of a grassy knoll of great beauty through which it passes. However unsightly and unpleasant all this may be to the complainant, it does not constitute such an injury as could be construed by this court to be the special damages which must be proved by him to entitle him to the relief for which he prays. The principles which I have laid down as governing this question are only the elementary ones governing the wielding of the injunction process. To fully illustrate and support them by citations from treatises and Reports would be tedious and unnecessary.

The respondent's counsel argued most ingeniously to show that this particular railway in this particular park is not inconsistent with the uses of a park, although no case has been produced by him holding that a railway, whether operated by steam or electricity, is not inconsistent with the uses of a public park, and several have been cited by the complainant which hold that it is inconsistent. If Mr. Bayard, as abutting property owner, had been able to show that he would receive from the proposed location and operating of the trolley such special damage as would give him standing in this court, it would be necessary for me to make an exhaustive examination of this large and most important question; but, inasmuch as the considerations which I have briefly set forth above have brought me to the conclusion that the complainant has failed to show that he has any standing in court, it becomes unnecessary, if not improper, for me to pass upon the other contention, and I am therefore constrained to decide that the motion for a preliminary injunction must be denied, for the reasons which I have indicated.

Let the order be entered accordingly.

PATTERSON et ux. v. JARMON.

(Superior Court of Delaware. Kent. Oct. 26, 1905.)

1. JUSTICES OF THE PEACE—REVIEW OF PROCEEDINGS—RECORD.

A justice's record should state, as required by statute, that the justice heard plaintiff's "proofs and allegations," and it is insufficient for it to state that he heard the "proofs in the case."

2. JUDGMENT—DEFAULT—CODEFENDANTS.

In an action against joint defendants, a judgment by default against one of the defendants vitiates a joint judgment against both.

Action before a justice by Ralph B. Jarmon against Frank Patterson and wife. There was a judgment for plaintiff, and defendants bring certiorari. Reversed.

The record of the justice, after the title of the case, was as follows: "Be it remembered that on this 17th day of March, A. D. 1905, an action on book account was brought by Ralph B. Jarmon against Frank Patterson and Mrs. Frank Patterson for the sum of \$10.75, with credit of \$4. The justice being satisfied by deposition of Ralph B. Jarmon, the plaintiff, there is danger of losing process by delay, summons issued forthwith this 17th day of March to Constable Jenkins. Constable Jenkins returns, 'Served personally.' And now, to wit, this 18th day of March, 1905, Frank Patterson appearing and Mrs. Frank Patterson failing to appear, and after hearing the proofs in the case, the credit of \$4 is corrected to \$4.75, and I therefore give judgment against the defendants, Frank Patterson and Mrs. Frank Patterson, for the sum of \$10.75, with credit of \$4.75, and costs of this suit. Charles B. Ridgely, J. P."

Numerous exceptions were filed to the above record, among which were the following: (1) That it does not appear by the record that the plaintiff was present on the day of the hearing of the justice, which was error, as judgment should not be rendered against the defendants without the allegations and proofs of the party plaintiff. (2) That the record does not show that the proofs and allegations of the defendants were heard by the justice, and it is error to enter judgment against the defendants without their proofs and allegations. (3) That the record does not show that the parties plaintiff and defendant were present at the hearing on the 18th of March, 1905, but discloses that only one of the defendants was present and one thereof absent at said hearing, and it was error for the justice to have rendered judgment without hearing the proofs and allegations of the plaintiff. (4) That the record of the justice is erroneous and defective, in that it fails to show that the justice heard the proofs and allegations in the cause before rendering judgment therein, which is error.

Argued before LORE, C. J., and GRUBB and PENNEWELL, JJ.

Thomas C. Frame, Jr., for plaintiffs in error. Arley B. Magee, for defendant in error.

LORE, C. J. This record states that the justice heard "the proofs in the case." We have uniformly held that the record should set out, as required by statute, that the justice heard the plaintiff's proofs and allegations; and, moreover, this judgment against the wife is on the face of it a judgment by default, and, it being a joint judgment, it of course vitiates the judgment.

Let the judgment below be reversed.

JOHNSON v. SMITH et al.

(Supreme Court of Vermont. Caledonia. Nov. 2, 1905.)

CONSTITUTIONAL LAW—BILL OF EXCEPTIONS—SETTLEMENT AND SIGNING—DEATH OF JUDGE—PENDING CAUSES—RETROACTIVE STATUTE.

Acts 1902, p. 44, No. 35, provides that in case of the decease of a judge of the Supreme Court any judge of that court may allow or amend exceptions in a case tried by such deceased judge. *Held*, that a party's right to a new trial under the law as it stood at the time of the trial, because of the death of the trial judge without signing and settling the bill of exceptions presented to him, was not a vested right, and hence such act applied to causes pending at the time it took effect.

Exceptions from Caledonia County Court; Watson, Judge.

Action by George L. Johnson against A. D. and D. D. Smith. A motion by defendants for judgment on the verdict was overruled, and plaintiff's motion to set aside the verdict and grant a new trial was granted, and defendants bring exceptions. Reversed.

Argued before ROWELL, C. J., and TYLER, MUNSON, START, and POWERS, JJ.

Demmett & Slack, for plaintiff. J. P. Lamson and May & Hill, for defendants.

POWERS, J. The defendants obtained a verdict at the June term, 1900, of Caledonia county court, which the plaintiff moved to set aside for misconduct of certain of the jurors and of the officer who had them in charge. With this motion pending, the case was entered "with the court," and was held by the late Chief Judge Taft, who presided at the trial, until his death. So no judgment had been entered upon the verdict, and no bill of the exceptions taken by the plaintiff during the course of the trial had been signed. In these circumstances, as the law then stood, the plaintiff was without means of having the case reviewed in this court, and was therefore entitled to have the verdict set aside and a new trial granted. See *Nelson v. Marshall*, 77 Vt. 44, 58 Atl. 793, and cases cited. But before the plaintiff took further action in the matter Acts 1902, p. 44, No. 35, became effective. By this act it is provided that "in case of the decease of a judge of the Supreme Court, any judge of that court may allow or amend exceptions in a case tried by such deceased judge." At the December term, 1903, of Caledonia county court, the plaintiff having withdrawn his former motion, the defendants moved for a judgment on the verdict, and the plaintiff moved to set aside the verdict and for a new trial; the latter motion being based on the plaintiff's inability to obtain a bill of exceptions on which to have his case heard in this court. The defendants' motion was overruled, and the plaintiff's granted; both questions being ruled as matter of law. The case is here on

the defendants' exceptions to these rulings.

The determination of the question thus presented depends upon the character of the right which entitles an excepting party to a new trial when the presiding judge dies without signing the bill; for, if the right is a vested one, it is beyond the reach of the Legislature, and the act of 1902 could not divest it. On the other hand, if it springs simply from a rule of procedure, the act of 1902 applies, and the plaintiff is provided with ample means for the prosecution of his exceptions, and the necessity, upon which is based the right to a new trial, is removed, and the reason for such procedure falls. While it is true as a general rule of construction that retroactive effect is not favored, in the absence of terms clearly indicating such legislative intent, it is equally true that a statute which is designed to change the mode of judicial procedure only, where such change relates to the method of enforcing a right and does not affect the right itself, applies to causes of action which accrued prior to its enactment as well as to those which accrue thereafter, and takes effect upon a pending action as it stands when the act became operative, in the absence of a saving clause. *Richardson's Adm'r v. Richardson's Ex'rs*, 37 Vt. 599, 88 Am. Dec. 622; *Murray v. Mattison*, 63 Vt. 479, 21 Atl. 532; *Willis v. Fincher*, 68 Ga. 444; *In re Savings Bank*, 69 N. H. 84, 39 Atl. 522. Our statute (V. S. 28) is in harmony with this rule of construction; for, while it provides, speaking generally, that no act of the General Assembly shall effect pending suits, it expressly excepts from its provisions acts regulating "practice in courts"—a term broad enough to cover all matters of judicial procedure.

The rule granting a new trial under the circumstances here existing seems to have received its first announcement in *Newton et ux. v. Boodle et al.*, 54 E. C. L. 795, decided in 1847. This case was tried before Chief Justice Tindal, who ordered a verdict for one of the defendants, to which the plaintiffs excepted. A bill of exceptions was prepared and presented to the Lord Chief Justice, but he ultimately died without having sealed the bill. Thereupon, after some delay, judgment having been signed, the plaintiffs moved for a rule upon the defendants to show cause why, among other things, the judgment should not be set aside and a new trial granted. In granting the rule, Chief Justice Wilde used this language: "If it should turn out, upon examination, that the plaintiffs have, without any fault of their own, but solely from the circumstance alluded to, lost the benefit of their bill of exceptions, the court think that the justice of the case may require that they should have an opportunity to try the cause again. At the same time, it is to be observed that there was an interval of nearly 17 months between the day of the trial and the decease of the

late Chief Justice; and it is rather a fearful thing to say that the whole proceedings should be reopened after so great a delay. As, however, we have not the facts sufficiently before us to enable us to determine how far the plaintiffs are to be held responsible for this delay, and with a view to prevent a failure of justice by reason of the happening of an event beyond human control, we think a rule may go, calling upon the defendants to show cause why there should not be a new trial upon the point as to the sufficiency of the evidence to fix Norman." It is apparent from this language that the learned Chief Justice did not consider that the plaintiffs had a vested right to a new trial, or even a fixed right. Else why did he allude to the delay in their application? Certainly a delay of 17 months would not forfeit a right which had become vested within the meaning of the law. Vested rights are not thus easily taken away. More significant still is the fact that upon hearing a new trial was refused in this case, because it appeared from the minutes of the presiding judge that there was no error in ordering a verdict for the defendant Norman. This result could not have been reached if the court had considered that the plaintiffs were entitled to a new trial as a matter of right at all; for in that case the question of misdirection would have been entirely immaterial. A little later Chief Justice Wilde himself left *Benett v. Steam Boat Co.*, 16 C. B. 29, in the same plight, and a new trial was granted, apparently on the authority of *Newton v. Boodle*; but there is nothing in the case to aid us here. The rule thus established has been generally followed in this country, as is shown in the opinion in *Nelson v. Marshall*, *supra*; and in *State v. Welskittle*, 61 Md. 51, there cited, this significant language is used: "It is the established practice, both in England and this state" to grant new trials under these circumstances. This language indicates pretty clearly that the Maryland court did not regard the right as a vested one, but rather as a rule of practice merely. And this, we think, is the logic of it. The procurement of a bill of exceptions, with a proper signature, for the consideration of this court, is one of the steps in the orderly progress of the case to its final determination. A statute which extends the means or opportunity of obtaining such a bill is remedial in its character and should be liberally construed. It extends, rather than restricts, the plaintiff's rights. It affects the remedy only, it is not repugnant to the statute, and it does not disturb a vested right; for there is no such thing as a vested right in a particular procedure. *Endl. Intrep. St. § 285; Lee v. Buckheit*, 49 Wis. 54, 4 N. W. 1077.

In reaching this conclusion we have not overlooked *People v. Judge*, 40 Mich. 630, where a contrary result is arrived at on the precise question here presented, or *Yeatman*

v. Day, 79 Ky. 186, which is in conflict with the views herein expressed. But, notwithstanding these very respectable authorities to the contrary, we hold that the provisions of the act of 1902 apply to this case, and that the court erred in denying the motion of the defendants and in granting that of the plaintiff.

Judgment reversed, and cause remanded.

GIBSON v. HOLMES et al.

(Supreme Court of Vermont. Franklin. Oct. 28, 1905.)

1. EVIDENCE—JUDICIAL PROCEEDINGS—DOCKET ENTRIES.

A certified copy of docket entries made in a bankruptcy court, which entries constitute only the minutes from which to make a record, is inadmissible to show bankruptcy.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1294.]

2. BANKRUPTCY—ARRESTS—PRIVILEGE—SUFFICIENCY OF EVIDENCE.

Testimony that plaintiff filed his petition in bankruptcy before his arrest on civil process is insufficient to show that plaintiff was privileged from arrest because of the bankruptcy proceedings, where it is not shown when he filed the petition.

3. FALSE IMPRISONMENT—ILLEGAL DETENTION.

Under V. S. 1701, 1703, providing that, when defendant is arrested on mesne process in a civil action, the officer shall take him to jail in the county where the arrest is made, if there is a legal jail there, it is the duty of the officer making the arrest to commit defendant to a legal jail, if there is one in the county, and his action in lodging defendant in jail in another county, without defendant's consent, constitutes the officer a trespasser ab initio.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. False Imprisonment, § 72.]

4. ARREST—PRODUCTION OF PRISONER.

An officer who arrests defendant on civil process does not, by following V. S. 1701, 1703, requiring a defendant arrested on mesne process to be committed to jail, put it out of his power to obey the precept of the writ commanding him to produce defendant at the time and place of trial.

5. SAME—PRODUCTION OF PRISONER—RECOMMITMENT.

While an officer who has arrested defendant on civil process and has committed him to jail, in accordance with V. S. 1701, 1703, is unable, after taking defendant out of jail for production in court, to recommit him on the original writ, yet the court, especially a court of record, has ample authority to order defendant committed for want of bail, and such commitment will be deemed to be on the original writ.

6. FALSE IMPRISONMENT—AUTHORITY OF ATTORNEY—RESPONSIBILITY OF CLIENT.

An attorney retained to collect a debt is, by virtue of his employment as such, invested as his client's agent with a large and liberal discretion and the most ample authority in everything pertaining to the collection of the debt and control and service of the process; and his action in directing an officer, who arrests the debtor, to commit the debtor to a jail in another county than that in which the arrest is made, in violation of V. S. 1701, 1703, is chargeable to the client, and makes the client a trespasser ab initio with the officer who makes the arrest.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. False Imprisonment, §§ 60, 63.]

7. PROCESS—AMENDMENT—JURISDICTION TO PERMIT.

Where plaintiff, in an action before a justice, abandoned his suit on the release of defendant from arrest, and the justice was not present at the time and place of trial, nor within two hours thereafter, and the case was not continued, so that the jurisdiction of the justice lapsed, the justice had no authority, six months afterwards, and after defendant had commenced an action for false imprisonment, to allow the officer who arrested defendant to amend his return to the writ.

8. FALSE IMPRISONMENT—JUSTIFICATION—PROCESS—RETURN—SUFFICIENCY.

Under V. S. 1075, 1076, requiring officers to execute and return writs and precepts agreeably to the direction thereof, and subjecting them to a penalty for making a false and undue return, an officer who arrests defendant in a civil action on mesne process, which commands him to "make service and return according to law," must return the writ with a statement of substantially all his doings in executing the same; and a return, merely stating that he served the writ on defendant and read the same in his hearing, is not sufficient to enable the officer to justify under the writ for making the arrest.

9. SAME.

Where plaintiff abandons his suit before the entry thereof, he cannot justify under the writ on which defendant was arrested, in an action by defendant for false imprisonment.

Exceptions from Franklin County Court; Tyler, Judge.

Trespass by Burton J. Gibson against A. G. Holmes and another. The court directed a verdict for defendants, and plaintiff excepted. Reversed.

Argued before ROWELL, C. J., and MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

C. G. Austin & Sons and A. A. Hall, for plaintiff. Hogan & Hogan, for defendant Holmes. G. F. Ladd, for defendant Phareuf.

ROWELL, C. J. Trespass for false imprisonment. The defendants separately justified under a justice writ in favor of the defendant Holmes against the plaintiff, issued as a *capias*, brought to recover for goods sold and delivered, and served by the defendant Phareuf by arresting the plaintiff in Orleans county. The plaintiff claims that he was in bankruptcy in Massachusetts, where he lived, and therefore was privileged from arrest, as his discharge would release him from the debt sued for. But he can take nothing by this claim, for it does not appear that he was in bankruptcy. The certified copy of the docket entries in the bankruptcy court of Massachusetts, introduced to show that he was in bankruptcy, was not admissible, as those entries were no record, but only minutes from which to make a record. *Austin v. Howe*, 17 Vt. 654; *Armstrong v. Colby*, 47 Vt. 359. Nor was the plaintiff's testimony that he filed his petition in bankruptcy before his arrest sufficient, though admitted without objection; for it does not appear when he filed it, and it might have been so long before the arrest that there had been a final adjudication on his application

for a discharge, which would end his privilege, and the presumption of continuance cannot be invoked for want of sufficient data, if for no other reason.

But it was error to direct a verdict for the defendants, for the testimony tended to show, if it did not thereby appear, that the defendants were trespassers *ab initio*. At common law, when an officer arrests a man on mesne process in a civil action, he may make any place his prison; for the writ is, "*Ita quod, habeas corpus ejus coram*," etc., which is a general authority. But when the authority is special, he must imprison accordingly; and, if he imprisons elsewhere or otherwise, he is a trespasser. *Swinstead v. Lyddal*, 1 Salk. 408; *Bac. Ab. "Trespass" (D)*. But our statute has changed the common law in respect of a general authority, and makes the authority special in such cases, notwithstanding the command of the writ remains the same; for it provides that, when a defendant is arrested on mesne process in a civil action, the officer shall commit him to jail in the county where the arrest is made, unless otherwise directed by law, if there is a legal jail there, unless he exposes sufficient property to secure the officer, or some person becomes surety to the satisfaction of the officer by indorsing his name on the writ as bail. V. S. 1701, 1703. It appearing that there was a legal jail in Orleans county, where the arrest was made, and it not being otherwise directed by law, it was the duty of the officer to commit the plaintiff there in default of exposing property or procuring bail; and it was the plaintiff's right to be committed there, unless he waived that right, and the testimony tended to show that he did not. *Ellis v. Cleveland*, 54 Vt. 437. But, instead of committing him there, by direction of Holmes' attorney, given pursuant to an understanding with Holmes, the officer took him to St. Albans and lodged him in the Franklin county jail for safe-keeping till the time of trial, where he remained about an hour in a cell, and then, by advice of counsel whom he consulted about leaving him there and about making his return if he did leave him there, the officer took him back to Richford, where he was released by order of Holmes or his attorney on July 30th, having been arrested at North Troy on July 28th. This, if done without the plaintiff's consent, made the officer a trespasser *ab initio*. *Bond v. Wilder*, 16 Vt. 393; *Hall v. Ray*, 40 Vt. 576, 94 Am. Dec. 440; *Clayton v. Scott*, 45 Vt. 386.

It is claimed that the officer might keep the plaintiff where he pleased, notwithstanding the statute, because, if he committed him to jail in Orleans county by delivering him to the keeper thereof within the same, and giving the keeper an attested copy of the writ with his return thereon, as he would have to do by statute, he would thereby have transferred the custody and control of him to the jailer, and so have put it out of his power

to obey his precept by having him before the justice at the time and place of trial. But in *re Jennison*, 74 Vt. 40, 51 Atl. 1061, holds the other way. There the relator was arrested on a justice writ issued as a *capias*, and committed to jail for want of bail; and yet the court said it was the duty of the officer to obey his precept by producing the relator at the time and place of trial, and, because he did not, the relator was discharged, but by agreement of the parties. That case is express authority for the proposition that by obeying the statute in respect of committing the officer does not put it out of his power further to obey his precept by having the defendant before the justice at the time and place of trial. To hold otherwise would bring the precept and the statute into conflict, whereas they should be made to harmonize, if possible. And there is no difficulty in harmonizing them; for, although the officer, by taking the defendant out of jail for production in court, would be incapacitated to recommit him on the original writ, because that, being returned into court, could not be taken out for that purpose, yet the court, especially as it is a court of record, would have ample authority to order him committed for want of bail, and such commitment would be deemed to be on the original writ, the same as it is by statute when a surety on mesne process delivers the principal into court in discharge of himself. Although there seems to be no statute for this, yet the authority inheres in the court, as much as the authority did before the statute to do what the statute says shall be done when the principal is surrendered, as shown by *Abells v. Chipman*, 1 Tyler, 377. And see 1 Tidd, Pr. 285, 286. Cf. *Worthen v. Prescott*, 60 Vt. 68, 11 Atl. 690, and *State v. Shaw*, 73 Vt. 159, 50 Atl. 863, and following.

The cases referred to in support of said claim are not in point. What is said in *Whitcomb's Adm'r. v. Cook*, 38 Vt. 477, about the officer having a right to put the defendant into any suitable place for safe-keeping, was said in respect of keeping him after notice that he would appear before the magistrate for examination for discharge from arrest, which suspended the right to commit until the examination was had. In *Kenerson v. Bacon*, 41 Vt. 573, commitment was made in disregard of such a notice, which was held to deprive the defendant of his right to go before the magistrate, because, as it would seem to have been thought, the officer could not take him out for that purpose. But this is not authority for saying that he could not take him out to produce in court, concerning which the precept commanded him, but did not command him concerning taking him before the magistrate for examination for discharge from arrest. In *Durant's Case*, 60 Vt. 176, 12 Atl. 650, the process on which the arrest was made was a warrant in a criminal case. What is there said about its having "been repeatedly held in civil cases that an

officer may use the common jail for the safe-keeping of a person arrested on a capias, whom it is his duty to keep safely so to have him to appear at a time and place named," referring to Whitcomb's Adm'r v. Cook, 38 Vt. 477, is disapproved, if it means less than a commitment in the statutory sense. In *Kent v. Miles*, 68 Vt. 48, 33 Atl. 768, and 69 Vt. 379, 37 Atl. 1115, the precepts were warrants in a criminal case, and the authority was general, as neither the warrants nor the law required commitment to jail. But the plaintiff was committed, and rightly, it was held. In the *Miles* Case the court expressly said that the case did not come within V. S. 1701, and said that that section relates to service of legal process when the officer is "directed by the process to commit to jail." Counsel seize upon this as making in their favor. But the language of the section makes it broader than that. It is, when "required by law to commit to jail." This embraces the case at bar; for, although the process did not require commitment to jail, the statute did.

And the defendant Holmes is a trespasser ab initio, as well as the officer, for he procured the suit to be brought and the arrest to be made, and is responsible for his attorney's direction to have the plaintiff taken to jail in St. Albans; for that direction was within the scope of his attorney's authority by virtue of his employment as such, who was thereby invested as Holmes' agent with large and liberal discretion and most ample authority in everything pertaining to the collection of the debt and the control and service of the process. *Willard v. Goodrich*, 31 Vt. 597, where it is held that the attorney of an execution creditor has full authority as such to direct the officer as to the time and manner of enforcing the execution, short of discharging it without satisfaction. Trespass for false imprisonment lies against the client and his attorney, when the latter sues out an illegal ca. sa. and causes the defendant to be arrested and imprisoned thereon. "The client commands the attorney; the attorney actually commands the sheriff's officer; the real commander is the attorney; the nominal commander is the plaintiff in the action; so attorney and client are both principals." *Barker v. Braham*, 3 Wils. 368, 377. In *Bates v. Pilling*, 6 B. & C. 38, attorney and client were held jointly liable in trespass for the issue and service of an execution by the attorney's agent after the demand had been paid, though neither of them directed or knew of its issue. In *Cook v. Wright, R. & M.*, 278, it was held that, where a trespass was committed in the service upon the defendant therein of a fi. fa. sued out by an attorney, it was necessary, in order to make the execution creditors liable, to show that the attorney was retained in the case; and, when that appeared, the creditors were made trespassers by the act of their attorney. In *Newberry v. Lee*, 3 Hill, 523, it is held that, where an attorney of record illegally issues

a fi. fa., and thereby renders himself liable as a trespasser, his client is liable also, without showing that he specially directed its issue. In *Foster v. Wiley*, 27 Mich. 244, 15 Am. Rep. 185, it was held that, where plaintiff's property was taken and sold on an execution wrongly issued at the instance of the defendant's attorney, the defendant was liable in trespass. The court, speaking through Judge Cooley, said it seemed to be the result of the authorities that, when one puts his case against another into the hands of an attorney for suit, it is a reasonable presumption that the authority he intends to confer upon the attorney includes such action as the latter, in his superior knowledge of the law, may decide to be legal, proper, and necessary in the prosecution of the demand, and that consequently whatever adverse proceedings may be taken by the attorney are to be considered, as far as they affect the defendant in the suit, as approved by the client in advance, and therefore as his acts, even though they prove to be unwarranted by the law. In *Poucher v. Blanchard*, 86 N. Y. 256, it was said not to matter that the sale of the boat in question was a pure trespass; for it had been frequently decided that a client may be responsible for a trespass committed by his attorney that he in no way authorized, except by his general employment of the attorney. It is said in *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72, that an attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in court or out, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action. In *Morgan v. Joyce* (N. H.) 27 Atl. 225, it was held that the plaintiff, by employing an attorney to bring and prosecute a suit, authorized him to give directions for serving the writ, and was bound by them.

When the plaintiff was released from arrest, the suit was abandoned by the defendant Holmes, who did nothing more with it. Nor was the justice present at the time and place of trial, nor within two hours thereafter, nor was the case continued. So it was never entered in court, and was discontinued, and the jurisdiction of the justice lapsed. He had, therefore, no authority, six months afterwards and after this suit was commenced and being prepared by the defendants for trial, to allow the defendant Pharneuf to amend his return on the writ, by adding thereto that he safely kept and detained the plaintiff within his precinct until the 30th of July, when he released and discharged him from custody by direction of Holmes' attorney. *Fletcher v. Pratt*, 4 Vt. 182; *Orvis v. Isle La Motte*, 12 Vt. 195. So the return as amended must be laid out of the case.

The testimony tended to show that the justice who signed said writ kept all the writs and files in cases before him in which Holmes' attorney in said suit was attorney

for the plaintiffs, in said attorney's office, and that the writ in that case was returned by the officer to said attorney's office before the return day, where it was put with the justice's other files, with a return upon it stating only that at North Troy, in Orleans county, on July 28, 1902, "I served this writ by arresting the body of the within-named defendant, Burt Gibson, read the same in his hearing, and this my return indorsed thereon." It does not appear that the fact that the writ was returned to the office of said attorney was ever brought to the attention of the justice. But, treating that for present purposes as a sufficient returning to the justice, the officer's return was not sufficient to enable him to justify under the process. The writ commanded him to "make service and return according to law." This is the form prescribed by statute, which requires officers to execute and return writs and precepts "agreeably to the direction thereof," and subjects them to a penalty for making a false or an "undue return." V. S. 1075, 1076. To make "return according to law" is, not only to return the precept to the authority that issued it, but to return with it a statement by the officer of his doings in executing it. *Turner v. Lowry*, 2 Aikens, 72, 75. And that statement must contain substantially all of his doings within the scope of proper execution, certainly; otherwise, the return will be "undue," within the meaning of the statute, and may be essentially false. Here the officer states nothing in his return but the mere fact of arrest and reading. Whether the defendant in that action exposed property, procured bail, was released by the magistrate on preliminary hearing, was committed for want of bail, or discharged by direction of the plaintiff in the action or his attorney, the return does not show, and but for the oral testimony we should not know what was done with him. It was the officer's duty to make a full and complete return of his doings, and, because he did not, his return is "undue," and insufficient for his protection. An officer who serves returnable process shall not protect himself by it unless he shows that he has paid due and full obedience to its command. *Ellis v. Cleveland*, 54 Vt. 487. He must show that he has done all it was his duty to do. *Tubbs v. Tukey*, 3 Cush. 438, 50 Am. Dec. 744. He must show that he has done all that was required of him in order to complete and fulfill the duty imposed on him. *Kent v. Willey*, 11 Gray, 368, 373. He must show that he made return of his writ, and did all the law required him to do. *Paine v. Farr*, 118 Mass. 74. He must faithfully obey every lawful command of the statute and the process, or he will be left without protection. *Boston & Maine R. R. Co. v. Small*, 85 Me. 462, 27 Atl. 349, 35 Am. St. Rep. 379, 383. There are exceptions to this rule; as when the parties settle the suit, and agree that the writ need not be returned. *Paine v. Farr*, above cited. But that element does not appear in this case.

Nor is the officer's neglect to make a proper return a mere nonfeasance, any more than his neglect to return at all would be, in which case he would unquestionably be a trespasser ab initio. In *Moore v. Robbins*, 7 Vt. 363, 367, it is said that the neglect of an impounder to proceed with the distress according to the statute makes him a trespasser ab initio, because his neglect is not a mere nonfeasance, but is analogous to a sheriff's neglect to return a writ. So a tax collector, who neglects to offer a distress for sale within the time prescribed by statute, is not protected; for he is thereby deprived of a justification for the taking, and stands as though he took without authority, and therefore is a trespasser ab initio. *Pierce v. Benjamin*, 14 Pick. 356, 360, 25 Am. Dec. 396. So an officer is a trespasser ab initio who neglects to sell property on an execution. *Bond v. Wilder*, 16 Vt. 393. The resolution, in the *Six Carpenters' Case*, that "not doing cannot make a party who has authority or license by law a trespasser ab initio, because not doing is no trespass," is criticised because it is the disobedience, and not the act, that deprives of protection, and that disobedience can come from not doing, as well as from doing. But that resolution is followed in this state. The true view of the matter, when applied to the nonreturn or the insufficient return of process, seems to be that, if an officer arrests a person or seizes goods on a writ that it is his duty to return, he never has a justification under it, unless he discharges that duty; that it is inaccurate to say that he is made a trespasser ab initio by not returning, but, rather, that for want of a return, or a proper return, he never has a justification; that therefore, instead of saying that the want of a return makes him a trespasser ab initio, it would be more accurate to say that the presence of a return is necessary to make the taking lawful ab initio. *Shorland v. Govett*, 5 B. & C. 485.

But, although the defendant Holmes may not be responsible for the officer's neglect to make a proper return, yet, having abandoned his suit before entry, he cannot justify under the writ.

Reversed and remanded.

STATE v. STIMPSON.

STATE v. LEE.

(Supreme Court of Vermont. Orleans. Oct. 25, 1905.)

1. CONSTITUTIONAL LAW—"LAWS OF THE LAND"—OFFENSES—PROSECUTION—INDICTMENT BY GRAND JURY.

V. S. 1867, as amended by Acts 1898, p. 34, No. 46, and Acts 1904, No. 64, providing that state's attorneys may prosecute by information all crimes except those punishable by death or by imprisonment in the state's prison for life, is not unconstitutional as depriving persons convicted of noncapital felonies of their liberty, except by the "laws of the land," in that it

authorizes their prosecution and conviction otherwise than by indictment of a grand jury.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 755.]

2. WITNESSES — CREDIBILITY — RAPE — EVIDENCE.

In a prosecution for rape on a female under the age of consent, defendant was not entitled to prove, to affect her credibility as a witness, that she was 6 or 8 months gone with child, was never pregnant before, and that ever since she was 12 years old, to the time in question, she had had sexual intercourse with many different men.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1121–1125.]

Exceptions from Orleans County Court; Tyler and Munson, Judges.

W. H. Stimpson was convicted of rape and Edward Lee was convicted of grand larceny, and they bring exceptions. Cases heard together. Exceptions overruled.

Argued before ROWELL, C. J., and MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

In Stimpson's Case: E. A. Cook, State's Atty., for the State. J. W. Redmund, for respondent.

In Lee's Case: F. G. Bicknell, State's Atty., for the State. Taylor & Dutton, for respondent.

ROWELL, C. J. The case against Stimpson is an information for statutory rape, and the one against Lee is an information for grand larceny. The principal question in the former, and the only question in the latter, is whether section 1867 of the Vermont Statutes, as amended by Act No. 46, p. 34, Acts 1896, and Act No. 64, Acts 1904, is constitutional. It provides that state's attorneys may prosecute by information all crimes except those punishable by death or by imprisonment in the state prison for life. It is claimed that said section is in contravention of the declaration in the Constitution that no person can "be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers." This claim is based upon the contention that the words "laws of the land," as there used, require prosecutions for common-law felonies to be by indictment, because it is said those words as used in Magna Charta, from which we borrow them, required that by settled judicial construction in England at the time of the adoption of our Constitution, and that it is to be presumed that we took that construction with the words. As bearing on this question, it is important to consider whether that declaration in the Constitution has received a practical construction that has been acquiesced in for a considerable time; for, if it has, that will be a valuable aid, to say the least, in determining the intent and meaning of those words as there used.

As early as 1779 state's attorneys were provided for, and authorized to prosecute, manage, and plead, in all matters proper, for and in behalf of the state. Slade's State Papers,

331. By an act passed November 10, 1797, it was made the duty of state's attorneys to file informations ex officio in matters proper therefor. Rev. St. 1797, c. 64, § 1. By an act passed February 27, 1787, it was provided that no person should be held to trial, nor put to plead for a capital offense punishable with death, unless a bill of indictment was found against him therefor by a grand jury lawfully impaneled and sworn. St. 1787, p. 82. This was only 10 years after the adoption of the Constitution, and indicates that thus early the Legislature thought that without such an enactment one might be prosecuted for a capital offense even otherwise than by indictment; for it is not to be presumed that the Legislature thought it was passing a useless act. This provision was carried into Revision 1797, p. 106, c. 3, § 65. By an act "for the punishment of certain capital and other high crimes and misdemeanors," passed March 9, 1797, it was provided that no person should be tried for any offense under said act until a bill of indictment was found against him by the grand jurors attending the Supreme Court of Judicature. Revision 1797, p. 178, c. 9, § 36. This act did not include larceny, except horse stealing. On March 4, 1797, during the same session, an act was passed "for the punishment of certain inferior crimes and misdemeanors." Revision 1797, p. 175, c. 10. This act included larceny of money, goods, chattels, bonds, bills, notes, etc., regardless of value, and divers other offenses but did not provide how any of them should be prosecuted, and larceny is a felony at common law. These two statutes, taken together, point strongly to the conclusion that at that time it was not supposed that the Constitution required common-law felonies to be prosecuted by indictment, but that it was for the Legislature to say what ones should be thus prosecuted, and what ones might be thus or otherwise prosecuted. The act of March 9, 1797, was re-enacted in 1818 with some additions, but not with the addition of larceny, and the act repealed. But the provision in respect of prosecuting by indictment was retained (Acts 1818, p. 19, c. 1, § 37), and continued in force till the Revision of 1839, unless it was changed by chapter 9, § 1, p. 19, of the Acts of 1819, constituting state's attorneys "informing officers," which is doubtful, although it is said in *State v. Magoon*, 61 Vt. at page 47, 17 Atl. 729, that prosecution by information of all crimes was authorized by statute from 1819 to 1839. The act of March 4, 1797, was re-enacted in 1821, with an increased penalty for larceny, but was still silent as to the mode of prosecution, and continued so until the Revision of 1839.

Since 1816 it has been the law that, when a person is confined in jail on a complaint for a crime or misdemeanor, the Supreme Court may, on his application in writing, direct an information to be filed against him, whereon the court may receive and record a plea

of guilty and award sentence. V. S. 1895. The act of October 30, 1828, provided that, whenever a person was in actual confinement in jail by virtue of a complaint for an offense against said act "for the punishment of certain capital and other high crimes and misdemeanors," the county court should have power and authority, on the application in writing of such person, to direct an information to be filed against him for the offense for which he stood charged, on the filing of which it was made the duty of the court to proceed in the trial in the same way and manner as if an indictment had been presented by the grand jury. Acts 1828, p. 4, No. 23, § 3. And that has been the law ever since (V. S. 1897), and has always been acted upon, except in homicide cases, probably, and without objection as far as we know. This, in effect, is a legislative construction that the Constitution does not require prosecution by indictment in any case, unless we say that the Legislature thought the requirement, if it existed, could be waived by the accused with its consent, which we can hardly do, for the law seems to be otherwise. That mere rights and privileges guarantied by the Constitution can be waived, to some extent at least, is probably true. But it would seem that constitutional requirements as to the mode and manner of instituting prosecutions involving the deprivation of life or liberty cannot be dispensed with by the Legislature, nor waived by the accused, even with the consent of the Legislature. *Cooley, Const. Lim.* (6th Ed.) 214 et seq., 390; *Cancemi v. People*, 18 N. Y. 128; *Hopt v. Utah*, 110 U. S. 574, 579, 4 Sup. Ct. 202, 28 L. Ed. 262. In 1839 it was enacted that no person should be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, except in case of proceedings before a justice and when a prosecution by information was expressly authorized by statute. Rev. St. c. 93, § 1. This was but the act of March 9, 1797, as re-enacted in 1818, with some additions. By chapter 102, § 1, of the Revision of 1839, it was provided that state's attorneys might prosecute by information all crimes not capital and where the punishment was by imprisonment in the state prison for a term not exceeding seven years. Both of these statutes are still in force, with an enlargement in the latter of the authority of the state's attorney to prosecute by information all crimes not capital and not punishable in the state prison for life.

It was decided in *State v. Leach*, 77 Vt. 166, 59 Atl. 168, that statutory rape can be prosecuted by information. But the constitutionality of that mode of prosecuting was not raised nor considered, and the question has never been decided by this court, nor raised in it but twice before—once in 1880, in *State v. Haley*, 52 Vt. 476, and again in 1888, in *State v. Magoon*, above cited, in both of which, strong judicial utterances were made in favor of the correctness of the long

practical construction above shown. *State v. Haley* was an information for a liquor nuisance, a mere misdemeanor, and the respondent contended that the proceeding should have been by indictment. But the court held otherwise, and said that the statute had always been supposed to mean that all crimes, except capital and those for which the punishment exceeded seven years in the state prison, might be prosecuted by information, without regard to any distinction between felonies and misdemeanors, and without regard to the punishment prescribed, provided it did not exceed seven years in state prison and was not capital, and that such had been the construction and uniform practice by all courts, judges, state's attorneys, and lawyers down to that time. *State v. Magoon* was an information for grand larceny. The court said that, prosecutions by information for high crimes having been authorized by statute from a time reaching back to a period when many of those who framed and adopted our present Constitution were living, and those statutes having been acted upon unquestioned for nearly 70 years, it would not be profitable to consider the respondent's contention of unconstitutionality; its consideration being unnecessary. The question was not involved. *State v. Dyer*, 67 Vt. 690, 32 Atl. 814, was an information for conspiracy, held to be a misdemeanor; and the contention was that the case did not come within the statute authorizing the state's attorney to prosecute by information, because the punishment might be by imprisonment in the state prison for more than seven years. Thus it appears that during substantially the whole time since the adoption of the Constitution the Legislature has practically construed the clause in question not to require common-law felonies to be prosecuted by indictment, and this construction has been acquiesced in and accepted as correct by the courts and with great unanimity by the profession generally, many of the best of whom have revised the statutes from time to time, commencing with that great lawyer, Nathaniel Chipman, in 1797, who was prominently active in public affairs during the formative period of the Constitution and must have been imbued with its spirit and meaning.

There is abundant authority for saying that after this long acquiescence in that construction it should not be departed from, but should be accepted as correct beyond the permissibility of question. In *State v. Bosworth*, 13 Vt. 402, 413, it is said that questions arising under the Constitution, settled by a long and uniform practice, questioned in the judicial tribunals but once, and then sanctioned, should be considered at rest. "Where," the court asked, "is the security of individual rights, if constitutional questions are to be considered as always open, if no acquiescence, even though sanctioned by judicial decree, is to be regarded as settling them?" There the construction had obtained only 34 years,

while here it has obtained more than 100 years. See, also, *Boyden v. Brookline*, 8 Vt. 284. In *Lincoln v. Smith*, 27 Vt. 328, 345, this court adopted the language of the Supreme Court of the United States in *Briscoe v. Bank of the Commonwealth of Kentucky*, 11 Pet., at page 818, 9 L. Ed. 709, 928, that "a uniform action involving the right to the exercise of an important power by the state government for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightly exercised." In *Stuart v. Laird*, 1 Cranch, 299, 2 L. Ed. 115, it was objected that the judges of the Supreme Court had no right to sit as Circuit Judges, not being appointed nor commissioned as such. But the court said that practice and acquiescence under it for several years, commencing with the organization of the judicial system, afforded an irresistible answer to the objection, and had fixed the construction of the Constitution, which was too strong to be shaken or controlled. There are many more cases to the same effect, but they need not be referred to. The subject is pretty fully treated in *Cooley's Const. Lim.* (7th Ed.) 102 and following. See, also, *Black, Int. Laws*, 31; *Lewis' Suth. Stat. Const.* § 476; *Endlich, Int. Sts.* § 527. But the aids of contemporaneous and practical construction must be resorted to with caution and reserve, and can never be allowed to abrogate, contradict, enlarge, nor restrict the plain and obvious meaning of the text.

As to the true meaning of the words "law of the land" and "due process of law," as used in the Constitutions of our states, there is a diversity of opinion; but all agree that they mean the same thing, whatever that is, and that, if they were combined to read, "due process of the law of the land," the meaning would not be changed. The Supreme Court of the United States had this question under consideration in 1883, in *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232; and pretty much all that can be said on the subject was there brought out in the majority opinion by Mr. Justice Matthews and in the dissenting opinion of Mr. Justice Harlan. The Constitution of California, adopted in 1879, provides that offenses therefore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law, and that a grand jury shall be summoned at least once a year in each county. By the Penal Code of the state, where a defendant has been examined and committed as thereby provided, it is the duty of the district attorney to inform against him for the offense. The plaintiff in error having been thus examined and committed for murder, the district attorney informed against him for that crime, and he was convicted and sentenced to death, and the question was whether that was "due process of law"

within the meaning of the fourteenth amendment of the federal Constitution, which forbids the states to "deprive any person of life, liberty, or property without due process of law," and it was held that it was; that an indictment or a presentment by a grand jury, as known to the common law of England, is not essential to that "due process of law," when applied to prosecutions for felonies, that is guarantied by the federal Constitution, and forbidden to the states to dispense with in the administration of criminal law; that those words refer to the law of the land in each state that derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice that lie at the foundation of all our civil and political institutions, the greatest security for which lies in the right of the people to make their own laws, and to alter them at pleasure. The court said that in this country written Constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and so the provisions of *Magna Charta* were incorporated into bills of rights; that they were limitations upon all the powers of government, legislative as well as executive and judicial; that it necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would justify and receive a corresponding and more comprehensive interpretation; that they applied in England only as guards against executive usurpation and tyranny, while here they have become bulwarks also against arbitrary legislation; but in that application, as it would be incongruous to measure and restrict them by the ancient customary law of England, they must be held to guaranty, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property. The court approved and commended as most accurate the language of Mr. Justice Johnson in *Bank of Columbia v. Okely*, 4 Wheat. 235, 244, 4 L. Ed. 559, when he said, speaking of those words from *Magna Charta*, incorporated into the Constitution of Maryland, that "after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Such is the oft-repeated and settled doctrine of that court. And this court approved that doctrine in *State v. Hodgson*, 66 Vt. 134, 157, 28 Atl. 1089, which was affirmed by the Supreme Court of the United States in *Hodgson v. Vermont*, 168 U. S. 262,

18 Sup. Ct. 30, 42 L. Ed. 461. And such has been and is the prevailing opinion in this country, both judicial and individual. Chancellor Kent says that "the better and larger definition of 'due process of law' is that it means law in its regular course of administration through courts of justice." 2 Com. *13. Webster's famous definition in the Dartmouth College Case is often quoted. "By the law of the land," he says, "is most clearly intended the general law; a law that hears before it condemns, that proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules that govern society," etc. Judge Cool-ey says this definition is apt and suitable to judicial proceedings. He says that he has met in no judicial decision a statement that embodies more tersely and accurately the correct view of the matter than the language of Mr. Justice Johnson above quoted. He then goes on to say that "the principles, then, on which the process is based, are to determine whether it is 'due process of law' or not, and not any considerations of mere form," which, he says, may change from time to time, with due regard to the landmarks established for the protection of the citizen. Const. Lim. *355. Again he says: "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." Id. *356.

The Supreme Court of Tennessee says that, "when first adopted in Magna Charta, the phrase 'law of the land' had reference to the common and statute law then existing in England, and when embodied in our Constitution, it referred to the same common law as previously modified, and as far as suited to the wants and conditions of our people in a new country. At present, the 'law of the land' embraces the same body of laws as still further modified; those parts validly cut off being now excluded, and those parts validly added being now included. Every valid statute of the state now in existence, whenever enacted, is the present 'law of the land' in respect to the subject-matter of that statute, and every existing enactment passed with due form and ceremony and not in conflict with some provision of the state or federal Constitution is a valid statute; and no statute otherwise valid is unconstitutional because affecting life, liberty, or property, if, when being general, it embraces all persons who are or may be in like situation and circumstances, or, when being special, it is, in addition, natural and reasonable in its classification." *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 437, 53 S. W. 955, 56 L. R. A. 316, 76 Am. St. Rep. 682, affirmed in 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55.

The Supreme Court of Mississippi says, in *Brown v. Levee Commissioners*, 50 Miss. 468, speaking of the words "due process of law," that "the principle does not demand that the laws existing at any point of time shall be irrevocable, nor that any forms of remedies shall necessarily continue. It refers to certain fundamental rights which that system of jurisprudence, of which ours is a part, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, the deprivation has not been by 'due process of law.'"

The Constitution of Wisconsin originally declared that "no person shall be held to answer for a criminal offense, unless on presentment or indictment of a grand jury." Const. 1848, art. 1, § 8. That clause was amended in 1870 (Laws 1870, p. 180, c. 118), so as to read: "No person shall be held to answer for a criminal offense without due process of law." The statute of 1871 provided that the several courts of the state should possess, and might exercise, the same power and jurisdiction to try prosecutions on information for all crimes as they possessed and might exercise in cases of like prosecution on indictment. Laws 1871, p. 202, c. 137, § 1. *Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559, was an information for murder, and the question was whether the amendment changed the meaning of the Constitution, or, in other words, whether "due process of law" and "on presentment or indictment of a grand jury" meant the same thing; and it was held that they did not. The court said that the words "due process of law" did not mean, and had not the effect, to limit the powers of the state to prosecution of crime by indictment, but meant law in its regular course of administration according to prescribed forms and in accordance with the general rules for the prosecution of individual rights.

The Supreme Court of Texas says that, when the words "law of the land" were used in Magna Charta, they probably meant the established law of the kingdom, in opposition to the Roman law, which was about being introduced into the land, but that now, in their most usual acceptance, they are regarded as meaning general public laws, binding all the members of the community in similar circumstances, and not partial or private laws affecting the rights of private individuals. *Janes v. Reynolds' Adm'rs*, 2 Tex. 250.

The Supreme Court of California, in the judgment under review in the *Hurtado Case*, followed its previous decision in *Kalloch v. Superior Court*, 56 Cal. 229, in which it held that the proceeding, as regulated by the Constitution and laws of the state, was not opposed to any of the definitions of "due process of law" and "the law of the land" but was strictly within such definitions, as much as was a proceeding by indictment, and took

from the accused no immunity nor protection to which he was entitled under the law.

In Utah, the words "due process of law" are held to mean law in the regular course of administration through the courts. In *re McKee*, 19 Utah, 231, 242, 57 Pac. 23. Indiana holds the same. *State v. Boswell*, 104 Ind. 541, 4 N. E. 675. It is said in *Hoke v. Henderson* 15 N. C. 1, 25 Am. Dec. 688, 689, that the words "law of the land" do not mean merely an act of the General Assembly, for, if they did, every restriction upon legislative authority would be at once abrogated; but that they mean that such legislative acts as profess in themselves directly to punish persons or to deprive the citizen of his property without trial before the judicial tribunals, and a decision upon the matter of right as determined by the laws under which it vested, according to the course, mode, and usages of the common law, are not effectually laws of the land for those purposes. Many of the other states adopt the view of the cases referred to, but some of them hold the other way, notably Massachusetts, in *Jones v. Robbins*, 8 Gray, 329. Mr. Stephen says, in the first volume of his *History of the Criminal Law of England* (page 595), that "from the earliest times the king accused persons of offenses not capital in his own court by the agency of his legal representatives without the intervention of a grand jury."

But it is objected that *Hurtado v. California* is not in point here, because, the case coming within the Penal Code of that state, its Constitution expressly authorized prosecution by information, whereas our Constitution gives no such authority. But the objection is not well taken; for, if an information for a capital offense was forbidden by the fourteenth amendment, the Constitution of the state could not authorize it in any circumstances. So the case is precisely in point. Thus it appears that the practical construction that our Constitution has so long received in this respect accords with the prevailing opinion in this country, which we think the better opinion, and therefore we the more readily hold that our Constitution does not require common-law felonies to be prosecuted by indictment, and that consequently the statute in question is constitutional.

In the rape case, it appeared that the girl consented in fact; but she could not consent in law, as she was under the age of consent. As bearing on her credibility as a witness, and as tending to show a motive to charge the respondent with the crime, the respondent offered to show by her on cross-examination that she was 6 or 8 months gone with child, and was never pregnant before; and that ever since she was 12 years old, down to the time in question, she had had sexual intercourse with many different men. The state offered to admit her pregnancy, but objected to her being cross-examined as to her

intercourse with other men; but the respondent did not want the admission of pregnancy unless he could cross-examine as to the intercourse, which was not permitted. As a general rule, particular acts of misconduct are not provable by extrinsic evidence. In this state you cannot prove by such evidence that a woman is a prostitute, for the purpose of impeaching her credibility as a witness (*Morse v. Pineo*, 4 Vt. 281; *State v. Smith*, 7 Vt. 141; *Spears v. Forrest*, 15 Vt. 435), nor that a witness is a notorious counterfeiter (*Crane v. Thayer*, 18 Vt. 162, 46 Am. Dec. 142), nor the keeper of a house of ill fame (*State v. Fournier*, 68 Vt. 262, 270, 35 Atl. 178).

State v. Hollenbeck, 67 Vt. 34, 30 Atl. 696, relied upon by the respondent as expressly deciding this question, is not in point. That was an indictment for rape simpliciter, and the woman was of the age of consent, as shown by the record in that case and as is inferable from the case as reported. In such a case, there is no doubt but the respondent has a legal right to cross-examine the complainant as to her intercourse with other men, not to shake her credit as a witness, but to show her consent, and so no rape. What is said in that case about allowing the cross-examination to be as unrestricted and searching as consistent with the rules of law related to the refusal of the trial court to accord to the respondent his legal right to show by the complainant that her relations with him were friendly and cordial at the time of the alleged offense, and continued so afterwards. Whether in the case at bar the Court could have allowed the cross-examination as matter of discretion is a question not before us. As to a motive to charge the respondent unjustly, the case as presented would afford no ground for such an inference, had the claimed intercourse with other men been shown.

Judgment in *Stimpson's Case* that there is no error in the proceedings of the county court, and that the respondent take nothing by his exceptions; and judgment in *Lee's Case* that there is no error, and that sentence be imposed and execution thereof done.

MARCY v. PARKER.

(Supreme Court of Vermont. Orleans. Oct. 25, 1905.)

1. SHERIFFS—WRONGFUL LEVY—EVIDENCE.

In trover against a sheriff for the conversion of lumber standing in the yard of a third person, a contract between plaintiff and the third person giving plaintiff title to the lumber in the yard until advancements made by him should be repaid, leases of the yard from the third person to plaintiff, and a quitclaim deed executed by the third person, prior to the taking by defendant, conveying the yard to plaintiff, were admissible in evidence, although the third person remained in possession and control of the premises until the execution of the quitclaim deed, where there was testimony showing that, when the quitclaim deed was executed,

plaintiff assumed control of the premises and took exclusive possession of the lumber, and continued so in possession until after the lumber was taken by defendant at the instance of a creditor of the third person.

2. SAME—SUFFICIENCY OF EVIDENCE.

In trover against a sheriff for the conversion of lumber, evidence held sufficient to show that plaintiff was in actual possession of the lumber at the time of the conversion.

3. EVIDENCE—PLANS AND DIAGRAMS—AC-CURACY.

A plan offered in evidence to show the location of certain piles of lumber was properly admitted, although other piles of lumber standing in the same neighborhood were not shown thereon, where the omitted piles were not in controversy and their location was wholly immaterial.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1505.]

4. APPEAL—PRESERVATION OF ERRORS—NE-CESSITY OF EXCEPTION.

Error in the admission of evidence over objection is not before the Supreme Court for review, where no exception was taken to such admission.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1503, 1509.]

5. SAME—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in allowing a question asked of a witness was harmless, where the witness answered that he did not know and had never paid much attention to the matter.

6. TROVER AND CONVERSION—SUFFICIENCY OF PLAINTIFF'S TITLE—POSSESSION.

A person having actual possession of chattels has sufficient title thereto to enable him to maintain trover against a stranger for their conversion.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, § 121.]

7. SAME—BURDEN OF PROOF.

Where plaintiff in an action of trover, was in actual possession of the property at the time of the conversion, the burden was on defendant to show a better title than plaintiff's in some other person and also to connect himself with such person.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, § 216.]

8. APPEAL—REVIEW OF FACTS.

The action of the trial court in sustaining a verdict as not against the weight of the evidence is discretionary, and not revisable by the Supreme Court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3872.]

9. TRIAL—VERDICT—IMPEACHMENT—AFFI-DAVITS OF JURORS.

Affidavits of jurors to the effect that they misunderstood the law of the case or the instructions of the court will not be received to impeach or set aside their verdict.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 813.]

Exceptions from Orleans County Court; Rowell, Judge.

Action by Frank F. Marcy against Chester S. Parker. There was judgment for plaintiff, and defendant excepted and petitioned for a new trial. Judgment affirmed, and petition dismissed.

Argued before TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

J. W. Redmond and W. R. Aldrich, for plaintiff. Young & Young, for defendant.

WATSON, J. This is an action of trover for the alleged conversion of a quantity of lumber. The plaintiff's evidence tended to show that the defendant took and sold about 30,000 feet of 2-inch hardwood planks, which plaintiff claimed to own by purchase from R. B. Lang, of Barton, and also to hold, as against the defendant, by virtue of his claimed possession thereof. The defendant, who was a deputy sheriff, denied that the plaintiff was either owner or possessor of the property. He admitted the taking and selling of the planks in question, but claimed and his evidence tended to show that they were previously conditionally sold to Lang by Taplin & Rowell, and that in payment therefor they took Lang's two lien notes, each payable one day after date and duly recorded; that the lien notes covered all the 2-inch hardwood planks shipped by Taplin & Rowell to Lang from October 7, 1903, to November 20, 1903, inclusive, and that they covered no other or different 2-inch hardwood planks; that said planks were piled in the Lang millyard in a certain large double pile, just west of the spur track, and in one other stack just south of and next to the double pile in the same row, and none of said lumber was piled in any other stack or pile; that shortly before January 20, 1904, Taplin & Rowell placed the two lien notes, then overdue and unpaid, in his hands as deputy sheriff, and directed him to enforce them against the 2-inch hardwood planks described in each; and that by virtue of said lien notes he took and sold the same 2-inch hardwood planks described therein and none other, and applied the net proceeds thereof to the notes in proportion as the planks were covered by them, respectively. The plaintiff's evidence tended to show that the defendant took, moved, and sold all the 2-inch hardwood planks in the said double pile and the single pile directly south of and next to it, and also nearly all of another stack just south of the one last named and on the same side of the spur track, and that the planks which the defendant admitted that he took and sold were in fact delivered at the Lang millyard at an earlier date than October 7, 1903, and were largely planks which had been piled there as early as the first part of August, 1903, and were not covered by the lien notes. In connection with the general verdict for the plaintiff, the jury made a special finding that the hardwood planks which the defendant took and sold were not covered by the lien notes.

It appeared that prior to December 3, 1903, Lang was the owner of the millyard and premises known as the "R. B. Lang mill property" at South Barton. The lumber in controversy, at the time it was moved away by the defendant, was located on these premises, piled or stacked in the millyard. Subject to defendant's exception, and for the purpose of showing that at the time in question the possession of the millyard was in

himself, the plaintiff introduced in evidence a contract, two leases, and a quitclaim deed. The contract was made and executed September 30, 1902, by and between Lang and the plaintiff. By its provisions, in consideration of advancements to be made by the plaintiff, Lang agreed to ship to the order of the plaintiff all the lumber cut out of the then coming season's stock of logs, that the plaintiff should do the exclusive marketing thereof, and that Lang should manufacture and car the lumber according to plaintiff's directions. The plaintiff agreed to advance to Lang a certain sum of money per 1,000 feet when the logs were cut and piled on skids on the "railroad lots," a further sum when hauled to Lang's mill, a further sum when the logs were sawed and the lumber stuck up, and a further sum when the lumber was planed and loaded on the cars at South Barton. He also agreed to advance money to Lang on all other logs purchased by him, at different stages, from the time when they should be delivered at Lang's mill to the loading of the lumber on the cars, inclusive. It further stated: "It is agreed and understood by the parties that all logs and the lumber manufactured therefrom, when delivered at or about the Lang mill, shall become the sole and entire property of said Marcy, and so remain until all advancements made by the said Marcy and the interest thereon are fully paid." The contract was to continue in force until the lumber from the then coming season's stock of logs should be disposed of according to its terms. On September 28, 1903, this contract, by agreement in writing on the back, was extended to continue in force until all the lumber manufactured from "the past season's cut of logs, and from the logs to be hereafter cut on lots Nos. 130 and 131 (mentioned in a deed from R. B. Lang to Frank F. Marcy, dated November 5, A. D. 1902), is fully marketed." The evidence showed that the lots referred to in the contract as "railroad lots" were owned by the plaintiff and that the logs cut thereon under the contract belonged to him. True, this written contract did not in itself refer to any of the lumber in dispute; but the plaintiff's evidence tended to show that by subsequent parol agreement it was made to cover all sawed lumber bought by Lang and delivered at the Lang millyard, which would include the lumber in question. Thus, in re-examination, the plaintiff testified respecting such sawed lumber as follows: "Q. You may state the substance of what was said between you and Mr. Lang about that lumber that he should buy. A. At various times I was to pay for what lumber was delivered on my ground and put in my possession, and it was to be treated the same as the logs. Q. Same as the logs under the contract? A. Yes, sir."

The leases were from Lang to the plaintiff, and of the Lang millyard where the lumber was piled—one dated October 1, 1903, and

recorded on the 6th day of the same month, with term to October 1, 1903; the other dated September 28, 1903, and recorded the next day, term to begin at the expiration of the former lease and to continue one year. The defendant's counsel objected to the admission of the written contract and the two leases on the ground that they were immaterial. The quitclaim deed was from Lang to the plaintiff, dated and delivered December 3, 1903, and recorded the next day, conveying Lang's mill property at South Barton, including the millyard on which the lumber in dispute was located at the time it was taken by the defendant. Defendant objected to its admission on the ground that it also was immaterial, being dated after the defendant's lien notes were executed and recorded. In the light of the parol evidence showing the situation of the parties, the subject-matter of these four documents, and the surrounding circumstances when they were respectively executed, there can be no doubt regarding their materiality. They were so connected with the lumber transaction between Lang and the plaintiff as to form a part of it. They constituted different steps therein, from the time when the plaintiff engaged to advance money to Lang on the logs cut on the plaintiff's lots, and on all other logs purchased by Lang at market price, and the lumber sawed, at different stages of the work, with an agreement that all logs and the lumber manufactured therefrom, when delivered at the Lang mill, should "become the sole and entire property of" the plaintiff, and so remain until all advancements made by him should be fully paid, and a subsequent parol agreement that all other lumber furnished by Lang was to be treated the same as logs, to the time when, finding that Lang "was running things wrong," the plaintiff received the quitclaim deed and took possession of the property. True, the evidence showed that Lang was in the occupancy of the millyard during all the time covered by the terms of the two leases until he gave the quitclaim deed; yet the plaintiff's evidence tended to show that when he received the deed he put men in charge of the mill and millyard, and kept them in charge thereof until after the defendant took the lumber in dispute, and that soon after the plaintiff received the deed, and before the lumber in question was taken away by the defendant, Lang ceased to work in or about the mill or millyard, left the premises, and ceased to exercise any control over the mill premises, or the property there, or the business there carried on. Especially is the materiality of this documentary evidence obvious if, as the plaintiff claims, the testimony tended to show that he took exclusive possession of all the lumber in the millyard on or about the day he received the quitclaim deed, and continued so in possession till after the lumber in controversy was taken.

The defendant denies that the testimony tended to show that plaintiff took possession of the lumber in controversy, beyond such constructive possession as the quitclaim deed and leases gave him, if any. We are referred to the transcript of the evidence to determine this question. In addition to the evidence before referred to, the plaintiff testified in substance that what lumber Lang bought and delivered into the millyard, into the plaintiff's possession, he (plaintiff) was to pay for, and had done so; that Lang would write down to him that he (Lang) had so much lumber or logs and had done so much work, and the plaintiff would send him a check to pay for the lumber which he said was delivered in the yard; that when he took the quitclaim deed he took Lang's "interest in everything"; that about the time he took the deed he put Mr. Robinson in charge of his interests there, and also S. A. Hunt at different times. Hunt was produced as a witness by the plaintiff, and testified in substance that he worked for the plaintiff from December 22, 1903, until July, 1904; that he was the plaintiff's foreman in charge of the property at the Lang mill; that he did the scaling of lumber in the millyard, took care of the lumber there, and did the shipping; that within a few days after December 22d, when he was first put in charge, he went through all the lumber in the millyard, including that taken by the defendant, and estimated it "to determine somewhere near what we had of different kinds." Robinson was called by the plaintiff, and testified that he went to work there for the plaintiff December 4, 1903, and remained as foreman in charge inside until some time in March following; that he was there when the defendant took the lumber, and that he helped Hunt make estimates of the piles of planks in question before the defendant moved them. Bert Sheldon testified that he was bookkeeper for Lang until the plaintiff took possession, and after that he worked in the same capacity there for the plaintiff; and, as we have before observed, the plaintiff's evidence tended to show that Lang went away soon after he gave the quitclaim deed, and had nothing to do with that property or business thereafter. Certainly this evidence tended to show that with the taking of the quitclaim deed the plaintiff took the actual possession of all the lumber in the millyard, and was thus in possession when the planks in dispute were moved away by the defendant.

A plan prepared by the plaintiff's witness Hunt, purporting to show four piles of lumber on the west side of the railroad siding running to the Lang mill, numbered 1, 2, 3, and 4, from which plaintiff claimed defendant took lumber, and two piles on the mill platform, numbered 5 and 6, was offered and received in evidence, in connection with the testimony of the witness, to explain and make clear what he was talking

about with respect to what lumber was moved and where the lumber which was moved was situated before moving with respect to this siding. Before the plan was admitted the witness testified on cross-examination that between the piles 2 and 3 was a pile of white birch, and that about half its bigness further from the track on the same side "was another pile of hardwood, not a stack, but heaped up, piled up." That the plan shows with reasonable accuracy the situation of the piles marked thereon had previously been testified by the plaintiff. Defendant excepted to its admission because it did not show these other piles and was misleading; that it was not a correct representation of the piles that were there at the time defendant took the planks sued for. The two piles of lumber which the evidence shows were not represented on the plan were not in controversy and could have no bearing on any issue before the jury. There was no dispute as to the location of the six piles represented thereon with reference to each other nor with reference to the spur track. The location of any other piles was wholly immaterial, and their representation on the plan could not have made the testimony of the witness any clearer to the jury. The plan was admitted for a particular purpose, and in the ruling there was no error. The case of *Hale v. Rich*, 48 Vt. 217, is full authority for this holding.

The plaintiff called B. C. Berry as a witness, who testified that the defendant pointed out to him the stacks of lumber in the millyard, which he claimed he had taken, and placed them in charge of the witness as keeper; that there was one solid or double stack and five others, making six in all, if the double one is called two. After testifying on which side of the track the stacks were, the witness was shown the plan and asked to state if it represented the situation of the stacks that he was put in charge of. To this the defendant's counsel objected; but no exception was taken to its admission, and the question is not before us. In re-examination the witness was asked when, if ever, he first noticed that pile 3 on the plan was moved. Defendant's counsel objected to the witness being allowed to testify by the number on the plan, and excepted to the allowance of the question. The witness answered that he did not know as he could answer that correctly; that it was a matter which he never paid much attention to. We need not consider this exception, since the answer was harmless.

At the close of the testimony the defendant moved for a verdict on the ground that (1) no title is shown in the plaintiff to any of the property which defendant took, removed, and sold; (2) there is no evidence that the plaintiff had rightfully any possession of the lumber which any of the testimony tends to show was taken possession

of or moved by the defendant; and (3) there is no evidence in the case tending to show or establish facts entitling plaintiff to recover. The motion was overruled, to which defendant excepted. As we have already seen, the evidence tended to show the actual possession of the lumber in question in the plaintiff at the time the defendant took it. The special finding of the jury that the lumber sold by the defendant was not covered by the lien notes shows that as to that lumber the defendant stood as a stranger. The motion was rightfully overruled, for a person having the actual possession of chattels has a sufficient title thereto to enable him to maintain trover against a stranger for their conversion. *Knapp & Worden v. Winchester*, 11 Vt. 351; *Potter v. Washburn*, 13 Vt. 558, 37 Am. Dec. 615.

The court charged the jury, among other things, that "there is no controversy * * * upon the testimony in the case but that before and at the time the lumber was thus taken from the millyard the plaintiff was in full and actual possession of the millyard and of the lumber thus taken away. The testimony shows in substance that on the 3d day of December last the plaintiff took a quitclaim deed from Lang, and that deed on inspection seems to cover, and it is conceded by counsel, as I understand, does cover, the Lang mill and millyard and the appurtenances. I don't think there is anything in that deed showing that any lumber in the millyard was conveyed by it. There is not. I have read it. The testimony further is that on the 4th day of December the plaintiff put men in charge of the mill and the yard, and the testimony further is that pretty soon, and in the month of December, and before the lumber was taken away by the defendant, Lang moved away, went away, so that left the plaintiff in the full actual possession of the lumber in the yard." To this part of the charge the defendant excepted as follows: (1) That the plaintiff was in full and actual possession of the lumber in controversy at the time it was taken by the defendant; (2) that the effect of the quitclaim deed and the possession of the land conveyed to the plaintiff gave him the full and actual possession of the lumber in controversy. Immediately after the above exceptions were taken, the plaintiff's counsel asked the defendant's counsel whether they claimed the "right to go to the jury upon the question as to the truth of what the plaintiff says in respect to putting Hunt in charge, and what Hunt says in respect of being in charge, and what Robinson says in respect of being in charge, of the property, the millyard there." To which the defendant's counsel replied, "We have no testimony on that subject," and, further, that "the legal effect of this testimony is not sufficient to give the plaintiff legal possession of the property." We have already discussed the plaintiff's evidence showing the title and

possession of the mill property, including the millyard, in the plaintiff under the quitclaim deed, and his possession of all the lumber in the millyard before and at the time the lumber in question was taken by the defendant, and further discussion of it is unnecessary. We think the legal effect of this evidence, undisputed, is as stated in the charge above quoted, and that the exceptions thereto are without force.

The court further instructed the jury that, there being no controversy but that the defendant did take away lumber there as indicated in the part of the charge above quoted, the burden was upon him to show that he had a right to take it, because by taking it he invaded the plaintiff's possession, and the possession that the plaintiff had was sufficient title as against the defendant, unless he could show a better right than the possessory right of the plaintiff, to which the defendant excepted. But in this there was no error. Actual possession of personal property is enough, *prima facie*, to sustain an action of trover for its conversion against any one except the true owner or one connecting himself in some way with the true owner. In such circumstances, in order to defeat a recovery, the burden is on the defendant, not only to show a better title in some other person, but also his connection with such other person. *White v. Bascom*, 28 Vt. 268; *Wooley v. Edison*, 35 Vt. 214.

The defendant moved to set aside the verdict because (1) it is contrary to the evidence; (2) the uncontradicted evidence in the case shows that a portion of the planks which were taken by the defendant were the planks of Taplin & Rowell, and were the same planks covered by the lien notes; (3) the evidence shows that a large part of the planks which defendant took were planks described in the lien notes of Taplin & Rowell, under which he was acting; and (4) the verdict is excessive and gives the plaintiff damages for taking more lumber than any testimony in the case tends to show that defendant did take, which belonged to plaintiff. The motion was overruled, to which defendant excepted. As we have before seen, the exceptions state that the defendant claimed and his evidence tended to prove that the lien notes before mentioned covered all the 2-inch hardwood planks shipped by Taplin & Rowell to Lang from October 7, 1903, to November 20, 1903, inclusive, and that they covered no other or different hardwood planks, and also that the plaintiff's evidence tended to show that the planks which the defendant admitted he took and sold were in fact delivered at the Lang millyard at an earlier date than October 7, 1903, and that they were largely planks that had been piled there as early as the first part of August of that year. Defendant's evidence further tended to show that Taplin & Rowell sold no 2-inch hard-

wood planks to Lang, except 10,834 feet sold conditionally July 1, 1903, and the planks sold between October 7th and November 20th, inclusive, which were covered by the two lien notes, and that Lang bought no other 2-inch hardwood planks of the same kind and quality from any one else during the summer or fall of that year, and that he bought no 2-inch maple, birch, and beech planks of any one in that year, except from Taplin & Rowell. The plaintiff claimed that Taplin & Rowell did sell to Lang during that summer and fall more 2-inch hardwood planks of the kind and quality in question than above stated, and that Lang must have received other 2-inch hardwood planks of the same kind and quality of some one else during that summer and fall, and claimed that the evidence tended so to show. The defendant denied that the evidence had such a tendency, and we are referred to the official transcript of the evidence to determine it. We have examined the evidence as shown by the transcript and think its tendency bears out the claim of the plaintiff in this respect. The motion to set aside the verdict, as far as it was based upon the claim that it was without evidence, was therefore properly overruled. And to the extent that the motion is based upon the ground that it is against the weight of evidence, the action of the court below was discretionary, and not revisable here.

This disposes of all the exceptions upon which the defendant relies as showing error, and judgment is affirmed.

The defendant has brought a petition for a new trial upon the ground that a part of the jury wholly misapprehended the effect of the charge and rendered a different verdict by reason thereof than they otherwise would. The petition is supported by the affidavits of five of the jurors who sat on the case, and by no other evidence. The law is well settled in this state that the affidavits of jurors who sat on a case will not be received to impeach or set aside their verdict, and that their affidavits to the effect that they misunderstood the law of the case or the instructions of the court come within this rule. *Sheldon v. Perkins*, 37 Vt. 550; *Carpenter v. Willey*, 65 Vt. 177, 26 Atl. 488; *Tarbell v. Tarbell*, 60 Vt. 486, 15 Atl. 104.

The petition is dismissed, with costs.

GOODWILL et al. v. HEIM.

(Supreme Court of Pennsylvania. June 22, 1905.)

1 PARTNERSHIP—ACCOUNTING—INTEREST.

Before a settlement of partnership accounts, interest is not chargeable, unless demanded by the equities of the case.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 120, 121.]

2. SAME.

Where the control of the finances and business of a firm are given a liquidating partner,

and he has made no claims on his copartner for interest on moneys withdrawn, none should be allowed in an accounting.

Appeal from Court of Common Pleas, Northumberland County.

Bill by Phillip Goodwill and others against Andrew A. Heim. Decree for defendant, and plaintiffs appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

Charles M. Clement, S. P. Wolverton, and W. H. M. Oram, for appellants. George W. Ryon and Samuel Heckert, for appellee.

ELKIN, J. This case comes before us venerable with age. The original bill was filed March 21, 1879, and from that time to the present the questions involved have been before the masters, the court below, and here for consideration and determination. Most of the original counsel connected with the case have departed this life, and the two principal litigants are now numbered with the dead. It could serve no useful purpose to undertake a review in detail of the complicated partnership accounts extending over a period of about 40 years. This work has been done by expert accountants, and by able counsel representing the parties to the controversy. We are not inclined to disturb the findings of fact nor the conclusions of law stated by the masters and approved by the court below, except in one particular, wherein we believe there was error. When the original account was filed in 1885, the accounting partner was credited with interest on certain sums of money withdrawn by the other partner, as follows, to wit: On \$3,119.55 from November 30, 1871, 13 years, 11 months, \$2,604.82; on \$75 from April 8, 1872, 13 years, 6 months and 22 days, \$61.02; on \$115.83 from July 8, 1872, 13 years, 3 months and 22 days, \$92.51; on \$150 from October 8, 1872, 13 years and 22 days, \$117.55—total, \$2,875.50. We have examined the testimony with care, but have not been convinced that the interest charged is justifiable under the circumstances. The accounting partner had the exclusive control of the finances and business of the firm and had made no demand for a settlement, and no claim for interest on the amounts withdrawn and on which interest was allowed. The general rule is that interest will not be allowed on partnership accounts until there has been a settlement of the same. It is true this court has frequently said that the allowance or refusal of interest in the settlement of partnership accounts depends upon the circumstances of each particular case. *Gyger's Appeal*, 62 Pa. 73, 1 Am. Rep. 382; *Grubb's Appeal*, 66 Pa. 117; *Jones v. Farquhar*, 186 Pa. 386, 40 Atl. 1134; *Brenner v. Carter*, 203 Pa. 75, 52 Atl. 178; *Kelley v. Shay*, 206 Pa. 215, 55 Atl. 927. In some of these cases the rule has been recognized that the defendant will not be charged with interest on overdrafts where there is no evidence of an agreement to

pay interest, and where it appears that the liquidating partner who was acquainted with the account never made demand on the defendant for settlement or for interest until he filed his bill after the dissolution of the partnership. Interest should not be allowed on partnership accounts before there has been an accounting or settlement of the same, unless under the peculiar facts and circumstances surrounding the case the equities demand that interest be charged. In the case at bar we do not discover such peculiar facts or circumstances as would justify a departure from the general rule. There was no agreement to pay interest between the partners. No demand was made by the defendant for settlement of the account, the payment of balances, or for interest on the same before the bill was filed. Under these facts the masters and the court below erred in allowing the accounting partner, in the account filed in 1885, interest amounting, as above stated, to \$2,875.50. This sum should be deducted from the balance found due at that time, and the interest charged upon said sum after 1885, in the later accounts, should also be deducted. All of the remaining assignments of error are overruled.

Decree reversed, and it is ordered and directed that the record be remitted to the court below, to be modified and corrected in accordance with this opinion.

REAL ESTATE TRUST CO. v. PERRY COUNTY R. CO. et al. (No. 1.)

(Supreme Court of Pennsylvania. Oct. 9, 1905.)

RAILROADS — MORTGAGE FORECLOSURE — RIGHTS AND LIABILITIES OF PURCHASER — SUIT BY BONDHOLDERS.

A decree in mortgage foreclosure of a railroad authorized the purchasers to use bonds as purchase money, and the amount due on the bonds was fixed by the court. The purchasers purchased bonds designated in the decree in reliance thereon and applied them on their bid, receiving a deed for the property, and thereafter organized a new corporation and expended large sums of money in the improvement of the property. *Held*, that bond owners, having notice of the decree and proceedings and of such purchase and payment, had no standing to petition many years thereafter for a change of the decree, so as to correct any inequality among the bondholders.

Appeal from Court of Common Pleas, Perry County.

Bill by the Real Estate Trust Company of Philadelphia against the Perry County Railroad Company and others. From the decree, Edward R. Sponsler and others appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

W. H. Sponsler and James M. Barnett, for appellants. George R. Barnett and William S. Snyder, for appellees.

BROWN, J. On July 1, 1892, the Perry County Railroad Company issued 200 bonds

of \$500 each, and to secure their payment executed to the Real Estate Trust Company of Philadelphia, as trustee, a mortgage for \$100,000 on all of its property and franchises. The bonds bore interest at the rate of 6 per cent. per annum and were payable 25 years from date, the coupons for the semiannual interest becoming due on the 1st days of January and July. The bonds were all negotiated by the railroad company, and at the time the mortgage was foreclosed were held by 14 different parties. On July 1, 1893, the company defaulted in the payment of interest on 18 of the bonds held by the Pennsylvania Steel Company. On July 1, 1896, it defaulted in payment of the coupons on 143 of the bonds held by the Real Estate Trust Company of Philadelphia, and no interest was ever thereafter paid to either of the said companies, the holders of the bonds up to the time of the foreclosure proceedings. On the remaining 39 bonds, held by 12 different parties, including the appellees, all interest was paid until July 1, 1903. On a bill filed by the Real Estate Trust Company as trustee in the mortgage and as a holder of the bonds of the company, a decree of foreclosure was made on July 20, 1903. By that decree the court below found the exact amount due on each of the 200 bonds, and who held them, and in directing the manner in which the net proceeds of the sale of the property should be distributed among these bondholders the decree was that the proceeds should be appropriated, first, to the payment of all interest due on the bonds; second, to the payment of interest accrued upon the matured and unpaid coupons attached to the bonds; and, third, to the payment of the principal of the bonds in full, if the purchase money should be sufficient for that purpose, and, if not, pro rata, so that no preference, priority, or distinction should be given to any of the bonds. And it was further decreed that at the sale the purchase money might be paid "either in cash, or by owners of bonds secured by such mortgage, in such bonds, to such extent as said bonds shall be entitled to payment in cash out of the proceeds of sale." Subsequently to this decree, and before the day of sale, the appellants purchased 163 bonds from the Real Estate Trust Company, John Wister's estate, and James Boyd, and shortly thereafter the 18 held by the Pennsylvania Steel Company. In pursuance of public advertisement, the property of the railroad company was sold at public sale in the city of Philadelphia on September 14, 1903, to the appellants for \$75,000. On September 21, 1903, the Real Estate Trust Company made return of its sale to the court below, and on that day, after a public proclamation in open court, no exceptions having been filed nor objections made, the sale was confirmed to the appellants and a deed ordered to be made out to them. Upon full settlement made by them with the Real Estate Trust Company, by paying

to it all the cash required by the terms of sale and turning in their bonds at the value which they had for the purpose of being used as purchase money under the decree of the court, a deed was executed and delivered to them and a receipt given in full for the purchase money. They subsequently formed a new railroad corporation under the act of assembly, taking over all the property and franchises that had been purchased by them, and prior to January 1, 1904, paid out large sums of money in the repair of the rolling stock of the new company and other improvements and betterments. On January 18, 1904, nearly four months after they had paid for their purchase in exact accordance with the decree of July 20, 1903, and received a deed for what they had purchased, the appellees filed a petition, praying for a rehearing of the bill and alleging that the decree of distribution was inequitable, as it ought to have been ordered pro rata upon all of the bonds, based upon the accumulation of principal and interest in each case only from July 1, 1903, the date of the last payment of interest to the petitioners. The status in which the other bondholders had been placed by the default of the company was alleged to be due to their indulgence of it, as a penalty for which their coupons that had matured before July 1, 1903, ought not to be paid. A rehearing was ordered, with the condition that, "in so far as the decree has been executed, the parties who have acted on the faith of such decree shall not be prejudiced by such decree being reversed or varied." The appellants, upon their petition, were allowed to intervene as respondents to the application for the rehearing. It was conducted before a judge of the Eighth judicial district, specially presiding, who, on October 12, 1904, modified the decree of July 20, 1903, by ordering a general pro rata distribution among all of the bondholders, based upon the amount of principal and interest due as one sum in each case, wholly ignoring the rights which had been given the bondholders by the former decree, and upon which the appellants had acted in good faith.

The petition for rehearing was disposed of by the learned judge specially presiding on answer and testimony, but with no regard to the decree of July, 1903. Indeed, it is not referred to in his general discussion, and reference is made to it only in the order modifying it. He disposed of the questions raised as if they had never been passed upon by the court before, and, though his opinion is designated as one on rehearing, from all that can be gathered from it, except its reference to a prior hearing, it could properly be regarded as the original hearing in the case. After reciting that the appellants had become the purchasers of the property and franchises of the railroad company in September, 1903, and had paid the purchase money in full, as already stated, the court found that in pursuance of the permission

given by the former decree, and in reliance upon it that the purchase money bid for the property and franchises at the sale might be paid for either in cash or bonds secured by the mortgage to such extent as the bonds should be entitled to payment in cash out of the proceeds of the sale, the appellants without any knowledge of the contemplated proceedings by the petitioners for a rehearing, or that they, or any of them, were dissatisfied with the decree of sale, or any part thereof, in good faith had purchased and become the owners of a number of bonds of the value of many thousands of dollars, for the purpose of using them as purchase money in the purchase contemplated by them, and prior to the filing of the petition for the rehearing, and without knowledge that an application for it was contemplated, used the bonds so purchased in their settlement and payment for the property and franchises of the railroad company, as permitted and allowed by the decree of sale, and that in their plan and contemplation of the purchase of the said property and franchises of the said railroad company they had considered the condition of the tracks and equipment of the railroad company as dilapidated, worn out, menacing, and dangerous, and, in view of the necessity of quick and immediate repair and betterment of the property in the interest and safety of the public, had made the railroad safe by the expenditure of a large sum of money. But in the face of these sweeping findings the rights of the appellants, as fixed by the decree of July, 1903, and upon which they had acted, were ignored, to their manifest prejudice, by the decree made on the application for the rehearing; for, if it is not disturbed, it will compel them to pay additional purchase money after they have received their deed and paid every dollar called for by the decree under which they bought. The question before us is not whether the decree of July 20, 1903, was erroneous in directing that the proceeds of the sale should be applied, first, to the payment of all interest due on the bonds, second, to the payment of interest accrued upon matured and unpaid coupons, and the balance to the payment of the principal of the bonds, but whether, under the admitted facts, just stated, the second decree of October 12, 1904, should be allowed to stand as an equitable one.

An undenied allegation in the answer to the petition for a rehearing is that before the decree of July 20, 1903, was finally made, the Real Estate Trust Company had notified each one of the appellees of the proceedings to foreclose the mortgage and what decree would be asked for. Again, after it was made, and before it was executed, notice was given them on August 14, 1903, that a sale of the railroad property would be held in pursuance of it in the city of Philadelphia on September 14, 1903. No one of them objected to the entry of the decree, to the exe-

cution of the order of sale, nor to the confirmation of it by the court after the appellants had complied with all the conditions of the decree. As soon as the property was sold at the bid of \$75,000, the appellees knew, or ought to have known, that by the decree, which they had allowed to become final, they would receive much less than the amounts due them on their bonds; but in the period between the date of the sale and its confirmation, when they could have acted, they did nothing. On the contrary, they allowed it to become absolutely confirmed, and permitted the plaintiffs to pay for their purchase in accordance with the decree of sale. Nearly four months after its confirmation and the payment not only of the purchase money by the appellants, but after the expenditure of thousands of dollars by them in the betterment of the property acquired by the new company, a modification of the decree was asked for, with the immediate effect of making the appellants pay more for the property for the benefit of the appellees. Assuming that their complaint as to the decree of July 20, 1903, is just, they had been given an opportunity to protest against it before it was made; again, before it was executed; and later on, before the absolute confirmation of the sale, to ask that it be modified. They did nothing, however, and with their laches and supineness, not only admitted, but unexplained, it would be against every equitable principle if a chancellor should now hear them to the prejudice of others, who, as found by the judge below in modifying the first decree, had acted in good faith on that decree, with not the slightest intimation that those who now complain of it were dissatisfied with it or contemplated any proceedings to have it modified. The decree of July 20, 1903, was fully executed as to the appellants, the purchasers of the property. There was nothing more for them to do under it, and yet, as now modified on the rehearing granted under the equity rule that "parties who have acted on the faith of such decree shall not be prejudiced by such decree being reversed or varied," they are so manifestly prejudiced that attention need not again be called to the wrong done them. The holder of a legal claim may be estopped from asserting it, and an equitable claim may in time, through the conduct of its owner, become inequitable as to those against whom he would press it. When the doors of chancery are knocked at in time, they will open, that the chancellor may hear; but the knock may be too late, as was the appellees'.

The decree appealed from is reversed, and that of July 20, 1903, is affirmed, as fixing the rights of the appellants as purchasers of the property sold; the costs in the proceedings on the rehearing and on this appeal to be paid by the appellees.

REAL ESTATE TRUST CO. OF PHILADELPHIA v. PERRY COUNTY

R. CO. et al, (No. 2.)

(Supreme Court of Pennsylvania. Oct. 9, 1905.)

Appeal from Court of Common Pleas, Perry County.

Bill by the Real Estate Trust Company of Philadelphia against the Perry County Railroad Company and others. From the decree, the Duncannon National Bank appeals. Dismissed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

BROWN, J. In view of what we have said in the opinion this day filed in the appeal of Sponsler and others from the same decree (January Term, 1904, No. 305, 62 Atl. 25), and of the finding of the court below that neither the Real Estate Trust Company nor the Pennsylvania Steel Company had done anything which precluded it from demanding payment of its matured and unpaid coupons, this appeal must be dismissed.

Appeal dismissed, at the costs of the appellants.

ROHRBACH et al. v. SANDERS.

(Supreme Court of Pennsylvania. June 22, 1905.)

1. TENANCY IN COMMON—LIMITATION OF ACTIONS—RECOVERY OF REALTY.

Testator, who died in 1859, devised to his wife and to his son all of his property, to be held for herself and in trust for his son, providing that, if she married again, then all the property should go to his son, and the trust in his favor to be void. The widow did not marry, but died in possession of the real estate in 1891. The son's interest was sold under a judgment against him in 1880. *Held*, that an action brought 25 years later by the grantee of the purchaser against the committee of the son, who had been declared a lunatic, to recover such property, was barred by limitations.

2. WILLS—CONSTRUCTION—NATURE OF ESTATE.

Where testator devised all his property to his wife and his son, to be held for herself and in trust for his son, with the provision that it should descend to the son if the wife married again, she took a defeasible fee-simple estate in an undivided one-half of the real estate, which, when she did not marry again, became an absolute fee simple.

3. TENANTS IN COMMON—ADVERSE POSSESSION.

Where a tenant in common for more than 20 years held uninterrupted and notorious possession of the entire property, taking the whole profits exclusively to himself and claiming the whole land, he acquired title by adverse possession.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy in Common, §§ 42-49.]

Appeal from Court of Common Pleas, Northumberland County.

Action by G. E. Rohrbach and W. R.

Rohrbach against W. J. Sanders, committee of Henry Simpson. Judgment for defendant, and plaintiffs appeal. Affirmed.

Defendant presented the following points:

"(2) That under the will of Henry V. Simpson, Sr., the widow, Sarah A. Simpson, took a fee in the undivided one-half of the whole estate, defeasible upon her remarriage. That event not having taken place, upon her death she was, or her estate was, seised of the fee in the undivided one-half of the premises described in the writ of ejectment. That the sheriff's sale, under the judgment of Daniel Beckley against Henry V. Simpson, Jr., did not pass the interest of Sarah A. Simpson, but only the interest of Henry V. Simpson, Jr., which was the undivided one-half; the sale taking place prior to the death of Sarah A. Simpson." Answer: That point is affirmed, and is I believe, what I have already said to you in my charge.

"(3) When one tenant in common enters on the whole, and takes the profits and claims the whole exclusively for 21 years, the jury ought to presume an actual ouster, though none be proven; and as between tenants in common a legal presumption of ouster arises in favor of one who has been in the peaceable and exclusive possession of the profits of the land for more than 21 years, and the taking of the whole profits exclusively, is evidence from which the jury may draw the conclusion of ouster and adverse possession." Answer: I shall not affirm that in the exact language in which it is drawn. I charge you, however, gentlemen of the jury, that when one tenant in common enters upon the whole, and takes the profits and claims the whole exclusively for 21 years, the jury may presume an actual ouster, though none be proven, and as between tenants in common a legal presumption of ouster arises in favor of one who has been in the peaceable and exclusive possession of the profits of the land for more than 21 years, and the taking of the whole profits exclusively is evidence from which a jury may draw the conclusion of ouster and adverse possession, and, as thus answered, is, I believe, substantially what I have already said.

Plaintiff presented these points:

"(1) Under all the evidence in this case the verdict must be for the plaintiffs." Answer: Refused without reading.

"(3) The words, 'provided, however, that if my said wife should again marry, then I give and devise the property before mentioned to my son, Henry V. Simpson, and his heirs, forever,' operated as a limitation, and not as a condition; and (a) the widow, Sarah Ann Simpson, acquired a life estate under the will, subject to be sooner determined upon her remarriage, with (b) a vested remainder in Henry V. Simpson, the son; and (c) it matters not, for the purpose of the disposition of this case, whether the widow took

an estate for life as to the whole, with vested remainder in Henry, or whether the widow took an estate for life as to the undivided one-half, with vested remainder in Henry as to the said undivided one-half, with Henry the owner in fee of the other undivided one-half as an executed trust. The result is the same." Answer: The third point is refused without reading.

"(5) The statute of limitations did not begin to run in this case until the death of the life tenant, Sarah Ann Simpson, which occurred on December 26, 1891, and the defendant's plea thereof in bar of this action will not avail." Answer: Refused without reading.

"(6) The possession of Sarah A. Simpson was the possession of the other tenant in common, and the plaintiffs in this suit will not be barred from sustaining this suit by reason of the suit not having been brought within 21 years from the time of the sheriff's sale to J. B. Reed, but the statute would only run from the time of the death of Sarah A. Simpson, the life tenant." Answer: Refused without reading.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

John F. Schaffer and S. P. Wolverton, for appellants. Geo. B. Reimensnyder and W. J. Sanders, for appellee.

FELL, J. The first question presented by this appeal is what estate Sarah Ann Simpson took under the following clause of her husband's will: "I give and devise unto my beloved wife, Sarah Ann, and to my son, Henry V. Simpson, all my property, both real, personal, and mixed, to be held for herself and in trust for my said son; provided, however, that if my said wife should again marry then I give and devise the property beforementioned to my son, Henry V. Simpson, and his heirs, forever, and the trust thereby created in favor of my son shall after such marriage be null and void." The testator's widow did not marry again, and was in possession of the real estate until her death in 1891, 32 years after the death of her husband. At the trial of an action of ejectment brought by the grantees of a purchaser at a sheriff's sale of the son's interest, the jury were instructed that Sarah Ann Simpson took a defeasible fee-simple estate in the undivided one-half of the real estate, which became an absolute fee simple. This instruction was correct. No intention is disclosed to give a life estate merely, and the words used are apt words for the creation of an estate upon condition. There was no limitation over in the event of the widow not remarrying, and an intestacy as to one-half would result in that event, if the fee was not in her. The devise was of the property itself. It vested immediately, and was in fee, defeasible on the happening of an

event which did not happen. In principle the case is not distinguished from *Redding v. Rice*, 171 Pa. 301, 33 Atl. 330.

The second question is whether the statute of limitations defeated a recovery of the one-half interest of the son. The testator died in 1859. The trust as to the son was a dry trust. His whole interest was sold by the sheriff to the plaintiff's grantors in 1880, 25 years before this action was commenced. During this period of time there was no assertion of title by the plaintiffs or their predecessors in title, and the property was in the exclusive possession, first of the widow of the testator until her death in 1891, and then in his son until he was adjudged a lunatic, and afterwards in his committee, who exercised all the rights of exclusive ownership. They occupied or rented the property, received the rents and profits, and appropriated them to their own use, paid the taxes, and made alterations and repairs. The court left it to the jury to determine whether these acts were so inconsistent with joint ownership as to give rise to and sustain an inference of ouster. The instruction on the subject was as follows:

"* * * When one tenant in common enters upon the whole, and takes the profits and claims the whole exclusively for 21 years, the jury may presume an actual ouster, though none be proven, and as between tenants in common a legal presumption of ouster arises in favor of one who has been in the peaceable and exclusive possession of the profits of the land for 21 years, and the taking of the whole profits exclusively is evidence from which a jury may draw the conclusion of ouster and adverse possession." The possession of one tenant in common is *prima facie* the possession of his co-tenant also, and the mere reception of profits, payment of taxes, and making repairs, without more, will not sustain a claim of ouster or adverse possession. *Bolton v. Hamilton*, 2 Watts & S. 294, 37 Am. Dec. 509. The claim of exclusive right may be established by proof that one tenant in common has entered on the whole land, and taken possession and occupied the whole, claiming the profits as his own, for 21 years, without acknowledging the claim of his co-tenant. *Law v. Patterson*, 1 Watts & S. 184. It was said in *Frederick v. Gray*, 10 Serg. & R. 182, that where one tenant in common enters on and takes the profits of the whole under an exclusive claim for 21 years, the jury ought to presume an actual ouster, though none be proved. The rule is thus stated in the opinion in *Susquehanna, etc., R. R. & Coal Co. v. Quick*, 61 Pa. 328. "It is therefore certainly the law that open, notorious, and uninterrupted possession of the whole by a tenant in common for more than 21 years, claiming the whole land as his own, and taking the whole profits exclusively to himself is evidence from which a jury may draw the conclusion of an ouster and an adverse possession.

The distinction is that it does not afford a legal presumption, which would entitle the court to withdraw the question from the jury, and instruct them that they must infer an ouster and adverse possession, if not successfully rebutted."

We find no error in the record, and the judgment is affirmed.

JERMYN et al. v. CITY OF SCRANTON et al.
(Supreme Court of Pennsylvania. June 22, 1905.)

1. MUNICIPAL CORPORATIONS—BONDED INDEBTEDNESS—REPEAL OF STATUTE.

Act March 7, 1901 (P. L. 40), repeals Act June 14, 1887, § 24 (P. L. 898), as amended by Act Feb. 13, 1895, § 1 (P. L. 13), relating to an increase of the bonded indebtedness of cities of the second class and authorizing an election.

2. SAME—ISSUE OF BONDS—VALIDITY OF ORDINANCE.

The fact that an ordinance of a city of the second class providing for an issue of bonds does not provide for the payment of the first semi-annual installment of interest is immaterial, where it contains a sufficient levy for the payment of the bonds and interest.

3. SAME—TIME FOR PAYMENT.

Under Act March 7, 1901 (P. L. 40), as amended by Act June 20, 1901 (P. L. 586), relating to the issue of bonds by cities of the second class, bonds for the creation of new debts or for payment of contemplated improvements are payable annually; funding bonds, payable in 5 to 30 years.

4. SAME—TAXATION—CLASSIFICATION OF REAL ESTATE.

Cities of the second class may classify real estate for purposes of taxation, and levy a different rate on each class of property.

Appeal from Court of Common Pleas, Lackawanna County.

Bill by Joseph J. Jermy and others against the city of Scranton and others. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

The following is the opinion of Edwards, P. J., in the court below:

"The city of Scranton on August 10, 1904, passed two ordinances; one authorizing the issue of bonds in the sum of \$38,000 for the purpose of paying the amount assessed against the city for the construction of certain sewers, and the other authorizing the issue of bonds in the sum of \$100,000 to provide for the construction of a building to be used as police and fire headquarters, and for other purposes designated in the ordinance. Both ordinances provide for the creation of a sinking fund for the redemption of the bonds, as required by law. Thereupon the city proceeded to print the bonds and to advertise for bids for the purchase of the same. The plaintiffs, claiming that the said bond issues were not authorized under the law, filed their bill of complaint in the present case, and they now pray for an injunction to restrain the city authorities from executing and delivering the bonds specified in the ordinances aforementioned. There are no facts in dispute. Counsel on both sides

agree that the case shall be heard and finally disposed of on bill and answer; the only questions raised being matters of law.

"The said issues of bonds are attacked on four grounds, which, in brief, are as follows: (1) They are contrary to the provisions of the first section of the act of February 13, 1895 (P. L. 13), providing that there shall be no increase in the interest-bearing indebtedness of a city of the second class without a vote of the electors. (2) The ordinances authorizing the issue of the bonds do not provide for the semiannual interest falling due January 1, 1905. (3) The provisions in said ordinance, levying three different rates on the three several classifications of real estate as returned by the city assessors, are in conflict with sections 1 and 10, art. 9, of the Constitution. (4) The bond issues offend against the provisions of paragraph 6, § 3, art. 19, of the act of March 7, 1901 (P. L. 40), as amended by the act of June 20, 1901 (P. L. 586). The foregoing grounds of attack are not in the exact order in which they are found in plaintiffs' bill, but they are given by me in the order in which I intend to discuss them.

"1. The act of February 13, 1895 (section 1; P. L. 13): Section 1 of this act of assembly amends section 24 of the act of June 14, 1887 (P. L. 398). The latter section is as follows: 'Any increase of interest-bearing bonded indebtedness of cities of the second class is hereby prohibited, unless the same shall be approved by an affirmative vote of the majority of the qualified electors voting thereat at an election provided for by ordinance of councils.' The Legislature of 1895, having unusual regard for correct grammatical expression, by amendment changed one word in the section quoted, using 'thereon,' instead of 'thereat.' This was the only change made by the amendment. The change was unnecessary, because no court, in construing this section, would permit the error of using one word instead of the other to defeat the plain meaning of the legislative enactment. The fourth section of the schedule contained in the act of March 7, 1901 (P. L. 48), specifically repeals the whole of the act of 1887, excepting sections 1 and 2, thus wiping out section 24 above quoted. Counsel for plaintiffs argues that the act of 1895 (section 1) is still in force, and that therefore no city of the second class can increase its bonded indebtedness in any amount without a vote of the people. We can hardly think that counsel is serious in maintaining this contention. It appears very clear that the only effect of the amendment in the act of 1895 (section 1) was to read into the twenty-fourth section of the act of 1887 the word 'thereon,' instead of 'thereat.' In this particular instance the latter section falls with the repeal of the former. We also call attention to paragraph 5, § 3, art. 19, of the act of 1901, relating to the corporate powers of cities of the second class. The paragraph reads thus: 'To borrow

money on the credit of the city, and to pledge the credit and revenues thereof for the payment of the same, to an amount not exceeding two per centum upon the assessed value of the taxable property in said city, and with the consent of the people of the said city, obtained at an election held under the provisions of the Constitution and the general laws of this commonwealth, to increase the indebtedness of such city to an amount not exceeding in the aggregate, seven per centum upon the assessed valuation of the taxable property therein.' In view of the power expressly given by this paragraph to cities of the second class to pledge the credit of the city up to 2 per cent. of the assessed valuation without a vote of the people, what becomes of section 1 of the act of 1895? Both provisions cannot stand. They are absolutely irreconcilable. One or the other must give way, and according to a well-understood rule of construction the latter enactment must prevail. We need not enlarge on this point.

"2. The payment of the interest falling due January 1, 1905: It is claimed that there is no provision for the payment of the interest which falls due on January 1, 1905. Section 8 of the ordinance levies a tax for the year 1905 and every year thereafter to pay the bonds and interest. Counsel for plaintiffs says that the taxes, as a matter of fact, are not collected until late in the year, and that there will be no money in the treasury to pay the first semiannual installment of interest. This is undoubtedly true; but it is equally true that the city has many lawful ways for providing money for temporary purposes. The main question is: Has the city done what the law requires it to do in making provisions for the payment of the bonds and interest? Has it made a levy sufficient for the purpose? The eighth section of the ordinance answers these questions affirmatively. The ordinance has been carefully drawn, and meets the requirements of the law in such cases; but the city is not so helpless in this matter as counsel would have us believe. The interest, even for the whole of the year 1905, may be paid out of the premium bid on the sale of the bonds. We know of no reason why this cannot be done. The amendment to the answer filed by agreement shows that the total premiums exceed one year's interest. Regardless of the particular source from which the city may draw the money to pay the first semiannual interest, it is a sufficient answer to plaintiffs' contention on this point that the city has made all the provisions demanded by law for the payment of all the bonds and interest. It could do no more. We consider this objection as highly technical.

"3. Want of uniformity in the rate of levy: This objection is of a more substantial character than those we have already discussed. The Constitution provides that all taxes shall be uniform on the same class of sub-

jects within the territorial limits of the authority levying the tax. Counsel for plaintiffs admits the right of the Legislature to classify real estate for purposes of taxation, but denies the right of a municipality to levy a different rate on each class of property. In other words, he admits the principle, but denies the propriety of applying it so as to produce practical results. Unless there is a different rate of levy on the several classes of property, why should properties be classified at all? The point of objection, as we understand it, is that one man pays more than another on the same valuation. In the present case, for instance, the ordinance levies .142 on each dollar of valuation on first class property, .0946 on second class property, and .071 on third class property. All properties in cities of the second class being assessed at their actual value, the result is that three men each owning property worth, say, \$5,000, the properties being in each of the several classes, do not pay the same amount of tax on the same valuation. This is undoubtedly true, and such is the result of the practical operation of the rule; but unless some such result is secured it is apparent that the classification of real estate for purposes of taxation is useless. If all properties are assessed at their actual value, and if the same rate should be levied on all properties, why not include all properties in the one class? It is too late in the day in Pennsylvania to question the power of the Legislature to classify subjects of taxation on broad lines and within certain limitations. The reasons for such classification, based upon imperious necessity, are so numerous, and have been so frequently discussed by the higher courts, that it is useless to refer to them now. We shall cite only one case to show that the question before us is definitely and authoritatively settled. *Commonwealth v. Delaware Div. Canal Co.*, 123 Pa. 594, 16 Atl. 584, 2 L. R. A. 798. It is decided that the power to impose taxes for the support of the government, with the power of classification, still belonging to the Legislature under the new Constitution. The selection of the subjects thereof, their classification, and the methods of collection to be provided are matters purely legislative. The power to classify being given, all that is then required by the Constitution is that taxes shall be uniform upon the members of a class, and it is the uniformity of taxation, according to the classification made, which is the matter to be determined by the court.

"The act of 1901, as amended in the same year (see P. L. 586, on page 594), has the following provision: 'To provide for the issuing of bonds; for the application of bonds already issued, for the purpose of funding any and all indebtedness, now existing or hereafter created, of the city, now due or to become due: Provided, that the said bonds shall be payable in not less than five years and not more than thirty years from the date

of their issue, and that the same shall bear interest at a rate not exceeding six per centum per annum, with interest coupons attached, payable annually or semiannually, and the said bonds shall not be sold or exchanged for less than their par value and accrued interest.' This provision undoubtedly refers to funding bonds or bonds issued to take up or pay an existing indebtedness. The phrase 'indebtedness hereafter created' must be taken to mean that such indebtedness, if funded by the issue of bonds, is in the same class, and all such bonds should be payable in not less than 5 nor more than 30 years. It is conceded that the bonds in question in the present case are not funding bonds. They are issued for the purpose of providing money for improvements yet to be made. We hold, therefore, that the provision above quoted does not authorize the issuing of bonds payable annually. Where, then, do we find the authority for the issuing of bonds payable annually? The only place it can be found is in article 11, Act 1901 (on page 31), relating to the 'Sinking Fund Commission,' which states that, whenever any new bonds shall be issued by any of said cities, they shall be made payable in annual installments equal to the tax levied therefor, and shall be made payable annually from the funds so provided. It is difficult to escape the effect of the comprehensive and general character of this provision relating to the issue of 'any new bonds.' Counsel for plaintiffs claims that the place of this provision in the article pertaining to the sinking fund commission means that the 'new bonds' referred to are those bonds issued by the city to take up maturing bonds. We do not know what might have been in the mind of the person who drafted article 11, but we do know that we must give effect to the language used. The language is so plain and unambiguous that we cannot change it by any method of interpretation. We think the criticism is proper that the provision belongs logically to some other part of the act of 1901, but we must take this act of assembly as we find it, and give it such a construction that the whole may stand, if possible. If it was the intention of the Legislature to say that any new bonds issued by cities of the second class shall be payable annually, when issued for the purpose of taking up or funding maturing bonds, it should have said so. We have scanned every word and line of article 11, and can find no such intention expressed. Combining the two provisions in the act of 1901, in relation to the issue of bonds, we read them thus: 'Whenever any new bonds shall be issued by any of said cities they shall be made payable in annual installments'; but, 'bonds issued for the purpose of funding any and all indebtedness now existing or hereafter created * * * shall be payable in not less than five years nor more than thirty years.' This, in our opinion, is the present state of legislation relating to

the issue of bonds by cities of the second class. Bonds to provide means for contemplated improvements, or for the creation of a new indebtedness, are payable annually. Funding bonds are payable in from 5 to 30 years. It is conceded in this case that the ordinance was regularly adopted.

"Now, October 31, 1904, this case having been heard on bill and answer, and having been argued by counsel, it is adjudged and decreed that the plaintiffs' bill be dismissed, at their cost."

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

G. M. Watson, for appellants. David J. Davis, City Sol., for appellees.

PER CURIAM. Decree affirmed, on the opinion of the court below. Cost to be paid by appellant.

MILLER v. LEWISTOWN ELECTRIC LIGHT, HEAT & POWER CO.

(Supreme Court of Pennsylvania. June 22, 1905.)

1. ELECTRICITY—NEGLIGENCE OF LIGHT COMPANY.

Where defendant, an electric light company, suspended an arc light at the intersection of several streets, and one of its employes lowered the lamp and left it under the charge of a boy, and a sleigh driven around the corner struck the wires of the lamp, which then struck plaintiff, who was crossing the street, the question of the negligence of the light company was for the jury.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Whether a pedestrian was negligent in attempting to cross a street at a place other than the regular crossing is for the jury, in an action for injury caused by a live electric wire.

Appeal from Court of Common Pleas, Mifflin County.

Action by Henry W. Miller, to use of Sarah J. Miller, against the Lewistown Electric Light, Heat & Power Company. Verdict for plaintiff, and defendant appeals. Affirmed.

At the trial it appeared that plaintiff was seriously injured by contact with electric light wires belonging to the defendant company. At a point in the borough of Lewistown where several streets intersected, the defendant maintained an arc light, which on the evening in question had been lowered for repairs. An employe of the company, after lowering the light, left it in charge of a boy while he went to secure a file. During his absence a one-horse sleigh dashed around a corner and struck the wires attached to the lamp. The

testimony tended to show that Miller, while attempting to cross one of the streets at a point other than the regular crossing, was struck by the wires and sustained injuries, from which he died after the present suit was instituted.

Defendant presented the following points:

"(4) If the jury believe that it is the custom to lower arc lamps at night on public highways for the purpose of making them operate, and that in this case the lamp, when lowered, was left in charge of the boy, to notify the public of possible danger in the short and necessary absence of defendant's employe, then their verdict must be for the defendant." Answer: This point is denied. The question as to whether leaving the light in charge of the boy was negligence or not is for you to determine, and not for the court; and an electric light company could not have a custom, unless the custom had been established by many long years, so as to become universal and known by all persons, to negligently lower lights at night.

"(6) From all the evidence in the case the verdict must be for the defendant." Answer: This point is denied. It is for you to say what your verdict will be, not for the court.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

A. Reed Hayes, for appellant. W. W. Uttley, for appellee.

PER CURIAM. Whether the defendant's conduct in lowering the lamp, or leaving it in charge of a boy, while the wires were down, was negligent, was a question for the jury. There could be no custom of the defendant which would excuse it for exposing the public to what the jury should find was unnecessary danger.

The question of proximate cause was also for the jury. The fact that the horse was going at a rapid pace was not so unprecedented that the jury might not fairly find that the defendant was bound to anticipate and look out for it, and that the chain of events was continuous up to the injury to plaintiff.

As to the plaintiff's alleged contributory negligence, a pedestrian is not necessarily negligent if he leaves the sidewalk and crosses the street at other than the regular crossings. In so doing he may encounter risks that he would not on the sidewalk; but, unless they are manifest, it is for the jury, not the court, to say that his act was negligent.

Judgment affirmed.

LAMB v. ZUNDELL.

(Supreme Court of Vermont. Orange. Nov. 25, 1905.)

1. ATTACHMENT—LEVIES—SALE OF PROPERTY—RECOVERY OF PRICE.

Where a deputy sheriff, having levied on certain iron, permitted the defendant in attachment to sell the same, on the purchaser's agreement to pay the price to such officer, the surrender of the officer's special property in the iron was a sufficient consideration for the purchaser's promise to pay, entitling the officer to recover against the purchaser, though his writs had been satisfied out of other property.

2. PLEADING—AMENDMENT TO CONFORM TO PROOF.

In a suit by an officer to recover the purchase price of property levied on, the case having been referred by the parties, it was immaterial that general assumpsit would not lie; the declaration being adaptable by amendment to the facts found.

3. GARNISHMENT—LIABILITY OF TRUSTEE—PLEADING—GENERAL ISSUE.

Plaintiff, having levied on certain scrap iron, permitted it to be sold, on the purchaser's agreement to pay the price to plaintiff. After having made a partial payment, the purchaser was garnished as trustee of the attachment defendant, and, having been adjudged trustee on default, paid the judgment. *Held* that, plaintiff's writs having been satisfied out of other property, plaintiff, in an action against the purchaser for the price of the iron, was the representative of the attachment defendant, within V. S. 1374, discharging a trustee from demand by the defendant for credits paid by force of a trustee judgment, and allowing him, as against the defendant or his representative, to plead such special matter in discharge under the general issue.

Exceptions from Orange County Court; Powers, Judge.

Assumpsit by Frank Lamb against Morris Zundell. On defendant's exceptions to the report of a referee in favor of plaintiff. Judgment reversed, and rendered for plaintiff for a less amount than that sued for.

Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, and HASELTON, JJ.

David S. Conant, for plaintiff. C. H. Williams, for defendant.

ROWELL, C. J. The plaintiff, as deputy sheriff, had several writs in his hands against the Bradford Paper Company in favor of its creditors, whereon he attached certain real estate and some scrap iron as the property of the company. Thereafter, and while the attachments were in force, the defendant, to the knowledge and with the acquiescence of the plaintiff, purchased the iron of one Homer, a member of said company, and at the same time it was understood and agreed by the plaintiff, the defendant, and Homer that the money should be paid to the plaintiff, and the defendant then and there agreed to pay it to him, and subsequently did pay to him a considerable part of it, and would have paid the rest had he not been adjudged trustee in a suit against the company and paid the judgment. It appears that the claims of

all the attaching creditors whose writs the plaintiff served were fully paid and satisfied by execution sales of the real estate attached, so that the iron was thereby released from the attachments; and this we understand was before this suit was brought.

The defendant objects that the plaintiff cannot recover because the legal right is not in him. But at the request of the defendant, implied, if not expressed, the plaintiff conferred a benefit upon the defendant by allowing him to purchase and have the iron, in which the plaintiff had a special property as attaching officer, and that benefit was a sufficient consideration for the defendant's promise, which was induced thereby, and made to the plaintiff and no one else. But the defendant says that general assumpsit will not lie. It is immaterial whether it will or not, for if not, the declaration is adaptable by amendment to the facts found, without changing the nature of the action, the case having been referred by the parties, and thereby the cause of action.

The defendant did not appear and disclose when he was trustee, but was defaulted and adjudged trustee and paid the judgment, and now seeks to avail himself of that payment under the general issue, to which the plaintiff objects that the defendant should have disclosed, and have pleaded the payment specially. But as the claims of the attaching creditors have been fully paid and satisfied, the plaintiff is suing solely for the benefit of the defendant in the trustee suit, which is the paper company, and to which alone he is accountable for all he recovers here; and so he stands as its representative within the meaning of V. S. 1374, which discharges a trustee from demands by the defendant for credits paid by force of a trustee judgment, and allows him when afterwards sued therefor by the defendant or his representative, to give evidence under the general issue of the special matter in discharge.

Judgment reversed, and judgment for the plaintiff for \$18.38, with interest thereon from the commencement of the suit.

JENNETT v. PATTEN.

(Supreme Court of Vermont. Chittenden. Sept. 30, 1905.)

1. WITNESSES—CROSS-EXAMINATION UNDER STATUTE—CONCLUSIVENESS OF TESTIMONY GIVEN.

Under V. S. 1246, providing that a party to a civil action may compel an adverse party to testify as a witness in his behalf, and may examine him under the rules applicable to the cross-examination of witnesses, plaintiff may call defendant as his first witness and examine him, and may then call and examine other witnesses and show by them what actually took place, although their testimony tends to contradict defendant's testimony, and the court cannot go behind the record and determine the existence of a deliberate plan on plaintiff's part

to destroy the credit to be given defendant's testimony.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1269.]

2. NEW TRIAL—GROUNDS—MISCONDUCT OF JURORS—CONCEALMENT FROM COURT.

Misconduct of defendant and jurors in conversing about the case at defendant's house on the occasion of an adjournment during the trial is not available to defendant as ground for setting aside the verdict, where he did not call the attention of the court or of his counsel to the circumstance until after the rendition of verdict.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 110.]

Exceptions from Chittenden County Court; Powers, Judge.

Action by Charles Jennett against Henry Patten. There was judgment for plaintiff, and defendant excepted. Affirmed.

Argued before POWELL, C. J., and TYLER, MUNSON, START, WATSON, and HASELTON, JJ.

J. J. Enright and R. E. Brown, for plaintiff. Palmer, Foster & Russell, for defendant.

TYLER, J. This action is trespass for an assault and battery. Pleas, not guilty and self-defense. Verdict for the plaintiff. The plaintiff's evidence tended to show that he and the defendant met in a barn, where they had a right to be, and that words passed between them, resulting, as the plaintiff claimed, in the defendant's assaulting him. The defendant claimed that he acted in self-defense.

The exceptions state that the plaintiff called the defendant as his first witness and examined him on all points as fully as he would have been allowed to do in cross-examination, if he had been called as a witness in his own behalf. The plaintiff and witnesses called by him were then allowed to testify about the assault, and so far as their testimony tended to contradict the defendant's testimony upon the subjects upon which he had testified it was received under his objection and exception. This evidence was offered and admitted for the purpose of showing what actually took place between the parties, and not to impeach the defendant, although it contradicted the testimony given by him on material points. The right of one party to call the adverse party as a witness and cross-examine him is given by V. S. 1246, which is: "A party to a civil action or proceeding at law or in equity may compel an adverse party * * * to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses. But the party so called to testify may be examined by the opposite party under the rules applicable to the cross-examination of witnesses." We cannot go behind the record and find, what the defendant claims, that there was "a deliberate plan made by the plaintiff to disparage, destroy, and render

useless the credit to be given to the defendant's testimony." It appears that the plaintiff's daughter and hired boy were the only witnesses of the affray, and they were excluded from the courtroom while the defendant testified. Afterwards these witnesses and the plaintiff himself gave their versions of the occurrence as they claimed to have seen it. In *Cox v. Eayres*, 55 Vt., on page 28, 45 Am. Rep. 583, it is said: "It is also well settled that a party is not bound by the testimony of his own witness, but is at liberty to show that facts relevant to the issue are otherwise than as he has stated them to be, although the effect of such showing may be to discredit the witness." Wigmore on Ev. § 908, says: "It has been noted (section 897) that a chief reason for the victory of the newer notion was the perception that without it one could not prove the facts of his case, if the first witness called were to testify untruly. From this point of view the discrediting of the witness is regarded as incidental only (because inevitable) to this other and necessary right." It does not appear that the plaintiff's evidence was introduced for the purpose of discrediting the defendant, nor that the plaintiff exceeded his right under the statute. Therefore this exception is not sustained.

After the testimony and arguments were closed, and before the charge was given to the jury, two jurors, on their way to their homes, on Saturday afternoon, called at the defendant's house and at their request were by him shown certain objects and localities which had been testified about in the trial and were material to the issue. They also asked him certain questions, which he answered. After verdict the defendant moved to have the verdict set aside by reason of this misconduct of the jurors, and testimony was taken in support of and in opposition to the motion. It was found that the defendant was in court on Monday and heard the charge of the court, and did not make these facts known to the court nor to his counsel until after the verdict was rendered, hoping, as the court found, "that he would derive an advantage in the result of his case by reason of the information obtained by said jurors as aforesaid." It is unnecessary to comment upon the misconduct of the defendant, or that of the two jurors in violation of their oath and of the emphatic instructions of the court given them on Saturday to hear nothing said about the case nor to receive any information concerning it during the recess. It is sufficient to say that the defendant's omission to call the court's attention to these facts brought the case within the settled rule laid down in *Whitcher v. Peacham*, 52 Vt. 242. See, also, *Scott v. Moore*, 41 Vt. 205, 98 Am. Dec. 581; *Badger v. State*, 69 Vt. 217, 37 Atl. 286; *McKinstry v. Collins*, 74 Vt. 147, 52 Atl. 438.

Judgment affirmed.

FRENCH v. WHITE.

(Supreme Court of Vermont. Washington.
Oct. 25, 1905.)

1. BANKRUPTCY—STOCK IN CORPORATION—PLEDGE—FAILURE TO TRANSFER—REQUISITES.

A debtor deposited with his creditor certificates of stock as collateral. The certificates were neither assigned in writing nor was any transfer made on the books of the corporation. No notice was given to the corporation that the certificates were so deposited, but subsequently an officer was incidentally told of it. Stock was transferable only on the books of the corporation by a surrender of the certificate. *Held*, that there was no transfer of the stock, either at common law or under V. S. 3689, providing that transfers must be by assignment and delivery, with notice to the corporation, but the same was subject to levy and sale in proceedings by another creditor, and on the bankruptcy of the debtor the stock passed to his trustee, under Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], providing that the trustee of the bankrupt shall be vested with the title of the bankrupt in property subject to levy and sale against him.

2. JUDGMENT—PROCESS—ATTACHMENT—PERSONAL SERVICE.

Where, in an attachment suit against a nonresident, there was no service on the debtor and no appearance by him, the suit was in effect one in rem, and any personal judgment was void.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 33.]

3. SAME—PROPERTY IN TRUSTEE IN BANKRUPTCY.

Property which vests in the trustee of a bankrupt under the federal bankruptcy law is not subject to attachment in a state court.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 238.]

4. AUDITA QUERELA—JUDGMENTS SUBJECT TO REVIEW.

Where a court had no jurisdiction and the judgment rendered is void, audita querela to vacate the judgment and execution thereon is unnecessary.

Exceptions from Washington County Court; Rowell, Judge.

Audita querela to set aside a judgment and execution thereon by William A. French against Stillman C. White. Judgment for plaintiff, and defendant excepts. Reversed.

Argued before TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Hunton & Stickney, for plaintiff. George W. Wing and Gordon & Jackson, for defendant.

WATSON, J. On the 22d day of April, 1899, Henry S. Mackay was adjudged a bankrupt under the United States bankruptcy laws, before the District Court of the United States in the District of Massachusetts, and the plaintiff was appointed sole trustee of the bankruptcy estate. At that time Mackay was the owner of 220 shares of the capital stock of the Vermont Granite Company, represented by two certificates issued to him—one numbered 25 for 90 shares, and one numbered 26 for 130 shares. The Vermont Granite Company is a corporation organized under the laws of this state, and has its

principal office and place of business at the city of Barre. Mackay was the owner of this stock as early as in October, 1893, but how much earlier does not appear. After he became the owner of it, he gave to the defendant on the day of their date two promissory notes—one for \$6,500, at one year's date, with interest annually, and one for \$4,500, at eight months' date, with like interest. At the time of the execution and delivery of these notes Mackay "deposited" with the defendant the certificates of stock—the one for 130 shares as collateral security for the payment of the larger note, and the one for 90 shares as collateral security for the payment of the smaller note. The certificates were not assigned in writing nor otherwise than as above stated. Nor was any memorandum of transfer or deposit made on any books of the company. Neither Mackay nor the defendant ever gave or procured to be given any notice to the company that the certificates were so "deposited"; but in October, 1893, the then treasurer and secretary of the company was incidentally told of it by a person who happened to know the fact. Stock in the company was and is transferable only on the books of the company by the holder or his attorney on the surrender of the certificate. The transfer of the certificates to the defendant was by delivery only. No assignment of them was made.

To render a transfer of shares of stock as collateral security valid against subsequent attaching creditors of the owner, under the statute, the transfer must be "by assignment and delivery," with notice to the clerk, cashier, or treasurer of the corporation, and a memorandum thereof made upon its stock ledger. V. S. 3689. Aside from the statute, without a written transfer of some kind sufficient to pass the legal title, with a transfer on the books of the corporation, or accompanied with power to make such a transfer, as well as a delivery of the certificate, there is no such delivery of the possession of the property as is essential to the validity of a pledge of corporate stock. *Jones on Pledges*, §§ 151, 152. See *Samson v. Rouse*, 72 Vt. 422, 48 Atl. 666, and *White River Savings Bank v. Capitol Savings Bank and Trust Co.*, 77 Vt. 123, 59 Atl. 197. Thus under the well-known rules of the common law the word "assignment," used in connection with such pledges, means a written transfer, and it must be understood in the statute above referred to in the same sense in which it is understood at common law. 9 Bac. Abr. (Bouvier Ed.) 238. Since there was no written transfer of the stock in question, there was no pledge either at common law or under the statute, and the question of notice to the corporation is immaterial. It follows that prior to the filing of the petition in the proceedings in bankruptcy the 220 shares of stock might have been levied upon and sold under judicial process against Mackay; and under the

provisions of the bankrupt law, when the plaintiff was appointed trustee, the title to this stock vested in him by relation at the date of the commencement of the proceedings. Bankr. Act July 1, 1898, c. 541, § 70; 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]; In re Appel, 103 Fed. 931, 4 Am. Bankr. Rep. 722.

Some months after the title to the property was so vested in the trustee, the defendant sued out his writ of attachment against the bankrupt, returnable before the county court within and for the county of Washington, in this state, therein commanding that the goods and chattels of the bankrupt be attached to the value of \$20,000. The action was general assumpsit and founded on the two promissory notes before described. The writ was in form served by attaching as the property of the bankrupt the said 220 shares of stock. The bankrupt was a nonresident of this state, and at most was given only constructive notice of the suit and attachment. The trustee in bankruptcy was also a nonresident. Neither of them had any notice in fact or knowledge of the suit or any of the proceedings therein. An order for notice to the bankrupt by publication was made, but it is contended that the requirements of the statute in this respect were not complied with. In the view we take of the case before us, however, that question is immaterial and not further noticed. Judgment was rendered in the former case against the bankrupt by default for the sum of \$17,698.12 and costs. Execution was issued, and the property attached was advertised for sale thereon. Pending the notice for sale the present suit was brought in the name of the trustee in bankruptcy to vacate the judgment and execution. Since in that action there was no service of process upon the bankrupt and no appearance by him, the case was in its essential nature a proceeding in rem, the only effect of which could be to subject the property attached to the payment of the debt found due to the plaintiff on which the action was founded. As a personal judgment, the judgment rendered was void. Indeed, when regularly obtained, such a judgment is without any binding force, except as to the property attached. Woodruff v. Taylor, 20 Vt. 65; National Bank v. Peabody & Co., 55 Vt. 492, 45 Am. Rep. 632.

At the time of the commencement of the former case, could the property in question be attached by process from the state court? This is an important question, and, if held in the negative, one that is decisive of the present case. In Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, the court, speaking through Mr. Chief Justice Fuller, said: "It is as true of the present law as it was of that of 1867 that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction (International Bank v. Sherman, 101 U. S. 407, 25 L. Ed. 867), and on adjudication title to the bank-

rupt's property became vested in the trustee (sections 70, 21c [Bankr. Act July 1, 1898, c. 541, 30 Stat. 565, 552, U. S. Comp. St. 1901, pp. 3451, 3430]), with actual or constructive possession, and placed in the custody of the bankruptcy court." Since the stock in question, as a part of the bankrupt estate, was in the custody of the federal court, it could not be taken out of that custody by any process from a state court. Property cannot be constructively, any more than actually, in two places at the same time. To give a court jurisdiction in a proceeding in rem, there must be a valid seizure and an actual control of the res under the process therefrom. The attempt to seize the property by attachment was a nullity, and gave the state court no jurisdiction over it. In Stoughton v. Mott, 13 Vt. 175, the action was trespass for taking and carrying away the plaintiff's sloop and a quantity of military stores, arms, etc. After a trial was had on the general issue, resulting in a verdict for the plaintiff, the suit was dismissed on defendant's motion for want of jurisdiction, and on exception thereto the case was heard in this court. It appeared that the defendant, an officer of the United States, seized and was holding the sloop and arms and munitions of war under an act of Congress, as intended to be employed by the owners thereof in carrying on military operations within the province of Lower Canada, a country with which the United States was at peace. Royce, J., delivered the opinion of the court: "If the action is of a character which necessarily goes to deplete the possession, under the seizure, it cannot be sustained. Such was the case of Slocum v. Mayberry, 2 Wheat. 1, 4 L. Ed. 169, being replevin, which could not be instituted to effect without retaking the property from the seizing officer. But if the action is an ordinary one, seeking merely to recover damages, there would seem to be nothing in principle to forbid the pendency of both suits at the same time." The doctrine there laid down is a principle thoroughly established in law. In Buck v. Colbath, 8 Wall. 334, 18 L. Ed. 257, the court, speaking through Mr. Justice Miller, said: It is "a principle which is essential to the dignity and just authority of every court, and to the comity which should regulate the relations between all courts of concurrent jurisdiction. That principle is that, whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being, and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises." See, also, Taylor v. Carryl, 20 How. 583, 15 L. Ed. 1028; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed.

390; *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1188.

It follows that the state court acquired no jurisdiction of the res in the former case, and that the attempted attachment of the property and all subsequent proceedings in that action are void. This being so, the property is not affected thereby, and there is no necessity for this action of *audita querela* to vacate the judgment and execution. The question whether such an action can be maintained in the name of a trustee in bankruptcy in any other circumstances, where the judgment sought to be vacated was rendered against the bankrupt, is not considered.

Judgment reversed, and judgment for defendant to recover his costs.

STATE v. KRINSKI.

(Supreme Court of Vermont. Rutland. Nov. 8, 1905.)

1. CRIMINAL LAW—EVIDENCE—INTOXICATING LIQUOR ILLEGALLY SEIZED.

On a prosecution for keeping for sale intoxicating liquors without a license, it was proper to admit in evidence liquors which had been seized, irrespective of the legality of the warrant.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 877.]

2. SAME.

On a prosecution for keeping for sale intoxicating liquors without a license, it was not error to admit evidence as to the finding of Jamaica ginger, although evidence had already been introduced regarding the finding of alcohol, as the state was not bound to confine its evidence to the liquor for which it claimed a conviction.

3. INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—EVIDENCE—INCrimINATING CIRCUMSTANCES.

On a prosecution for keeping for sale intoxicating liquors without a license, it was proper to permit the state to show that at the time of the search two men, under the influence of liquor, were wrangling over a bottle, though it further appeared that the bottle only contained soda water.

4. SAME.

On a prosecution for keeping for sale intoxicating liquors without a license, it appeared that bottles purporting to contain Jamaica ginger found on the premises were flask-shaped, and the state chemist testified that there was a standard form of bottles put in the glass manufacturers' catalogues for putting up medicinal Jamaica ginger, and that he had never seen it put up in bottles such as those in evidence, and he also testified that he never saw such a bottle used in a proper pharmacy. *Held*, that the testimony had a legitimate tendency to sustain the charge.

5. SAME—INSTRUCTIONS.

On a prosecution for keeping for sale intoxicating liquors without a license, the court instructed that if a preparation found on the premises was a beverage "capable of producing intoxication, and may be used for that purpose, then it is prohibited." The court in its charge first took up the question whether the preparation was a beverage within the meaning of the law, and said that the law did not mean that it must be classed among liquors that are ordinarily used as beverages, but that it was sufficient if the liquid was one which can be

used so practically, and further stated that the important question was whether the preparation was kept for the purpose of sale, with intent to sell it as a beverage. *Held*, that defendant was not harmed by the quoted language, as the evident meaning of the entire charge was that a preparation may in some circumstances be classed with intoxicating liquor, although not ordinarily used as a beverage.

6. SAME—LIQUORS PROHIBITED.

The act of 1902 does not exclude from the term "intoxicating liquor" medicinal preparations, fluid extracts, and toilet articles of which alcohol is the solvent principle.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 146.]

Exceptions from Rutland County Court; Tyler, Judge.

Herman Krinski was convicted of keeping and exposing for sale intoxicating liquors without a license, and he brings exceptions. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

R. A. Lawrence, State's Atty., for the State. Butler & Moloney, for respondent.

MUNSON, J. The respondent objected to the production of the articles found in his building, and testimony relating thereto, on the ground that the search in which the articles were seized was made upon an illegal warrant. The court held the evidence admissible, without regard to the legality of the warrant; and this was correct. *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575. The respondent relies upon *State v. Slamon*, 73 Vt. 212, 50 Atl. 1097, 87 Am. St. Rep. 711, and *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 254, 29 L. Ed. 746; but these cases, however regarded, are not controlling. There is a plain distinction between the seizure and production of papers which are not the basis of the charge and are merely of an evidentiary character, and the seizure and production of property kept for an illegal use.

The respondent objected to evidence regarding the Jamaica ginger, on the ground that evidence had already been introduced regarding the finding of some alcohol. The state was not bound to confine its evidence to the liquor for which it claimed a conviction. The finding of other liquors in the same place would bear upon the question whether the kind relied upon was kept for illegal sale.

The state was permitted to show that at the time of the search two men, under the influence of liquor, were wrangling over a bottle, during which wrangling the respondent came into the room. It appeared, further, that this bottle was seized, and afterwards found to contain only soda water. This evidence was admissible as one of the circumstances of the search and seizure, and as tending to characterize the place and business.

The bottles purporting to contain Jamaica

ginger were small, flat, flask-shaped bottles, and there was evidence that the officer found nearly 300 empty bottles of the same kind in the back room of the store. Dr. Wiltse, the state chemist, testified to the differences between the article seized and the standard Jamaica ginger, and stated, further, that there was a standard form of bottle put in the glass manufacturers' catalogues for putting up the medicinal Jamaica ginger, and that he had never seen it put up in bottles of the shape of those put in evidence. He was also permitted to testify, under respondent's exception, that he never saw a bottle of the style and shape of these bottles used in a proper pharmacy, and that glass manufacturers put in their catalogues what they call a "ginger bottle" of a different shape and style. It does not appear that any question was raised as to the witness' competency to testify upon this subject, and we think the matters testified to had a legitimate tendency to sustain the charge.

The respondent submitted several requests as to what constitutes a beverage, and excepted to the court's refusal to comply therewith and to its charge upon that subject, and now argues that the court erred in saying: "If this preparation * * * is a beverage that is capable of producing intoxication, and may be used for that purpose, then it is prohibited." But this sentence must be considered in connection with other parts of the charge. The court first took up the question whether this Jamaica ginger was a beverage within the meaning of the law. And in considering this question, after referring to the evidence in respect to its being used as a beverage, the court said, in substance, that the law did not mean that it must be classed among liquors that are ordinarily used as beverages, but that it is sufficient if the liquid is one that can practically be used as a beverage and be drunk for the purpose of intoxication; that if the preparation was a beverage capable of producing intoxication, and one that could be used for that purpose, then it fell within the list of intoxicating liquors, and the sale or keeping for sale was prohibited. The evident meaning of this is that a preparation of this kind may in some circumstances be classed with intoxicating liquors, and so come within the prohibition, although not ordinarily used as a beverage; and the remainder of the charge makes it certain that it must have been so understood by the jury. For the court then proceeds to consider the purpose for which this article was kept, and states the claim of the respondent to be that he kept it to sell for medicinal purposes and not to sell as a beverage, and declares it to be the leading question in the case whether the respondent kept it with intent to sell it as a beverage, and directs the attention of the jury to the evidence upon one side and the other bearing upon that point. The court said, further, that if they found the respondent had made

sales of this preparation to be used as a beverage for the purposes of intoxication, that would be a circumstance tending to show that the stock on hand was designed for the same purpose. Later the court concluded a restatement of the case in these words: "The important inquiry, I repeat, is, was it kept for the purpose of sale, with intent to sell it as a beverage?" It is clear that the respondent was not harmed by the sentence complained of, if the court was right in holding that the liquid in question could be made a beverage under the law then existing.

The respondent insists that it is the manifest purpose of the act of 1902 to exclude from the term "intoxicating liquor" all medicinal preparations, fluid extracts, and toilet articles, of which alcohol is the solvent principle, even though they contain more than one per cent. of alcohol. We think the act was not intended to effect any change of the law in this respect, and that *State v. Kezer*, 74 Vt. 50, 52 Atl. 116, is still applicable, as regards the purpose of the keeping or sale.

Judgment that there is no error in the proceedings, and that the respondent take nothing by his exceptions.

STATE v. COSTA.

(Supreme Court of Vermont. Caledonia. Nov. 20, 1906.)

1. CRIMINAL LAW—EVIDENCE—RETURN TO SEARCH WARRANT.

On a prosecution for keeping intoxicating liquor with intent to sell the same without authority, the return to a search warrant was not admissible against defendant.

2. WITNESSES—REFRESHING MEMORY.

On a prosecution for keeping intoxicating liquor with intent to sell the same without authority, the officer who searched defendant's premises might, in testifying, use the return to the search warrant to refresh his recollection.

3. SAME—CROSS-EXAMINATION.

On a prosecution for keeping intoxicating liquor with intent to sell the same without authority, defendant may cross-examine the officer who made the search from the return to the search warrant.

4. INTOXICATING LIQUORS—CRIMINAL PROSECUTION—EVIDENCE—SEARCH.

On a prosecution for keeping intoxicating liquor with intent to sell the same without authority, it was not error for the officer who searched defendant's premises to testify that he made the search by virtue of a warrant for intoxicating liquor; the court having charged fully and correctly with regard to reasonable doubt and the presumption of innocence.

5. SAME—INSTRUCTIONS—PRESENTATION OF DEFENSE.

Where, on a prosecution for keeping intoxicating liquor with intent to sell the same without authority, a physician testified that the malt extract found in defendant's place of business was sold and used as a proprietary medicine to a great extent and prescribed by physicians, and the court charged that there was no question but that the malt extract was a legitimate medicine frequently prescribed by physicians and that such a preparation might be manufactured for a lawful purpose and sold as a medicine without violation of law, the tendency of defendant's evidence in regard to the

medicinal character of the medicine was sufficiently presented to the jury.

6. SAME—EVIDENCE—ALCOHOLIC PREPARATION—OTHER PREPARATIONS—PERCENTAGE OF ALCOHOL.

It was not error to refuse to permit the manufacturer of a malt extract found in defendant's place of business to testify as to the percentage of alcohol in the other medicines manufactured by his firm.

7. SAME—SALES BY OTHERS.

It was proper to exclude testimony of grocers and druggists that they had for a long time sold the malt extract in question openly and visibly.

8. SAME—MEDICINAL USE—USE OF OTHER PREPARATIONS.

It was not error to exclude evidence to show that the malt extract in question was used by the medical profession and by people generally for the same purposes as certain known proprietary articles and that a person could not become intoxicated by the use of such articles.

9. SAME—PERCENTAGE OF ALCOHOL—OTHER INGREDIENTS.

On a prosecution for keeping intoxicating liquor for sale without authority, it was proper to permit the amount of alcohol and the other ingredients of the extract found in defendant's place of business to be shown.

10. SAME—ISSUES—USE AS BEVERAGE.

On a prosecution for keeping intoxicating liquor for sale without authority, as respects extracts, tinctures, essences, and compounds having a legitimate use for medicinal or toilet purposes, the question is, not merely whether they contain more than 1 per cent. of alcohol, but also whether the articles are sold to be used as a beverage.

11. SAME—EVIDENCE—PURCHASES—STATEMENTS OF DEFENDANT.

On a prosecution for keeping intoxicating liquor with intent to sell the same without authority, testimony of a witness that he bought four bottles of the malt extract found in defendant's place of business, and that defendant told the witness that he could not drink it in the store, but must go outside to do so, was properly admitted as tending to show defendant's intent.

12. CRIMINAL LAW—OTHER OFFENSES.

Evidence tending to show that defendant sold a malt extract for use as a beverage in March, 1905, tended to show that he was keeping it for sale as a beverage in June of that year.

13. INTOXICATING LIQUORS—CRIMINAL PROSECUTION—EVIDENCE—STATEMENTS TO PURCHASER.

Evidence tending to show that, when a bottle of the malt extract found in defendant's place of business was purchased, the purchaser asked defendant to open the bottle for him, but that defendant refused to do so, saying that the purchaser must take it away, was properly received.

14. SAME—INSTRUCTIONS.

An instruction that, if the preparation kept by defendant was bought and used as a beverage because of the intoxicating ingredient contained in it, it was a beverage and an intoxicating one within the statute, was not erroneous, where accompanied by a correct instruction as to the amount of alcohol that the preparation must have contained in order that it could be deemed an intoxicating liquor, and by further instructions to the effect that, since it had a legitimate use medicinally, its use as a beverage would not render defendant liable, unless he kept it to sell as a beverage.

15. SAME—CONSTRUING INSTRUCTIONS TOGETHER.

On a prosecution for keeping intoxicating liquor with intent to sell the same without authority, the court instructed: "We do not sub-

mit the question—we do not make your verdict depend in any way upon the question—whether it is possible for the ordinary man, or any man, to drink enough of this preparation to intoxicate him." The instruction was followed by a statement to the effect that the statute has fixed the amount of alcohol that it is essential for a preparation to contain in order that it may be deemed an intoxicating liquor, and the court also instructed that, in determining whether the preparation was sold for use as a beverage, all the evidence in the case bearing on the composition of the liquid, the medicinal properties of the ingredients, the percentage of alcohol, its effect or lack of effect in the quantities testified to, and its pleasantness or unpleasantness to the taste, should be considered. *Held*, that the instruction quoted was not erroneous.

16. CRIMINAL LAW—INSTRUCTIONS—DEFINING REASONABLE DOUBT.

On a prosecution for keeping intoxicating liquor with intent to sell the same without authority, it was not error for the court to refuse to define the phrase "reasonable doubt," where the definition would not have aided the jury.

17. SAME—NEW TRIAL—STATUTES—TREATING JURY.

V. S. 1232, providing that if a party in whose favor the verdict is rendered during the same term of court gives to a juror in the cause any victuals or drink, or procures it to be done, by way of treat, before or after the verdict, it shall be ground for a new trial, has no application to a criminal case.

18. SAME—CORRUPTION OF JURY.

An accused is to be awarded a new trial where there is sufficient reason to believe that a verdict has been returned against him in consequence of corruption practiced upon the jury-men by an officer or any one else.

19. SAME—EVIDENCE AS TO CORRUPTION—SUFFICIENCY.

Where, on a criminal prosecution, the jury told the sheriff that they should want supper, but before going to supper they returned their verdict, and they were then permitted at the expense of the state to eat the supper, there was nothing in the nature of corruption or impropriety.

Exceptions from Caledonia County Court; Munson, Judge.

Dominic Costa was convicted of keeping intoxicating liquor with intent to sell the same without authority, and he brings exceptions. Affirmed.

Argued before ROWELL, C. J., and TYLER, WATSON, HASELTON, and POWERS, JJ.

Frank D. Thompson, State's Atty., and David E. Porter, for the State. Harland B. Howe, for respondent.

HASELTON, J. This was an information for keeping intoxicating liquor with intent to sell the same without authority. The evidence on the part of the state tended to show that the respondent kept a fruit and cigar store "and sold soda and soft drinks," and that June 24, 1905, one A. H. Noyes searched said store and found in the cellar a large quantity of "Red Cross Canada Malt Extract" put up in pint bottles, and that he found three bottles of the same on a shelf in the store, and one bottle in the show window. The time of this search is the time of the alleged offense. Noyes testified under objection and exception that

he made the search referred to and found the malt extract while acting under a warrant to search the respondent's store for intoxicating liquor. The objection was that the search warrant and the return thereon were the best evidence. As to the return it is enough to say that in this proceeding it was not admissible against the respondent. Noyes might have used it to refresh his recollection, and the respondent might have cross-examined from it, and if it was inconsistent with the testimony of Noyes the respondent might have made another use of it; but the man who made the search was properly called to testify to the finding of the malt extract and the circumstances in which it was found. One of these circumstances, the finding of a bottle of the extract in the show window, was favorable to the respondent.

But it is urged that the witness should not have been allowed to testify that he made the search by virtue of a warrant to search for intoxicating liquors; that the warrant should have been produced. However the character and sufficiency of the warrant were not in issue. The witness was merely explaining how he came to be hunting over the respondent's cellar and other premises. It is often impracticable for a witness to testify as to his doings without referring in a general way and by its proper designation to some writ, warrant, execution, chattel mortgage, book, or other document; and there is no rule of law which, properly interpreted, makes it error for a witness to do so without producing the document when the contents of the document are not the subject of inquiry and are not material to any question raised. The respondent concedes that the witness might well enough have said that he was at the respondent's store by virtue of a warrant, but urges that the witness prejudiced the respondent by saying that he was acting under a warrant to search for intoxicating liquor. But, if the witness had simply testified that he had a warrant, the respondent might have argued that the jury were left to infer that there was a warrant out for the arrest of the respondent or for the search of his store for some purpose not connected with the very charge for which he was on trial. If the witness had left his testimony in the way in which it is said by respondent's counsel that he should have left it, the respondent might have argued that he was prejudiced in respect to his general character.

It is undoubtedly true that there is danger of prejudice against a respondent because he stands in court under arrest charged with a criminal offense, since it is well understood that under our system he could not be in that situation unless there was some evidence or supposed evidence against him. It is for this reason, more than any other, that the doctrine of the presumption of

innocence is maintained in this jurisdiction as something distinct from the doctrine of reasonable doubt. And so in this case the court not only charged fully and correctly with regard to reasonable doubt and the presumption of innocence, but also particularly charged the jury that the facts that the charge for which the respondent was on trial had been brought against him and that he was on trial therefor were not to be taken against him.

The evidence tended to show that the extract, to the finding of which the testimony of Noyes related, contained about 4 per cent. of alcohol and that the respondent kept it for sale, and there was no claim or evidence to the contrary. But the main question in the case was whether the respondent kept this malt extract to sell for medicinal uses only, or whether he kept it to sell for use as a beverage. Several exceptions relate to the claim that the respondent was unduly restricted in proving that the malt extract was a legitimate proprietary medicine which might properly be sold for medicinal uses, and that the tendency of the evidence in that regard was not satisfactorily presented to the jury; but the case shows otherwise. The respondent himself testifies that he was a wholesale and retail dealer in patent medicines, that this extract was such a medicine, and that he did not keep it for sale as a beverage. Dr. E. W. Hitchcock, of St. Johnsbury, gave evidence tending to show that the malt extract "was sold and used as a proprietary medicine to a great extent, that it was generally prescribed by physicians, and that it was used to a large extent as a medicinal tonic." The facts which this evidence of Dr. Hitchcock tended to show were treated as established, for the court charged the jury, in substance, that there was no question in the case but that the malt extract is a legitimate medicine frequently prescribed by physicians and extensively sold in the drug trade. The court charged, further, that "a preparation of this kind may be manufactured for a lawful purpose and be kept and sold as a medicine without violation of law." Indeed, there is considerable more in the charge to the same effect.

The respondent called as a witness one Harris, a member of the firm which manufactures the Red Cross Canada Malt Extract, and he testified to the effect that his firm manufactures various other proprietary medicines, among them Harrisonia, sarsaparilla, and a preparation of beef, iron, and wine. In the course of the testimony of this witness the respondent offered to show "the percentage of alcohol in the other proprietary medicines which his firm manufactured and sold for the same purpose as said extract, and particularly that beef, iron, and wine contained 50 per cent. of alcohol, for the purpose of comparing this extract, which was one of said proprietary medicines,

with said other proprietary medicines, and as tending to classify and characterize it as a patent or proprietary medicine." The offered evidence was excluded. By the same witness the respondent offered to show that two grocers and three druggists in St. Johnsbury had for a long time sold this malt extract openly and visibly, "as tending to characterize the article as a patent or proprietary medicine and to show its general use as such." Evidence under this offer was excluded. The respondent also offered to show by the same witness that this malt extract "was compounded and put upon the market to be used and administered for the same purposes and for the same general use as said other proprietary medicines which his firm manufactured." The offered evidence was excluded. These rulings of the court excluding offered evidence from the witness Harris were not erroneous. Evidence as to beef, iron, and wine, Harrisonia, and other proprietary medicines manufactured and sold by the firm which manufactured the malt extract, and of the doings of a few dealers in St. Johnsbury, would have been wholly immaterial, though it might have been misleading.

After Dr. Hitchcock had given the evidence above referred to tending to establish the character of the malt extract as a legitimate medicine, prescribed as such by physicians, and lawfully sold and used for medicinal purposes, the respondent offered to show by the doctor (1) "that this malt extract was used by the medical profession and by people generally for the same purposes as sarsaparilla, Paine's Celery Compound, Peruna, and beef, iron, and wine; (2) that Peruna contained from 50 to 61 per cent. of alcohol, and beef, iron, and wine from 25 to 30 per cent. of alcohol; (3) that a person could not become intoxicated upon Peruna, beef, iron, and wine, or this extract." Each of these three offers was made and excluded separately, but all were made "as tending to compare this extract with other patent or proprietary medicines as to its composition, general use, effect upon the system, and to classify and show its use as a patent or proprietary medicine." But these comparisons would have been irrelevant, and would have had a tendency to get before the jury evidence with regard to various preparations, more or less popular as remedies, in a way that would have had a tendency to lead the jury to decide the case upon erroneous grounds. The court, however, permitted the actual amount of alcohol and of the other ingredients of the extract to be shown, and properly did so, for the character of a liquid containing more than 1 per cent. of alcohol may be such that its use as a beverage is impossible, as is the case with some virulent poisons. The mere fact that a liquid can be and is swallowed does not make it a beverage. *Fabor v. Green*, 72 Vt. 117, 47 Atl. 391.

So it must be said, in the case of extracts,

tinctures, essences, and compounds having a legitimate use for medicinal, culinary, or toilet purposes, that the mere presence, as a solvent, preservative, or otherwise, of more than the proportion of alcohol named in the statute, does not make the preparation one to which the statute applies. In respect to such articles the inquiry is not simply whether they contain more than 1 per cent. of alcohol, but there is the further inquiry whether or not the articles are sold to be used as a beverage. In respect to the sale of such preparations the intent governs. If there is no intent to sell these preparations for other than legitimate uses, there is no offense. If, however, a preparation is capable of being used as a beverage, and is sold or kept for sale with the purpose, intent, or understanding that it is to be used as a beverage, then, if it contains more than 1 per cent. of alcohol, an offense is committed. In this trial the state proceeded in accordance with the views just stated and introduced evidence tending to show that the malt extract in question was kept for the purpose and with the intent of selling it, or some part of it, for use as a beverage.

The state introduced evidence tending to show that in June, 1904, one Petty bought this malt extract of the respondent; that in March, 1905, one Woodward bought four bottles, one Bennett two bottles, and one Besant two bottles; and that on these occasions of purchase and sale the respondent told the purchasers that they could not drink the extract on the premises. Woodward testified that he bought his four bottles for drinking purposes, but that he did not inform the respondent of that fact. But the evidence tended to show that the respondent told Woodward that he could not drink it in the store, that he must go outside to drink it. To the reception of this evidence the respondent objected and excepted, but the evidence was clearly admissible. The intent of the respondent in making the sales to Woodward, which the evidence tended to show, was indicated by the evidence tending to show what the respondent told Woodward about going outside to drink his purchase. It tended strongly to show that the respondent understood that Woodward was buying the extract for bibulous, rather than for medicinal, purposes, and it is immaterial whether he got that understanding from what Woodward said or in some other way. The evidence tended to show that in some way the respondent was aware of the use to which the customer intended to put the malt extract, and that the respondent was also aware that it could be put to such use. The evidence tending to show that the respondent sold this malt extract to Woodward for use as a beverage in March, 1905, tended to show that he was keeping the extract in question for sale as a beverage June 24, 1905. *State v. White*, 70 Vt. 225, 39 Atl. 1085; *Com. v. Cotton*, 138 Mass. 500.

Petty's testimony tended to show that he bought the extract of the respondent in June, 1904, and that on one occasion he asked the respondent to open a bottle for him, but that the respondent said, "No," and told him he would have to take it away. The testimony of Petty was taken under objection and exception; but it was properly received. It bore, though more remotely than Woodward's, upon the question of the respondent's intent in keeping the malt extract which he had on hand, as the evidence tended to show, June 24, 1905. The statute in force at the time to which the testimony of Petty related was, indeed, different from that under which the respondent was prosecuted. But the statute of 1902 and that of 1904 were the same in all respects that could affect the intent with which the respondent was keeping and dealing in this extract.

The respondent offered to show that he sold this extract to one Randall for medicinal use in his family. The offer was made on the ground that the offered testimony would tend to characterize the keeping of the extract by the respondent, to show his intent and good faith, and to rebut the evidence tending to show that he had sold the extract to Woodward, Bennett, Petty, and Besant for use as a beverage. But proof that he sold the extract to Randall for a legitimate use was not admissible on any of the grounds stated nor on any conceivable ground. The fact that the respondent embraced an opportunity to make a legitimate sale of the article would have had no bearing upon the issue. The state was not called upon to show that the respondent would refuse to make any but illegal sales, and it would not have aided the respondent if he had shown that he had no scruples against taking the profit of a legal sale.

The respondent took 27 exceptions to the charge of the court. Counsel for the respondent says nothing in his brief about 21 of these, many of which were to very obvious principles of law. We have, however, examined them all, and the parts of the charge to which they relate; for the whole law of the case could not be stated in one sentence, and propositions which seem doubtful, standing alone, are seen to be sound when taken in their connection. We find no error in the charge.

The sentence of the charge about which the respondent chiefly complains is this: "If this preparation was bought and used as a beverage because of the intoxicating ingredient contained in it, it was a beverage, and an intoxicating beverage, within the meaning of the law." But this statement was accompanied by correct instructions as to the amount of alcohol that the extract must contain in order that, in any view of the case, it could be deemed an intoxicating liquor, and by further instructions to the effect that, since it had a legitimate use as a medicine, its use as a beverage would

not make the respondent liable, unless he kept it to sell for use as a beverage.

Another sentence of the charge which the respondent complains of was this: "We do not submit the question—we do not make your verdict depend in any way upon the question—whether it is possible for the ordinary man, or any man, to drink enough of this preparation to make him actually intoxicated." But this sentence immediately follows a statement to the effect that the statute has fixed the amount of alcohol that it is essential for a preparation to contain, in order that it may be deemed an intoxicating liquor within the meaning of the law, and the sentence of the charge complained of was entirely correct in its application to the element of the case which the court was then presenting. But this was not all of the case, and so, with careful regard to the rights of this respondent and of others dealing in preparations containing alcohol, the court charged the jury that, in determining whether or not this preparation, such as it was, was kept to be sold for use as a beverage, "all the evidence in the case bearing upon the composition of the liquid and the medicinal properties of the various ingredients, the percentage of alcohol contained in it, its effect or lack of effect in the quantities testified to, whether it is pleasant or unpleasant to the taste, and what is shown regarding its use as a medicine," was for the consideration of the jury. *Russell v. Sloan*, 33 Vt. 656, *Fabor v. Green*, 72 Vt. 117, 47 Atl. 391, and *State v. Kezer*, 74 Vt. 50, 52 Atl. 116, all cited by the respondent, were obviously and rightly treated as sound law and as still applicable to the extent to which the *Kezer* Case is held to be applicable in *State v. Krinski*, 78 Vt. —, 62 Atl. 37; that is, the principles laid down in those cases were given such effect as could be given them under a statute which treats a beverage as intoxicating liquor if it contains more than 1 per cent. of alcohol.

The respondent excepted, lastly, "because the court did not tell the jury that the respondent would have a right to sell medicine, if he sold it as a medicine and not as a beverage, even though it contained more than 1 per cent. of alcohol; that the jury should be charged as last aforesaid because 12 laymen would not be liable to understand the charge as given upon that matter." This exception concedes the correctness of the charge in that regard, and there was nothing in the subject-matter or the presentation of it that could possibly have been misunderstood by the jurymen.

The respondent made 14 requests to charge. Some of them were complied with in terms and some in substance, and others were not complied with. Two requests were for a definition of the phrase "reasonable doubt." Neither of the definitions asked for would have aided the jury, and the

court properly omitted to give these definitions. *State v. Blay*, 77 Vt. 56, 58 Atl. 794. The court refused to comply with no request which the respondent was entitled to have followed.

The respondent made a motion to have the verdict set aside and a new trial granted. Under this motion the court found that at about a quarter past 5 in the afternoon of the day on which the jury took the case, and during their deliberations, they told the sheriff having them in charge that they should want supper and that the officer immediately ordered their supper. However, at about a quarter before 6, and before going to supper, they returned their verdict into court. The sheriff then told them that, as he had ordered their supper, they could eat it, and accordingly they partook of the supper which had been provided for them. The expense was borne by the state. It was on the ground that this supper was given the jurors by the state as a treat that the respondent moved to have the verdict against him set aside and a new trial granted. The court overruled the motion as a matter of law, and the respondent excepted. The respondent now argues that the motion should have prevailed, and relies upon V. S. 1232, which provides that "if a party in whose favor a verdict is rendered, during the same term of court gives to a juror in the cause, knowing him to be such, any victuals or drink or procures it to be done by way of treat, either before or after such verdict, the same on proof thereof shall be set aside and a new trial granted." But this statute cannot apply, and was not intended to apply, to criminal cases. See *Baker v. Jacobs*, 64 Vt. 197, 23 Atl. 588. It cannot apply in a case in which the respondent is acquitted, and it cannot apply in a case in which the respondent is convicted, for no officer of the state can make himself an agent of the state in respect to practices forbidden by the state; nor would the fact that the expense attending an illegal act was in some way put upon the state make the government itself a party to the illegal transaction. What is intimated in *Carlisle v. Sheldon*, 33 Vt. 440, in respect to treating by an authorized agent of a town in a civil suit, has no application here.

But, while the statute relied upon by the respondent has no application in criminal cases, a respondent should be awarded a new trial when there is sufficient reason to believe that a verdict has been returned against him in consequence of corruption practiced upon the jurymen by an officer of the state or by any one else. But here the facts found have no tendency to show corruption, or an attempt at corruption. No. 135. p. 102, Acts 1898, provides that, "when in the trial of a criminal cause in county court a petit jury is kept together by the order of the court, the necessary expenses

of the board and lodging of such jury while so kept together shall be borne by the state." This supper was ordered and provided for the jurors, and so the expense of it was incurred, while the jurors were kept together, and there was nothing in the nature of corruption or impropriety in the conduct of the sheriff in letting the jurymen eat the supper which he had provided in pursuance of his duty under the statute. The motion to have the verdict set aside and a new trial granted was properly overruled as a matter of law.

Judgment that there is no error in the proceedings, and that the respondent take nothing by his exceptions. Let execution be done.

STATE v. BARR et al.

(Supreme Court of Vermont. Caledonia. Oct. 25, 1905.)

1. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY.

Where, on a trial under an information containing several counts charging the illegal sale of liquor without a license and counts for keeping and exposing liquor for sale without a license, the state gave evidence showing the several offenses of selling, it was proper to permit evidence of other sales.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 822-825; vol. 29, Cent. Dig. Intoxicating Liquors, § 286.]

2. INFORMATION—SEPARATE COUNTS—ELECTION BY STATE—DUTY TO REQUIRE.

Where, on a trial under an information containing several counts charging the sale of liquors without a license, the state gave evidence showing the several offenses charged, it was error to refuse at the close of the testimony to require the state to elect on which count it would rely for a conviction, though the court ruled that there could be a conviction of no more offenses than there were counts, and that each offense must be found on evidence particularly relating to it.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 438-447.]

3. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY.

On a trial for crime, officers may testify as to what they learned while making illegal searches of defendant's premises.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 876.]

4. INFORMATION—SUFFICIENCY AFTER VERDICT.

An information charging the sale of intoxicating liquors, without specifying the kind of liquors sold, and without negating the circumstances under which cider and wines, included in the words "intoxicating liquors," could lawfully be sold, is sufficient after a verdict of guilty; for it will be presumed the sale found was unlawful.

5. CONSTITUTIONAL LAW—PERSONS ENTITLED TO RAISE CONSTITUTIONAL QUESTIONS.

Where one convicted of selling intoxicating liquors in violation of the license act of 1902 was not affected by the discriminations in the act with reference to cider and wines, as it did not appear that defendant was convicted of selling either cider or wines, he could not assail the validity of the act on the ground of such discriminations.

Exceptions from Caledonia County Court;
Tyler, Judge.

Eddie Barr and another were convicted of selling intoxicating liquors, and they except. Overruled.

Argued before ROWELL, C. J. and MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Frank D. Thompson, State's Atty., and David E. Porter, for the State. Taylor & Dutton, for respondents.

ROWELL, C. J. This is an information under the license act of 1902. Six counts are for selling and furnishing intoxicating liquor without a license, and two for keeping and exposing for sale without a license.

It was not error to allow the state, after having introduced evidence tending to show six offenses of selling, to introduce evidence of other sales. This precise question was so ruled in *State v. Smith*, 22 Vt. 74, and in *State v. Croteau*, 23 Vt. 14, 54 Am. Dec. 90.

But as each sale was a separate offense, it was error for the court to refuse at the close of the testimony to require the state to elect the occasions on which it would rely for conviction under the counts for selling, and to allow the case to go to the jury on all the evidence of sales, although it ruled that there could be a conviction of no more offenses than there were counts and charged that each offense must be found on evidence particularly relating to it. Although that was a question of practice, addressed to the discretion of the court, still that discretion was to be exercised within the bounds of the law, which are pretty well defined in such cases. *Hubbard v. Hubbard*, 77 Vt., at page 77, 58 Atl. 969, 67 L. R. A. 969. The object of an election being, whether of counts or offenses, to save the prisoner from embarrassment in his defense, the cases say that as a rule it should be made before the prisoner is called upon to put in his evidence. Thus, in *State v. Smith*, 22 Vt. 74, this court said there is much good sense in what Alderson, J., said in *Wigglesworth's Case*, that the election ought to be made, not merely before the case goes to the jury, but before the prisoner is called upon for his defense, and approved of that as satisfactory. *State v. Willett*, 78 Vt. —, 62 Atl. 48. The special circumstances of a case may make it proper to defer election till the testimony is all in. *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208. But then it should be made before summing up. *Woodford v. People*, 62 N. Y., at page 131, 20 Am. Rep. 464. In a prosecution for rape, where several acts of intercourse were proved, the state was allowed to go to the jury on all of them, and held error; for, each act being a separate offense, the state should have been put to elect which it would rely upon. *Powell v. State* (Tex. Cr. App., Oct. 1904) 82 S. W. 516. It is held in Kentucky that where several separate offenses are proved, though

the indictment is general, the state must elect, and cannot submit them all to the jury. *Commonwealth v. Illinois Central R. R. Co.* (Ky. Ct. App., Oct. 1904) 82 S. W. 381. In *Smith v. Commonwealth*, 109 Ky. 685, 60 S. W. 531, that court said that the state should not be allowed to prove a number of separate offenses beyond what are charged, and submit them all to the jury, to catch the prisoner in a dragnet of offenses.

It is contended that the several searches of the respondent's premises were illegal, and that therefore it was error to allow the officers to testify to what they saw there while making them, as that was compelling the respondents to furnish evidence against themselves. But this question was ruled the other way in *State v. Krinske*, 78 Vt. —, 62 Atl. 37. The same thing is held in *Commonwealth v. Hurley*, 158 Mass. 159, 33 N. E. 342.

Under the motion in arrest, it is urged that, as cider and wine are included in the words "intoxicating liquor" as used in the information, which could be lawfully sold in some circumstances without a license, the information should have negatived those circumstances, or have specified the kind of liquor sold. But, after verdict, the sale found must be taken to have been unlawful, for the presumption is in favor of the legal correctness of the verdict, the contrary not appearing.

It is further urged under the motion that said act is unconstitutional as interfering with interstate commerce, and as being in derogation of the fourteenth amendment of the federal Constitution, in that it in terms discriminates in favor of cider and wine manufactured in this state, and unreasonably discriminates between sales of cider by the barrel and sales in lesser quantities. But, as it does not appear that the respondents were convicted of selling either cider or wine, it does not appear that they were in any way affected by those discriminations, if they existed, and therefore they cannot be heard to contest the constitutionality of the act on that ground. *State v. Scampini*, 77 Vt. 92, 59 Atl. 201.

Judgment and sentence reversed, verdict set aside, and cause remanded for a new trial.

STATE v. BARDITTI.

(Supreme Court of Vermont. Caledonia. Oct. 25, 1905.)

WITNESSES — BIAS — PROOF OF STATEMENTS SHOWING BIAS.

The hostility of a witness to a party against whom he is called cannot be shown by proving oral statements made out of court, unless a proper foundation is laid by inquiring of him, with particularity of time, place, and occasion, whether he made the statements attributed to him.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1200.]

Exceptions from Caledonia County Court;
Tyler, Judge.

Giscomo Barditti was convicted of selling intoxicating liquors, and he excepts. Overruled.

Argued before ROWELL, C. J., and MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Frank D. Thompson, State's Atty., and David E. Porter, for the State. Tayler & Dutton, for respondent.

ROWELL, C. J. While it is always competent to show that a witness is hostile to a party against whom he is called, yet if that hostility is sought to be shown by his oral statements out of court, as it was here, it is not error to require a foundation to be laid by inquiring of the witness on the stand, with particularity of time, place, and occasion, whether he made the statements or not. *State v. Glynn*, 51 Vt. 577. It not appearing that such foundation was laid, no error is shown.

The court sufficiently charged that each offense must be found in the evidence that particularly related to it. The other questions are like some of those in *State v. Barr and Planfetti* (Vt.) 62 Atl. 43, and are decided against the respondent.

Judgment that there is no error, and that the respondent take nothing by his exceptions. Let execution be done.

CARTY'S ADM'R v. VILLAGE OF WINOOSKI.

(Supreme Court of Vermont. Chittenden. Oct. 25, 1903.)

1. CONSTITUTIONAL LAW—POLICE POWER.

The exercise of the police power reserved by Const. c. 1, art. 5, declaring that the people by their legal representatives have the exclusive right of regulating the internal police of the state, whether delegated to a municipality or reserved by the state, is the exercise of a governmental function founded on the duty of the state to protect the public safety, health, and morals.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 148.]

2. MUNICIPAL CORPORATIONS—PERFORMANCE OF GOVERNMENTAL FUNCTIONS—CONSTRUCTION OF JAIL.

A municipality, constructing and maintaining a jail, as expressly authorized by V. S. 5302-5304, is exercising a governmental power, and is not liable at common law for negligence to one committed to the jail to await an examination, as expressly authorized by section 5305.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1550.]

3. DEATH—ACTION FOR CAUSING DEATH—GROUNDS OF ACTION.

Where an intestate would have no right of action if death had not ensued, his personal representative can have none, under V. S. 2451, 2452, providing that a person through whose wrongful act death results shall be liable to an action for damages, if the injured person could have maintained a suit if death had not ensued.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 17.]

Exceptions from Chittenden County Court; Powers, Judge.

Action by Fred Carty's administrator against the village of Winooski. There was a judgment sustaining a demurrer to the declaration, and plaintiff excepts. Affirmed.

Argued before ROWELL, C. J., TYLER, MUNSON, START, WATSON, and HASELTON, JJ.

J. J. Enright and R. E. Brown, for plaintiff. Henry Conlin, H. F. Wolcott, and H. N. Deavitt, for defendant.

WATSON, J. This case is here on exception to the holding on demurrer that the declaration is insufficient. The demurrer is both general and special, but the declaration will be considered with reference to substance only.

It is alleged therein that the defendant is a municipal corporation organized and existing under a charter granted by the Legislature, and carrying on and administering its municipal affairs through a board of trustees, and that pursuant to a lawful vote of the village its trustees constructed, furnished, and maintained at the expense of the village the lockup in question for proper and lawful use in the detention, safe-keeping, and custody of such persons as might by proper authority and legal right be thereto committed. It is further alleged that the plaintiff's intestate was found in such a state of intoxication in the defendant village that he was greatly disturbing the public peace and tranquility, whereupon he was arrested by a police officer of the village in the lawful and proper performance of his duties, and, to restrain the intestate in custody for the purpose provided by law, the officer committed him to the lockup, as he well and lawfully might. Other allegations show that in the construction, furnishing, and maintenance of the lockup the defendant and its trustees were guilty or negligence; that a mattress in the lockup became and was ignited from some cause unknown, and without the fault of the intestate, producing "in said small, close, and unventilated lockup and cell a great volume of heavy smoke," etc., by reason whereof the intestate was "helplessly overcome, smothered, suffocated, and killed."

A town or incorporated village in this state may by vote authorize its selectmen, if a town, or trustees or bailiffs, if a village, to erect and maintain, at the expense of the town or village, within its corporate limits, one or more lockups or jails, and appoint a jailer, who shall perform the duties and be subject to the same penalties imposed on county jailers and receive the same fees. V. S. 5302-5304. And "when process is delivered to an officer to serve, requiring him to commit a person to jail to await an examination or trial before a justice, or for neglect or refusal to make disclosure under

the law prohibiting the traffic in intoxicating liquor, if such order for commitment was made within the limits of a town or an incorporated village maintaining a lockup or jail, such person shall be committed to such lockup or jail and be subject to the restraints and entitled to the privileges provided by law for persons confined in the county jail." V. S. 5305. One of the powers of government inherent in every sovereignty is the governing and regulating of its internal police. Thus the police power, so called, rests at common law, and in this state also, by reservation, in the Constitution. Chapter 1, art. 5. In the absence of constitutional restrictions, this power may be delegated by a state to municipal corporations, to be exercised within their corporate limits; but, whether the power be so delegated or otherwise, it is a governmental function, founded upon the duty of the state to protect the public safety, the public health, and the public morals. *Thorpe v. Rutland*, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625; *Lake Shore*, etc., R. Co. v. *Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858; *License Cases*, 5 How. 504, 12 L. Ed. 258.

Since laws for the preservation of the public peace, quiet, and good order are within the police power, it must follow that when, for the purpose of enforcing such laws, a municipality lawfully constructs, furnishes, and maintains a lockup or jail wherein to confine persons under arrest and awaiting an examination or trial, or for neglect or refusal to make disclosure under the law prohibiting the traffic in intoxicating liquor, it is but the exercising of the same power; for the whole includes all its parts. But, as acts done within this power are governmental in character, the municipality performing them is not liable at common law for negligence therein. The cases of *Welch v. Village of Rutland*, 56 Vt. 228, 48 Am. Rep. 762, and *Aitken v. Village of Wells River*, 70 Vt. 308, 40 Atl. 829, 41 L. R. A. 566, 67 Am. St. Rep. 672, were determined upon the same underlying principle, and are decisive of the one before us. Cases very like this one have been before the courts in other states, and in the absence of statutes creating a liability they have been decided in the same way. *Gray v. Griffin*, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131; *Gullikson v. McDonald*, 62 Minn. 278, 64 N. W. 812; *Davis v. Knoxville*, 90 Tenn. 599, 18 S. W. 254; *Lindley v. Polk County*, 84 Iowa, 308, 50 N. W. 975; *Brown's Adm'r v. Guyandotte*, 34 W. Va. 299, 12 S. E. 707, 11 L. R. A. 121; *White v. Commissioners*, 129 Ind. 396, 28 N. E. 846; *La Clef v. City of Concordia*, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285; *Kelley v. Cook*, 21 R. I. 29, 41 Atl. 571; *Blake v. City of Pontiac*, 49 Ill. App. 543.

As the intestate would have had no right of action if death had not ensued, his per-

sonal representative can have none for the benefit of next of kin. V. S. 2451, 2452; *Lazelle v. Town of Newfane*, 70 Vt. 440, 41 Atl. 511.

Judgment affirmed, declaration adjudged insufficient, and judgment for the defendant to recover its costs.

WARD v. MARVIN.

(Supreme Court of Vermont. Orleans. Nov. 2, 1905.)

1. SALES—RESCISSION BY BUYER—TIME FOR RESCISSION.

Where there are disputed facts involving questions of excuse and discovery of fraud, it is a question for the jury whether a buyer rescinded his contract for false representations by the seller within a reasonable time.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 317.]

2. SAME—WAIVER OF RIGHT TO RESCIND.

Where the buyer of a horse, after discovering fraud of the seller, and after being assured by the seller that, if the horse was not as represented, he would make it right, continued to use the horse as his own, he thereby waived his right to rescind the contract.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 299.]

Exceptions from Orleans County Court; Tyler, Judge.

Assumpsit by Charles Ward against Delos Marvin. Verdict for plaintiff, and defendant excepts. Reversed.

Argued before ROWELL, C. J., and MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

J. W. Redmond, for plaintiff. Cook & Williams, for defendant.

POWERS, J. Assumpsit for the recovery of the purchase price of a certain horse, which the plaintiff purchased of the defendant on or about the 15th of April, under the latter's false and fraudulent representation that it was a good, moderate worker, practically sound, not more than eight years old, and suitable to work with a Percheron horse which the plaintiff then owned. Within a day or two after the purchase the plaintiff discovered that the horse was a "puller," and a "whistler" when used as a driver, but thought that it might act better in that regard when put to work. Within a week he found that the horse worked too fast for the Percheron, and that it had various physical defects and vices which seriously impaired its value; but he bought the horse for a work horse, and, thinking that it might work down and improve after being used longer with the Percheron, and so made to answer his purpose, the plaintiff continued to use the animal until the 8th day of May, when he became satisfied that it was not such a work horse as it had been represented to be, and wrote the defendant to that effect. Soon after the parties had an interview regarding the matter, and the defendant told the plaintiff that,

if the horse was not as represented, he would make it right. Relying upon this, the plaintiff waited until the 6th day of June, and, nothing having been done by the defendant toward making it right, the plaintiff again wrote him, fixing a time within which the matter would have to be adjusted. On the 20th day of June the parties met and the defendant refused to take back the horse and return the purchase price, and a day or two later the plaintiff formally tendered back the horse and demanded the price. During all this time the plaintiff continued to work and use the horse. At the close of the plaintiff's evidence the defendant rested and moved for a verdict upon two grounds: (1) That the rescission and tender back of the property were so long after the discovery of the fraud that as matter of law it was too late; (2) that the plaintiff, after discovering the fraud, made his election to stand upon the contract by continuing to use the horse. The motion was overruled, and the defendant excepted.

1. When a person has been induced to buy goods by the fraudulent misrepresentations of the seller, he is entitled either to sue the seller for the fraud, or he may, on discovering the fraud, rescind the contract, and, if he has paid the purchase price, recover it under a count for money had and received to his use, provided he can restore the article purchased in the same state as that in which he received it. But, if he would rescind, he must act promptly, or that remedy will be lost to him. The law does not require him to act upon the appearance of the first indication of fraud, but allows him a fair opportunity to ascertain the extent of the false representations and to test the quality of the article fraudulently put upon him. All the law requires is that he shall act within a reasonable time after the discovery of all the essential elements of the fraud. How promptly one must act to be within this rule of law depends upon the circumstances of each particular case, and when there are no facts involved, but the simple one of the length of time elapsed, it is a question of law. But when disputed facts, involving questions of excuse, discovery of fraud, and like matters, as in this case, are to be passed upon, the question is a mixed one of law and fact, and is for the jury. This is the settled law of this state as established by *Whitcomb v. Denio*, 52 Vt. 390, *Chamberlin v. Fuller*, 59 Vt. 252, 9 Atl. 832, and *Norton v. Gleason*, 61 Vt. 478, 18 Atl. 45, and recently approved in *Brainerd v. Van Dyke*, 71 Vt. 359, 45 Atl. 758. There was nothing in this case to take it out of this general rule, and there was no error in submitting the case to the jury on that question.

2. The second ground of the defendant's motion is more serious. The plaintiff could not treat the contract as subsisting after he discovered the fraud and afterwards avoid it. Upon discovering the fraud, he had his election to affirm or disaffirm the contract.

He could not do both. And, when he has once made his election to affirm, the law requires that he adhere to it. *Barrett v. Tyler*, 76 Vt. 108, 56 Atl. 534. His conduct in continuing to use and treat the horse as his own after the discovery of all the essential features of the fraud amounted to an election to recognize the contract as binding, and precluded a subsequent rescission. 1 Benj. Sales, § 675; *Cookingham v. Dusa*, 41 Kan. 229, 21 Pac. 95; *Downer v. Smith*, 32 Vt. 1, 78 Am. Dec. 148; *Barrett v. Tyler*, supra. It is urged that the plaintiff was induced to act as he did by the conduct of the defendant. He was induced to delay action by the defendant's assurance that he would make it right if the horse was not as represented, and, so far as the delay thus caused is concerned, it would excuse him, if in the opinion of the jury it was not unreasonable. But he did more than delay. He continued to work the horse, and his continued use of the horse was not so induced by the defendant. There was nothing in the defendant's statement or conduct that can be construed as a permission to use the property during the time negotiations for a settlement were pending. The defendant said he would make it right if the horse was not as represented; and that is all there was to the statement. In working the horse after that, the plaintiff must be held to have acted voluntarily, and, having dealt with the horse as his own after fully discovering the fraud practiced upon him, he waived his right to rescind. *Tarkington v. Purvis* (Ind. Sup.) 25 N. E. 879, 9 L. R. A. 607. In view of this holding, the other questions raised by the exceptions are unimportant and are not considered.

Judgment reversed, and cause remanded.

LAVALLEY v. RAVENNA.

(Supreme Court of Vermont. Rutland. Nov. 2, 1905.)

SALES—CONDITIONAL SALES—DESTRUCTION OF PROPERTY—RECOVERY OF PRICE.

Where, on the sale of a horse, a written lien was executed, reciting that the seller was to retain title until the balance of the purchase price was paid, and the horse died before the balance was due, the seller was nevertheless entitled to recover such balance.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1362.]

Exceptions from Rutland County Court; Tyler, Judge.

Assumpsit by Harry Lavalley against Bernardo Ravenna. Verdict for plaintiff, and defendant excepts. Affirmed.

Argued before ROWELL, C. J., and MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Butler & Moloney, for plaintiff. M. O. Webber, for defendant.

POWERS, J. This is an action of general assumpsit for the recovery of a balance due

on the purchase of certain personal property. The parties disagreed somewhat in regard to the precise terms of the contract, but it satisfactorily appears from the record that the plaintiff sold and delivered to the defendant a team, consisting of a horse, buggy, and harness, receiving in part payment therefor another horse, harness, and wagon, and a certain sum of money, and taking as security for the unpaid balance of the price agreed upon a written lien on all the property so conveyed to the defendant. Soon after, and before any part of such unpaid balance came due, the horse covered by the lien died, without the fault of the purchaser. The seller waited until the full amount of such balance fell due by the terms of the contract, and then brought this suit for its recovery. At the close of the evidence the defendant moved for a verdict on several grounds, which was overruled, to which he excepted.

It appears from the record that the written lien was not formally offered or received in evidence, but it was submitted to the jury and used by the court as though it was a part of the case; so we treat it as the parties treated it at the trial, and regard it as properly a part of the record. It is informal and crude, but the substantial recitals of it are that the property in question was conditionally sold and delivered to the defendant, and that the title thereto was to remain in the plaintiff until the sums therein named were fully paid, that the plaintiff might repossess himself of the property on the defendant's default of payment, and that in such event all payments theretofore made by the defendant should be forfeited. Both parties signed the instrument, but it did not contain a note or other express agreement on the part of the defendant to pay the sum specified. So the question presented, stated broadly, is this: Can there be a recovery for property sold and delivered on condition that the title shall not pass until full payment therefor has been made, when, without the fault of the purchaser, the property is destroyed before the price falls due? This question we answer in the affirmative. It is true that these contracts are sometimes spoken of as "executory," and the purchaser is termed a "bailee," as was done by this court in *French v. Osmer*, 67 Vt. 427, 32 Atl. 254; but these expressions have reference to the strict legal title to the property, and should not determine the present question, which is one pertaining to an absolute promise to pay. And the defendant's promise to pay was absolute, and was made upon a sufficient consideration; for he got just what he bargained for, the use, possession, and enjoyment of the property, with the right to acquire the absolute title upon payment of the stipulated price, and this was the consideration for his promise. The seller had done all that he was to do to or with the property by the terms of the contract—all that he was to do at all, except to receive the price; and upon

that the title passed, without further action on the part of either party. The defendant's promise was in no sense conditioned on the seller's ability to deliver the title. He could not return the property to the seller, and thereby avoid further liability. *Appleton v. Library Corp.*, 53 Conn. 4, 22 Atl. 681; *Smith v. Aldrich*, 180 Mass. 367, 62 N. E. 381. The authorities are not in harmony on the question herein decided. *Tufts v. Griffin* (N. C.) 12 S. E. 68, 10 L. R. A. 526, 22 Am. St. Rep. 863; *Soda Fountain v. Vaughn* (N. J. Sup.) 55 Atl. 54; *Burnley v. Tufts*, 66 Miss. 49, 5 South. 627, 14 Am. St. Rep. 540; *Tufts v. Wynne & Thompson*, 45 Mo. App. 42; *Cooper v. Organ Co.*, 58 Ill. App. 248; *Hintermister v. Lane*, 27 Hun, 497—are among the cases in full accord with the views herein expressed; while to the contrary are *Bishop v. Minderhout & Nichols* (Ala.) 29 South. 11, 52 L. R. A. 395, 86 Am. St. Rep. 134; *Cobb v. Tufts*, 2 Willson, Civ. Cas. Ct. App. § 153; *Swallow v. Emery*, 111 Mass. 356. The result is that we hold that the defendant is liable for the unpaid balance, notwithstanding the death of the horse included in the sale.

Judgment affirmed.

STATE v. WILLETT.

(Supreme Court of Vermont. Chittenden. Nov. 3, 1905.)

1. INFORMATION—QUASHING—ALLEGATION AS TO TIME OF OFFENSE.

Where the information charged an offense on the 9th day of September, the statement of the prosecuting attorney that he expected to prove an offense in August could not make the date alleged an impossible one, and a motion to quash on such ground was properly overruled.

2. RAPE—EVIDENCE.

In a prosecution for statutory rape, evidence of acts of intercourse on different days, both before and after the one charged, is admissible.

3. SAME—ELECTION—DISCRETION OF TRIAL COURT.

In a prosecution for statutory rape, where evidence of several acts of intercourse was properly in the case, the matter of election between them is in the discretion of the court, and no exception will lie where an election is required before the respondent is called on for his defense.

4. SAME—EVIDENCE.

In a prosecution for statutory rape, where the state's attorney, in attempting to prove a complaint, cautioned the witness not to name the person complained of, and he answered that "she said he had insulted her," this was not erroneous as in effect naming respondent; he being entitled at most to an instruction as to the proper use of the evidence.

5. INFORMATION—VARIANCE—TIME OF OFFENSE.

Unless descriptive of the offense, the time need not be proved as laid in the information.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 548.]

6. RAPE—SUBMISSION OF ISSUES.

In a prosecution for statutory rape, where there was evidence tending to prove an alibi, the court properly refused to instruct that, if the respondent had established his absence on

the date named by the prosecuting witness on cross-examination as the date of the offense, he was entitled to an acquittal, and left it for the jury to determine whether the state had shown beyond a reasonable doubt that the respondent was where he had an opportunity to commit the offense on the occasion testified to, saying, further, that it was not necessary to find the date.

Exceptions from Chittenden County Court; Tyler, Judge.

Charles Willett was convicted of statutory rape, and excepts and petitions for new trial. Exceptions overruled and petition dismissed.

Argued before ROWELL, C. J., and MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

M. G. Leary, State's Atty., for the State. H. S. Peck and J. J. Enright, for respondent.

MUNSON, J. The information charged an offense on the 9th day of September, and the state's attorney said in his opening statement that he expected to prove an offense in August. The respondent thereupon moved that the information be quashed, on the ground that it alleged an impossible date. It is certain that no statement of a time other than the one alleged could make the one alleged an impossible date under the rules of pleading. The motion was properly overruled.

The court permitted the state to introduce evidence of intercourse had on different days as the basis of an election, and refused to require the state to select the occasion on which it would rely until the close of its case, to all of which exception was taken. The admission of evidence covering several occasions was not error, if, upon an election being made, the evidence relating to other occasions bore upon the issue as finally submitted. In a prosecution for adultery, evidence of other acts of adultery, occurring both before and after the one charged, is admissible. *State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124. The same rule must be applicable in a prosecution for statutory rape. So the evidence of the several acts was properly in the case. The matter of election is ordinarily within the discretion of the court, and it is clear that no exception will lie to the action of the court if an election is compelled before the respondent is called upon for his defense. 1 Bish. New Cr. Proc. § 461, 5; *State v. Smith*, 22 Vt. 74.

In undertaking to prove a complaint, the state's attorney asked in regard to the nature of it, cautioning the witness not to name the person complained of; and the witness replied, "She said he had insulted her." The witness was then asked, "What did she say had been done to her?" and replied: "She did not say, only that is the way she said it. She said he had insulted her." The answers were objected to on the ground that, in effect, they named the respondent, and exceptions were noted. We do not think the case should be reversed because of these

answers. The state was without fault. The question was proper, and the witness carefully cautioned. The witness evidently tried to answer properly. The frame of the answer was such that a successful interruption was impossible. The answer itself did not name the respondent. It could have that effect only because the respondent was on trial and had been testified about. The propriety of allowing an exception in these circumstances has been questioned. The court would at once have instructed the jury as to the proper use of the answer upon a suggestion from respondent's counsel. This removal of the matter from the minds of the jury, as far as it can be done, is all that the respondent is ordinarily entitled to in such instances. The views of the court upon this subject may be gathered from *Houston v. Russell*, 52 Vt. 110, 117; *Frary v. Gusha*, 59 Vt. 257, 9 Atl. 549; *Lawrence v. Graves' Estate*, 60 Vt. 657, 15 Atl. 342.

The respondent moved for a verdict on the ground of a variance between allegation and proof as to the time when the offense was committed. The motion was properly overruled; for, unless descriptive of the offense, the time need not be proved as laid. 1 Bish. New Cr. Proc. 386.

The prosecutrix was at the respondent's house during the four weeks in August. It appears from a short extract of her testimony, incorporated into the exceptions for another purpose, that she testified that the first occasion was after she had been there about two weeks. The exceptions show that the state's evidence tended to establish five or six occasions during the last two weeks in August. The respondent's requests assume that she fixed the first occasion as occurring on Thursday or Friday of the second week, which would be the 13th or 14th, and the last occasion as occurring on Thursday or Friday of the last week, which would be August 27th or 28th. It appears from the charge, which is referred to on the points made by the requests, that she testified to five or six occasions during the second and third weeks, but without undertaking to fix the days of the week or month, and testified, further, that nothing occurred during the first week or the last. The charge goes on to say that she did fix some days in cross-examination, and left it for the jury to say whether she was able to fix the days of the week or the month from memory or was led to give them by the cross-examination. The state elected to stand upon the last occasion testified to, but was not required to name the day.

It appears from the charge that the respondent gave evidence tending to establish an alibi covering the occasions testified to, and the court was requested to charge that, if the respondent had established his absence during Thursday and Friday, August 27th and 28th, he was entitled to an acquittal. The court declined to give this effect to the prosecutrix's answers fixing the day, but

left it for the jury to determine whether the state had shown beyond a reasonable doubt that the respondent was where he had the opportunity to commit the offense on the last occasion testified to, saying, further, that it was not necessary for them to find the date. The respondent was not entitled to have the question restricted as claimed. The alibi was not a special issue to be separately disposed of upon a consideration of the evidence bearing solely upon the dates. The question for the jury was whether, upon a consideration of the whole evidence, they were satisfied of the respondent's guilt beyond a reasonable doubt.

Judgment that there is no error in the proceedings, and that the respondent take nothing by his exceptions.

There is also a petition for a new trial. Upon respondent's motion the evidence of a witness for the state, whom he was deprived of the opportunity to cross-examine, is excluded from consideration. The petition is based upon a retraction of the complaining witness, the only witness to the occurrences in question, who now testifies that the story she told on the trial was a fabrication, which she was instructed to tell by her grandmother, and told through fear of punishment. This is contradicted by the testimony of the grandmother. The circumstances in which the retraction was originally made are fully presented in the evidence taken, but it is not necessary to recite them. Upon a careful review of the whole case a majority of the court are satisfied that the respondent was justly convicted.

Petition dismissed.

LYNDON SAVINGS BANK v. INTERNATIONAL CO. et al.

(Supreme Court of Vermont. Caledonia. Nov. 9, 1905.)

1. BILLS AND NOTES—NATURE OF LIABILITY ON INDORSEMENT—QUESTION FOR JURY.

Where it appeared that, after a note sued on was overdue and one of the makers had been adjudged insolvent, plaintiff employed an agent to call on the managers of defendant corporation, the maker, "to do something about the note," and that as a result of the interview defendants wrote their names on the back of the instrument, and the evidence was conflicting as to what was said between plaintiff's agent and defendants at the time as to the nature of the indorsement, the question of their liability was for the jury.

2. APPEAL — REVIEW — CONFLICTING EVIDENCE.

The Supreme Court will not review conflicting evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3935-3937.]

3. BILLS AND NOTES — INDORSEMENT — CONSIDERATION.

An extension of the time of payment of a note is sufficient consideration for the indorsement of the note by one not previously a party thereto.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 539.]

4. SAME—LOANS—PRESUMPTIONS.

In an action by a bank on a note, plaintiff claimed that there had been an agreement between its agent and defendants extending the time of payment, and that, in consideration of such extension, certain of defendants had become parties thereto, signing the same as makers, and defendants insisted that the alleged agreement was not operative until accepted by plaintiff and approved by the inspector of finance. It appeared that plaintiff continued to hold the note for several years after the alleged agreement, without objection by defendants and apparently with the approval of the said official. It also received interest thereon for several years. *Held*, that it might be presumed that plaintiff's agent returned the note to plaintiff, and that the inspector and plaintiff were satisfied.

5. CORPORATIONS—REPRESENTATION BY OFFICERS — ESTOPPEL TO DENY AUTHORITY OF OFFICERS.

Although the general manager of a corporation had no authority to make an agreement extending the time of payment of a note on which the corporation was liable, yet where he has made such an agreement, and the company has received the benefit of the forbearance, and has ratified it by paying interest on the note for several years after the agreement was made, defendants, when sued on the note, are estopped from denying the authority to make such agreement.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1704.]

6. BILLS AND NOTES—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on a note, evidence considered, and *held* sufficient to support a verdict finding that plaintiff, by receiving dividends from the assets of one of the insolvent makers, did not thereby release its right to collect the debt from the indorsers of the note.

7. LIMITATION OF ACTIONS — AGREEMENT WAIVING LIMITATIONS.

It is competent for the makers of a note to stipulate therein that they will waive the statute of limitations.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 63.]

8. BILLS AND NOTES — TIME OF PAYMENT — VERDICT.

Where, in an action on a note, the jury found that an agreement had been made for an extension of the time of payment, that no definite time was agreed upon, and that a reasonable time for such delay was until plaintiff was dissatisfied with the security or until payment was demanded or offered, such finding cannot be considered as making the instrument a demand note in the ordinary legal meaning.

9. BANKS AND BANKING—SAVINGS BANKS—LOANS.

V. S. 4099, providing that a savings bank shall not make a contract or agreement to loan or extend the time of payment of a loan on personal security for a longer time than one year, is not violated by an agreement extending the time of payment of a note until the payee should be dissatisfied with the security or until payment was demanded or offered.

Exceptions from Caledonia County Court; Watson, Judge.

Special assumpsit by the Lyndon Savings Bank against the International Company and others. From a judgment against the International Company and O. C. Miller, and in favor of defendant G. H. Prouty, the International Company and O. C. Miller, bring exceptions. Judgment reversed pro

forma, and rendered for plaintiff against the three defendants.

The International Company is a corporation organized under the laws of this state. The writ in this case is dated March 7, 1901, and was served March 11, 1901. The note in suit is for \$5,000, dated June 12, 1886, payable to plaintiff, or order, on demand, with interest semiannually, and waiving "all right or claim to the statute of limitations," and signed: "International Co., J. A. Prouty, Pres., H. E. Folsom, Treas." Upon the back appears: "Waiving demand and notice. H. E. Folsom. O. C. Miller. G. H. Prouty." The interest was paid by the International Company semiannually down to July 1, 1898. J. A. Prouty died before this suit was brought, and so is not a party. H. E. Folsom pleaded his discharge in insolvency, and a nonsuit was entered as to him. He was adjudged an insolvent in the fall of 1893. On December 19, 1893, and after Folsom had been adjudged an insolvent, plaintiff sent its agent, L. B. Harris, to Newport, Vt., to see G. H. Prouty, who is a son of J. A. Prouty, and O. C. Miller about doing something in respect of the note in suit. After an interview with said Harris, O. C. Miller and G. H. Prouty wrote their names on the back of said note at Newport, Vt., on December 19, 1893. O. C. Miller was the manager of the International Company from 1886 to September 30, 1898. In the fall of 1898 the International Company became financially embarrassed, and O. C. Miller wrote to each creditor of the company, including the plaintiff, a letter dated September 22, 1898, signed by him as manager, stating that the International Company was insolvent, and calling a meeting of the creditors at the office of the company on September 30, 1898. The letter sent to plaintiff also stated: "Although you have good backers on your note, if convenient, should like to have you present at the meeting." Said meeting of the creditors was held September 30, 1898. At said meeting the creditors elected a committee of three, whom they directed to take charge of the assets of the company, realize upon the same, and divide the proceeds pro rata among the creditors of the company. J. W. Copeland, who was a trustee and the vice president of the plaintiff, was present at said meeting, but did not vote. Before any vote was taken he said to the meeting that he was there as the representative of the plaintiff to note the proceedings of the meeting and report to plaintiff's trustees, and that he was without instructions and should not vote. He reported the action of said meeting to the plaintiff. The stockholders of the International Company, at a meeting duly warned and held for that purpose on October 1, 1898, voted that "the company is insolvent," and that its assets be realized upon and disposed of as directed by said creditors' meeting. The evidence of defendants tended to show that thereafter the Inter-

national Company delivered to said creditors' committee all its assets, and that each creditor, except the plaintiff, executed and delivered to the International Company a writing agreeing to accept, in settlement of their claims, such sums as might be their due, pro rata, from the proceeds realized by said creditors' committee from the assets of the company.

It appeared from the records of the plaintiff that on October 3, 1898, the plaintiff's trustees voted: "To give the assent of the Lyndon Savings Bank to the proposition that the property of the International Company be put into the hands of trustees to be sold to the best advantage, and the proceeds to be divided between the creditors pro rata; the bank reserving all rights to collect its debt from the indorsers of the note." It appeared that on October 15, 1898, plaintiff, by its treasurer, wrote a letter to the International Company, which was received by O. C. Miller in due course of mail, and which gave notice of said vote of plaintiff's trustees. Defendants' evidence tended to show that about October 1, 1898, the International Company surrendered all of its assets to said creditors' committee, who thereafter converted the same into cash, and paid from the proceeds thereof to the creditors, including plaintiff, a dividend of 10 per cent. on each of the following dates: November, 1898; March, 1899; June, 1900; November, 1900—and a dividend of 5 per cent. on each of the following dates: May, 1901; August, 1901; December, 1902; and September, 1903; that each 10 per cent. dividend so paid plaintiff was \$507.50, and each 5 per cent. dividend so paid plaintiff was \$253.75. There was no evidence tending to show that O. C. Miller ever paid anything on the note in suit. There was no evidence, except said letter dated September 22, 1898, tending to show that O. C. Miller had in any way, since he wrote his name on the back of said note on December 19, 1893, acknowledged any personal liability on said note, or promised to pay it. Only special verdicts were submitted, and in answer to these the jury found that G. H. Prouty and O. C. Miller were makers; that an agreement was made at Newport, Vt., on December 19, 1893, between plaintiff and the International Company for an extension of the time of payment of the note in suit "until plaintiff is dissatisfied with security"; that on December 19, 1893, plaintiff agreed with O. C. Miller and G. H. Prouty that the time of payment on the note in suit should be extended, if said Prouty and Miller wrote their names on the back of said note, but that no particular time for the payment of the note was stated; that a reasonable time for the payment of said note after said agreement was made was "until payment was demanded or offered"; that it was "doubtful" whether the note could have been collected of the International Company at any time from December 19,

1898, to January 1, 1898; that O. C. Miller and G. H. Prouty were not damaged by plaintiff's omission to collect the note in suit from December 19, 1893, to January 1, 1898; that after October 1, 1898, the committee appointed by the creditors of the International Company managed and disposed of the property of said company, and paid from the proceeds thereof the dividends which were paid to the creditors; that the plaintiff, by its conduct with reference to the property of the International Company, and by accepting the dividends from the committee of the creditors of said company, did not discharge said company from further liability; that O. C. Miller and G. H. Prouty did not sign their names on the back of the note in suit in consideration that the plaintiff would not prove that note against H. E. Folsom's insolvent estate, unless compelled by law to do so.

Argued before ROWELL, C. J., and TYLER, MUNSON, START, HASELTON, and POWERS, JJ.

Cook & Norton and W. W. Miles, for plaintiff. Young & Young, for defendants.

TYLER, J. The note in controversy is described in the opinion in this case reported in 75 Vt. 224, 54 Atl. 191. At the first trial in the county court a verdict was directed for the defendants, which action this court held was error, reversed the judgment, and remanded the case for a new trial. We then held that: "What relation Miller and Prouty assumed to the note by placing their names upon it was a question of fact, and not of law. If they became joint makers, no demand was necessary, and this action was properly brought against them. If they were indorsers, it could not be held as matter of law that they waived demand and notice by placing their names under the name of Folsom, who, when the note was executed, signed it as indorser, waiving demand and notice; and if there was an agreement or understanding between the parties that the time of payment should, in consideration of their signing the note, be forborne, there being no time of forbearance specified, it would mean, in law, a reasonable time. What constituted a reasonable time, in the circumstances, was a question of fact for the jury, and, as against Miller and Prouty, the statute of limitations would begin to run at the expiration of such reasonable time." Quoting further from that opinion: "And it has generally been held by this court that one not before a party to the note, who signs his name upon the back of it in blank, is *prima facie* a maker, and assumes the same obligations as if he wrote his name upon the face of the instrument. In *Sylvester v. Downer*, 20 Vt. 355, 49 Am. Dec. 786, the rule was extended and emphasized, for it is there declared that it makes no difference that the signing is long after the making of the note and while

it is in circulation, for the reason, as stated by Judge Redfield, that if the signer consents to be thus bound, and induces others to take the note under that expectation, he will be estopped to deny that fact, and will be treated the same as if he had signed the note at its inception. It was, however, held in that case that, the indorsement being in blank, the real obligation intended to be assumed, whether that of maker, guarantor, or indorser, might be shown by parol evidence. In *Bank v. Dorset Marble Co.*, 61 Vt. 106, 17 Atl. 42, this rule was recognized and reaffirmed."

At the last trial the jury found, by special verdicts submitted to them, that Miller and Prouty, by placing their names upon the note, became joint makers thereof; that an agreement was made December 19, 1893, between the plaintiff and the International Company for an extension of the time of payment, but for no definite time; and that a reasonable time to delay its collection was: "Until the plaintiff was dissatisfied with the security." Another special finding was: "Until payment was demanded or offered." There were special findings that the International Company turned over to a committee all its assets to be divided pro rata among its creditors, that the committee paid over the dividends, and that the company was not discharged from further liability. The defendants Miller and Prouty objected, and were allowed an exception to the submission to the jury of the question whether they signed the note as joint makers, and they claimed that there was no evidence that they were joint makers. They also excepted to the submission to the jury to find whether there was an extension of the time of payment of the note, and claimed that there was no evidence to sustain that finding. The defendants contend that this action was barred by the statute of limitations, that no new promise or acknowledgment was shown, and that the note had not matured when the action was commenced. The case shows that no agreement was made at the time the money was loaned and the note was given that either Miller or Prouty should ever become parties to the note, and it appears that neither of them received any security or indemnity for placing their names upon the back of it. Down to that time the note had remained as it was when made by the International Company, with Folsom as indorser. The plaintiff seeks to hold Miller and Prouty liable by reason of their placing their names upon the note, and claims that they thereby became makers. The defendants claim that they became indorsers or guarantors. The general rule of law is found in the opinion of Redfield, J., in *Sylvester v. Downer*, 20 Vt. 355, 49 Am. Dec. 786: "That he who writes his name upon the back of a note, if he were not before a party to it, assumes the same obligation as if he wrote his name upon the face of the

instrument; and that, although he does this long after the making of the note, it shall make no difference."

But the question of Miller's and Prouty's liability is not to be determined by this rule of law, but by the agreement made between themselves and L. B. Harris, who went to see them and make an arrangement about the payment or an extension of the note. It appeared that the note was overdue; that Folsom had been adjudged insolvent; that the plaintiff employed Harris to go to Newport and call upon Miller and Prouty "to do something about the note"; and that, as a result of the interview, they wrote their names upon the instrument. The exceptions state that the evidence was very conflicting as to what was said between them, and it so appears by the record; but it is not the duty of this court to reconcile the evidence. As there was evidence tending to show that Miller and Prouty signed the note as makers, the submission of that question to the jury was not error. The weight that should be given to the testimony of the witnesses who testified upon this subject was a matter that rested with the jury. The testimony of Harris tended to show that after Folsom became insolvent the plaintiff sent him to see Miller and Prouty about the note; that he saw them at Newport, and informed them that he came as a messenger from the plaintiff to collect the note, if collection could be made, and, if not, to ascertain their wishes, or obtain instruction about proving this, and another note which the plaintiff held, against Folsom's estate; that he told them that Folsom had said that they (the Proutys and Miller) were, practically, the company; that if they would fix the note, so it would be lawful, and safe in the judgment of the bank, it could run as long as they kept the interest paid and the bank considered the security good; that Miller and Prouty both said that the estate of Folsom should not be charged with the loan, and that they would do anything that he (Harris) or the plaintiff required in respect to fixing the note, so as to make it all right without Folsom's name; that they would put their names upon the note; and that they did so after Harris had taken a little time to make inquiry as to their financial responsibility and expressed his willingness to accept their names. This evidence brings the case within the rule in *Sylvester v. Downer*. Miller, Prouty, and Folsom disputed the testimony of Harris, but it was for the jury to decide as to the weight of evidence, and this court cannot disturb the verdict. Upon the testimony of Harris, the jury were warranted in finding that an agreement was made between the plaintiff and said company for an extension of the time of payment, which was a sufficient consideration for Miller's and Prouty's acts, in view of their interest in the company. It is held that "consideration does not necessarily de-

pend upon whether the thing promised results in a benefit to the promisee or a detriment to the promisor. It is enough that something is promised, or the exercise of a present right is forborne." *Ballard v. Burton*, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664, and cases cited in the opinion.

The defendants contend that, upon the testimony of Harris, the alleged agreement made by him with Miller and Prouty was not operative until accepted by the plaintiff and approved by the inspector of finance. It may be presumed that Harris returned the note to the bank, and that the bank officers were satisfied with the names upon it that Harris had obtained, for they continued to hold it for years thereafter without objection by them, and apparently with the approval of the state official. They also received the interest upon it semiannually down to July, 1898. Miller and Prouty might well have understood that the note had been accepted. That Miller did so understand it is shown by his note to the plaintiff, written nearly five years later, in which he said, "You have good backers on your note," which words must have referred to Mr. Prouty and himself.

The defendants also contend that the case shows no authority in Miller, conferred upon him by the International Company, to make the agreement through Harris with the plaintiff. It is true that no vote of the company was produced by the plaintiff showing that such authority was given Miller, but it appeared from defendant Miller's testimony that he was the general manager of the company at the time he signed his name to the note, that he held that position from 1886 until the fall of 1898, when all the assets of the company were placed in the hands of a committee, converted into money, and the proceeds distributed pro rata among the creditors; the plaintiff reserving the right to proceed against the indorsers upon its note. It is unnecessary to hold as an abstract legal proposition that, as general manager of the corporation, Miller had power to borrow money to meet corporate debts in due course of business. He testified that he had charge of the funds of the company as general manager, and that it was his duty to pay a note when it came due, "or to look out for it." He evidently understood that he and Prouty had authority to sign this note, and the record shows no dissent by the other directors to his agreement for an extension; neither is there any evidence in the case that tends to contradict his testimony.

But, assuming that Miller and Prouty had no authority to make the agreement, they and the company received the benefit of the forbearance, and the company ratified it by paying the interest upon the note for five years after the agreement was made. That the defendants were estopped from denying Miller's and Prouty's authority was held in

the former decision. *Grand Isle v. Kinney*, 70 Vt. 381, 41 Atl. 130, is an authority upon this point. It was said in the former opinion that it could not be held as a matter of law that the vote taken by the plaintiff, and its receipts of dividends from the committee of the International Company, discharged the company. The proposition of the company to its creditors was that they should accept, pro rata, such amounts as should be received from the company's assets in settlement of their respective claims. The plaintiff, by its resolution, assented to the proposition that the property be sold and the proceeds be divided among the creditors, with a reservation of the right to collect its debt from the indorsers of the note; and the company, through its committee, acted upon this acceptance, and subsequently paid dividends to the plaintiff with the other creditors. That the plaintiff should receive its dividends, reserving the right to collect the remainder of its debt from Miller and Prouty, whom the jury have found were joint makers of the note, was a matter of contract between the International Company, through its committee, and the plaintiff. Miller and Prouty were evidently regarded by the plaintiff as responsible; and it is not presumable that it would have released them upon receiving what could be got from the Company's assets, which Miller had said in his notice to the creditors were insufficient to pay the debts in full. It is noticeable that the plaintiff's resolution omitted the word "settlement," which the committee's offer contained. There was no error in the refusal of the court to set aside the ninth special finding.

It is competent for the makers of a promissory note to stipulate therein that they will waive the statute of limitations. *Trust Co. v. Sheldon et al.*, 68 Vt. 259, 35 Atl. 177. The plaintiff contends that, as the jury have found that Miller and Prouty signed this note as joint makers, they became subject to the clause, "and agree to waive all right or claim to the statute of limitations." But it is unnecessary to decide this question, for the jury found that an agreement was made for an extension of the time of payment of the note; that no definite time was agreed upon, but that a reasonable time for such delay was until the plaintiff was dissatisfied with the security—until payment was demanded or offered.

It cannot be maintained that these findings made this instrument a demand note in the ordinary legal meaning of the term "payable on demand." The jury, in effect, found that a right of action did not accrue upon the note until the plaintiff was dissatisfied with the security and made an actual demand of payment; and this was the agreement according to Harris' testimony. *Stanton v. Stanton*, 37 Vt. 411; *Thrall v. Mead's Estate*, 40 Vt. 540; *Smith v. Franklin*, 61 Vt. 385, 17 Atl. 838; *Ins.*

Co. v. Batchelder & Son, 62 Vt. 148, 19 Atl. 982. The case shows that demand of payment was made of defendants Miller and Prouty on February 5, and February 19, 1901, and that the suit was brought March 7, 1901. The failure of the International Company in 1898, and the nonpayment of interest after that, were sufficient causes for the plaintiff's dissatisfaction with the security.

The finding of the jury that an extension of time of payment was agreed upon by the parties is inconsistent with the defendants' contention that the other finding should be construed to mean that the note was payable immediately after the agreement was made. According to the testimony of Harris, the note was to run along indefinitely, if the interest was kept paid; the only limitation being the time when the plaintiff should become dissatisfied with the security and call for payment. When demand was made, the plaintiff's cause of action accrued against Miller and Prouty. This answers the defendant's suggestion in the brief of counsel that the agreement was in violation of V. S. 4099, which provides that a savings bank shall not make a contract or agreement to loan or to extend the time of payment of a loan on personal security for a longer time than one year.

Upon the special findings, judgment should have been rendered against both Miller and Prouty. Therefore the judgment for defendant Prouty is reversed, the judgment against the International Company and Miller is reversed, pro forma, and judgment is rendered for the plaintiff against the three defendants, with costs.

GUILMONT'S ADM'R v. CENTRAL VERMONT RY. CO.

(Supreme Court of Vermont. Washington. Nov. 9, 1905.)

1. RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

In an action for damages on account of the death of plaintiff's intestate, resulting from an accident at a railroad crossing, it appeared that as deceased approached the track and when within 25 feet of it he looked up and down the track and then up the track a second time, that the track was plainly in sight, that he was acquainted with the locality, that the horse moved slowly, and that he was in full possession of the senses of sight and hearing; such facts making it probable that he hastily measured the distance between the train and the crossing, and thought there was time for him to pass over the track before the train reached the crossing. *Held*, that he was guilty of contributory negligence.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1080.]

2. SAME—CARE AS TO PERSONS SEEN NEAR CROSSING.

Where it appeared that defendant's train was running about 30 miles an hour, and that, when it was within a distance of 150 to 200 feet from the crossing, the engineer saw plaintiff's intestate with a horse and sled 10 to

15 feet from the crossing, that the horse seemed to stop an instant or two and then started, and that, as soon as the engineer saw deceased approach the train, he shut off the steam, applied the emergency brake, and sounded the danger whistle, doing all that he could to stop the train, no negligence on the part of defendant was shown.

Exceptions from Washington County Court; Stafford, Judge.

Action by Israel Guilmont's administrator against the Central Vermont Railway Company. From a judgment for the plaintiff, defendant brings exceptions. Reversed.

Argued before ROWELL, C. J., and TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

F. L. Laird, M. M. Gordon, and R. A. Hoar, for plaintiff. Hunton & Stickney, for defendant.

TYLER, J. This action is brought by the plaintiff, as administrator of the estate of Israel Guilmont, deceased, under the statute, to recover damages to the wife and next of kin on account of the death of the intestate, alleged to have been caused by the wrongful act of the defendant.

The defendant's trainmen were running a regular freight train of 11 cars, on its usual time, between Montpelier and Barre, at about 30 miles an hour. As the train approached a certain bridge, the fireman put in a shovel full of coarse coal, the effect of which was to surround the engine with smoke. The distance from this bridge to a highway crossing which the train was approaching was about 800 feet. After the smoke cleared away, so that the engineer could see ahead as far as the crossing, the distance to it was 150 to 200 feet. When the crossing came into view, the engineer saw the intestate, with a horse and sled, 10 to 15 feet from the crossing, and then it was not apparent that he was about to cross. As soon as he was seen to approach the track, the engineer put on the emergency brake and sounded the danger whistle, but it was too late to stop the train and avoid striking the intestate. He was struck and received injuries of which he soon died. It appeared that he stopped a few minutes at the "Tabor House," which was opposite the crossing and about 100 feet from it, and then, without taking reasonable precautions, drove to the railroad track and upon the crossing in front of the train.

The court held and instructed the jury, without exception by the plaintiff, that the intestate was guilty of contributory negligence; but the court further said to the jury, in substance, that the only question for their determination was whether, after the defendant's servants saw, or ought to have seen, the intestate about to cross and in a position of peril, they neglected the reasonable means at their command which might have saved him from accident. The exceptions leave

no open question in respect to negligence by the defendant prior to the engineer's discovering the intestate near the crossing. The only question submitted to the jury was in relation to what occurred after the trainmen saw, or ought to have seen, him about to cross, and whether they used all reasonable means to save him.

The case made by the plaintiff shows that as Guilmont approached the railroad track, and when within 25 feet of it, he looked up and down the track and then up the track a second time; that the track was plainly in sight, and that he was acquainted with the locality; that the horse moved slowly but steadily forward, though to some witnesses he seemed to stop or hesitate for an instant before stepping upon the track, and passed over it unharmed. It also appeared that Guilmont and his sleigh had nearly cleared the track when they were struck by the engine. Guilmont was in full possession of the senses of sight and hearing when he undertook this perilous enterprise. The fact that he looked up and down the track before driving upon it makes it probable that he hastily measured the distance between the train and the crossing and thought there was time for him to pass over the track before the train reached the crossing. Whether this was the case or whether he was oblivious to the danger when he attempted to cross the track, the court correctly held him guilty of contributory negligence.

The crew of the train consisted of a conductor, an engineer, a fireman, a forward brakeman, who was then upon the engine, and a rear brakeman, who was upon the rear car. All these men were in their proper places on the train. The engineer testified, and his testimony was not disputed, that when the engine had passed through the bridge, and the smoke and steam had cleared away, so that he could see to the crossing, he saw Guilmont within 10 or 15 feet of the track; that the horse seemed to stop an instant or two; that as soon as he saw him approaching the track he instantly shut off the steam, applied the emergency brake, and sounded the danger whistle; that he did all that he could do to stop the train; that he could not have stopped it more quickly; and that he did all that could have been done to prevent a collision. The engineer had a right to assume, when he saw the intestate driving toward the track, that he would not drive upon it in front of the train. He owed the intestate no duty until he saw him about to drive upon the track and that he was in peril. As the case shows that the engineer then used all the means in his power to stop the train and avoid the collision, the court erred in submitting any question to the jury. The defendant's motion for a verdict should have been granted.

Judgment reversed, and cause remanded.

BELKNAP v. BILLINGS.

(Supreme Court of Vermont. Windsor. Nov. 21, 1905.)

PAYMENT—ACCEPTANCE OF NOTE—EFFECT.

Where, in an action for assault, defendant pleaded that plaintiff accepted a note in satisfaction of the cause of action, it was not error to refuse to charge that, a note given and received in payment for a personal injury resulting from a tort is "prima facie payment" therefore, as a note given and received in payment is payment.

Exceptions from Windsor County Court: Watson, Judge.

Action by Roswell Belknap against Albert Billings. A verdict was rendered in favor of plaintiff, and defendant brings exceptions. Affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, START, HASELTON, and POWERS, JJ.

Joseph C. Enright and Edward R. Buck, for plaintiff. Davis & Davis, for defendant.

HASELTON, J. This was an action of trespass for assault and battery. The defendant filed four pleas, one of which was that the defendant gave and the plaintiff accepted a certain promissory note in full satisfaction and discharge of the alleged cause of action. To this plea the plaintiff replied that the note therein mentioned was not accepted by the plaintiff in payment and satisfaction of the cause of action in the declaration alleged, but that the note was accepted as satisfaction only on condition that it be paid when due, and that the note was long overdue and remained unpaid. At the June term, 1902, of the Windsor county court this replication was held sufficient on demurrer, and later this court so held. See *Belknap v. Billings*, 76 Vt. 54, 56 Atl. 174, where the pleadings, which are referred to in the bill of exceptions herein, are stated with sufficient fullness. At the December term, 1904, of the Windsor county court, the case was tried by jury on its merits, and came here on a single exception.

That exception is to the refusal of the court to comply with a request to charge: "That a promissory note given and received in payment for personal injury resulting from a tort is prima facie payment therefore, and a suit cannot be maintained for that tort, whether the note be paid or not." But if a note is, in fact, given and received in payment, it is payment. To say expressly or impliedly that it is merely prima facie payment, when given and received in payment, would be confusing and incorrect, and the court rightly declined to comply with the request. The briefs of counsel have largely to do with propositions other than that embodied in the request which the court did not in terms comply with. In this case, the parties were at issue as to whether the accepting of a certain note

was to operate as payment or not. The defendant claimed, and his evidence tended to show, that it was so agreed; but the plaintiff claimed, and his evidence tended to show, that the note was to operate as payment only in case it should be paid when due. The full charge is referred to, and upon examining it we find that the jury were correctly and fully instructed upon the subject-matter which the request was probably intended to cover.

Judgment affirmed.

POMEROY v. KELTON.

(Supreme Court of Vermont. Rutland. Nov. 23, 1905.)

QUO WARRANTO—MISCONDUCT OF PETITIONER.

Where, on petition by a private prosecutor for quo warranto to try title to an office, for which petitioner and respondent were opposing candidates, it appeared that intoxicating liquor was, with some system and to a considerable extent, furnished to voters at the election, while the polls were open, in the interest of petitioner and through his connivance, the writ would be denied on the ground of public policy.

Petition by Edward Pomeroy for a writ of quo warranto against Guy O. Kelton to try title to the office of alderman of the Eleventh Ward of the city of Rutland. Writ denied.

Argued before ROWELL, C. J., and TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

O. M. Barber, E. H. O'Brien, and T. H. Brown, for relator. Buller & Moloney, for defendant.

HASELTON, J. This is a complaint in the nature of a quo warranto, brought by Edward Pomeroy against Guy O. Kelton, asking judgment of ouster of the said Kelton from the office of alderman from the Eleventh Ward of the city of Rutland, and judgment that the complainant was lawfully elected to and is now entitled to hold said office and to exercise the functions thereof. The election brought in review is that held in Ward 11 of the city of Rutland on March 7, 1905, for the choice of an alderman and other officers. At the election 116 votes for alderman were counted for the relator, Pomeroy, and 117 votes were counted for the defendant, Kelton, and the said Kelton was accordingly declared elected.

A large amount of evidence has been taken by which it is clearly established that at the election in question intoxicating liquor was, with some system and to a considerable extent, furnished to voters while the polls were open, and that this liquor was so furnished in the interest of the relator and through his connivance. This being so, the relator does not come into court with clean hands, and the court will not, at the relator's instance, inquire into the matters and things complained of by him. The plying of voters with

intoxicating liquor during voting hours, at any election, is contrary to the spirit of our Constitution and laws, and is manifestly obnoxious to public policy. A complaint for a quo warranto is addressed to the sound discretion of the court, and it would be unbecoming and demoralizing for this court to act on the complaint of a private relator who stands as a wrongdoer in respect to the very thing in issue. The relator is asking the court to aid him in securing an official position which he sought to obtain on election day by a course having a natural tendency to defeat the free and voluntary choice of the voters. For the court to lend such aid would be a reproach to the law and to the administration thereof. Had this complaint been preferred and prosecuted by the state's attorney for Rutland county, other principles would be applicable, and the duty devolving upon the court might be different from that which we are now clearly bound to perform. *State v. Harris*, 52 Vt. 218.

The complaint is dismissed, with costs.

MASSUCCO v. TOMASSI.

(Supreme Court of Vermont. Washington. Nov. 9, 1905.)

1. BREACH OF MARRIAGE PROMISE—EVIDENCE—DECLARATIONS OF DEFENDANT.

In an action for breach of marriage promise, it was not error to permit plaintiff to testify that, when defendant proposed marriage, he stated that he was worth a certain amount of money.

2. SAME—REPRESENTATIONS OF DEFENDANT.

In an action for breach of marriage promise, it appeared that the parties had been married by religious ceremony in Italy at a time when such ceremony did not bring about a valid marriage, and plaintiff testified that, while negotiations were going on between herself and defendant relative to the contemplated marriage, he told her that the reason why a civil marriage was also necessary was in regard to the property, and that marriage by the church alone was not so strong as marriage by both the church and civil authority. *Held*, that there was no error in admitting such testimony.

3. SAME—CONVERSATIONS WITH PRIEST.

It is not error to permit plaintiff to testify that, while she and defendant were consulting with the priest, defendant asked the priest whether plaintiff could marry, and that the priest said she could, as she was 21 years old.

4. SAME—TESTIMONY OF PLAINTIFF—FAILURE TO MARRY.

It was not error to permit plaintiff to testify that, except the religious ceremony, no marriage ceremony was ever performed.

5. WITNESSES—REDIRECT EXAMINATION—EXPLANATION.

It was not error to permit plaintiff to testify on re-examination, after having testified that she considered herself defendant's wife, that she did not claim to be his legal wife, having been married only in church.

6. EVIDENCE—OPINION EVIDENCE—LAWS OF FOREIGN COUNTRIES.

It was proper to permit an Italian priest to testify that a marriage by religious ceremony alone did not constitute a legal marriage in Italy at the time a certain ceremony was performed; the witness having been shown to be duly qualified.

7. BREACH OF MARRIAGE PROMISE—MEASURE OF DAMAGES—INSTRUCTIONS.

Where, in an action for breach of marriage promise, it appeared that plaintiff had been married to defendant by a religious ceremony in Italy, which at that time did not bring about a valid marriage, and that thereafter she had lived with him, an instruction that, in considering plaintiff's damages, the jury should have a right to consider the fact of the parties living together as an element of damage, was proper.

8. CONTINUANCE—TRIAL COURT'S DISCRETION.

Questions of continuance, as a rule, rest in the discretion of the trial court.

9. NEW TRIAL—ACCIDENT PREVENTING DEFENSE.

Under V. S. 1662, giving the Supreme Court a right to grant a new trial on petition of either party subsequent to the term at which the original judgment was rendered, a defendant, who was prevented from making a defense owing to the fact that he resided in Italy, and was prevented from attending the trial by sickness and by the death of his father, was entitled to a new trial, inasmuch as such sickness and death might be considered accidental causes.

Exceptions from Washington County Court; Stafford, Judge.

Action by Irene Massucco against Dominico Tomassi. From a judgment in favor of plaintiff, defendant brings exceptions. Affirmed.

The defendant excepted to allowing a certain witness to testify that, when defendant came to her with the proposal of marriage, he said he was worth \$30,000; to the plaintiff being allowed to testify that, while negotiations were going on between herself and defendant relative to the contemplated marriage, he told her that the reason why a civil marriage was necessary was "in regard to the property," and because marriage by the church alone was not so strong as marriage by both church and civil authority; to the plaintiff being allowed to testify that, when she and defendant together were consulting with the priest about getting married, defendant asked the priest whether the plaintiff could get married, and that the priest answered that, being 21 years old, she could; to the plaintiff being allowed to testify that, except the religious already referred to, no marriage ceremony was ever performed between herself and defendant; to plaintiff being allowed to testify on re-examination, after having testified that she considered herself defendant's wife, that she did not claim to be his legal wife, having been married only in church; to an Italian priest being allowed to testify that a marriage by religious ceremony alone did not constitute a legal marriage in Italy at the time in question, the court having found the witness duly qualified. At the close of the evidence defendant moved for a verdict upon the grounds that "the plaintiff says she was married, and that the priest gave her a certificate; that the parties considered themselves legally married; that she still says she is defendant's wife; that she lived with him as such in Vermont, and having

done so under the form of a marriage cannot bring this action; that if it came to her attention and knowledge that the marriage was not legal, and she continued to cohabit with him, she cannot maintain this action; that she only claims that the civil marriage would make it stronger, not that it would not be a valid marriage without it." This motion was overruled, to which defendant excepted. The defendant also excepted to that portion of the charge "as to the relation that existed between the plaintiff and the defendant as an element of damage," claiming that "under the circumstances in which they went to living together it would not be an element." That portion of the charge was as follows: "In estimating the damages, you will consider the rank and condition in which each of the parties stood; you will consider what advantage to her the marriage would have been socially and in a pecuniary way; you will consider what advantage it would have been to her to have him marry according to his promise at the time he agreed to do so, and how much she has lost by his breach of that promise; and, in considering that question, you will have a right to consider, if you find it to be the fact, that she lived with him as his wife, gave herself to him as his wife, in reliance upon his promise to marry her. You have a right to consider that as an element of damage, with the other elements in the case. Damages are intended always as compensation, and it is for you, in your sound judgment, to say what sum of money will fairly compensate the plaintiff for defendant's breach of his promise, so that, so far as money will do it, she will be made whole for his not having done what he said he would do."

The defendant also brought his petition for a new trial, under V. S. 1662, to the Supreme Court for Washington county at its January term, 1905. Said petition was heard on testimony taken and filed at the May term, 1905, together with defendant's exceptions. The opinion states the substance of said petition and of the testimony taken in support thereof.

Argued before ROWELL, C. J., and TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Lard & Carleton, for plaintiff. J. P. Lamson and A. M. Sartorelli, for defendant.

TYLER, J. Action for alleged breach of a promise to marry. Upon an examination of the defendant's exceptions we find none of them sustainable as ground for a reversal of the judgment rendered by the court below. It was competent for the plaintiff to show by her own testimony what the defendant told her, and by the testimony of a witness, who claimed to have knowledge upon the subject, what the amount of the defendant's property was at the time of the alleged

promise. An Italian priest was permitted to testify that a marriage by religious ceremony alone did not constitute a legal marriage in Italy. In this there was no error, as the record shows that the court first found that the witness was duly qualified to testify upon the subject. See *Reg. v. Parry*, 14 Eng. Law & Eq. 549; *Watson v. Walker*, 23 N. H. 472, cited by defendant. Judgment affirmed.

On Petition for a New Trial.

The suit was brought for an alleged breach of promise of marriage. It stood for trial at the March term, 1903, Washington county court, and the defendant came from Italy to make defense; but, the plaintiff not being ready for trial when the case was reached, it was displaced, and the pressure of other business prevented its being tried at that term. At the following September term it was continued upon proof of the defendant's sickness in Italy. Besides, it was not reached in its order. At the March term, 1904, several cases before it having been disposed of, it was second for trial. The defendant's counsel applied to the court to have the trial postponed until a later day in the term, so that the defendant could arrive from Italy; but the court denied the application and held that the trial must proceed. The case was tried in the defendant's absence, and the plaintiff obtained a large verdict. The defendant arrived in court April 10th, after verdict and judgment.

The plaintiff testified at the trial that a few months after the death of the defendant's wife, who was her sister, the defendant went to the village in Italy where she resided with her father, paid attentions to her for some time, and then proposed a marriage with her; that she assented, and, upon the advice of a priest whom they consulted, a church ceremony was performed, upon an agreement between themselves and their promise to the priest that they would be legally married upon their arrival in this country; that soon after their arrival in Montpelier the plaintiff requested the defendant to have the marriage legally performed, but the defendant delayed the marriage on the pretense that he must receive a certain paper from Rome before they could be lawfully married, and that he put off the marriage for a year with this excuse, though she constantly urged its performance; that during this time she lived with the defendant as his wife, worked in his store, kept his house, and cared for his children; that at the end of a year they returned to Italy and lived there in the same relations about 10 months, she urging the marriage and he delaying it with various excuses; that she then left him and returned to St. Albans, in this state, with her sister and her sister's husband, who was the defendant's brother. She denied making any settlement with the defendant, and denied

receiving any money from him or from his brother. It appeared that soon after the plaintiff returned to this country the defendant married another woman. Testimony was given in behalf of the plaintiff at the trial tending to show that the defendant was worth \$30,000 when he made the promise of marriage.

The material facts set out in the petition and the other affidavits attached are that about six months after the death of the petitioner's wife, in January, 1899, the petitionee, who resided with her father in Italy, wrote a letter to the petitioner, complaining of her father's ill treatment of her and offering to come to Montpelier, where the petitioner resided, and take care of his house and children; that he sent her money with which to pay her fare; that a few weeks later she wrote him that her father had taken the money and she was unable to make the journey; that in March following he went to Italy to visit his parents; that while there he met the petitionee several times, and that it was finally decided that she should return with him to Montpelier; that upon the advice of a priest a religious ceremony was performed prior to their departure, but did not constitute a legal marriage, as both parties understood, and that the priest said they could be married at any time in America; that they arrived in Montpelier early in May of that year; that the petitionee soon developed a violent temper and treated the petitioner and his children rudely, and expressed a wish to leave his house; that she continued this abusive conduct towards him and his children for a year, when, not being able to endure it longer, he sold a profitable business and returned with her and the children to Italy, where they lived together until March, 1901, when the petitionee returned to this state with the petitioner's brother, who, with his wife, was coming here; that before she left he made a settlement with her, by which his brother, who owed him \$1,000, was to pay her \$600 in settlement; that the brother subsequently paid him \$400 and held the \$600 for the petitionee by her request, he agreeing to pay her interest thereon; that the petitionee never requested the petitioner to marry her, but refused to marry him and refused to live with him; and that he never lived with her as his wife. The petitioner also deposes that he was not worth more than \$5,000 at the time the petitionee left him, and that she knew that fact.

The petitioner's attorney makes affidavit of the following facts in support of the petition: That he had informed his client by letter how his case stood, and that he must be in Montpelier the last of February or first of March; that he replied from Italy that he was not then able to make the journey, but believed he would be in March; that the attorney wrote him again urging him to be there on a certain day; that on

March 6th he received a letter from him, saying that he would be there early in April and to hold the case for trial, and expressed a wish to have it tried as soon as it could be got ready after his arrival; that the attorney informed the court of the situation and that the defendant would be here to try the case in April; that the plaintiff's attorneys were willing that it be set at a later day, provided it would not result in a continuance, and that they so stated to the court; that the defendant's attorney showed the court the defendant's letter received by him March 6th.

It appears that the parties are at variance in respect to the promise of marriage, their relations while they lived together, the settlement, and the petitioner's financial means. The petitioner was entitled to a reasonable opportunity to make a defense in the court below. He did not have his day in court, and a large verdict was rendered against him. The question is whether he is entitled to have the verdict set aside and a new trial granted him. The petition is not based upon the ground of newly discovered evidence, but upon the claim that the petitioner was, by accident, prevented from making a defense to the action.

Questions of continuance and of assigning cases for trial must, as a rule, rest in the discretion of the trial courts, and we do not revise the action of the court below based upon the evidence that was before it. At the time the trial began the court doubtless had reason to believe that the defendant's alleged sickness was a pretense for a delay. No evidence of his sickness was shown otherwise than by his letters to his counsel, but he now makes affidavit that he was prevented by sickness from making the journey until the last of March, that the death of his father, which occurred March 9th, delayed him, that he should have come here the last of February, as requested by his counsel, had he not been prevented by sickness. If the court had known the facts which now appear in the petition and affidavit that the defendant intended to make defense and would be in court for that purpose before the term closed, we may assume that it would have deferred the trial, certainly with knowledge that the defendant's delay was caused by his sickness and the death of his father. The jury lawfully assessed the damages in view of what they understood to be the defendant's pecuniary ability. It was for this purpose that the plaintiff introduced evidence in respect to the defendant's property. If it is true, and the jury had known the fact, as the petitioner deposes, that he was not worth more than \$5,000, it is reasonable to suppose that the verdict would have been for a smaller sum.

The question is whether the case presented comes within V. S. 1662, which reads: "The Supreme Court may grant a new trial

in a cause determined by such court, or by a county court, on petition of either party, subsequent to the term of the court at which the original judgment was rendered." The Legislature has placed no limitation upon the power of the court to grant new trials under this section of the statute, nor prescribed the grounds for new trials. The court has repeatedly construed the statute and fixed the boundaries of its power. It is evident that both the Legislature and the court have intended to give a "broad scope" to this power, as was said in *Nelson v. Marshall*, 77 Vt. 44, 58 Atl. 793. In that case it was held that a party was entitled to a new trial, for the reason that by accident she had been prevented from filing her exceptions within the time required by law. The broad construction there given to this section, aided by the provision of section 1664, clearly entitle the petitioner to a new trial.

Webster defines accident as an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, and therefore not expected; chance, casualty, contingency. The word has often received judicial construction. In *Bostwick v. Stiles*, 35 Conn. 198, it is said that it includes, not only inevitable casualties, such as are caused by the act of God, but also those that arise from unforeseen occurrences, misfortunes, losses, and acts or omissions of other persons without the fault, neglect, or misconduct of the party. *Alexander v. Bailey*, 2 Lea, 639; *State v. Lewis*, 107 N. C. 978, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105. See 1 Am. & Eng. Enc. 272, and notes. In the same line of reasoning are *Webster v. Smith*, 72 Vt. 12, 47 Atl. 101; and *Bradley Fertilizer Co. v. Fuller*, 58 Vt. 315, 2 Atl. 162. *Rowell, J.*, in *Kopper v. Dyer*, 59 Vt. 478, 9 Atl. 4, 59 Am. Rep. 742, aptly quotes from 2 Pom. Eq. § 823, note 1: "Accident is an unforeseen and unexpected event, occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal right or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain." In that opinion the writer proceeds to say: "And the chief point of the thing is that, because of the unforeseen and unexpected character of the occurrence by which the legal relation of the parties has been unintentionally changed, the party injuriously affected thereby is in good conscience entitled to relief that will restore those relations to their original character, and place him in his former position."

We think that the petitioner's sickness

and the death of his father may properly be considered accidental causes of his failure to appear in court upon the trial of his case, and that he is entitled to a new trial.

Judgment reversed, verdict set aside, and a new trial granted.

LEWIS v. JOHN CRANE & SONS.

(Supreme Court of Vermont. Caledonia. Nov. 21, 1905.)

1. PARTNERSHIP—ACTIONS AGAINST PARTNERS.

In an action for negligence brought against defendants "as individuals or as partners," defendants are not entitled to have plaintiff ordered to elect whether he will proceed against defendants as individuals or as partners.

2. TRIAL—OPENING STATEMENTS—DECLARATIONS AS TO LAW.

The action of plaintiff's counsel in stating his contentions as to the law in his opening statement, and in falling into inaccuracy in some of his statements, was not ground of exception, where he expressly disclaimed a correct legal form for his statement, and reminded the jury that they were to take the law from the court, and said nothing of an inflammatory character, and suggested that the claim of defendants would differ from that of plaintiff.

3. PLEADING — DEMURRER — GROUNDS — DUPLICITY.

Duplicity in a count of a declaration is ground for demurrer, but not for a motion to compel an election.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 434.]

4. MASTER AND SERVANT—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In an action for injuries to a servant, caused by an unsafe hook which sustained one end of a swing staging, evidence as to the kind of staging used was admissible.

5. SAME.

Evidence that the hook was given to defendants on purchasing some ladders at a stated price was admissible.

6. SAME.

Evidence by a blacksmith, who did some work upon the hook, as to the character of the hook and to the effect which his work would tend to have in weakening it, and that he told one of the defendants about the hook, was admissible.

7. SAME.

Evidence of a witness, who was present when the officer served the writ in the case, that she was then shown parts of the broken hook by defendant's wife, and describing the parts so shown to her, was admissible.

8. SAME.

Evidence of a competent blacksmith, who repaired the hook a short time before the accident, as to the ways in which the hook could have been repaired, and that the hook had the characteristics of poor iron, was admissible.

9. EVIDENCE—EXPERT TESTIMONY.

Evidence of an experienced painter, who had made great use of swing stagings, as to the weight which a hook of the size in question would support, and that he would guaranty that a staging supported by such a hook would hold a certain weight, was admissible.

10. SAME.

Evidence of a carpenter of long experience, as to whether swing staging was safe and suitable for work such as that in question, was properly excluded, where the general safety of swing stagings was assumed by counsel for both

parties and the court not to be in issue in the case.

11. MASTER AND SERVANT—INJURIES TO SERVANT—ACTION—EVIDENCE.

Evidence as to what defendant would have done with the hook, if he had been told that it was poor iron and not safe, was properly excluded.

12. SAME.

Evidence that defendant was in charge of the inside arrangement of the building on which the work was being done, the injury having occurred while plaintiff was at work on the clapping, was inadmissible to show that defendant was in charge of the clapping, and should have been excluded.

13. WITNESSES—RE-EXAMINATION—MATTERS INVOLVED IN CROSS-EXAMINATION.

A party cannot object to the re-examination of a witness on matters which he himself has brought out on cross-examination.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1003.]

14. DAMAGES—PLEADING—VARIANCE—PERSONAL INJURIES.

A declaration alleging injuries to plaintiff's legs, back, and body, but not describing with any precision the parts claimed to be injured, is broad enough to authorize the admission of evidence as to the condition of plaintiff's ankle.

15. APPEAL—PRESUMPTIONS.

Where the objection to evidence of the condition of an injured ankle at the time of trial is that it is not admissible under the declaration, it will be presumed on appeal, in the absence of a showing to the contrary in the bill of exceptions, that the evidence was connected with testimony as to the injuries sustained.

16. EVIDENCE—EXPERT TESTIMONY—PERSONAL INJURIES.

In an action for injuries resulting in a stiff ankle, a physician may testify as an expert as to the nature of the stiffness, the motions and actions that it will impede, its causes, and its character as temporary or permanent.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2337.]

17. PARTNERSHIP—ACTION AGAINST PARTNERS—EVIDENCE—RELATIONSHIP OF DEFENDANTS.

In an action for negligence brought against defendants "as individuals or as partners," plaintiff may inquire into the business relations of defendants between themselves, although he declines to elect whether he will proceed against them as individuals or as partners.

18. DAMAGES—PERSONAL INJURIES—EVIDENCE—WAGES.

In an action for personal injuries, evidence as to plaintiff's wages at times shortly before the occurrence of the injury in question is admissible on the issue of damages.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 237, 498.]

19. TRIAL—DIRECTION OF VERDICT.

A verdict will not be directed for defendants, if one count of the declaration is good and there is evidence to support it.

20. NEW TRIAL—GROUNDS—IRREGULARITIES AFFECTING JURORS' DELIBERATIONS.

In an action for personal injuries, the fact that certain models, which had not been received in evidence, were discovered in the jury room after the jury had retired to consider their verdict, was not ground for setting aside the verdict or discharging the jury, where, immediately upon discovery of the fact, the court called the jury into the courtroom and admonished them, and the jury had agreed upon a verdict for plaintiff before the models got into their possession.

Exceptions from Caledonia County Court; Munson, Judge.

Action by M. A. Lewes against John Crane & Sons. There was a judgment for plaintiff, and defendants excepted. Reversed.

Argued before TYLER, START, WATSON, and HASELTON, JJ.; and reargued before ROWELL, C. J., and TYLER, WATSON, HASELTON, and POWERS, JJ.

Herbert I. Goss and Dunnett & Slack, for plaintiff. J. P. Lamson, for defendants.

HASELTON, J. This was an action on the case in which the plaintiff sought to recover for injuries alleged to have been sustained through the negligence of the defendants. The cause was tried by jury at the June term, 1901, of the Caledonia county court. A verdict was returned for the plaintiff, and judgment was rendered thereon. The defendants excepted.

The defendants were set up in the writ as John Crane, Charles Crane, and George Crane, "as individuals or as partners under the firm name and style of John Crane & Sons." Before the introduction of any evidence the defendants moved that the plaintiff be required to elect whether he would proceed against the defendants as individuals or as partners. But the doctrine invoked was not applicable. The action being what it was, the defendants were not entitled to have the plaintiff ordered to elect in what way he would attempt to connect the defendants. The motion was properly overruled.

In an opening statement to the jury the plaintiff's counsel briefly outlined his claim with regard to the law of negligence. The gist of the statement in this regard was that negligence is a shortage of duty; but some expressions were used which deviated from an accurate definition of negligence. Counsel expressly disclaimed that such statement was made in correct legal form, and at the outset reminded the jury that they were to take the law from the court. There was nothing of an inflammatory character in the statement, and what was said about the law was put forward in a way that suggested to the jury that the claim of the defendants would differ from that of the plaintiff. An exception was taken to the opening statement, but it avails nothing. In so holding there is no intention on the part of the court of giving countenance to the idea that counsel may argue the law to the jury, or read law to the jury, or treat as open questions of law upon which the court has ruled, or in any way seek to have the jury understand that they can do otherwise than to take the law from the court.

At the close of the plaintiff's opening statement the defendants claimed that the plaintiff had alleged more than one cause of action in the same count and moved that the plaintiff be compelled to elect which of such causes of action he would rely upon. The motion was overruled, and the defendants excepted. This motion was properly overruled. If the count in question was bad for

duplicity and the defendants desired any ruling or action of the court on that account, they should have demurred. *Onion v. Clark*, 18 Vt. 363.

The following quotation from the exceptions shows, in brief, what the case on trial was: "The accident occurred November 3, 1899, while plaintiff was working for the defendants on a barn they were building on their premises in Cabot. The negligence complained of was the furnishing by defendants of an unsafe iron hook which sustained one end of a swing staging." Evidence as to the kind of a staging used was received under objection and exception by the defendants; but very clearly nobody could testify intelligibly about the character of the hook in question, unless evidence was received with regard to the kind of a staging of which it formed a part and with regard to its function as a part of such staging.

Evidence on the part of the plaintiff tended to show that in the August next before the accident the defendants purchased some ladders at the price put upon them, which was \$7.50, and that at the time of the purchase they were shown the staging hook in question and another, and allowed, if they desired, to take the hooks with the ladders without paying anything in addition to the price put upon the ladders; that the defendants paid the price put upon the ladders and took the hooks with them, and that the hooks were put into a stable and were not used until a few days before the accident. The testimony as to the amount paid for the ladders and as to the throwing in of the hooks was received subject to objection and exception on the part of the defendants. But the fact, if it was a fact, that in the sale and purchase of the ladders the hooks were treated as the testimony tended to show they were, was a circumstance proper for the jury to consider along with the other circumstances which they might find in their efforts to determine what the defendants knew or ought to have found out about the hook in question. The price paid for the ladders, or any other fact about the ladders, taken by itself, was wholly immaterial, as there was no claim or evidence that the ladders had anything to do with the accident. The price paid for the ladders could not have been received and treated otherwise than as an incident of the transaction through which the defendants got the hook in question; and we discover no error in the reception of the testimony on the part of the plaintiff relative to the acquirement by the defendants of the hooks and ladders.

It appeared that the hook in question was procured by the defendants from one Parlin, and there was evidence tending to show that one Wales, a blacksmith, did some work upon the hook during the summer before the occurrence of the claimed injury to the plaintiff, and while Parlin had the use of the hook. Wales was a witness in behalf of the

plaintiff, and was permitted to testify to the character of the hook upon which he did the work and to the effect which his work upon the hook would tend to have in weakening it, and that he told one of the defendants about this poor hook. A part of this evidence was received under objection and exception, but all of it was admissible, since, as had been said, there was evidence tending to show that the hook upon which the blacksmith Wales did his work was the hook complained of.

Evidence in the case tended to show that the defendants had no hooks except the two already referred to. In connection with this evidence one Ada Stone, who it appeared was at the defendants' house when an officer went there to serve the writ in the case, was permitted to testify that at that time Mrs. Crane showed the parts of the broken hook, and said witness Ada described the pieces so exhibited, the shape and size of the hook, the angle and location of the break, and the indications of welding. This was not evidence on the part of Mrs. Crane, but was the evidence of a competent witness tending to show the appearance of the parts of the hook in question when she chanced to see them. This testimony of Ada Stone was received subject to objection and exception by the defendants, but there can be no doubt of its admissibility. In their brief the defendants' counsel make no serious contention here, but say: "Perhaps the evidence of Ada Stone was admissible." The exceptions state that "at the trial the defendants were requested to produce the parts of the hook which broke, but did not know their whereabouts." This statement makes it doubly sure that there was no error in the reception of the evidence of Miss Stone.

Charles Preston, a carpenter, was one of the plaintiff's witnesses. It is stated in the exceptions that on cross-examination by the defendants he testified as to "the general danger arising from swing stagings." Thereafter, upon re-examination, he testified, in effect, that he thought the danger that such a staging would swing away from the building might be avoided. This testimony upon re-examination came in under objection and exception on the part of the defendants. But we assume from the language of the exceptions that the defendants had on cross-examination made Preston their witness in respect to the danger arising from the use of swing stagings, and that so they have no ground to complain because during the re-examination of the witness in behalf of the plaintiff he was examined upon that point.

It appeared that the second day before the breaking of the hook it was repaired by one Myers, the repairs consisting in cutting and mending. The plaintiff called Myers as a witness, and the witness told how he mended the hook. Under the defendants' objection and exception he was then asked whether it could have been repaired in any other way

by a blacksmith. His reply was: "It could have been patched." Under objection and exception he testified to the characteristics of iron which is not good when it is heated and scarfed. His evidence tended to show that the hook in question had the characteristics of poor iron, and that while the hook was at his shop and after he had mended it he informed the defendant John that the hook was made of poor iron and was unsafe. The exceptions state that the witness Myers was a competent blacksmith. So far as the exceptions show all the testimony of Myers was properly received. It was the testimony of a competent blacksmith tending to show that before the accident he had mended the hook in the only way it could be mended without patching, that he had discovered that it was poor in quality, and that after he had mended it, but before it was taken from his shop, he notified one of the defendants that it was unsafe. His testimony about the ways in which the hook could be mended, in connection with all his testimony, had a bearing upon the condition in which the hook was.

The plaintiff's declaration alleged injuries to his legs, back, and body resulting in inability to labor. Physicians called by the plaintiff testified, under the defendants' objection and exception, to the condition of the plaintiff's ankle at the time of the trial, as to the amount of stiffness that remained, and, as experts, as to what effect the existing stiffness would have on the ability of the plaintiff to get about and work. The objection made to their testimony as to the condition of the plaintiff's ankle was solely that it was not admissible under the declaration. But the alleged injuries made this testimony admissible. It was not necessary to the admission of this evidence that the parts claimed to be injured should be described with anatomical nicety. The testimony as to the condition of the ankle at the time of the trial is presumed to have been connected with testimony as to the claimed injuries, since the bill of exceptions discloses nothing to the contrary, and since the objection was as is above stated. The objection to the testimony of the doctors as to what effect the existing stiffness would have on the plaintiff's ability to get around and work was that the subject-matter was not proper for expert evidence. But it would require an expert to tell the nature of the stiffness, the motions and actions that it would impede, if it would impede any, and the expert evidence was properly received. Whether such stiffness as was found resulted from muscular inflammation, from an injured tendon, from an impairment of the nerves of motion, or from voluntary control thereof by the plaintiff or from some other cause, whether the rigidity was likely to be relieved or to be aggravated by exercise, whether it was temporary or permanent in its nature, were all matters upon which the opinion of experts could properly be taken. What the expert

testimony in fact tended to show does not appear from the bill of exceptions.

The plaintiff called one Lewis Gingras, who testified that he had been a painter for many years, that he had made great use of swing stagings in outside painting, that during the painting season eight or nine men employed by him had used such stagings, and that he had used hooks made from $1\frac{1}{8}$ -inch iron as well as others. So far his testimony was of a qualifying character. He then testified to the way in which such stagings were attached to a building, that a staging supported by iron hooks of the size named would hold 1,100 to 1,200 pounds, more or less, that he would guaranty it to hold that much, and that it would be safe to have on one end of such a staging supported by one hook "two or three men at least and the stock." Other painters testified to the same subject-matter. All of this testimony of the painters was received subject to objection and exception on the part of the defendants. We make no criticism here upon the use by Gingras of the word "guaranty." The word was inapt, but the jury could have attached no technical meaning to it. They must have understood it as a strong expression of opinion, and a majority of the court think that the witness was properly testifying, not to the safety of swing stagings in general, but merely to the normal strength of an iron hook of the diameter of the one which broke. In this view the reception of the evidence of Gingras was not error.

The plaintiff called two of the three defendants, and these two testified that all three "were interested in the farm and farming, and were partners under the firm name of John Crane & Sons." The defendants objected to this evidence on the ground that the plaintiff was not entitled to inquire into the business relations of the defendants, so long as he declined to elect whether he would proceed against them as individuals or as partners. To the reception of the evidence the defendants excepted. At another stage of the trial the defendants renewed their motion to have the plaintiff elect whether he would attempt to hold the defendants as individuals or as partners. The motion was overruled, and the defendants excepted. In all that relates to this matter of election there was no error on the part of the court, and no more need be said in regard to that subject than is found in the opening part of this opinion.

The defendants called one Wood, a carpenter of long experience in putting up buildings, and asked him "whether swing staging was safe and suitable for carpenter stagings for clapboarding a barn." This question was properly excluded. Counsel on both sides, in argument before this court, take the position that the general safety of swing stagings was a matter not properly in the case, and the charge of the court proceeded upon that ground. Besides, the exceptions

show no offer in connection with the question. *State v. Buck*, 74 Vt. 29, 51 Atl. 1087; *Fuller v. Valiquette*, 70 Vt. 502, 41 Atl. 579.

Subject to objection and exception by the defendants, evidence was introduced by the plaintiff tending to show his wages at times shortly before the occurrence of the injury in question. This evidence bore upon the question of damages, and so was properly received.

The defendant John denied that the blacksmith, Myers, gave him the information testified to by Myers about the hook which broke. In this state of the testimony the defendants asked the said John this question: "What would you have done with this hook if Myers had told you that it was poor iron and not safe?" The question was excluded and its exclusion was proper. The answer would have been mere conjecture.

The plaintiff claimed, and his evidence tended to show, that the defendant Charles supervised the work. The defendants' evidence tended to show that Charles had had no experience as a carpenter except on this job, and that the plaintiff had charge of the work, and that Charles worked under him. As to George, the exceptions recite that: "The evidence tended to show that the defendant George Crane had nothing to do with clapboarding or finishing the barn." In this state of the evidence the plaintiff was allowed, under the objection and exception of the defendants, to introduce evidence tending to show that the questions which came up as to the inside arrangements of the barn, including the location of the stable, were determined by the defendants Charles and George, and not by the plaintiff. It is, in effect, claimed by the plaintiff that this evidence bore upon the question of who was actually overseeing the work of clapboarding which was in progress at the time of the accident. But the evidence had no such bearing. Assuming the fact to be that the defendants Charles and George determined the inside arrangements of their barn, such as the location of the stable and all that the phrase "inside arrangements" imports, this fact had nothing to do with the question of who was superintending the work of clapboarding at the time of the injury. The admission of this evidence was error, and neither from the bill of exceptions nor from the briefs of counsel are a majority of the court led to suppose that the error was harmless.

The defendants called the wife of the defendant John Crane, and offered to show by her several matters material to the case. The offered evidence of Mrs. Crane was excluded, and the defendants excepted. With reference to the rulings of the court excluding the testimony of Mrs. Crane, the bill of exceptions refers to the entire case and makes the transcript thereof controlling. An examination of the transcript shows that the correctness of these rulings could only be determined by a critical examination of

shifting, and apparently conflicting, evidence given by the same witness, and by a determination of the attitude which counsel took in regard to the matter of the testimony offered. The subject of her right to testify came up at various times and in various ways and under various claims and concessions on the part of counsel for defendants. This being so, and a reversal being necessary, and the law as to the competency of husband and wife as witnesses being now different from what it was when this case was tried, it is uncalled for and would be unprofitable to decide, and it is not decided, whether, upon any point or in anybody's favor, Mrs. Crane should have been allowed to testify.

Exceptions to a few other rulings relating to evidence, and exceptions to the charge of the court, all of which depended for their correctness upon the view taken of the evidence, are not here reviewed, either because the court was so clearly right as to make discussion uninformative, and therefore superfluous, or because the exceptions relate to matters which in no likelihood would arise on another trial.

At the close of all the evidence the defendants made a motion to have a verdict directed in their favor. This motion was a renewal of a motion made at the close of the plaintiff's evidence, and was overruled; the defendants excepting. Several grounds for the motion were assigned; but since a verdict will not be directed if one count is good, and there is evidence to support it, the motion rested upon two grounds, assumption of risks by the plaintiff, and contributory negligence on his part. With reference to these grounds we have examined the entire case, and we find the evidence to be so conflicting as to the conduct of the plaintiff, and as to what he knew and comprehended, or ought to have known and comprehended, about this defective hook, that the motion for a verdict was properly denied.

After the jury had retired, a small model of the barn which had not been received as an exhibit, and a painter's staging hook which had been used in the examination of some witnesses but had not been offered or received as an exhibit, were discovered in the jury room. Immediately thereupon the court called the jury into the court room and admonished them, but did not discharge them from the consideration of the case. The defendants excepted to the action of the court in not then discharging the jury. After the verdict was returned, the defendants moved to set it aside because of the discovery of the model and hook in the jury room. The court then took testimony and found that the jury had agreed upon a verdict for the plaintiff before the model and hook got into their possession, and, without considering the statements of jurymen that the model and hook did not influence them in assessing damages, found that the model and hook could not have influenced the jurymen in determining

damages. Thereupon the motion to set aside the verdict was overruled, and the defendants excepted. Everything that the court considered in making this finding is before us, and we hold that the finding was fully warranted. The exception to the refusal to discharge the jury, and the exception to the refusal to set aside the verdict, avail nothing.

Judgment reversed, and cause remanded.

**PUBLIC SERVICE CORPORATION
OF NEW JERSEY et al v.
DE GROTE et al.**

**VILLAGE OF RIDGEFIELD PARK v.
PUBLIC SERVICE CORPORATION
OF NEW JERSEY et al.**

(Court of Chancery of New Jersey. Oct. 19, 1905.)

1. GAS—GAS COMPANIES—RIGHTS IN PUBLIC PLACES.

Where the act incorporating a corporation gave it the right to lay gas mains and conduct a lighting business in a certain township, a subsequent statute dividing the township into several townships, none of the original township remaining, could not affect the corporation's rights.

2. MUNICIPAL CORPORATIONS—ORDINANCES—REPEAL.

Where a village ordinance required the permission of the street commissioner as a condition precedent to the right to lay gas pipes in the streets, but subsequently an ordinance was passed giving a certain corporation the right to lay such pipes, such ordinance containing many conditions and restrictions, but not requiring such consent, the latter ordinance repealed the former.

3. GAS—RIGHTS IN STREETS—STATUTES—CONSTITUTIONALITY.

Act April 8, 1903 (P. L. 1903, p. 359), providing that any corporation authorized to lay or maintain pipes in the streets of any municipality for the distribution of gas may use its pipes or mains within such municipality for the transmission of gas to any other municipality in the streets of which it may have lawful authority to lay or maintain pipes for the distribution of gas, is not unconstitutional.

4. SAME—PIPES AND MAINS.

The statute, having been enacted at a time when consolidations of gas companies had been made throughout the state, is to be construed as authorizing a gas company, within the statute, to lay in the streets of a municipality pipes large enough for the transmission of gas to other municipalities, though such size of pipe is not required for the needs of the municipality in the streets of which they are laid.

5. INJUNCTION—ISSUES.

Where a corporation leased its business to another, and they were both complainants in a suit for an injunction to restrain interference with such business in certain respects, the validity of the lease was immaterial.

6. SAME—COSTS.

Where a gas company had a right to lay pipes in streets of a village without first obtaining the permission of the street commissioner, but the corporation applied for such permission, and while the application was pending proceeded to lay the pipes and sought an injunction restraining any interference with such action, and the village contested the injunction and brought a suit to restrain the laying of the pipes, the corporation was entitled to costs in both proceedings.

7. SAME—VIOLATION—CONTEMPT—PERSONS NOT PARTIES.

Where a corporation obtained an injunction against certain officers of a township restraining them from interfering with the laying of gas pipes by complainant, such persons being enjoined in their individual capacities, and subsequently certain constables attempted to arrest those laying the pipes, copies of the injunction being thrust upon the constables when they were making the arrests, and they took the injunction papers and put them in their pockets and did not read them, they would not be held guilty of contempt of court; it appearing that they acted in good faith.

Suit by the Public Service Corporation of New Jersey and another against John W. De Grote and others, to enjoin interference with the laying of certain gas mains by complainants, and suit by the village of Ridgefield Park to restrain complainants from laying such gas mains. Motion by John W. De Grote and others for a modification of of the former complainants' injunction, and application by the former complainants to punish certain persons for contempt in violating the injunction. Injunction awarded the former complainants, and the motions denied.

Hobart Tuttle and Frank Bergen, for Public Service Corporation and Gas & Electric Company of Bergen County. Luther Campbell and Michael Dunn, for village of Ridgefield Park, John W. De Grote, and others.

STEVENSON, V. C. (orally). I take up the matter of laying the pipes, or the attempt to lay pipes, in the village of Ridgefield Park. There are three separate motions now before this court to be determined.

The first is a motion to modify a writ of injunction issued from this court by order of the chancellor, upon a bill filed by the Public Service Corporation of New Jersey and the Gas & Electric Company of Bergen County, as complainants, against certain persons, six I think, who were charged with interfering with the operation of the complainants in laying large gas mains within the limits of the municipality or village of Ridgefield Park. The injunction issued by the chancellor restrains these six natural persons from interfering with the deposit of these pipes along the streets in the village of Ridgefield Park, and the burying of them. The defendants, the six natural persons, embrace, as I recall the facts, three constables or police officers, or officers of that character connected with the municipality, a justice of the peace, and two members of the board of trustees of the village. These six persons had in an official way interfered with the incumbering of the streets with these pipes. The two members of the public board had to a certain extent instigated the acts that were complained of, which consisted of the arrest of the agents of the complainants who were laying these pipes by the three police officers, and the arraignment and holding to bail of these

agents before the defendant, who was a justice of the peace of the county. The defendants having filed their answer have not moved for a dissolution of the injunction, but have moved for a modification of it, which is equivalent to an injunction upon the complainants restraining them from laying these pipes, pending the litigation to ascertain and determine the respective rights of the parties. The complainants thus have enjoined the defendants from interfering with their operations in laying these pipes; the defendants upon filing their answer practically move for an injunction in the cause restraining the complainants from laying their pipes—a somewhat peculiar legal situation.

The next proceeding before this court in relation to this matter is an application on the part of the complainants, the Public Service Corporation and the Gas & Electric Company of Bergen County, to punish three persons for contempt, because of their alleged conduct in the way of obstructing the complainants in the enjoyment of their injunction. That perhaps is not an accurate statement of the exact nature of this proceeding, as will appear further on, although perhaps it is the way in which the proceeding was conceived of by the originators of the movement to have these parties punished for contempt. The three parties are not defendants in the cause. The writ of injunction did not go against them, either personally or by the use of any words which would include them within a class of people whom it was intended to reach and restrain. The application is made to punish these three outsiders, because they did or undertook to do the very acts which interfered with the complainants' operations in laying these pipes, which the defendants in the suit had done or undertaken to do and which the defendants in the suit were enjoined from doing. It is an unusual contempt proceeding in the state of New Jersey, and so far as I know without precedent.

The third proceeding before the court is upon an original bill filed by the village of Ridgefield Park, which for the first time by this bill comes into these contentions, and the object of the bill is to restrain the Public Service Corporation and the Gas & Electric Company of Bergen County, the complainants in the former bill, from laying certain pipes, which are described in the bill, within the corporate limits of the village.

The answer of the six defendants to the bill of the Public Service Corporation and the Gas & Electric Company of Bergen County takes two positions by way of defense: First, that the complainants have no right whatever to lay gas pipes in and under the streets of the village of Ridgefield Park without the written consent of the officials of the village, which consent is prescrib-

ed as a condition precedent to the opening of any street in the village by an ordinance adopted in 1893. Secondly, that such right, namely, the right of the complainants to lay gas pipes in the streets of the village without obtaining the consent of the municipal authorities in writing, is confined to the laying and maintaining of pipes and mains which are reasonably necessary for the supply of gas within the corporate limits of this village, a small village of 2,800 inhabitants. And the answer sets up that as a matter of fact the complainants are not undertaking to lay pipes for the purpose which I have described, but are undertaking to lay immense iron pipes of a diameter of 20 inches, for the purpose of transmitting gas through and under the streets of the village for use in other municipalities where the complainants are engaged in purveying gas. The position is taken by the answer that this is an additional burden upon the streets; that the complainants have no franchise which permits them to lay or maintain such large pipes altogether beyond the necessities of the gas supply to the municipality.

The bill filed by the village of Ridgefield Park—and it must be borne in mind that the two defenses which I have described are set up by the six natural persons who are defendants to the suit of the Public Service Corporation and the Gas & Electric Company of Bergen County—sets up the rights of course of the municipality, but the municipality is not a party to that first suit. The municipality, the village of Ridgefield Park, in its bill does not seem to take the extreme position which the six natural persons, the defendants, take against the former bill by way of defense. The village of Ridgefield Park asks for an injunction against the Public Service Corporation and the Gas & Electric Company of Bergen County to restrain them from laying these large 20-inch pipes, because they are not being laid for the purpose of carrying on any corporate business, for accomplishing any of the corporate business of the two companies within the limits of the village, but are being laid for the purpose which I described a moment ago; and, because the defendants are thus endeavoring to impose an excessive and unlawful burden upon the streets of the municipality, and are without the protection of their franchisees, an injunction is asked.

Now, these are the three matters to be determined. They were all argued together. All the affidavits which belong to each proceeding are by consent to be used in the other proceedings. I think at last we have definitely settled what are the motion papers—what are the proofs which are to be considered in determining each one of these motions; and I may say here I understand that the act of 1861, incorporating

the Hackensack Gaslight Company, and the act of 1864, incorporating the Bergen County Gaslight Company, are also deemed before the court in evidence.

The first question to be determined in both of these suits is the question whether the complainants, or either of them, now have, or had at the time of the transactions which were the subject-matter of investigation, a right to lay and maintain gas mains within the corporate limits of the village of Ridgefield Park, without obtaining the consent in writing of the official of the municipality designated by the ordinance of 1893 as the official whose written consent must be obtained. As I stated, the six defendants to the bill of the two corporations boldly take the position that the complainants have no right to open the streets and lay gas pipes, without obtaining in each instance the written consent of this designated official, the superintendent of streets. This contention seems to me to be entirely without merit. The right of the complainants or one of them to lay and maintain a gas plant, a plant with gas mains and pipes, under the streets of the village of Ridgefield Park can safely be traced, in my judgment, to two different sources, and possibly a third. It is conceded that the complainant, the Gas & Electric Company of Bergen County, now holds and exercises all the franchises of the Hackensack Gaslight Company, incorporated in 1861, and the Bergen County Gaslight Company, incorporated in 1864; both being incorporated by special charters which are before the court in evidence in these proceedings.

The charter of the Hackensack Gaslight Company, passed in 1861, incorporates the company (I now quote) "for the purpose of lighting the streets, buildings, manufactories and other places in and adjacent to the village of Hackensack in the county of Bergen." It will be observed that the object is not "the lighting of streets, buildings and manufactories in Hackensack and in other places adjacent." The object is "the lighting of the streets, buildings, manufactories and other places in and adjacent to the village of Hackensack," a somewhat different form of language from that employed in the case of the charter of the Morristown Gaslight Company, which was the subject of examination and determination in the case of *Borough of Madison v. Morristown Gaslight Company*, 63 N. J. Eq. 120, 52 Atl. 158, in the Court of Chancery, and afterwards in the Court of Appeals as reported in 65 N. J. Eq. 356, 54 Atl. 439. The charter of the Hackensack Gaslight Company further proceeds to empower the company (I now quote) "to lay down gas pipes and erect gas posts, burners and reflectors, in the streets, alleys, lanes, squares, highways and public grounds in the village of Hackensack and places adjacent in the county of Bergen." Here we have a most significant difference of phraseology from that which was em-

ployed in the Morristown Case. A grant is made of power to lay down gas pipes in the streets, alleys, highways, and public grounds in the village of Hackensack and in places adjacent in the county of Bergen. I have supplied the word "in," but grammatically it must be supplied; so that the gas company have the power here to lay pipes "in streets, in places adjacent to the village of Hackensack, in the county of Bergen." I may not refer again to the topographical relations of these different municipalities, but the force of this language is apparent when we consider that it is now proved in these causes that the territory of the village of Ridgefield Park is adjacent to the territory of the old village of Hackensack, separated by the Hackensack river. I do not lose sight of the fact that a navigable stream separates these two places, and some questions might arise in regard to the operation of the language which I have read. As I indicated, I do not trace any right of the complainants to the charter, not for the reason which Mr. Dunn has suggested, but for another which I will briefly state.

The Hackensack Gaslight Company, after consolidating with the Hackensack Edison Light Company, became merged in the consolidated corporation called the Hackensack Gas & Electric Company, and this Hackensack Gas & Electric Company being in possession of the franchise which I have described, of maintaining gas pipes under the charter of 1861, whatever its scope may have been, saw fit to apply to the village of Ridgefield Park in 1898 for permission to lay their pipes in the streets and obtained from that village and accepted an ordinance granting it the right to maintain a plant of gas mains in the streets of the village, under a number of conditions which are set forth. The parties entered into a contract for the maintenance of this plant, by which each party received large advantages, and I think it is a very serious question indeed whether the corporation, the Hackensack Gas & Electric Company, having thus dealt with the village of Ridgefield Park and obtained this ordinance, commonly but erroneously called a charter, and having enjoyed the fruits of it and having laid their system of pipes under its provisions, now can come forward and say: "Oh! We had the right all the time to do this very thing, under the old charter of 1861, by which one of our constituent companies, the Hackensack Gaslight Company, on account of the wide language employed in describing the area of its operations, got a right and had a right to do this very thing." For the reasons that I have indicated, I therefore do not place the right of the complainants or either of them to lay and maintain gas pipes in the village of Ridgefield Park upon this charter of 1861; and originally, I may say, counsel for the two corporations did not insist that such a right could be maintained. Subsequently, how-

ever, counsel undertook to place the right of the complainants upon this charter of 1861, and therefore I have felt it necessary to dispose of the matter.

The next source of authority to these two corporations, or one of them, to maintain a plant of gas pipes and mains in the village of Ridgefield Park, is the charter of the Bergen County Gaslight Company of 1864. It is conceded that the complainants, or one of them, now enjoy all the rights which the Bergen County Gaslight Company received under its charter. It is necessary therefore to find out what rights to lay and maintain gas pipes were vested in the Bergen County Gaslight Company by this act of 1864. The act incorporates the company (I now quote) "for the purpose of lighting the streets, buildings and other places in the township of Hackensack and its vicinity." It is perfectly plain that under that language the object of the provision is to furnish gas lighting throughout the township of Hackensack, and also in its vicinity. The language is "the lighting of streets, buildings and other places in the township of Hackensack and its vicinity," and here again we have to supply the word "in," so that the phraseology when the word is supplied will be "in the township of Hackensack and in its vicinity." Well, we need not concern ourselves here about the meaning of the word "vicinity," the content of that word, because at the time this charter was passed in 1864 the entire territory of the village of Ridgefield Park was embraced within the limits of the township of Hackensack. In 1871, ten years after this charter was granted, the Legislature divided the township of Hackensack into three townships, and, as I understood it, the whole territory of the original township of Hackensack was cut up into three different townships; there being no portion left, there being no Hackensack township left after this act went into operation. So I understand the contention of counsel. The act is entitled "An Act to divide the township of Hackensack into three townships," and my brief examination of the act itself seemed to indicate that, beyond the title, there was nothing to show that the whole of the territory of the township had been carved up into these three townships. For all that appears from the language of the act as I have hastily read it, there might have been left a portion of the ancient territory of Hackensack township, which after the act went into operation would constitute a Hackensack township; but the title announces that the whole township was subdivided, and such is admitted to be the fact. Now then, counsel for the defendants take the position that the division of this original Hackensack township into three different townships had the effect to limit the extent of the grant to the Bergen County Gaslight Company in this charter of 1864. I think this contention is without support in authority or reason.

In 1864 the Legislature granted to this corporation the right to engage in the business of lighting the streets and houses throughout the entire township of Hackensack as it then existed. The corporation was created upon the strength of that grant. The capital was subscribed and paid in for that purpose. It may be questioned whether the Legislature would have the power subsequently by dividing up the township to limit the operations of a corporation created by this charter. If the Legislature could do that, where could the line be drawn? The township of Hackensack might be left by legislative action composed of one-tenth of the original township or one-twentieth of the original population. The grant of the Legislature, upon which the corporation has been created and on the strength of which the capital had been subscribed and paid in, might become of no value whatever. But there is not any intention discoverable in this legislation of 1871 to affect the charter of 1864. The charter of 1864 gives a right to maintain and carry on the gas lighting business throughout the whole territory of the township of Hackensack as it then existed. That grant is not affected by subsequent legislation which cuts up the territory of Hackensack township, and the mere fact that the Bergen County Gaslight Company had not seen fit to extend its pipes throughout the whole area of Hackensack township is entirely an immaterial circumstance. The money was subscribed and the business entered into upon the strength of this charter, which gave the corporation the right to extend its mains and to extend its business from time to time throughout the entire area described in the charter, the area of Hackensack township. This right could not be interfered with. It is not to be presumed that the Legislature intended to interfere with it. I will say, further, there is not anything in the act of 1871 upon which a plausible argument can be founded that the Legislature intended to interfere with the scope of the grant, the franchise conferred on this corporation by the act of 1864, on the strength of which all this capital was invested. Nothing has been said about abandonment of any portion of the franchise of the Bergen County Gaslight Company, and I do not understand that there are any circumstances in this case that would found an argument that there had been any partial abandonment. These companies are started for the supplying of gas facilities in a prescribed area. It may take generations to cover the whole of that area. They keep on enlarging their plant from generation to generation as the public want increases, and it would be a very singular position to take that this corporation, chartered in 1864 for the purpose eventually of covering the entire area of this great township with a network of gas mains and pipes, when the public want would justify such expenditure, must, within 20 years or 30

years or 40 years or any other prescribed number of years, cover all the area which they intend to cover, and that after a period has elapsed the extension of their mains must cease, notwithstanding the fact that the expansion of the population continues and the public want grows greater and greater and wider and wider. I cannot adopt any such theory as that. It seems to me therefore that the complainants, or one of them, the Gas & Electric Company of Bergen County, certainly had at the time of the operations complained of, and now has, all the original charter rights of the Bergen County Gaslight Company under this charter of 1864, and that under its charter this complainant company has the right to (and I now read from the charter) "to lay down therein gas pipes and to erect gas posts, burners, and reflectors in the streets, avenues, highways, public grounds, alleys and lanes in the township of Hackensack and its vicinity and to adopt all proper and necessary means to light all dwellings, stores and other places situated therein with gas"; and under our settled rules of construction that right extends over the entire area of the township of Hackensack as it existed in 1864. Upon turning to the act of 1871 again, I observe that it left no township of Hackensack in existence. It divided what was the territory of Hackensack township into three new townships, no one of which bore the name of Hackensack. It would, I think, upon the theory of the counsel for the village of Ridgefield Park, be quite difficult to define the area within which the Bergen County Gaslight Company had power to operate after the passage of this statute. Counsel would hardly venture to go so far as to insist that when Hackensack township ceased to exist this gas company was deprived of its franchise.

The second source to which the right of the complainant, or one of them, may be traced is the ordinance of the village of Ridgefield Park adopted in 1898. It is conceded I believe by both parties in these causes that, under the act of 1893, the village of Ridgefield Park has the power to pass ordinances giving power to lay and regulate or prohibit the laying of water or gas or sewer pipes in the streets of the village. It is proved that the village of Ridgefield Park acted under that grant of power in 1893 and passed an ordinance providing in brief—I shall not turn to it—that no gas pipe should be laid in or under the streets of the village without the written consent of the street commissioner; and the six defendants to the bill of the two corporations, as I stated, take the very bold position that the complainants have no right to lay any pipes without obtaining that written consent. But it appears that in 1898, five years after this ordinance of 1893 was passed, the village of Ridgefield Park, as I stated some time ago, passed an ordinance giving the Hackensack Gas & Electric Com-

pany the right to lay and maintain a plant of gas mains and pipes throughout the village under the streets. This ordinance prescribes to a certain extent the conditions under which the streets shall be opened and how they should be closed. It is filled with conditions and terms affecting the rights of the two parties and giving each of the parties great rights. It manifestly deals with and covers the whole business of opening the streets. It therefore, so far as the operations of the Hackensack Gas & Electric Company were concerned, totally repealed the provisions of the ordinance of 1893. It is entirely inconsistent with its provisions. To my mind it is preposterous to argue that, after this ordinance of 1898 had been passed and these great considerations given to the village, these mutual contractual relations entered into, the Hackensack Gas & Electric Company had not the power to open a street in the village, to lay a pipe, to replace a main, without first obtaining the written consent of the superintendent of streets, and perhaps depositing a sum of money in pursuance of the terms of this ordinance of 1893. The two ordinances must be construed together, and the later, the ordinance of 1898, has full force so far as it is inconsistent with the provisions of the ordinance of 1893. My conclusion is that the right of the two complainants to maintain a plant of gas mains and pipes within and under the streets of the village of Ridgefield Park is clear, whether it be placed upon the charter of the Bergen County Gaslight Company of 1864 or the ordinance of the village passed in 1898.

I may say right here, lest I forget it later, that no question is raised in these litigations in regard to the power of the municipality to impose reasonable regulations upon the complainants with respect to the laying and maintaining of these gas pipes. The complainants submit to such reasonable regulations, if there are any which ought to be imposed in view of the fact that the ordinance of 1898 itself very carefully and fully seems to regulate the exercise of the powers which that ordinance granted to the Hackensack Gas & Electric Company. The question which has been debated in this cause is not whether the complainants or either of them have an absolute right free and untrammelled from all restrictions on the part of the village to lay and maintain their gas plant, but whether the village has the absolute right to prohibit the complainants or either of them from excavating the streets, until or unless a written permission is given in each case by the superintendent of streets of the village. No question of regulation is raised in this cause. It is not the power of the village to regulate which is insisted upon here, to reasonably regulate the exercise of rights and franchises of these companies, it is the power of the village under this ordinance of 1893 to prohibit which is insisted

upon. I find that no such power exists in this case, for the reasons that I have mentioned.

Now the next question, far more difficult, is the question arising upon both these bills of complaint as to the extent of this franchise, this right of the complainants, or one of them, to lay and maintain a plant of gas pipes under the streets of this village. Conceding that the complainants, or one of them, have full power to maintain a plant of gas pipes in this village for the supply of the village, the question is, have they now a wider right, can they lay and maintain pipes greatly in excess of what are reasonably necessary for the supply of gas for this municipality and the supply of gas to these streets and to the 2,800 people who live within its corporate limits, and can they lay down 20-inch pipes, the main function of which is to transmit gas to other and perhaps distant municipalities, where the complainants are engaged in purveying gas? Counsel for the village and its officers cited the case of *Andreas v. Gas & Electric Company of Bergen County*, reported in 61 N. J. Eq. 69, 47 Atl. 555, where the Court of Chancery held that an electric light company was not authorized to erect and maintain poles and appurtenances thereon in the streets larger than were necessary for the public use. As I recall the case now after this period of delay, it was conceded, or at any rate the court found, that the electric light company had the right to maintain poles and appurtenances attached thereto in the streets of the village which were reasonably necessary for lighting the public streets, but had not no right to erect and maintain larger poles with more numerous arms attached thereto than were necessary for this public lighting; the real object being to enable the company to carry on its private business and supply private lights to private consumers. If I recall the conclusion of the case correctly, the case was held in order that the court might supervise the construction of the poles, or, at any rate, that proceedings might be taken to see that the Electric Light Company was kept within the limits which I have indicated. Well, I think we may concede that, if the sole right of the complainants or one of them to maintain a plant of gas pipes in the village of Ridgefield Park must be based upon the charter of 1864 of the Bergen County Gas-light Company or the ordinance of 1898 of the village, the contention of the village in these cases would have to be sustained. It seems to me that, if a gas company has the right to maintain within a municipality a plant of gas pipes solely for the purpose of supplying the needs of that municipality, when it goes to work to lay enormous pipes in excess of what is necessary for the accomplishment of their corporate purpose and object within the municipality, for the purpose of conveying gas to distant places, they are away beyond the limits of their franchise and the

remedy of the village is probably by injunction.

The complainants, manifestly perceiving the force of the objection on the part of the defendants to which I have referred, looked about to find some authority to sustain them in this apparently excessive use of the streets of the village, which the village seeks to enjoin. They cited the act of April 8, 1903, entitled "An act relating to corporations of this state now or hereafter having lawful authority to lay or maintain pipes or mains in the streets or public places of any municipality for the distribution of gas." P. L. 1903, p. 359. The complainants insist that under this statute, if a gas company—and ordinarily a gas company, to constitute an instance of the sort with which we have to deal, would have to be a consolidated company—if a gas company has the right to purvey gas in three or four or a dozen different municipalities and to maintain in each a plant of gas pipes and mains for the supply of that particular municipality, then by virtue of this act of 1903 the gas company may not only transmit gas from one system to the other, but it may unify all these systems and make the pipes in each large enough not only to supply the lighting within the corporate limits of that particular municipality, but also large enough to transmit gas throughout the system. Thus, in case there are six or eight adjacent municipalities in which there are six or eight separate gas companies, each having a franchise under which it had the power to maintain a plant sufficient for the purpose of the lighting business within the corporate limits, if that was the situation, power is given under this act to a corporation formed by a consolidation of these separate companies to maintain pipes much larger than would be necessary in each municipality for the supply of that municipality, to maintain pipes in each municipality large enough to transmit gas to the other municipalities. Now, of course, it is perfectly plain in the case I have put, where you have six or eight adjacent municipalities with six or eight separate franchises of this character all held by one corporation, that the result of the unification of the entire plant is that there would be central mains with great capacity, very much greater than could be necessary under any possible circumstances for the supply of gas in any one municipality by itself.

Counsel for the village of Ridgefield Park makes several objections to this statute, I think several constitutional objections. My recollection is that counsel insisted that the act was a special act, and also that the title was defective. I gave close heed to these arguments of counsel. I shall not undertake to recall them at this late date. I think they are without foundation. The statute is unsailable, it seems to me, from a constitutional point of view. There is a difficulty, however, about the statute which was not the subject

of argument, but which has caused me some hesitation. I dislike disposing of the cause upon points that are not raised in argument. This cause was argued with great care, after industrious preparation and with great ability on both sides, still I cannot avoid dealing with the question which appears directly upon the face of this act and is raised by the pleadings. The act provides that any corporation in this state, now or hereafter having lawful authority to lay or maintain pipes or mains in the streets and public places of any municipality for the distribution of gas, may use its pipes or mains within such municipality for the transmission of gas to any other municipality in the streets or public places of which it may also have lawful authority to lay or maintain pipes or mains for the distribution of gas; and then out of abundant caution the act provides: "Provided, that nothing herein contained shall grant to any corporation a franchise to lay down gas pipes for the distribution of gas in any municipality in this state." The act, as I stated, deals with a situation where there are two separate franchises for the supply of gas in two separate municipalities, each franchise carrying with it the right to maintain a plant adequate for the purpose; and the act provides that any corporation in the possession of two such franchises may use its pipes or mains within the corporate limits of each municipality for the transmission of gas to the system maintained in the other municipality. Now the question is whether that gives a right to the corporation to maintain larger pipes in each municipality than those which are required for the supply of gas in that municipality. Does this additional use permitted by the statute carry with it the right to maintain larger pipes than those which are measured by the requirements of the franchise in each municipality? The language of the act is obscure, badly chosen. It would have saved all question if the act had provided that in the situation with which it deals the corporation should have the right at all times to lay and maintain gas pipes not only for the supply of gas within each municipality, but also for the transmission of gas to other municipalities. Practical reasons may be surmised why such plain language was not employed.

I made a very close examination of this act a week or ten days ago, and I am not sure that I can recall now all the points which finally led me to the conclusion that it was the intention of the Legislature to enlarge the franchises of corporations having the power and charged with the public duty of supplying gas to a number and perhaps a large number of municipalities. It is a little difficult to see what the real scope and effect of this act would be if it has not the effect which I have mentioned. Here is a grant to a corporation in the situation of the complainants, or one of them, the situation of the Gas & Electric Company of

Bergen County, to use its pipes or mains within the municipality of Ridgefield Park for the transmission of gas to those four or five other municipalities where the Gas & Electric Company of Bergen County has the power to maintain gas mains. The Gas & Electric Company of Bergen County is allowed to use its pipes in the village to transmit gas to these other places. Well now, if that does not confer the right to maintain a pipe or pipes in Ridgefield Park larger than are necessary for the municipal purpose of that city, large enough for an efficient transmission of gas to these other places, what operation has the act? Certainly it is hard to say how the stockholders of the Gas & Electric Company of Bergen County could complain if that corporation saw fit to transmit gas through the Ridgefield Park pipes to the pipes in the other municipalities. How could the stockholders complain? How could the village complain? The pipes are there. They are lawfully there. The entire public burden is upon the municipality and its streets. The public burden is not enlarged when those pipes are used to transmit gas to the adjacent village. It is rather difficult to see how there is any practical operation of this statute in protecting the gas company from objections on the part of the village of Ridgefield. Last of all I want to say—not last of all, but last of all according to my present recollection—there is a difficulty in perceiving why this act was necessary in order to save the Gas & Electric Company of Bergen County or any other corporation similarly situated from an attack by the Attorney General of the state. I have not really thought this matter out. It is a very fine point indeed. Whether technically there would be any foundation without this enabling act for a complaint of the Attorney General that the Gas & Electric Company of Bergen County was misusing its franchises when it employed its pipes in Ridgefield Park, not only for the supply of gas within the corporate limits of the village, but for the transmission of gas to the adjacent village. Whether there is any foundation for any complaint or not, I hardly deem it necessary to decide. It seems to me that to confine the act to such a narrow effect as that would be unreasonable. The Legislature had some other object in view in passing this statute besides legalizing the use of the plant of the Gas & Electric Company in Ridgefield Park, to take this instance, for the transmission of gas to the adjacent village in which the Gas & Electric Company had full power to maintain gas pipes and to supply gas. Now what was the intention of the Legislature?

I think we have a right to regard the history of the state, the history of its industries, the history of its corporations, in dealing with an act like this. It was passed in 1903, at a time when consolidations, especial-

ly of gas companies and lighting companies, had been made throughout the entire state. The old system of having separate gas companies, each one supplying a different village or a different town, had been to a very large extent displaced by these great consolidations of which we have striking illustrations afforded by the history of gas lighting and electric lighting in Bergen county set forth in these bills of complaint and these answers. The Legislature recognized the fact that, instead of six separate gas companies each with a gas plant including a gas manufactory and gas holder for each village, a new system had come in, and the six now are consolidated, and instead of six systems of smaller pipes, of comparatively small pipes, each supplied from a separate source, the situation was created in which in order to gain the great economies of consolidation and give the public the benefit of these economies it was necessary to unify the six plants and lay them out as one whole plant with large central mains and then smaller mains, thus making a united system out of what was formerly six separate systems. I think the Legislature recognized the fact, as it existed before the Legislature and before the state at the time this statute was passed, and the Legislature said: "We have this situation existing; we now will enlarge the power, the extent of each franchise and enable the single corporation holding the franchise to use pipes in each locality, in each municipality, not only for the purpose of supplying gas there, but also for the purpose of transmitting gas to the next and to the third and to the fourth and to the fifth and to the sixth municipality." It seems to me that was the intention of the Legislature, however inaptly expressed that intention may be in the language of this act. If that result is not correct, what would be the situation? Did the Legislature mean to leave the consolidated corporation exercising the power and charged with the duty of supplying the gas to six municipalities within the power of each one of these municipalities? Can each municipality exercise the arbitrary power of saying: "You shall not lay down a pipe within our limits larger than is necessary for the supply of gas within our limits? We intend to block and stop and thwart the effects and benefits of consolidation." Is it not plain that, where you have the interests of five or six adjacent municipalities involved, it is not wise, it is not politic that each one of these municipalities should wield any such power? It seems to me, therefore, that the Legislature intended to deal with a matter which was naturally beyond the scope of the authority and power of each municipality. It may be questioned whether the village of Ridgefield Park has any power whatever to grant a corporation the right to run a gas main 20 or 40 inches in diameter through its public streets for the purpose, not of supplying

that municipality, but for the purpose of supplying other places with gas. Is there any such power resident in each municipality? The Legislature, however, came in and dealt with the situation which was manifestly beyond the natural scope of the powers conferred upon each municipality. It being a matter of wide public concern the Legislature took hold of it and laid down a rule, and the rule is as I have stated. When you have six separate franchises, each one measured by the requirements of a different municipality, six in all, but you have one corporation possessed of all these franchises and charged with all the duties under each, then the Legislature said: "There has been a physical consolidation. Now we will permit you to practically consolidate your franchises so far as the maintenance of the plant is concerned, to lay large enough pipes anywhere throughout the entire area, not only for the supply of gas within a particular municipality in which such large pipes are laid, but large enough to supply the whole system, large enough to enable the consolidated company to erect and maintain a single manufactory of gas, and thus accomplish the enormous economy which always is accomplished when six separate gas manufactories are suspended and substituted by a single one." Of course, the consumer gets a share of the benefit of this economy.

An argument can be made, which I think would require consideration, that the consolidation act, when applied to gas companies occupying distinct but adjacent territories, confers the power upon the consolidated company to unify the system of gas mains and transmit gas throughout the whole system from a single central station without invoking any aid from this somewhat peculiar act of 1903. If six railroads connecting with each other are consolidated so as to form a single line, the result may be to compel or induce the consolidated corporation, for the successful operation of its consolidated line, to do many acts, to maintain many expensive structures, and employ many instruments for the operation of the railroad, none of which would be germane to the purposes of the original constituent corporations, or constituent railroads. Six separate adjacent gas companies, when consolidated under the statute, cease to be an aggregation of distinct units; they are consolidated into a single gas company. There is force I think in the argument that the legislative scheme of consolidation in the case of railroads in line or gas companies occupying adjacent territories necessarily implies a unification of the properties and plants of the several corporations corresponding exactly with the legal unification of the corporations themselves. I shall not, however, develop this argument or attempt to ascertain its exact force, because we have not to deal with the legal effect of the con-

olidation act alone. It is the consolidation act together with this act of 1903 with which we have to deal. Whatever may be the force of either of these acts when taken alone, in my judgment their combined force legalizes in a case like this the substitution of several separate systems of gas mains by a single system supplied from a single source, and therefore naturally, if not necessarily, composed in part at least of very much larger gas pipes than would be authorized by any one of the constituent franchises.

For these reasons which I have endeavored to indicate, I reach the general conclusion that the complainant corporations, or one of them, have the power not only to maintain a plant of gas mains and pipes in the streets of the village of Ridgefield Park, but that they have a right to lay and maintain pipes therein large enough for the transmission of gas to the other municipalities in which they, the complainants, or one of them, have the power and are charged with the duty of purveying gas. I may say here that last night I looked through these papers with some care in order to discover whether it appeared that the complainants, the two corporations, are in fact endeavoring to lay a pipe, this pipe 20 inches in diameter, for the purpose of applying gas to localities beyond the scope of the operations authorized by the act of 1864, the charter of the Bergen County Gaslight Company. There is no doubt from the evidence that the pipes which the two corporations are threatening to lay are larger than are necessary for supplying the village of Ridgefield Park and its 2,800 inhabitants with gas. There is no question about that whatever; but I fail to find any sufficient evidence that the other municipalities for the benefit of which these large pipes are being laid lie beyond the limits of Hackensack township. The affidavit of Mr. Wheaton made some statement but it is mere hearsay. Well, I do not intend to decide the matter. I suppose the burden is upon the village authorities to show that there is an intention on the part of the two complainants to use this situation for an unlawful purpose. There is this fragment of testimony, if it may be called testimony, that one of the officers of the company said something. I gravely doubt whether taking these papers as a whole, if I should re-examine them, I could find that the complainants, the village authorities, have shown that these pipes are larger than are reasonably necessary for the purpose "of lighting the streets, buildings, and other places in the township of Hackensack and its vicinity." I pass this point, however, because my conclusion which I have announced on the main question is sufficient for the disposition of these causes.

One more point, however, remains to be noted. Counsel for the village of Ridgefield Park and these six natural persons, defendants to the first bill that was filed, take the point that the Public Service Corporation is

a corporation created under the general corporation act, and that it appears in this case and is alleged on both sides and is admitted that in March, 1905, the Gas & Electric Company of Bergen County executed a lease of all its property and all its franchises, except its franchise to be a corporation, to this corporation, the Public Service Corporation, which existed under the general corporation act, and that the Public Service Corporation has no power to exercise the functions of a gas company. I do not have to decide a number of questions which are thus raised, because the lease which I have mentioned has been put in evidence and the lessor corporation, the Gas & Electric Company of Bergen County, is a co-complainant in the cause. An examination of that lease shows that the Gas & Electric Company of Bergen County has a very important and direct interest in the operations which are the subject-matter of litigation in these causes. If there is any defect in this lease, the sooner the Gas & Electric Company of Bergen County find it out, the better. If the lease is void, the sooner they resume possession of their property, the better. Meanwhile, the development of their property must go on. Business must be done for the maintenance of the great plant and business which the Gas & Electric Company of Bergen County undertook in good faith to lease. The Gas & Electric Company of Bergen County being a co-complainant, an injunction would go in my judgment most properly in this cause for the preservation of the rights of that corporation, just as if no lease had been attempted. Of course it is quite a question whether the Public Service Corporation can take a gas plant and gas franchises by lease and then use and exercise them. It is settled that a corporation under the general corporation act cannot exercise the functions of a gas company even by leave of the municipal authorities. That is settled in the case of *Richards v. Dover* (N. J. Sup.) 39 Atl. 705. Counsel for the complainants, the two corporations, points out a statute of the state which he claims validates this lease. This statute is entitled "An act concerning corporations," and was approved March 24, 1899 (P. L. 1899, p. 334). It provides that "any corporation of this state, except railroad and canal corporations, may hereafter, with the assent of two-thirds in interest of its stockholders, either in person or by proxy, lease its property and franchises to any corporation and every corporation of this state is hereby authorized to take the lease or any assignment thereof, for such terms and upon such conditions as may be agreed upon, and that any such lease or assignment, or both, heretofore made, are hereby validated." There is a proviso which I need not read. It seems to be conceded that the lease in this case from the Gas & Electric Company of Bergen County to the Public Service Corporation received the required assent of two-thirds in interest of its stock-

holders. No objection to the validity of the lease is made on the ground that such assent was not given. Counsel for the village of Ridgfield Park made some objections to this statute, similar I think to those that he made and urged with regard to the act of 1903, authorizing the use of pipes in one municipality for the transmission of gas to another municipality, that it was a special act and that the title was inadequate. Well, I have not examined those objections, but my impression is that they are unfounded. The difficulty about the act as it seems to me, or the question in regard to the act, is whether, when the Legislature has provided and in fact maintains on the statute book a special statute relating to the incorporation of gas companies, imposing special limitations upon them and providing for them a special form of government, through a very large number of directors, much larger than are required for the government of a corporation created under the general corporation act, this statute of 1899, is to be construed to enable a corporation created under the general corporation act, perhaps with three directors only, to accept by lease the franchises of a gas corporation and then exercise these franchises and carry on the gas business. I am very glad that I do not have to consider or decide this question. I avoid it as I feel it is my duty to do, because the decision of it is unnecessary in my judgment. We have here a complainant, as I stated, the Gas & Electric Company of Bergen County, with the unquestioned power to exercise all the franchises conferred by the charter of 1861 upon the Hackensack Gaslight Company and the charter of 1864 upon the Bergen County Gaslight Company and the ordinance of the village of Ridgfield Park adopted in 1898, granting a gas franchise to the Hackensack Gas & Electric Company. Inasmuch as this co-complainant has had all these powers and has them to-day, if it has not by a valid lease transferred them to the Public Service Corporation, we have I think an actor, a complainant in court, whatever views may be taken of the scope and effect of this statute of 1899, entitled to the protection of the court through the instrumentality of an injunction.

The result is: First, in regard to the motion to enjoin the Public Service Corporation and the Gas & Electric Company of Bergen County from laying its pipes pending this litigation, that the motion must be denied. And, second, in regard to the motion on behalf of the village of Ridgfield Park, upon their bill and the answer of the two complainant corporations for an injunction restraining the two corporations from laying mains larger than are necessary for the supply of gas to the village of Ridgfield Park and its 2,800 inhabitants, that the motion also must be denied.

Now, in regard to the costs, I note that the bill originally filed by the two corporations, upon which the chancellor granted

an injunction, did not set forth, as it was not obliged to do, that the two complainant corporations had applied to the village authorities of Ridgfield Park for a permission apparently under the provisions of the ordinance of 1898 to lay the very pipes which they undertook to lay without getting that permission. While that application was pending these corporations, having thus most unmistakably represented to the village authorities that their consent was necessary, went on without their consent to lay these pipes, acting upon the authority of their charter and the ordinance of 1898, which apparently they had conceded was not adequate to sustain them in laying these pipes. Ordinarily a man does not crave permission to do a thing which he has a right to do. If the village had submitted to this injunction, it would have been a question whether any costs would be allowed against them in the suit; but the village did not submit. The village employed counsel and then proceeded to examine all these charters and ordinances, and these counsel advised the village and also these defendants that the corporations had no right to open the streets without the written consent of the commissioner of streets under the ordinance of 1898, and also advised further that the corporations had no right to lay larger pipes than were necessary to supply gas to the village. Well, they have brought these matters here into court by their answer to the bill of the two corporations and by the bill of the village, and, whatever may be the result elsewhere, in this court they have met with defeat. The finding of the court is against them, and therefore it seems to me that the Public Service Corporation and the Gas & Electric Company of Bergen County, complainants in one cause and defendants in the other, are entitled to costs on both motions.

The third matter for determination is the proceeding against three individuals, who are strangers to the two suits with which we have dealt, to have them punished for contempt. I have not had an opportunity to examine the evidence since the day when I expected to deal with it at length. I shall not undertake now to more than indicate in an imperfect way the reasons which have brought me to the conclusion that the three persons, Anton Dosch, Thomas Malley, and J. F. Belkorf, are not guilty of contempt of court in the conduct of which complaint has been made, and have therefore not made themselves amenable to punishment. The proceeding, as I think I stated at the start, is almost and probably absolutely without precedent in the state of New Jersey. We have an injunction here issued against six persons, their officers, agents and servants. As a matter of fact these six persons were all acting in doing the things complained of in an official capacity, but the injunction does not refer to the capacity in which the defendants

acted at all. The injunction goes to the six persons and their agents, and enjoins them from interfering with the laying of these pipes. Where the effort is made by a writ of injunction to restrain an indefinite class of persons who are liable, anyone of whom or any number of whom are liable, to be excited to do the things complained of, it has got to be the custom, especially in the Western federal courts, to let the injunction go to certain persons named and then to a class of persons who are described. Sometimes they are described as members of a labor union, or employes of a railroad, or even residents of a city. Well, a great many questions may yet be debated as to the exact legal effect and operation of such injunctions. It is a novel way of bringing in parties to a suit. Whether such description has any other operation and effect than a notice of the injunction may be questioned. I know of no injunction of that character issued out of this court, although possibly in one or two instances such an injunction may have been issued. But in this case no language is inserted in the writ attempting to enlarge the scope of the injunction. Its restraining force is upon citizens of Ridgely Park, gentlemen who are officers of that township. In terms the writ is confined to these six individuals, and restrains them from interfering with the laying of these pipes, and manifestly on its face relates to the personal conduct of these six individuals. Now, it is complained in these proceedings that these three men, knowing of this injunction, went forward as officers of the township and made the same sort of arrests for laying pipes that were the subject-matter of complaint in the bill and to restrain which the injunction had gone against the six natural persons who are defendants.

The question is whether such conduct on their part amounts to a contempt of the process and power of this court. I do not question that the Court of Chancery has power to punish any person for contempt who by his conduct undertakes willfully to thwart the power of the court, or to interfere with and obstruct the service of its process. Where such process is a writ of injunction and the party who does the act complained of is not a party to the suit, he is not punishable for contempt for a violation of the injunction. That is perfectly well settled. He is not enjoined, and he does not violate any injunction. If he is guilty of contempt at all, it is probably a criminal offense and indictable, an obstruction of public justice, and such contempts are not only punishable by indictment, but they are punishable by the power of this court. If such were not the case, oftentimes the process of this court could be defied, and its remedial agencies rendered inoperative by the voluntary unlawful act of individuals who assume to step in and

prevent the accomplishment of objects which the court has said shall be accomplished in a suit between parties. The rules of law governing this sort of contempt and the power of the court to punish it are perhaps more fully set forth and discussed than in any other case in the recent English case of *Seward v. Patterson* (1897) 1 Chancery, 545. In that case, however, the party who was punished was found guilty of aiding and abetting the defendant, who was found guilty of violating the injunction of the court. That is a most important circumstance which does not exist in this case. The English court sustained its power to punish this outsider for taking part in conduct that was violative of its injunction, and it distinctly points out that it did not punish the man for violating the injunction, because no injunction was imposed upon him. They punished him because his conduct tended to obstruct the administration of justice, to thwart the court in its effort to administer justice; but the fact remained that the party thus punished was aiding and abetting a defendant who was found guilty of violating the injunction. In other words, there was in that case a violation of the injunction of the court by a defendant punishable as such, and this outsider's conduct was in the way of aiding and abetting that violation. It will be observed that in the case before this court there is no violation of the injunction. No defendant, no person, charged by this writ with the duty of obeying its mandate has violated the injunction. Three outsiders have come in as volunteers, have done acts which are precisely the same as those acts which were enjoined in the suit. That is all. Well, I do not say that, notwithstanding the absence in this case of any violation of the injunction, persons pursuing conduct such as these three defendants pursued may not be punishable. I do not have to decide this novel point and I feel it is my duty to refrain from doing so because we may concede that the court has such power, and that such power is necessary in order to the administration of justice, in order to the accomplishment of those great beneficial objects secured by the preventive remedy of injunction.

There is great force in the position that, if the complainants in this case obtained an injunction against three police officers of Ridgely Park, after the full force and effect of the injunction had been advertised and widely known and the village and its legal advisers had had opportunity to look into the matter, three other police officers would be guilty of contempt, if they volunteered to do the very things which they knew had been enjoined and which they had every reason to expect the court would enjoin them from doing. There is great force in the argument that, if a second injunction should be got out against the new

set of officers, three others who the next day should undertake to pursue the same line of conduct would be liable to proceedings for contempt. If that were not so in the very class of cases to which this belongs, the whole remedial power of the Court of Chancery could be absolutely thwarted by relays of offenders who would come in to do the acts which they knew right well had been enjoined in the case of their brethren, and knew right well would be enjoined again, if opportunity afforded. But before any such power should be exercised by this court, the case ought to be made plain beyond the shadow of a doubt; the court should proceed with the utmost caution in proceedings for contempt in this class of cases. Now, here we have three men who appear to be reputable law-abiding citizens charged with the administration of law in their locality. They acted in this matter without any motive of personal gain, and that is a most important consideration in determining whether parties are guilty of contempt of the power of this court. They acted under a mistaken but honest intention to subserve the public interest, to protect the public right and the public property. They are not defendants, as I said, in the injunction, and I have noted that the injunction was only brought to their notice at the time when they began to do the things complained of, when they were making these arrests. It would be very harsh to say that these three men, these honest constables, who were not lawyers, were bound to take the copy of the injunction, which was thrust upon them in the heat and excitement of the making of these arrests, and read it and arrive at a correct idea of its legal effect and scope, and to discover that they would have to practically obey the injunction although they were not parties to the writ, and because they did not do these things they must be charged with the actual criminal intent to defy the power of the Court of Chancery. I am very sure that I cannot recall all the considerations which occurred to me as controlling this motion to have these men punished for contempt, but I think that I have indicated the leading reasons.

My conclusion is that there was no intentional willful effort on the part of these defendants to thwart the power and process of the Court of Chancery. They acted rashly but they acted in good faith. Of course, if men knowingly do anything the effect of which is unlawful, they are generally charged with intending to do what has naturally followed as the result of their conduct; but in punishing for contempt I think generally there must be an evil mind in order to find a criminal intent, and that is what I think is necessary in this case. There must be an actual intent to do wrong, an actual intent to thwart the power of the court. I do not find such an intent in this case, and

therefore reach the result that the three defendants are not guilty. I think in relation to this matter of contempt there should be no order for costs. The defendants are found not guilty of actual intent to defy the power of the court, but they are not without blame. There is no question about that. They took the injunction papers and put them in their pockets. They refrained from reading them. A strong argument can be made that they are guilty of very rash and imprudent conduct, which warranted the proceedings which were taken to have them punished for contempt, and therefore I think I will make no order for costs.

THOMPSON et al. v. DYER et al.
(Supreme Judicial Court of Maine. Oct. 14, 1905.)

1. GARNISHMENT—TRUSTEE PROCESS—DISCLOSURE OF TRUSTEE—COSTS.

One summoned as trustee of the principal defendant in an action should file his answer, and submit to examination at the return term. If he fails to do so without reasonable excuse, he is liable to the plaintiff for all costs afterwards arising in the suit, if the judgment in the action be for the plaintiff.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, § 377.]

2. SAME—PLEA.

The usual formulary statement, even if upon oath, that at the time of the service of the writ upon him, the person summoned as trustee did not have in his hands any goods, effects, or credits of the principal defendant, is not the disclosure (the discovery), but is in the nature of a plea, to be sustained or overruled according to the evidence adduced in the disclosure, or otherwise.

3. SAME—DISCLOSURE.

The disclosure of a person summoned as trustee must be complete and explicit, containing statements of facts, and not conclusions of law. Every statement that he desires to have considered as evidence must be direct, and, under the sanction of his oath, at least that he believes it to be true.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, §§ 268, 269.]

4. SAME.

In making his disclosure, the trustee may refer to books, papers, etc., and thus make their contents part of his disclosure, but the reference must be so definite and specific that the court may know from the disclosure alone what is referred to.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, § 269.]

5. SAME.

He may refer to and adopt the statements of others made to him or in their testimony, but in such case he must make oath that such statements are true, or that he believes them to be true.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, §§ 268, 269.]

6. SAME—ACCOUNTING BY TRUSTEE.

When it is made to appear that before the service of the writ upon him the trustee had in his hands goods, effects, and credits intrusted to him by the principal defendant, he must fully and particularly account for all such, if he would avoid being charged generally.

7. SAME—ASSIGNMENT FOR BENEFIT OF CREDITORS—LIABILITIES OF ASSIGNEE.

One who accepts an assignment as assignee for the benefit of creditors becomes the trustee of the assignor as to all goods, effects, and credits so assigned, even though he does not take actual personal possession of them. He will be charged as such trustee unless he fully accounts for them.

8. SAME.

The fact that all such goods, effects, and credits so assigned were taken possession of by an attorney appointed by the assignee, and that such attorney undertook the sole management of them under the assignment, does not relieve the assignee from liability to be charged as trustee. All the acts of the attorney in the premises are presumably his acts.

9. SAME—DISCLOSURE.

A statement, even upon oath, by such attorney, showing a full accounting for all such goods, effects, and credits, cannot be considered upon the question of charging the assignee as trustee, unless the latter makes such statement a part of his disclosure under his oath that at least he believes it to be true, or unless an issue has been formed by some appropriate allegation.

10. SAME—STATEMENT AS EVIDENCE.

A statement in a trustee disclosure is evidence, and not an allegation under the statute. Rev. St. c. 88, §§ 30, 31. The allegation which must be made to let in evidence other than the disclosure must be additional to, outside of, the disclosure proper.

11. SAME — INSUFFICIENT DISCLOSURE — EFFECT.

In this case the trustee admits that before the service of the writ upon him he had accepted an assignment of certain goods, effects, and credits of the principal defendant, and it is held:

(1) That the statement of his attorney, though upon oath, and in the form of a deposition, cannot be received as evidence for want of the statutory allegation by either party.

(2) That it cannot be considered as a part of the trustee's disclosure, though referred to in it, because the trustee has not made oath that such statement is true, or that he believes it to be true.

(3) That the trustee's disclosure is not sufficiently direct, full, and explicit to relieve him from liability as trustee.

(4) That he must be charged generally, the amount to be determined on scire facias when he may make further disclosure, and perhaps be then relieved except from costs.

(Official.)

Exceptions from Supreme Judicial Court, Washington County.

Action by Cyrus Thompson and others against Minnie A. Dyer. Frank L. Shaw was served as trustee.

Assumpsit on account annexed for merchandise sold and delivered by plaintiffs to principal defendant previous to October 6, 1899, amounting to \$276.11, and interest thereon to date of writ, amounting to \$6.43, the total amount of the account annexed being \$282.54.

Frank L. Shaw of Machias was alleged in the writ to be trustee of the goods, effects, and credits of the principal defendant.

Service was duly made on the trustee on February 9, 1900. The writ was returnable to the April term, 1900, of the Supreme Judicial Court in and for Washington County,

and was duly entered at said term. The principal defendant was duly defaulted.

No disclosure was filed by the trustee at the return term, and the trustee, although a resident of the county of Washington, in which the writ was returnable, neglected without reasonable excuse to appear and submit to examination at the return term.

No disclosure was filed by the trustee until the April term, 1901, of said court. At the April term, 1902, of said court said trustee filed a further disclosure, and at the April term, 1903, of said court said trustee filed a further disclosure. At the hearing on these disclosures, the deposition and "additional statement" of W. R. Pattangall, attorney for the trustee, were offered, and received in evidence against objection. Upon said disclosures, deposition, and "additional statement," the presiding justice discharged the trustee, although without costs. Thereupon the plaintiffs excepted to the rulings and decision of the presiding justice. Exceptions sustained.

Argued before WISWELL, C. J., and EMERY, STROUT, SAVAGE, and POWERS, JJ.

J. H. Gray and Albert S. Woodman, for plaintiffs. W. R. Pattangall, for defendant and trustee.

EMERY, J. The contest in this case is wholly over the liability of Mr. Shaw, summoned as trustee of the principal defendant. The writ was served upon him February 9, 1900, returnable at the next April term of court in Washington county, where Mr. Shaw resided. He filed no disclosure, nor did he appear and submit to examination at that term, and nothing appears to have been done in this case until the April term, 1901, when Mr. Shaw filed the usual formulary statement that at the time of the service of the writ upon him he had not in his hands any goods, effects, or credits of the principal defendant, and thereof submitted himself to examination upon oath. It does not appear that any notice of this was given the plaintiff or his attorney, as required by court rule xii (20 Atl. xiv). *Butler v. Starrett*, 52 Me. 281. Under these circumstances, this statement or "denial must be considered in the nature of a plea, which is to be sustained by answers to interrogatories propounded by the plaintiff." *Toothaker v. Allen*, 41 Me. 324. The person summoned as trustee is not to determine the question of his liability. *Id.*

The principal defendant was defaulted, and the case remained on the docket with nothing further done, so far as appears, until the April term, 1902, when Mr. Shaw filed what is called in the report "a further disclosure," consisting of questions and answers. It is not stated which party put the questions, but from their character it would seem that they were put by Mr. Shaw's own attorney. Nothing further appears to have been done

till the April term, 1904, when, the judgment of the court upon the question of his liability as trustee being asked, Mr. Shaw offered as an additional disclosure a statement of information received from his attorney as to his (the attorney's) doings. This statement was received, and presumably considered, against the plaintiff's objection. Mr. Shaw also offered as evidence to be considered the deposition of his attorney, which was admitted against the plaintiff's objection.

The first question is whether this statement of Mr. Shaw can be considered as a disclosure, or as evidence in determining the question of his liability as trustee. We think it cannot, for the sufficient reason that it is merely a statement of what a third party had told him. It contains no allegation of fact purporting to be within his own knowledge. If offered as a deposition upon an issue formed, no part of it could be read in evidence for that obvious reason. True, a person summoned as trustee may incorporate in his disclosure the statements of another made to him, but to give them any force, or to have them considered, he must adopt them as his own statements on oath, or must at least declare on oath his belief in their truth. *Willard v. Sturtevant*, 7 Pick. 194; *Kelly v. Bowman*, 12 Pick. 383; *Parker v. Wright*, 66 Me. 392. In this disclosure is no such incorporation or adoption, nor any allegation in the disclosure or the jurat that Mr. Shaw believes the statement to be true. The jurat is simply "subscribed and sworn to." This is merely an oath that the statements were made to him, not that he believed them. The law attributes great weight to the disclosure of a trustee properly made, and hence the plaintiff is entitled to have the conscience of the trustee thoroughly searched, in the fear of spiritual and temporal penalties for perjury. If a trustee be allowed to introduce into his disclosure the statements of others made to him, without making oath at least that he believes them to be true, the plaintiff has no benefit from the conscience of the trustee.

The next question is as to the admissibility in evidence of the deposition of the attorney, Mr. Pattangall. We think it was not admissible. Formerly nothing was admissible unless contained in the disclosure, or made a part of it under the oath of the trustee. *Hawes v. Langton*, 8 Pick. 67. The statute (Rev. St. c. 88, § 30) now provides that either party "may allege and prove any facts material," etc. Such facts must be alleged in some statement or plea before evidence of them outside of the disclosure can be received. *Pease v. McKusick*, 25 Me. 73; *Schwartz v. Flaherty*, 99 Me. 463, 59 Atl. 737. In this case there was no issue raised upon which any evidence outside of the disclosure could be received. Nothing in the disclosure had been denied by the plaintiff. No fact outside of the disclosure had been alleged or set up by either party. No question of fact had

been put in issue. The only question was, what conclusion of law followed from the answers and statements made by Mr. Shaw under the sanction of his oath, leaving out of the account all statements not supported by his oath? The court, as well as the parties, was confined to those sworn answers and statements. *Rundlet v. Jordan*, 3 Me. 47; *Chase v. Bradley*, 17 Me. 89 (on page 94); *Minchin v. Moore*, 11 Mass. 90.

It is suggested that the statements in the disclosure may be regarded as an allegation under the statute. We do not think such statement is the allegation contemplated by the statute. The term "allegation" has a fixed technical meaning in law. It is a term in pleading, not a term in evidence. Allegation is not contained in the evidence, but precedes it. Allegation is the formal averment of a party setting forth the issue, and what he proposes to prove. *Schneider v. Rochester*, 160 N. Y. 172, 54 N. E. 721; Cent. Dict. The disclosure (the answers of the trustee to interrogatories) is not an allegation by way of pleading; it is a discovery. If the trustee desires to introduce the statements of other persons as evidence, he must make them a part of his disclosure by reciting them or identifying them, and by making oath that they are true, or, at least, that he believes them to be true, or else he must first make the statutory allegation by way of pleading. The allegation required is distinct from the disclosure. This is made clear by the language of the next section of the statute (section 31), which says: "Any question of fact arising upon such additional allegations," etc. This language indicates a separate, additional allegation in the nature of a plea. Again, no issue of fact to be tried under section 31 can be raised by any statement in the disclosure, since that statement it to be taken as true until overcome by allegation and evidence to the contrary. If no such allegation be made (and none was made in this case), there is no occasion for additional evidence. It is difficult to see how an issue of fact can be framed for trial under section 31, upon uncontradicted statements in the disclosure.

It is again suggested that the following statement in the disclosure makes the deposition of Mr. Pattangall, the attorney, a part of the disclosure, viz.: "So far as I know, the money was all received by W. R. Pattangall, to whose testimony I would refer you for the facts of the case." In the first place, Mr. Shaw does not state that Mr. Pattangall's testimony is true, or that he believes it to be true, neither in the disclosure proper nor in the jurat, which latter is simply "subscribed and sworn to." In the second place, the reference is too indefinite. The testimony alluded to is not annexed to the disclosure, nor referred to as an exhibit. Mr. Shaw does not state what that testimony is, nor where it can be found. He in no way identifies it, and anything

made a part of a disclosure must be identified. *Willard v. Sturtevant*, 7 Pick. 194. It does not appear that the testimony had then been given. It might be testimony to be given. It does not appear that the testimony had been filed or even reduced to writing. There is nothing to show what testimony of Mr. Pattangall is to be read as a part of the disclosure. It is a fundamental rule in such procedure as this that the disclosure of a trustee must be full and complete in itself; that the trustee must in his disclosure incorporate, annex, or distinctly identify any paper or statement he desires to be considered, so that the court will need no other identification. For these reasons, we think the deposition of Mr. Pattangall cannot be regarded as a part of the disclosure.

The supposed disclosure and the deposition of Mr. Pattangall, offered at the April term, 1904, being thus held inadmissible, the next question is one of law, viz., whether upon the answers and statements in his disclosure at the April term, 1902, supported by his oath, Mr. Shaw is chargeable as trustee. In that disclosure he states that, prior to the service of the writ upon him, the principal defendant, Minnie A. Dyer, then owning and possessing a store, a stock of merchandise, and also accounts due her from various parties, made to him a written assignment of all her attachable property for the benefit of her creditors. This assignment Mr. Shaw accepted and signed. The instrument of assignment, dated October 6, 1899, was expressly made a part of the disclosure as "Trustee Exhibit 1." By its terms, Mr. Shaw engaged to sell and dispose of all the assigned property, collect the accounts, and make proportional distribution among such creditors of Mrs. Dyer as should become parties to the assignment, and pay the surplus to Mrs. Dyer.

Upon this statement, taken by itself, Mr. Shaw would be chargeable as trustee of Mrs. Dyer, the principal defendant, since by the assignment goods, effects, and credits of Mrs. Dyer "were intrusted to and deposited in his possession." *Ward v. Lamson*, 6 Pick. 358; *Morse v. Bebee*, 2 Allen, 466; *Whitney v. Kelley*, 67 Me. 377. It placed the burden on him to clear himself from liability, and to do so by clear, full, and direct statements. *Haynes v. Thompson*, 80 Me. 125, 128, 18 Atl. 278. "No presumption is to be made in his favor." *Ripley v. Severance*, 6 Pick. 474, 477, 17 Am. Dec. 397. "Every doubtful statement is to be received as indicative that he could not truly make one which would relieve the case from doubt." *Lamb v. Manufacturing Co.*, 18 Me. 188. "The burden of discharging himself by clear and definite statements devolves upon the trustee." *Whitney v. Kelley*, 67 Me., at page 379. See also, *Fertilizer Co. v. Spaulding*, 93 Me. 97, 44 Atl. 371.

Recurring again to the contents of the disclosure, Mr. Shaw simply states that, despite the assignment and his engagement

under it, none of the property ever came into his possession or under his control. His statement is as follows: "I never took possession of any of the property, but immediately after receiving the assignment, I, together with Minnie A. Dyer, employed Messrs. Pattangall & Leathers as attorneys, and we left Minnie A. Dyer's matters entirely with them. About the disposal of the personal property and the accounts, I know nothing. * * * I personally never received any money under or by reason of the assignment."

The fact thus stated does not relieve Mr. Shaw from his liability he incurred to Mrs. Dyer and her creditors under the assignment. Messrs. Pattangall & Leathers were his agents, appointed by him, though with Mrs. Dyer's approval. Their possession of the property was his possession. Their acts over it were his acts. By the assignment of Mrs. Dyer, goods, effects, and credits were "intrusted to and deposited in his possession." By permitting or directing his agent or attorney to take possession and dispose of them, he has not divested himself of his liability to account for them. *Ward v. Lamson*, 6 Pick. 358. True, if the agents in this case proved faithless, it might perhaps be a defense for Mr. Shaw against Mrs. Dyer that she had approved of their appointment; but no such thing is stated in the disclosure. So far as appears, the attorneys still have all the property, or its proceeds. It was Mr. Shaw's duty to know and inform the court what had been done by his agents in the premises.

The result is that, upon the disclosure to which we are confined, Mr. Shaw must be charged generally as trustee. If in fact he had no goods, effects, or credits of Mrs. Dyer in his hands, either actually or constructively, at the date of the service of the writ upon him, he has not yet shown it by legal evidence adduced in the manner provided by law. He has not yet stated discharging facts in his disclosure, nor has he yet opened any door for the statements of other persons. Upon *scire facias*, he will undoubtedly have the opportunity to make as full and clear and detailed a disclosure as may be required, or as he may desire, and to make the statements of Mr. Pattangall a part of that disclosure, or to open a door for their admission otherwise. If it shall then appear that he is not really chargeable, he will be discharged. No injustice will be done him if he will take the course prescribed by the law for bringing the facts before the court.

The last question presented by the exceptions is that of costs. Rev. St. c. 88, § 19, provides as follows: "Sec. 19. If a person resident in the county in which the writ is returnable, is summoned and neglects to appear and submit to examination at the return term without reasonable excuse, he is liable for all costs afterwards arising in the suit to be paid out of his own goods or estate

if judgment is rendered for the plaintiff; unless paid out of the goods or effects in his hands belonging to the principal." Mr. Shaw was resident in the county, but did not appear and submit to examination at the return term. This neglect was adjudged by the presiding justice to be "without reasonable excuse." Being charged as trustee, he must also be adjudged liable for costs arising after the return term, if judgment be finally for the plaintiff.

The judgment of the court is:

Exceptions sustained.

Trustee charged generally. If plaintiff recovers judgment, he shall recover against trustee costs arising after the return term.

STATE v. DUANE.

(Supreme Judicial Court of Maine. Nov. 15, 1905.)

1. SEARCHES AND SEIZURES — DESIGNATING THREE PLACES IN ONE WARRANT.

A single search warrant cannot be lawfully issued to search more than one place. If the warrant contains a description of more than one place to be searched, it is invalid.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Searches and Seizures, § 2.]

2. SAME — WARRANT — DESCRIPTION OF PREMISES.

When a warrant in describing the place to be searched, describes, as it reads, three places, each occupied by a different person, though all three places are adjoining, the court cannot read into the warrant words not therein written, to show the other two places were named simply as boundaries of the place occupied by the respondent.

3. INTOXICATING LIQUORS—COMPLAINT—SEIZURE—DEMURRER.

A demurrer to a complaint and warrant will reach defects in the warrant, as well as those in the complaint.

(Official.)

Exceptions from Supreme Judicial Court, Lincoln County.

James A. Duane was convicted of keeping liquors for unlawful sale.

Under the provisions of section 49 of chapter 29 of the Revised Statutes, on a complaint made by W. R. Walter, a Lincoln county trial justice issued a search and seizure warrant, commanding the officer to search the premises therein designated for intoxicating liquors alleged to be kept therein, and intended for unlawful sale by defendant, Duane, and, if any such liquors were found, to seize the same, and arrest the defendant. The officer made search, as commanded, found certain intoxicating liquors, arrested the defendant, and brought him before the trial justice for trial. The trial justice, upon hearing, found the defendant guilty of keeping and intending the liquors for unlawful sale, and ordered the defendant to pay a fine of \$100 and costs. The defendant appealed. In the appellate court the defendant demurred to the complaint and warrant. The demurrer was overruled by the presiding justice, and thereupon the

defendant excepted. Exceptions sustained.

Argued before EMERY, WHITEHOUSE, STROUT, POWERS, PEABODY, and SPEAR JJ.

John W. Brackett, Co. Atty., for the State. Wm. H. Miller, for defendant.

EMERY, J. The use of what is known as "general warrants" for search had become so oppressive under royal authority, the people of Maine, in common with those of other states, undertook to safeguard themselves against them by the constitutional provision that "no warrant to search any place or seize any person or thing shall issue without a special designation of the place to be searched." Const. Me. art. 1, § 5; Rev. St. c. 133, § 14. In the warrant in this case the "special designation of the place to be searched" is as follows: "A certain building, and its appurtenances thereunto belonging, known as Hotel Davis, used and occupied by said Duane [the respondent] as a dwelling house in part and in part as an inn, situated on the south side of Main street, in the village of Waldoboro, in said Waldoboro, and the premises occupied by Edwin O. Clark on the east side, and the premises occupied by Gardiner J. Nash on the west side, of said building." The return of the officer on the warrant is this: "By virtue of the within warrant, I have entered the within described premises and searched the said premises," etc.

As it reads, the warrant assumes to authorize and even direct a search of three distinct premises, each occupied by a different person. This makes it a species of general warrant. If a magistrate can lawfully issue a single warrant upon a single complaint to search three distinct premises, each occupied by a different person, he can lawfully issue a single warrant for the search of any number of premises each occupied by a different person. This would practically be a return to that system of general warrants so emphatically forbidden by the Constitution and statute. This court, in *State v. Robinson*, 33 Me. 564, in speaking of search warrants, said (per Shepley, C. J.): "That cannot be considered a special designation of the place [to be searched] which if used in a conveyance would not convey it, and which would not confine the search to one building or place." We think this the true interpretation of the Constitution and statute.

The counsel for the state contends that really only one place is described in the warrant (the Hotel Davis), and that the Clark and Nash premises were named simply as boundaries of the hotel lot on either side. Unfortunately for this contention, there are in the warrant no words such as "between" or "bounded by," or other words indicating that the Clark and Nash premises were boundaries merely, and were not to be searched. Those premises cannot be excluded from the scope of the warrant without reading

into the warrant important words not found there. Even if such words could be read into such a description in a deed without having the deed reformed in equity, they cannot, under any rule of criminal pleading, be read into so sharp and summary a criminal process as a search warrant.

The demurrer is to the warrant, as well as the complaint, and we think it must be sustained.

Exceptions sustained.

Demurrer sustained.

Warrant adjudged invalid.

WINSTED SAVINGS BANK v. TOWN OF NEW HARTFORD et al.

(Supreme Court of Errors of Connecticut.
Nov. 7, 1905.)

1. SCHOOLS AND SCHOOL DISTRICTS—ORDERS—INTEREST.

Where it was intended by the parties that loans evidenced by school orders stating no time of payment should be carried by the plaintiff as continuing obligations, and a collateral agreement was made fixing the interest thereon, the orders drew interest at the contract rate until plaintiff demanded payment, brought suit, or the orders were paid.

2. SAME—INTEREST AFTER MATURITY.

Where school orders, payable on demand by virtue of a collateral agreement, drew only 4 per cent. interest before maturity, the holder, after having brought suit thereon, was entitled to recover damages at the rate of 6 per cent. from the commencement of the action to the date of the judgment.

3. SAME — CONSOLIDATION OF DISTRICTS — DEBTS—LIABILITY OF TOWN.

Gen. St. 1888, § 2198, authorizes each town at its option to abolish the school districts and parts of districts therein and assume the management and control of the schools, and constitute itself a single consolidated school district. Section 2198 declares that on the affirmative vote of the town to abolish the school districts therein, etc., it shall assume the property of such districts and be responsible for their debts. *Held*, that on the abolition of the school districts in a town, the town became absolutely liable for the debts of the districts, though there was no equitable adjustment of property rights and liabilities as between the taxpayers of the several districts, etc., as provided by sections 2198, 2206; such provisions being mere details for the equitable completion of the consolidation, and not conditions precedent to its accomplishment.

4. SAME—EQUITY—ESTOPPEL.

Where a town neglected to make a needed adjustment of property rights and liabilities as between taxpayers of several school districts in the town, which were abolished on the town constituting itself a single consolidated school district, as provided by Gen. St. 1888, §§ 2198, 2206, the town, after returning to the district method of maintaining its schools, was not entitled to object to the payment of interest on indebtedness of one of the districts abolished during such abolition, because such payment would be inequitable as against taxpayers of other districts.

Appeal from Superior Court. Litchfield County; Milton A. Shumway, Judge.

Action by the Winsted Savings Bank against the town of New Hartford and others to recover money loaned defendant school dis-

trict as evidenced by four school orders. A cross-complaint was filed by defendant district against defendant town, and judgment was rendered in favor of plaintiff as against the district, and on the cross-complaint in favor of the district against the town to recover certain interest, from which plaintiff and the town appeal. Reversed on plaintiff's appeal and affirmed on the appeal of the defendant town.

Prior to October 4, 1897, there were in the defendant town of New Hartford nine school districts and three parts of districts. In each of said districts and parts of districts was a schoolhouse and other school property belonging to the respective districts. Three of the districts had outstanding liabilities. The defendant school district was one of them. Its indebtedness was \$6,500, represented by four orders originally purchased and now held by the plaintiff, and each of the following tenor, to wit: "New Hartford, Conn., Nov. 15, 1886. Treasurer North End School District: Pay to the order of Winsted Savings Bank two thousand dollars, for Renewal Construction Acct. Orders. F. A. Jewel, George E. Bancroft, District Com. Accepted Nov. 15, 1886. Geo. A. Spencer, Treas." Upon these orders \$1,500 principal had been paid. When these orders were taken by the plaintiff and the loan thus made, the parties agreed that the interest thereon should be at the rate of 4 per cent. per annum. Interest at said rate was paid semiannually to November 15, 1898. No other payments of principal or interest have been made. The indebtedness of the other districts amounted to \$600. At the annual town meeting of said town, held on October 4, 1897, it was voted that the school districts of the town should be consolidated. The town thereupon assumed the exclusive control of the property of the several districts and the exclusive management of the schools, the maintenance of which it thereafter continued at its expense for five years. At the annual town meeting in October, 1898, it was voted "that any adjustment of school property deemed advisable under present consolidation of districts be left with the town school committee and the selectmen." Pursuant to this vote and by authority of the chairmen of the boards named, an appraisal of all the buildings belonging to the several districts and parts of districts was made. No further action was ever taken in the direction of an adjustment as provided in section 2198 of the Revised Statutes of 1888, then in force, and no transfer of property by the districts to the town was ever made. At the annual town meeting in October, 1902, it was voted to abandon town control and re-establish the pre-existing school districts, and thereupon the several districts resumed their former functions and possession and control of the property owned by them before consolidation was voted. During the following February, the selectmen and town school committee

met for the purpose of adjusting all claims between the town and districts, and decided that the property of the districts was in as good condition as before the town assumed its control, and that the town had no claim against the districts for repairs or improvements. The town never took any action assuming the liabilities of said districts other than that recited, and the defendant district never requested the selectmen to pay its said indebtedness to the plaintiff, or any part thereof, or the interest thereon, or to assess the amount thereof against the district on the grand list. In 1903 the two districts which had the \$600 of indebtedness paid the same, together with all accumulated interest. No question was made as to the legality of the action taken by the town. The answer of the defendant district contained a cross-complaint which set up the facts connected with the consolidation, and asked, by way of equitable relief, that, in the event that judgment should be rendered against it in favor of the plaintiff or against both defendants, the portion of said judgment which each defendant as between themselves should pay should be determined and adjudged. The court rendered judgment in favor of the plaintiff against the defendant district to recover the principal sum due upon said orders, with interest at 4 per cent. from November 15, 1898, and in favor of the defendant district against the defendant town to recover the amount of interest for the five years of consolidation, to wit, \$1,300.

Samuel A. Herman, for appellant Winsted Savings Bank. Wellington B. Smith and Frank B. Munn, for appellant town of New Hartford. Donald T. Warner, for appellee North End School Dist.

PRENTICE, J. (after stating the facts). The plaintiff complains that the amount of its judgment is too small, in that interest upon the principal sum was computed at 4 per cent., and no more, for the whole period of time from November 15, 1898, the date to which interest had been paid, down to the date of judgment. It contends that interest at the rate of 6 per cent. should have been allowed as damages from either said November 15th or the date of the service of the writ. As no time of payment is stated in the orders, they were in legal effect payable on demand. *Bacon v. Page*, 1 Conn. 404; *Raymond v. Sellick*, 10 Conn. 480. As demand obligations they were, as between the parties, due and payable immediately. *Curtis v. Smith*, 75 Conn. 429, 53 Atl. 902. The date fixed in the instrument for payment may not, however, be that when payment is in fact intended. *Hubbard v. Callahan*, 42 Conn. 524, 19 Am. Rep. 564. The intent governs and creates the real contract. *Seymour v. Continental Life Ins. Co.*, 44 Conn. 300, 28 Am. Rep. 469. In this case the intent of the parties that the loans evidenced by these orders should be carried by the plaintiff as continuing ones,

and that the collateral agreement which was made as to the interest should continue to fix the interest rate until such time as one of the parties should exercise its right to terminate that contractual situation by demand or suit, on the one hand, or payment on the other, is apparent. The contract must therefore be regarded as one to that effect. To hold otherwise and permit the plaintiff to receive a higher rate of interest, whether in the form of damages or of interest proper for any period prior to the time when it took appropriate steps to put an end to the relation it had by express agreement created, would be to violate the plain intent of the parties. There is no rule of law which compels such violation. *Seymour v. Continental Life Ins. Co.*, 44 Conn. 300, 28 Am. Rep. 469; *Hubbard v. Callahan*, 42 Conn. 524, 19 Am. Rep. 564. The first act to which the finding fixes a date by which the plaintiff, through appropriate action, sought to declare its termination of the long existing status, was the commencement of the present suit. The court therefore did not err in computing interest at the agreed rate of 4 per cent. for the time preceding the date of the service therein. *Jencks v. Phelps*, 4 Conn. 149.

With respect to the time subsequent to the beginning of the action, different considerations in part control. The recovery for this period is in the nature of damages for the breach of contract. *Sellick v. French*, 1 Conn. 33, 6 Am. Dec. 185. Parties may, in the absence of a statute to the contrary, agree as to the basis upon which the assessment shall be made. *Hubbard v. Callahan*, 42 Conn. 524, 19 Am. Rep. 564. As to what the rule should be in the absence of such an agreement or controlling statutes the decisions in different jurisdictions differ. Unfortunately those in our own do not leave some aspects of the subject free from doubt. It seems to have been well settled that, where the agreed rate of interest was higher than the legal rate, the agreed rate would be used as the measure of damage after breach. *Beckwith v. Hartford, P. & F. R. Co.*, 29 Conn. 268, 76 Am. Dec. 599; *Adams v. Way*, 33 Conn. 419; *Hubbard v. Callahan*, 42 Conn. 524, 19 Am. Rep. 564. With respect to a reverse situation, the cases are by no means explicit or satisfactory. Some quite plainly indicate the conclusion that the legal rate would be used. *Fisher v. Bidwell*, 27 Conn. 363; *First Eccl. Soc. v. Loomis*, 42 Conn. 570. Others, reference being had especially to the first two cited to the proposition that the conventional rate would be adopted where it is higher than the legal, are susceptible of a contrary inference. They may, however, be readily distinguished by limiting their doctrine, as Judge Loomis in *Hubbard v. Callahan*, *supra*, stated it, as intended to be applied to cases of the kind then under consideration. The reason for the position assumed in these cases is forcibly suggested in the first of them, where it is urged that

the borrowers could not have been expected to derive a benefit in the rate of compensation from their breach of contract. The court was not disposed to lay down a doctrine which would result in a reward to wrongdoers for their wrongdoing. *Beckwith v. Hartford, P. & F. R. Co.*, 29 Conn. 268, 271, 76 Am. Dec. 599. A reversal of the conditions puts a changed aspect upon the situation. Justice and equity no longer call for a continuance of the agreed rate after breach. On the contrary, they call for some rule which will not permit one, after the dishonor of his contract, to compel its unwilling continuance until judgment can be obtained at a rate lower than what the law regards as the ordinarily fair one, and as low as the obligee was satisfied with before the dishonor. The aim of the law is to award as damages what will be fair compensation. The legal rate of interest is under ordinary circumstances chosen as the measure of this compensation for the wrongful detention of money as furnishing a convenient and presumably fair and equitable rule. *Beckwith v. Hartford P. & F. R. Co.*, 29 Conn. 268, 76 Am. Dec. 599; *Fisher v. Bidwell*, 27 Conn. 363. A lesser rate which one might be willing to accept under favorable conditions could scarcely be presumed to be a just one to force upon him *ad invitum* and under changed conditions, which he could not be assumed to have contemplated when his agreement was made. We are of the opinion that reason and justice alike support the view that one who is unlawfully deprived of money which is his due should, statutory provisions to the contrary aside, be entitled to recover as damages for the unlawful detention interest at not less than the legal rate, unless he has otherwise agreed. Section 4600 of the General Statutes of 1902, following an act first passed in 1873, provides that "Interest at the rate of six per cent. a year, and no more, may be recovered and allowed in civil actions, including actions to recover money loaned at a greater rate, as damages for the detention of money after it becomes payable." It is unnecessary to determine the full scope and effect of this provision. It is sufficient for the purposes of this case to observe, not only that nothing in it can be held to militate against the plaintiff's right to recover at the rate of six per cent. since action brought, but also that its terms comport with such recovery, even if they do not expressly sanction it. The court therefore erred in not including in the damages awarded the plaintiff interest upon the principal sum at the rate of 6 per cent. from the date of the commencement of the action to the date of judgment.

The defendant town complains of the judgment rendered against it in favor of the defendant district for the recovery of the amount of the interest for the five years during which the vote of consolidation was in force. The reasons for this complaint are in

the record stated in various forms. They are in substance, however, only two, to wit: First, that the town never assumed the property of the district and never became responsible for its obligations; and, second, that the imposition of this interest charge upon the town would be unjust to the taxpayers in other districts and inequitable as between those concerned. The first of these claims is based upon the propositions that neither the vote of consolidation nor that vote followed by the actual assumption and use of the property of the districts in execution of the vote sufficed to vest the town with the districts' property and render it responsible for their debts. The contention is that such a vesting and responsibility could only result either from an express assumption, the agreement of the parties, or a compliance with some or all the provisions of chapter 130 of the Revision of 1888, relating to the adjustment of property and obligations as provided in section 2198 and to the payment of debts as provided in section 2206. The statutes are not to be so interpreted. To each town was left the option to abolish the school districts and parts of districts therein, assume the management and control of the schools, and constitute itself a single consolidated school district. Gen. St. 1888, § 2193. It was provided that upon the affirmative of a town it should assume the property and be responsible for the debts of the districts. Gen. St. 1888, § 2198. The meaning and effect of this enactment is manifest. By force of it the action of a town which accomplished the abolition of the districts, the assumption and control of the schools, and the creation of a single union district was also made to accomplish the assumption of the property of the districts and of the liability for their debts. The provisions of section 2198, looking to an equitable adjustment of property rights and liabilities as between the taxpayers of the several districts, and those of section 2206 regulating the payment of certain claims and demands upon the abolished districts, related to proper details in the convenient and equitable completion of the work of consolidation, but they were not in any way made conditions precedent to the accomplishment of the essential results of abolition of existing districts, assumption of school control, constitution of town district, and devolution of district assets and liabilities.

It is contended that this construction rendered it possible for a town to appropriate the property of a district and make no proper compensation therefor by the statutory method of an appraisal and adjustment by a tax levy or otherwise. We have no occasion to decide whether such a possibility existed. If, however, the statutes failed of completeness in this regard through the substitution of the word "may" in the place of the original "shall" of the act of 1865, it yet remains that the other language of

the statutes and their history and general scheme leave little room for doubt that the construction we have given is the correct one. Pub. Acts 1865, c. 112, p. 107; Pub. Acts 1866, c. 102, p. 90. The claim that a judgment against the town for this interest would be inequitable in its effect upon the taxpayers in the several districts is one to which the record gives no sufficient support. The facts which are said to indicate that result are that all of the districts had property, that all, save two in addition to the defendant, had no liabilities, and these two insignificant ones in comparison with those of the defendant, that these two have since the resumption of district control paid their debts and interest, and that there never was an appraisal, estimate, and adjustment of assets and liabilities to determine the equitable status of the several districts and equalize the burden upon their taxpayers as prescribed in section 2188. None or all of these facts tend to show that the judgment would lead to an inequitable distribution of burdens, as the town's brief assumes. The most that can be claimed of them is that they indicate such a possibility. What the fact is cannot be told from the facts upon this record. If inequity would result, the fault lies at the door of the town and its authorities who did not in 1897 take the statutory steps which would have created an equitable status under the new conditions then created. The law provided a way to that result. The town authorized its officials to take the necessary action. An appraisal was made by these officials. They went no further. It is fair to assume that this failure to complete the course contemplated by the statute was due to a decision that the existing condition required no action to render it an equitable one for the future; in other words, that the relation of the assets to the liabilities of the several districts and of the excess of the assets of each to the grand lists of each and of all was one which represented a fair distribution of the contribution to the joint fund vested in the town for school purposes by the consolidation. If the then status and conditions were equitable for the purposes of permanent consolidation, then it is equitable to all concerned that the town should bear the burden determined thereby, and an imposition upon it of the interest of any and every portion of the debts of the several districts for the period of consolidation becomes precise equity. The claim of the town, that there would be inequity in such a course, involves the proposition that it was seeking to do inequity when, in 1897, it failed to carry out an equitable adjustment. If by its own wrong it neglected to make a needed adjustment in order that an equitable status should be created, it is in no position now to take advantage of it. It is in no position to appeal to unproven possibilities. It cannot com-

plain, if, in the absence of contrary proof, it is held to the fair presumption from its acts, judged upon the theory that it did its duty. The fact that two of the districts have volunteered to pay the small amount of interest which matured upon their indebtedness during the consolidation period cannot, of course, operate to deprive this defendant district of its rights.

The brief of counsel for the town assumes that if liability for the debts of the district rested upon the town during the five years of consolidation, and its claim of inequity was not well founded, the judgment against it was justified. This assumption is correctly made. Under the circumstances indicated, which are, as we have seen, those which exist in the case, the equity of the judgment is clear. The town as the result of its own action took to itself all the property of the district and became responsible for its indebtedness. During the five years which followed, it used and had the benefit of this property and was bounden to pay this indebtedness. Obligation for the indebtedness carried with it obligation for the interest thereon, and the duty to pay it as it matured. Had the town performed this duty and promptly met its obligation in this regard, the interest in dispute would have been paid. As payment thereof was not made at maturity, suits therefor might have been successfully maintained against it. Had payment been made or enforced, it would scarcely have been contended that the town could now recover back its payments. Upon what theory ought it now to be in a better position as the result of its nonperformance of its legal duty? Had the consolidation status remained permanent, it is quite clear that the town would have paid the debt and interest without questioning. In what respect does the return to the district system change the equitable situation as to the interest earned prior thereto? When the return was made, the district received back its property unaugmented and is held liable for the pre-existing debt. Upon what principle is it to be said that this indebtedness may be justly increased? When the town took over the property of the districts and became obligated for their debts, what it really got in each case was the excess of property over liabilities. When the former system was resumed and the property and pre-existing debts remained unchanged, the purpose of the law was that it should restore each district to the status quo. If we assume, as we have seen we must, that the excess of property in the case of each and all of the districts represented an equitable proportional contribution to the joint net property vested in the town by the consolidation, then it follows that if the town, while taking and using the property of any district, were permitted to ignore its debts, it would be given an inequitable advantage, and that, if any district receiving back unaugmented property

is to have cast upon it an increment of obligations, it is not being restored to the status in which the consolidation movement found it. The brief on behalf of the town presents the claim that the court charged the town interest for five years, when under the pleadings only four years should have been allowed. Neither the claims below nor the appeal furnish any basis for this construction.

There is error upon the plaintiff's appeal, and no error upon the appeal of the town of New Hartford, and the cause is remanded for a correction of the judgment in favor of the plaintiff against the north end school district, conformably to the conclusions herein stated.

STATE v. MARLEY.

(Supreme Court of Errors of Connecticut.
Nov. 7, 1905.)

INTOXICATING LIQUORS—SALE—TOWN AGENT—DELEGATION OF AUTHORITY.

Gen. St. 1902, §§ 2722, 2726, provide that in a no-license town of not more than 5,000 inhabitants its selectmen shall appoint an agent to sell intoxicating liquors for specified uses only, to hold office for a year, and that an account of the liquor so sold shall be kept, etc. *Held*, that a town agent appointed under such sections had power to appoint suitable subagents necessary to aid him in carrying on the agency, and to delegate to them authority to make sales in conformity with the statutes.

Appeal from Superior Court, Litchfield County; John M. Thayer, Judge.

William Marley was convicted of illegal sale of intoxicating liquors, and he appeals. Reversed.

Leonard J. Nickerson, James P. Woodruff, and Elbert P. Roberts, for appellant. Donald T. Warner and Frederic M. Williams, for appellee.

TORRANCE, C. J. Upon the trial below the evidence for the state tended to prove that the defendant, a clerk in Crutch's drug store in Litchfield, at said store, upon two different days had sold, in September, 1904, without a license so to do, whisky to one Burke, to be used as a beverage. The defendant, in his defense, having testified that he was a licensed pharmacist, who as such had been, since 1896, employed in said store as chief clerk, offered to prove the following facts: That during the month of September, 1904, Litchfield was a no-license town; that Crutch was its duly qualified town agent for the sale of intoxicating liquors; that said drug store was the place designated for the sale of such liquors; that the sales charged in the information were made by the defendant in the absence of the agent, under a general authority from him to make, in the absence of the agent, such sales as the agent could himself make, if present; that the sales in question were made upon the statement of the purchaser that the liquor sold was to be

used for medicinal purposes only; that such sales were immediately entered upon the town agent's books as sales for medicinal purposes; and that the defendant in making said sales acted in good faith, and in the belief that he had the right to make them as the clerk and servant of the town agent. The court ruled that the town agent could not delegate to any one else his authority to make sales of spirituous and intoxicating liquors at said store, and for this reason excluded the offered evidence.

Whether the court erred in so ruling depends upon the construction of the statutes relating to town agents of the kind here in question. These statutes, found in sections 2722 to 2726 of the General Statutes of 1902, in substance provide as follows: In a no-license town, of not more than 5,000 inhabitants, its selectmen shall appoint a suitable person as the agent of the town for the purchase and sale of spirituous and intoxicating liquors, for certain specified uses only. Such agent is to hold office for one year, is to give bond for the faithful discharge of his duties, and is removable at the pleasure of the selectmen. He can sell liquors only at a place designated by the selectmen, for the uses specified only, at not more than a specified percentage above the cost price. The net profit of all his sales is to be paid over to the town. He is to receive for his services a fixed compensation, not to be increased or diminished by any increase or diminution of his sales. He is to keep an accurate account of all his sales, specifying the kind, quality, and price of the liquors sold, the name and residence of the purchaser, and the use for which the liquor was sold as stated by the purchaser. This account is to be open at all times to the inspection of the selectmen, and certain other designated officials; and the purchaser is made liable to fine and imprisonment for intentionally making to the agent any false representations "regarding the use to which such liquors are intended to be applied." This legislation, in regard to towns that have voted for no license, appears to have a two-fold object in view: (1) To provide an agency in such towns for the sale of liquor for certain harmless uses; (2) to prevent at such agency the sale of liquors for any harmful uses inconsistent with the vote of the town in favor of no license. To accomplish the first object the town is bound to provide a place where all those in want of liquors for the harmless specified uses can freely buy them at all reasonable times, subject only to such limitations and restrictions, as are imposed by law.

These provisions clearly evince, on the part of the Legislature, not only an intent that an agency for the sale of liquors for the uses specified shall be established and maintained, but also that such agency shall be open and available at all reasonable times to those who in good faith desire to purchase liquors for such uses. Now the town

agent cannot be expected to be personally present at the agency at all times when it should be open; and to hold that he cannot authorize a suitable person to make sales for him in his necessary absence, on account of sickness or other reasonable cause, is to defeat in a measure the legislative intent, and put those entitled to purchase at the agency to inconvenience and, perhaps, loss. The object in establishing such an agency cannot be fully attained, except by holding that the agent may make such an appointment. It may be conceded, as claimed by the state, that the performance of the agent's duty to sell involves to some degree the exercise of discretion, and that as a general rule such a delegated power cannot be re-delegated; but there is a well-recognized exception to this general rule in cases where the appointment of a subagent is necessary in order to fully carry out the purposes for which the agent was appointed. Evans on Agency (2d Eng. Ed.) pp. 53-55, c. 6. The case at bar is, we think, a case of that kind. The authority of the agent is always construed to include all the necessary and usual means of executing the duties of the agency properly. Am. & Eng. Encyc. of Law, vol. 1, pp. 879, 880, and cases there cited. "It embraces the appropriate means to accomplish the desired end." Benjamin v. Benjamin, 15 Conn. 347, 356, 39 Am. Dec. 384. Evans on Agency, supra, p. 54.

As the statutes in question neither in express terms nor by necessary implication deny to the agent the power to appoint suitable subagents necessary to aid him in carrying on his agency, we think this case falls within the exception to the general rule above mentioned. It is claimed that such a power is liable to abuse, and that, perhaps, is true; but the temptations to abuse it are not very great, and, if abused by any agent, an effectual and speedy remedy is given in the power of the selectmen to remove such agent at pleasure. For these reasons we think the court below erred in not permitting the defendant to avail himself, if he could, of the facts which he offered to prove.

There is error, and a new trial is granted.

JOHNSON v. PHILADELPHIA, B. & W. R. CO.

(Court of Chancery of Delaware. Nov. 6, 1905.)

1. EMINENT DOMAIN—RIGHT OF WAY—CONDEMNATION—CHARACTER OF PROPERTY—VALUE—EVIDENCE.

Where, in a suit to restrain a railroad company from condemning certain land, under a charter providing that its line should not pass through any outbuilding of the value of \$300 without the owner's consent, complainants alleged ownership of a stable affected by the intended right of way of the value of more than \$300, but the only proof was that the stable was of value as an adjunct to a licensed house, and had been previously rented for \$5 per month, and could not be replaced for less than \$450 or \$600, while defendant introduced a number

of affidavits that the value of the stable did not exceed \$150, complainant failed to sustain the burden of proof that the stable was worth \$300 "at the time proceedings were instituted."

2. MUNICIPAL CORPORATIONS—EXISTENCE OF STREETS—ABUTTING OWNERS' RIGHT TO QUESTION.

Where complainant, by virtue of proceedings to condemn land for a railroad right of way, was no longer an owner of land abutting on a street on which the railroad tracks were laid, complainant had no right to raise the question of the extension of the street over a portion of the railroad's right of way.

3. EMINENT DOMAIN—RESOLUTION—REPORT OF COMMISSIONERS—VARIANCE.

Where the resolution of the board of directors of a railroad company for the condemnation of certain lands to improve a portion of its line, required by 22 Del. Laws, p. 794, c. 394, § 82, for the institution of such proceedings, provided for a taking of a strip 40 feet wide extending between certain limits, it was insufficient to support a report of condemnation commissioners reciting the assessment of damages for the taking of defendant's land to the width of $41\frac{3}{10}$ feet in its widest part.

4. MUNICIPAL CORPORATIONS—EVIDENCE OF EXISTENCE OF STREET.

Evidence held insufficient to establish the taking of land for an extension of a street over lines claimed by defendant railroad company for a right of way.

5. EASEMENTS—RAILROADS—RIGHT OF WAY.

The use of longitudinal right of way along the right of way of a railroad company being inconsistent with its proper use by the railroad company, such an easement will not be presumed from mere user.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, § 30.]

Bill by Arthur Johnson against the Philadelphia, Baltimore & Washington Railroad Company to restrain defendant from elevating its tracks in certain streets of a city and from condemning certain property adjoining its right of way. On application for preliminary injunction. Granted in part.

Saulsbury, Ponder & Curtis, for complainant. Ward & Gray, for respondent.

NICHOLSON, Ch. The bill in this cause was filed August 31, 1905, and the answer September 11, 1905, at the hearing of a motion for a preliminary injunction on bill, answer, affidavits, and exhibits. The hearing began September 11th and ended September 16th. The case is one of a number brought by abutting property owners against the Philadelphia, Baltimore & Washington Railroad Company for the purpose of preventing the elevation of the railroad tracks upon the railroad's right of way between West and Justison streets, in the city of Wilmington, or the condemnation of the properties adjoining the railroad's right of way on the north. This is the second of such suits to be heard on motion for a preliminary injunction; decisions having been rendered and opinions filed in the other suit on two several motions. Daniel Bubenzer v. P. B. & W. Railroad Co. (Del. Ch.) 57 Atl. 242, and Id. (Del. Ch.) 61 Atl. 270. The complainant in this suit has presented essentially the same case as did the complainant in

the Bubenzer Suit, with the exception of the evidence adduced in relation to his claim of a right of way, and more specially as to the existence of a public street (Water street) over that portion of the railroad's property or right of way between West and Justison streets. The case presented by the respondent, however, is radically different. At the hearing of the first motion for a preliminary injunction in the Bubenzer Suit, there was no denial by the respondent of the allegations in complainant's bill, supported by a number of affidavits, in relation to his alleged easement of a right of way; and the preliminary injunction was granted expressly because of the implied admission of all the plaintiff's allegations by such failure to deny. The question of the right of way is referred to in the opinion delivered by this court upon the decision of the second motion (that made upon the amended pleadings subsequent to the condemnation proceedings) as follows: "And in respect to the original right of way above described, the respondent alleges in his answer to the amended bill that the condemnation proceedings concerning all that portion of complainant's property abutting upon the respondent's right of way have destroyed the easement and right of way alleged by the complainant over the respondent's present right of way, or the alleged bed of Water street, and that the destruction of said alleged easement or right of egress and ingress was considered by the said commission in assessing their damages for the condemnation of said property." *Bubenzer v. P., B. & W. R. Co.* (Del. Ch.) 61 Atl. 272. After the decision of that motion, affidavits and plots and photographs relating to a longitudinal right of way alongside the railroad tracks, to and from the property of complainant, were presented at Chambers by the respondent's solicitors, and from these were formulated the terms of the order actually signed. In the present case, however, a great number of affidavits are introduced, denying any adverse user of a way either across or alongside the tracks of the railroad, respondent, although the answer alleges, as did the answer in the Bubenzer Case, above cited, "that the destruction of said alleged easement or right of egress and ingress was considered by the commissioners in assessing their damages for the condemnation of said property." The most vital difference, however, between the case presented by respondent in this suit and that presented by it in the Bubenzer Suit consists in the respondent's treatment of the alleged fact which constituted the crucial point of the decision in the suit brought by Daniel Bubenzer, and the ground upon which that decision rested exclusively. I refer to the alleged fact of the existence of an outbuilding of the value of \$300 upon the premises sought to be condemned. The respondent

did not deny that there was an outbuilding on Bubenzer's property of the value of \$300 or upwards, and that circumstance alone brought the Bubenzer property within the restriction of respondent's power of condemnation contained in the charter of the Wilmington & Susquehanna Railroad Company, viz.: "That it shall not pass through any burying ground or place of public worship, nor any dwelling house without the consent of the owner thereof, nor shall it pass through any outbuilding of the value of three hundred dollars without such consent." In the case before me, however, this vital allegation of the complainant is denied, both in the answer and by affidavits, and as, according to the principles laid down in the Bubenzer Suit, the complainant's case must rest ultimately upon his proof of this alleged fact, it would seem proper that this should be the first point considered.

The complainant's allegation upon this point in the first paragraph of his bill is as follows: "And on Water street, in which respondent's tracks are now laid, a stable opening upon said Water street, which stable has been in use, with egress and ingress by, through, and upon Water street, where said tracks are laid, certainly for fifty years, which said stable is of the value of more than three hundred dollars, to wit, the value of one thousand dollars." The respondent answers this allegation as follows: "And respondent further denies that there is any stable or other building or outbuilding of any kind upon the rear portion of said lot, described as No. 1, which portion of said lot was condemned by commissioners on petition of the said respondent railroad company, in accordance with the forms of law and of the statutes of the state of Delaware in such cases made and provided, of the value of three hundred dollars or upwards." The complainant supports this allegation of his bill by his own affidavit, as follows: "The stable on the easterly of two properties in which he is interested is of great value to the place as a licensed house, and has been regularly rented, when not used by the properties, for as much as five dollars a month, though sometimes for three dollars per month." There is but one affidavit corroborating or supporting in any way this allegation. That affidavit is made by William M. Connelly, the present building inspector of the city of Wilmington, and gives no estimate whatever of value. Mr. Connelly estimates what it would cost to construct an equivalent building, but significantly refrains from giving his estimate of the value of the present building. I will give his affidavit in full: "My name is William M. Connelly, and I am building inspector of the city of Wilmington, Dela. On Thursday, the 14th day of September, A. D. 1905, I visited the locality known to me for thirty years as Water street, west of West street,

where the southerly ends of the properties fronting on Front street west of West street abut. I made an examination of the stable on the rear end of the Johnson property, for the purpose of determining what it would cost to place a building there to answer the same purpose for which this is fitted. The building is, of course, weather beaten, but a little pointing up of bricks and some paint would cause it to make a very different appearance. It would not be possible to erect an equivalent building there for less than \$450 to \$500. The building as it stands is sound, and answers all the purposes a new one would of the same size and character."

The railroad company, respondent, has filed in support of its answer the affidavits of eight experts. One of these, John J. Cassidy, alleges that he was building inspector of the city of Wilmington for six years, from 1898 to 1904, and that he had never had his attention called to the building erected in the rear of certain properties between West street and the Harlan & Hollingsworth Company's old foundry, abutting on the Philadelphia, Baltimore & Washington land, until recently. He then says: "I have also carefully inspected the said buildings as to their values, and beginning at West street, on going westward, I would value the buildings upon said properties as follows: The stable upon the rear of the property of Ellen Johnson, known as 402 West Front St., I would consider a value of one hundred and fifty dollars a liberal estimate therefor. The stable of Daniel Bubenzer, upon the rear of one of his properties, facing on Front street, I would consider seventy dollars as a liberal figure for its value"—and so on through the properties abutting on the space in dispute. The seven other affidavits are by prominent contractors and builders of the city of Wilmington, who testify that they have examined carefully the properties described by Mr. Cassidy, and four of them pronounce the buildings absolutely valueless, remarking that the estimate of value made by John J. Cassidy is very liberal. The other affiants simply aver that none of buildings referred to are of the value of \$300. That there is an outbuilding on the property condemned of the value of \$300 must, of course, be proved affirmatively by the complainant, in order to entitle him to the protection given by the charter restriction of the railroad company's power to condemn, and enable him to invoke the aid of the strong arm of the Court of Chancery. It cannot be held that he has succeeded in doing this, for the allegation in the bill to that effect is fully met by the denial in the answer, and the affidavit of the complainant himself, instead of strengthening, rather weakens, the simple allegation he has made in his bill, inasmuch as he indicates that he bases his estimate of value upon rents received at some past time, no rent at all being alleged as of the present time, and on some fancied peculiar value given to a stable by being owned in connec-

tion with a licensed saloon—a value which is not measured or accounted for. The affidavit of Mr. Connelly, as I have noted above, contains no estimate of value whatever, and it must assuredly be admitted that the cost of erecting a new building in the place of the old one, "of course, weather beaten," "which while it stands answers the purpose," cannot be taken as a measure of the value of the present building in the proceedings before me. The question is not what it would cost to construct a new building on the site of the old one, but what is the value of the present building.

The conclusion is inevitable, from the principles laid down in the Bubenzer Case, that, the complainant having failed to establish this ground for exempting his property from condemnation, the motion for a preliminary injunction must be dismissed, without regard to any of the other questions raised; provided, only, that the railroad company, respondent, can be shown to have taken the pains to proceed correctly in the condemnation of complainant's property. If the land of complainant has been lawfully condemned, the alleged easement of a right of way goes with it. It would also follow that the complainant, being no longer an abutting land owner, in consequence of the condemnation, would have no standing in this court to raise the question of the extension of Water street over that portion of the railroad's right of way west of West street.

The general corporation law contains the provisions which authorize and regulate the respondent's right of condemnation. It appears from these provisions that these condemnation proceedings are based upon a resolution of the board of directors (section 82, c. 394, p. 794, vol. 22, Del. Laws) which provides that "it shall also be lawful for any railroad company in this state * * * to straighten, widen and otherwise improve the whole or portions of its line or lines of railroad * * * in such manner and to such extent as its board of directors may determine upon, whenever, in the opinion of such board the same may be necessary, * * * and to acquire all lands and material necessary therefor by agreement with the owner or owners, or on failure to so agree, in the manner and by the proceedings prescribed in section 81 of this act." In section 81 it is provided: "That whenever any corporation created under this act cannot agree with the owner or owners of any lands, sand, * * * necessary to be taken and used in the construction of said railroad, for the purchase thereof, the said corporation may apply to the associate judge of the state of Delaware resident in the county where the land and material necessary to be taken are located," etc. Then follow the provisions relating to the appointment of freeholders, notice, etc., the assessment of damages which "the owner or owners will sustain by reason of the said railroad passing through, taking

and using the same," and, finally, after prescribing how payments shall be made, etc., it concludes: "Whereupon the said corporation shall be entitled to have, hold, use and enjoy the said lands, premises and materials described and condemned in said report and required for the purposes of said corporation, for or on account of which said damages shall have been so assessed." The prerequisite resolution was duly passed by the board of directors, resolving that it was necessary, etc., to acquire the tract of land marked 3 on the plans submitted to the board, and describing No. 3 as follows: "A piece of land, with improvements thereon, having a width of forty feet, and extending from West street to Justison street, along the northeasterly side of the Philadelphia, Baltimore & Washington Railroad." A strip 40 feet in width was thus authorized to be condemned, and therefore the first step was taken, in accordance with the law as construed in the Bubenzer Case, above referred to; but an examination of the proceedings following the said resolution of said board show a fatal variance. The report of the commissioners states that they did go upon and assess the damages on land of the defendant $41\frac{1}{10}$ feet in width at its widest part, and the plot of the land belonging to complainant, which was sought to be condemned, which plot has been submitted by respondent's solicitors since the hearing of the motion, shows a strip of land $41\frac{1}{10}$ feet in width, in harmony with the report, and it is not denied that that is the width of the strip which they proceeded to condemn; the same description of the strip appearing throughout in other papers. The authority upon which depended the whole proceeding of condemnation formally declared 40 feet to be the width of the strip to be condemned, thus at once creating and limiting the power to take. The commissioners, on the other hand, totally disregarding their mandate, proceeded to take a strip exceeding that width by one foot and two-tenths of a foot.

Nothing has been suggested by counsel, nor have I been able to discover anything, which could give me the authority to alter or amend the condemnation proceedings, or in any way avoid the conclusion that all the proceedings subsequent to the resolution of the board of directors were fatally defective and void. Respondent's solicitors have submitted an affidavit by one of the railroad engineers, which gives the reasons or motives which induced the variation; but unfortunately the motives, however excellent, cannot alter its legal effect. It appears to be clear, therefore, that although the respondent had the power to condemn the property in dispute in accordance with the provisions of the general corporation law, yet it is equally clear that it has failed so to do.

This conclusion brings me to the consideration of that question for the solution of which counsel in the cause have expended an

amount of labor, which, if I may judge by its results, is almost unprecedented in this court. The question to which I refer is whether Water street extends west of West street, over the lines claimed by the railroad company, respondent. Beginning as far back as 1801, statutes, ordinances, debates, and proceedings in council, plots, maps, resolutions of committees, reports of condemnation proceedings, abstracts of title and affidavits without number, as well as letters and propositions from railroad officials, were produced at the hearing, and consumed in the reading nearly a whole week. In order to be certain that I had overlooked nothing, and to be able properly to co-ordinate and arrange in my mind this vast mass of material, I have gone over it all again very carefully at my desk, and over many portions again and again. If, taking it all together, anything affirmative could be extracted from the miscellaneous aggregate of papers, it would be proper for me to review and tabulate it thoroughly, even though it might occupy the space of a whole volume of law reports. Such is not the case, however. The conclusions to be drawn from it are purely negative, and my decision must be based upon what it fails to prove, rather than what it does prove; upon what does not appear, rather than what does appear. I shall therefore be very brief and very general in my view of it. The industry and research displayed in the collection of this material entitle counsel to commendation, and its results, which will be preserved in the office of the register in chancery, will doubtless prove of inestimable value to the local historian.

Proof of the Rumford title to the land in dispute was introduced by the respondent and abstracts of title of the abutting owners; also, an agreement between Jonathan Rumford and the Wilmington & Susquehanna Railroad Company, dated April 1, 1835, by which Jonathan Rumford agreed to convey to the railroad company, and "to make a good title in fee simple" to as much of his land "as shall be required by the said act of incorporation for the purposes of the said railroad," for the sum of \$400. This was followed by Rumford's receipt for \$400, and written promise to give a deed for the land whenever required by the company. The company went into possession under this agreement, and counsel claim a fee-simple title to the land, and not a mere right of way.

It will be entirely useless for me to cite the numerous acts and ordinances concerning Water street, because they have not been shown to have resulted in its opening between West and Justison, nor is there the slightest scintilla of evidence in writing that it was ever condemned. Condemnation proceedings were had throughout the year 1872, which finally resulted in the opening of a street 25 feet wide, called "Railroad Avenue," along the south side of the track of the respondent company, west of West street.

These proceedings were based upon a statute directing, and followed by a city election and numerous meetings of the city council showing discordant views, all resulting in condemnation proceedings, which finally ended, after many checks and delays, in the opening of a street 25 feet wide on the southerly side of, and immediately adjoining, the tracks of the respondent company. All this was set forth in detail, even to the amount of damages paid to each person entitled, and the exact description of every piece of property condemned. There are also affidavits as to the thoroughness of the search for documents and the ransacking of the city archives, which aver, in conclusion, that there is no evidence of the legal taking for a public street of any portion of the land used by the respondent company west of West street.

Upon the question of common report and long user showing dedication, many affidavits were produced by the complainant to the effect that the railroad tracks west of West street were considered to be laid on the bed of Water street, and that every one used the space south of the properties above described, and between West and Justison street, as a public highway, believing it to be Water street. In reply to this, however, the respondent introduced affidavits by the score contradicting these affidavits in every particular, and the affidavits introduced by the respondent were not only three or four times as numerous as those introduced by the complainant, but were made by the prominent manufacturers and business men of the city of Wilmington whose places of business were in the neighborhood of the property in dispute. Finally, the complainant introduced certified copies of city maps from the municipal offices, showing Water street extending beyond West street; but in reply to this it was pointed out by counsel for respondent that the Water street shown upon the said maps was a continuation in a straight line of Water street to the east, so that, as the railroad's right of way curved to the south at the block in dispute, the Water street shown upon the maps introduced by complainant would pass through the properties of the complainants in the above-mentioned suits against the railroad, rather than over the tracks of the railroad. Only one map has been shown by complainant that represents Water street as extending beyond West, and at the same time curving southward in conformity with the curve of the railroad. This map is in an atlas published in 1876, under the direction of one G. M. Hopkins, of 320 Walnut street, Philadelphia, as appears from the title page. It is manifestly a commercial enterprise, and the fact that Water street is indicated by it upon the land in dispute would not, of course, carry enough weight as evidence to justify this court in holding that such additional evidence proved the existence of Water street in the locality indicated.

The condemnation proceedings which I have referred to as going on during nearly the

whole of the year 1872 did actually result, as I have already indicated, in the opening of Railroad avenue south of the respondent's right of way, hinging with it west of West street. A map maker, from a casual glance at those proceedings, in the absence of the exhaustive examination of them and other records and proceedings that has been made in this cause, might easily infer that Water street was extended with Railroad avenue.

The labor and research expended upon this branch of the case have shown laxity, confusion, and carelessness on the part of nearly every one concerned in past years, but it fails to disclose evidence that the land into the possession of which the railroad company, respondent, or its predecessor went under the agreement with Jonathan Rumford was ever subjected to the easement of a public highway, and became a public street of the city of Wilmington. I am therefore brought, after the long and arduous labors which this branch of the subject has cost me, as well as the counsel in the cause, to the same conclusion which I announced upon the decision of the first motion in the Bubenzer Case, viz.: "The complainant failed to sustain the contention that the land southwardly of his premises is an extension of Water street, and therefore a public highway."

The grounds upon which the complainant based his objection to the condemnation proceedings in the Bubenzer Case are stated on page 271 of 61 Atl., as follows: "(1) The respondent has no authority to construct an elevated railroad. (2) The respondent has no authority to widen its roadbed at the points in question, having already reached the extreme width authorized by the act under which it was created. (3) The respondent has no right to take for its use or destroy or pass through any outbuildings of the complainant of the value of three hundred dollars without his consent, by reason of the provision in the original charter of the Wilmington & Susquehanna Railroad Company, which provides that it 'shall not pass through any burying ground or place of public worship, nor any dwelling house without the consent of the owner thereof, nor shall it pass through any outbuilding of the value of three hundred dollars without such consent.' (4) The respondent has no authority to take the land in question because of certain irregularities claimed to exist in the condemnation proceedings, which are elaborately set forth in the bill." The complainant repeats all these grounds of objection in the present case. Two of them (the third and fourth) have been hereinbefore considered at length, and the two remaining ones (the first and second) were decided adversely in the Bubenzer Case for reasons fully set forth in the opinion of the Chancellor, and they must, for the same reasons, be decided in like manner in the case before me.

There is but one question, therefore, still to be discussed, and that is whether the complainant is entitled to an easement of a right

of way obtained by user, and, if so, what way. It having been shown above that the condemnation proceedings taken by respondent were fatally defective, it follows that the complainant's motion for a preliminary injunction must be granted so far as to restrain the railroad company, respondent, from entering upon or taking the premises sought to be condemned. It also follows that, if there be an easement of a right of way attached to the said Johnson property, it should be protected by an injunction.

The complainant claims a longitudinal right of way alongside of the railroad tracks to West street for both of his abutting properties, and also claims a right of way across the railroad tracks for the property upon which there is a rear entrance to his saloon. The failure of proof as to this latter claim is complete. In fact, the affidavits submitted on this point seem to have been intended to support two different contentions, and they appear to be relevant to the claim of an indefinite roving use of the respondent's railroad track as a public highway or city street, rather than to the claim of user of a specific way to the rear entrance of complainant's property.

There are 52 affidavits, all in the following form: "That he knows the saloon kept by Arthur Johnson on Front street or Lancaster avenue in the city of Wilmington, just west of West street, with a back entrance thereto from Water street, and that he has more or less frequently, from time to time, as he has found convenient and desirable, crossed over the ground on which the railroad tracks of the defendant are laid on what is called 'Water Street' west of West street from the direction of the premises of the Harlan & Hollingsworth Company, and entered the premises of Arthur Johnson by his back gate on Water street, which is such entrance, to transact such business there as he desired. This the deponent has done for about — years." They differ only in the number of years of user. These vary from a couple of years upward, there being seven which allege twenty years or more, and some which state "about twenty years," the others stating much less. It is manifest without discussion that such evidence is utterly insufficient to establish a right of way appurtenant to the Johnson property across the respondent railroad's tracks. For that purpose, it is not entitled to receive serious consideration.

The longitudinal right of way, however, rests upon a great mass of testimony connected generally with the rear entrances to nearly all of the abutting properties in the block, but is contradicted by a very large number of affidavits introduced by the respondent in reply to the complainant's affidavits, and denying that the user was adverse. I will not discuss now the effect of the allegations of the respondent's answer in regard to the condemnation of this alleged easement of the right of way, nor will I revert again to

the position taken by the respondent through its counsel in relation to the alleged easement of the same way in the Bubenzer Case; but I will confine myself to the consideration of the very interesting and important question of law raised in the brief of respondent's counsel. This point is, as decided by some of the cases cited by him, that a longitudinal right of way along the right of way of a railroad cannot be granted by the railroad company, and therefore such easement cannot be acquired by user which presumes a grant. In the case which it has been necessary for me to cite so often—the Bubenzer Case (Del. Ch.) 57 Atl. 243—the Chancellor says: "The argument in that case and in the cases cited in the opinion does not apply to the decidedly different questions that are raised by the claim of a right of way by prescription over a railroad's right of way; and it is interesting to note that in the state of Massachusetts, where the right to obtain by prescription the easement of a private right of way over a railroad's right of way is established beyond question, the law is by statute precisely the same as that laid down in the California case above quoted, with regard to obtaining title by adverse possession to a portion of a railroad's right of way. *Turner v. Fitchburg Railroad Co.*, 145 Mass. 433, 14 N. E. 627, and *Fitchburg Railroad Co. v. Frost*, 147 Mass. 118, 16 N. E. 773. In *Turner v. Fitchburg Railroad Co.*, above cited, the court said: 'In *Fisher v. N. Y. & N. E. Railroad*, 135 Mass. 107, it was held that the statute of 1861, p. 413, c. 100 (Pub. St. 1882, c. 112, § 215), which, in substance, provides that no length of possession or occupancy of land of a railroad corporation by an abutter shall create a right in such land to the abutter, would not prevent him acquiring a right to a private way across the railroad by a twenty years user thereof.' The court further says: 'The defendant further urges that it is impossible to gain the right of way over a railroad in actual operation, as the land of the railroad would be subject to the easement of the plaintiff, who might make use of it at his own pleasure. The case does not require us to define the exact limits of the right which the plaintiff has acquired, but it does not follow that, even if he has an easement, it is not one which he is compelled to exercise subject to the superior right of the railroad corporation to run its trains as it may determine to be proper for the general business of its road. There certainly may be an easement which will permit a way to be used only at particular times or seasons or for particular purposes. As there may be by grant a "right to cross a railroad when the trains of the corporation are not passing, so such a right may be acquired."' On the one hand, the failure of the respondent to deny, either by answer or affidavit, the allegations of the bill and accompanying affidavits with reference to the easement of a private right of way, operates as an admission of the user

of such right of way in the manner and for the period (much exceeding twenty years) alleged; and, on the other hand, the admission at the hearing by the respondent that the elevated structure contemplated would block absolutely all ingress and egress to and from complainant's premises operates to eliminate from this case questions relating to the extent to which difficulties of crossing respondent's right of way might be increased, or opportunities for so doing decreased, under conditions suggested by the language of the learned Massachusetts judge, above quoted." And the Chancellor concludes as follows: "In view of all the considerations which I have thus briefly adduced, it only remains for me to say that the complainant has shown that he possesses an easement for ingress and egress to and from the premises described in the bill over and across the railroad's right of way southwardly of his said premises, and that it follows that the company, respondent, should be restrained by a preliminary injunction from erecting any permanent structure that would obstruct, in the way contemplated by it, the complainant's enjoyment of his easement of such right of way. The motion for a preliminary injunction is therefore granted in so far as it seeks to restrain the respondent from obstructing or interfering with the enjoyment by the complainant of his private right of way over the respondent's right of way, southwardly of complainant's premises, by any structure or obstacle of a permanent character."

It is true that the order for the injunction issued after the decision of the second motion in that case protected a longitudinal right of way; but such modification of the original injunction granted in the case quoted just above was made upon the application of the respondent's solicitors after the decision of the second motion, and at a hearing granted them on the extent and form of the order to be signed, complainant's solicitors being also present. A moment's reflection will show that although, as stated in the Massachusetts case above cited, "there may be by grant a right to cross a railroad when the trains of the corporation are not passing," yet a right to use a railroad's right of way longitudinally is totally different. The first is, in fact, only a form of the familiar grade crossing, but from the very nature of things the use of the track or right of way of any railroad longitudinally cannot be subordinate to its use by the railroad, nor consistent with such use; and yet that is the postulate upon which rests the decision of the Massachusetts court which I have followed, to wit, that the easement of a railroad crossing exists *sub modo*, and is subordinate to the railroad's legitimate use of its right of way, dangerous and undesirable as such crossings are under the present conditions of railroading.

It is self-evident that the use of a longitudinal way along the right of way of a railroad company, except for an extremely

short distance, is absolutely inconsistent with its proper use by the railroad company, and is subversive of such use. The question is discussed at some length in the case of *Sapp et ux. v. Northern Central Railway Co.*, 51 Md. 124. The court say: "It appears from the facts stated that the easement set up is that of a private footway for some considerable distance over the lands of a railroad corporation, alongside of or between the tracks of the road from the house of the plaintiffs to a public highway. Without stopping now to consider other essentials of an easement by prescription, it is familiar and elementary law that title by prescription is founded on the presumption of a grant, and it follows from this that, in order to establish a prescriptive right, it must be claimed under and through some one who had a right to grant or create the easement claimed. Washb. on Easements, 120. That a railroad corporation has no power or right to grant an easement like this of footways for persons to walk along their tracks or by the side of them seems an almost self-evident proposition. It is obvious that, if such power existed and were exercised, it would be subversive of the very purposes for which railroad charters are granted. But the principle, if it needed authority for its support, has been decided. Thus, where a company was authorized by act of Parliament to construct and operate a canal for public use, and the defendant erected a milldam and steam engine upon its banks, and drew water therefrom for operating the same, and to an action for doing this pleaded a prescriptive right so to use the water, the court held that such right could not be maintained, for it implied an original grant thereof by the company to him, and they had no right to make any such grant, or to use the water for any purpose except for that of a canal." The court cite and quote from *Rockdale Canal Co. v. Radcliffe*, 83 Eng. C. L. Reports, 287, and also *Staffordshire Canal v. Birmingham Canal*, Law Reports, 1 Eng. & Irish Appeals, 254, and add: "We have been referred to no authority and have found none in which the doctrine of those decisions have been controverted." These English canal cases cited contain, of course, many elements not existing in a railroad case, but the same line of reasoning seems to apply, and it compels assent to the proposition that a longitudinal right of way along the right of way of a railroad not owning the soil cannot be created by such railroad by grant or otherwise, and cannot be acquired by user adverse to the railroad. How, indeed, can a railroad corporation, possessing only a right of way for railroad purposes, grant a right of way for purposes inconsistent with, and subversive of, their own use of it as a railroad? And, as stated by the court in the Maryland case, "It is familiar and elementary law" that title by prescription is founded on the presumption of a grant, and

it follows from this "that, in order to establish a prescriptive right, it must be claimed under and through some one who had a right to grant or create the easement claimed."

The only question arising in the application of this reasoning to the case before me arises from the question of title. Counsel for the respondent have claimed throughout the argument that the railroad company, respondent, has an estate in fee simple in the land over which the easement of a right of way is claimed, and not a mere right of way over the land. If such be the case, the question arises whether the railroad company, respondent, as owner in fee, might not have the right to grant or create the easement, notwithstanding the fact that it is a corporation created for the purpose of conducting the business of a railroad company. This claim of title, however, made by the respondent's solicitors, has been emphatically denied during the argument of the pending motion by the complainant's solicitors, although it has not been a material issue in the cause, and assuredly it has not been so established as to become the basis of any affirmative action.

In view of all the considerations which I have adduced in reviewing the confused and complicated matters presented for my determination upon the pending motion, and also in view of the fact that one of the fundamental rules controlling the action of a court of equity in granting or refusing an injunction is that the protection of the writ must be actually, and not theoretically, needed in order to justify the granting of it, I am led to the conclusion that the motion for a preliminary injunction ought to be denied so far as it concerns the alleged easement of a right of way, which is the same way that the railroad company, respondent, is already enjoined from encroaching upon or interfering with by the injunction outstanding in the *Bubbenzer Case*.

For the reasons hereinbefore given at length, the motion for a preliminary injunction is granted only so far as to restrain the railroad company, respondent, and its agents from entering upon or taking the land described in the condemnation proceedings which have been hereinbefore referred to.

Let the order be entered accordingly.

DILLON v. HUDSON, PELHAM & SALEM ELECTRIC RY. CO.

(Supreme Court of New Hampshire. Hillsborough. Oct. 3, 1905.)

1. DEATH — DAMAGES — CAPACITY TO EARN MONEY—EVIDENCE.

Under Pub. St. 1891, c. 191, § 12, providing that, in an action for the wrongful killing of a human being, his capacity to earn money may be considered as an element of damage, evidence tending to show such capacity is competent.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 88, 108.]

2. SAME.

Evidence in an action for the wrongful killing of plaintiff's wife, brought under Pub. St. 1891, c. 191, section 12 of which makes capacity to earn money an element of damage, that deceased never had earned money, and from her station in life probably never would render services calling for pay, though competent on the question of capacity to earn, would not prevent the jury from finding from other evidence that such capacity existed.

3. SAME.

In an action for the wrongful killing of plaintiff's wife, brought under Pub. St. 1891, c. 191, section 12 of which makes earning capacity of the deceased an element of damage, evidence as to the value of the wife's services as housekeeper in plaintiff's family was competent as tending to show such earning capacity.

Transferred from Superior Court; Chamberlin, Judge.

Action by James Dillon against the Hudson, Pelham & Salem Electric Railway Company. There was a verdict for plaintiff, and defendant excepted. Transferred from the January term, 1905, of the superior court. Exceptions overruled.

The deceased was the wife of the plaintiff. The defendant excepted to evidence of the value of the deceased's services as housekeeper in the plaintiff's family, which was offered as tending to show her capacity to earn money, and also to so much of the charge to the jury as authorized an assessment of damages on account of the capacity of the deceased to earn money. Other exceptions taken at the trial were abandoned in argument.

Rice, King & Rice and George F. Jackson, for plaintiff. Samuel W. Emery, for defendant.

PARSONS, C. J. The statute which authorizes the present action for the wrongful killing of a human being limits the damages which may be recovered to \$7,000 (Pub. St. 1891, c. 191, § 11), and provides (Id. § 12) that "the mental and physical pain suffered by him in consequence of the injury, the reasonable expenses occasioned to his estate by the injury, the probable duration of his life but for the injury, and his capacity to earn money, may be considered as elements of damage in connection with other elements allowed by law." The rule of the common law which permitted no recovery for causing the death of a human being has been generally abrogated by statutes which prescribe the grounds for which damages may be recovered, which differ so widely in the different statutes that decisions as to the damages recoverable under them would be of little aid, if there were doubt as to the meaning of the statute upon which this action is founded. The statute makes the capacity to earn money an element for consideration in assessing the damages. Hence evidence tending to show such capacity was competent. Evidence that the deceased never had earned money, and from

her station or situation in life probably never would, might be competent upon the question of capacity to earn, but would not establish its nonexistence. Hence the fact that the deceased never had earned money and probably never would render services which would be requited by a pecuniary compensation, if found from the evidence, would not prevent the jury from finding from other evidence that such capacity existed. The defendant's contention that the damage to the deceased's estate because of the cessation of her earning power is dependent upon so many contingencies as to be entirely speculative in character, and that therefore the earning capacity of the plaintiff could not properly be considered in assessing the damages, might be entitled to serious consideration if this were a common-law action; but the statute which authorizes the action prescribes the elements of damage, among which is the "capacity" of the deceased "to earn money." The language of the statute disposes of the exception. *Carney v. Railway*, 72 N. H. 364, 372, 57 Atl. 218.

Exceptions overruled. All concurred.

COOLBAUGH v. LEHIGH & WILKES-BARRE COAL CO.

(Supreme Court of Pennsylvania. Oct. 9, 1905.)

1. JUDGMENT—LIEN—PROPERTY SUBJECT.

Where a coal lease gave the lessee the right to remove a certain number of tons of coal annually, the lease to determine when all the coal should be removed, unless ended sooner under certain other provisions of the lease, and an annual rental was to be paid to the lessors, the lessors retained an interest in the coal to which the lien of a judgment would attach.

2. EXECUTION—SALE—INTEREST IN COAL—RIGHTS ACQUIRED.

Where a coal mine was leased for a certain annual royalty, and the lessors' interest in the coal was sold under a judgment against it, the royalties provided for in the lease were properly paid to the purchaser of the lessors' interest.

3. SAME.

Where a coal lease gave the lessee the right to mine a certain number of tons annually until the coal was mined at an annual rental, the legal title remained in the lessors; and where it was not taken from them within six years during the continuance of the lease, by mining the same, the money paid to them under the lease belonged to them as rental for the land occupied by the lessee, though the lessee had not used the land for the mining of coal, as it had a right to do under the provisions of the lease; and on a sale on execution against one of the lessors his interest in the rental went to the purchaser.

Mestrezat, J., dissenting.

Appeal from Court of Common Pleas, Luzerne County.

Action by J. R. Coolbaugh, administrator of Milton Dana, against the Lehigh & Wilkes-Barre Coal Company. From an order discharging a rule for judgment for want of a

sufficient affidavit of defense, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

F. C. Sturges and F. M. Nichols, for appellant. S. J. Strauss, A. H. McClintock, and Arthur Hillman, for appellee.

BROWN, J. On August 30, 1870, Milton Dana and others, owners of coal lands in Luzerne county, entered into an agreement with the Wilkes-Barre Coal & Iron Company, granting, demising, and leasing unto it, its successors and assigns, all the coal in said lands. The appellee succeeded to all the rights of the original lessee. The demise or lease, as the agreement is termed by the parties, was to date from January 1, 1870, and "to determine and end when all the mineable (and) anthracite coal shall have been mined and removed from the demised premises, unless the term be sooner ended under provisions" thereafter contained. The lessee covenanted to pay to the lessors the annual rental of \$20,000, in quarterly installments of \$5,000 each, in consideration of which it is permitted annually to mine and remove 80,000 tons of coal. There is a further provision that, "if the said party of the second part shall pay said twenty thousand dollars rent in any one year, as is hereinbefore provided, and during that year less than eighty thousand tons of coal, of the pounds aforesaid, be mined and removed, the said party of the second part may, in any subsequent year within six years thereafter, during the continuance of this lease, mine and move sufficient coal to make up the deficiency." On default in the payment of "an installment of rent, or any part thereof," for a period of 60 days, it was covenanted and agreed that the lessors, in their option, might declare the term of the "lease" at an end, and the "lease" was thereupon to absolutely cease and determine. Dana received his share of the payments made for the coal mined and removed up to April 1, 1880. On April 3, 1880, on an execution upon a judgment against him, the sheriff of the county sold to Joseph Birbeck and Alexander H. Van Horn all his "right, title, and interest in and to all the coal in and under" the land embraced in the lease. Since the sale and delivery of the sheriff's deed to these vendees of Dana's interest the payments for the coal mined and removed have been made to them. The affidavit of defense, in addition to the allegation of Birbeck's and Van Horn's ownership of interest in the coal and their right as the sheriff's vendees to receive payments for the same as mined, avers that the payments were made to them in the lifetime of Dana with his knowledge and consent; that since his death they were made without protest or objection from any of his heirs or personal representatives; that there has

arisen a complete and final presumption of law that Birbeck and Van Horn acquired the title for a full consideration, and have paid for the same to the said Dana or the persons who, on his behalf, were entitled to receive the rentals; and therefore his administrator, who brings this suit, is estopped from asserting a right to recover.

The questions raised by the statement and affidavit of defense are properly stated by the court below to be: "(1) Whether the sheriff's sale to Birbeck and Van Horn passed to them the right of the execution defendant Dana to receive 'rentals' or royalties under the coal lease. (2) If not, then is the administrator of his estate estopped from now asserting the right to recover from the defendant company royalties already paid to the sheriff's vendees or their representatives? (3) Would the facts averred, if proven, raise a presumption of a grant by Milton Dana to said vendees, of his right to receive such royalties?" Having been of opinion that the first of these three questions should be answered in the affirmative, and having so answered it, the court below deemed the discussion of the other two unnecessary.

Though the agreement of August 30, 1870, is called by the parties to it a demise or lease, we have, from Hope's Appeal (Pa.) 3 Atl. 23, down through a long line of cases, called it a sale of coal in place as land. Sanderson v. Scranton, 105 Pa. 469; D., L. & W. Railroad Co. v. Sanderson, 109 Pa. 583, 1 Atl. 394, 58 Am. Rep. 743; Lillibridge v. Coal Co., 143 Pa. 293, 22 Atl. 1035, 13 L. R. A. 627, 24 Am. St. Rep. 544; Kingsley v. Coal & Iron Co., 144 Pa. 613, 23 Atl. 250; Lazarus' Estate, 145 Pa. 1, 23 Atl. 552; Denniston v. Haddock, 200 Pa. 426, 50 Atl. 197. In the last case cited the lease was for 20 years and provided for the payment of a minimum royalty. It was executed on September 27, 1870, by Margaret Denniston and others to Charles Hutchinson, whose interest became vested in Haddock, the appellant. It appeared that Hutchinson and his successors in title had paid royalty during the whole term of the lease, but, on account of strikes and other circumstances, were prevented from mining coal to the full extent of the minimum paid. On September 22, 1891, the lessors executed a new lease, to take effect from October 1, 1891. Haddock, the lessee, had been continuously in possession of the property during the terms of both the old and the new lease and the period between them. He claimed to defalk the overpayments under the old lease, amounting to \$15,000, from the royalties due under the new lease, and, in affirming the judgment of the court below, refusing to allow such set-off, what was said by the present Chief Justice may now be very properly quoted at length as supporting appellee's contention: "It has been said in a number of cases that a conveyance of the right to mine and remove all the coal in a given tract of land, is a sale of the coal in place, although the con-

veyance may be called a lease. The expression is unfortunate; for, while it may have produced no erroneous result in the cases where it is used, it tends to substitute the general rules appertaining to sales for the rules properly applicable to the particular contract that may be under consideration by the court. Thus, for example, in Hope's Appeal (Pa.) 3 Atl. 23, which is practically the starting place of the error, the agreement, though called a lease, was a purchase of the coal at a fixed price per acre, making a liquidated gross sum, which was payable absolutely in installments ending within 13 years, though the lessee had a nominal term of 99 in which to remove the coal. It was justly said by the learned court below, whose decision was affirmed here, that it was 'manifest that the parties contemplated an actual sale of the coal, and not a lease in the ordinary use of that word.' In Sanderson v. Scranton, 105 Pa. 469, the lease was expressly made 'perpetual until all the coal under the tract is mined,' and it was held that this was such a complete severance that the taxes of the city of Scranton on the coal in place were chargeable to the lessee, and not the lessor. So in Kingsley v. Hillside Coal & Iron Co., 144 Pa. 613, 23 Atl. 250, it was again held that there was such a severance that occupation of the surface was not an adverse possession, even against a lessee who had not opened up or entered on actual possession of the coal. With the decisions in these cases no fault can be found; but the expression that a conveyance of coal in place, even by a lease for a limited term, is a sale, is inaccurate as a general proposition of law, and unfortunate from its tendency to mislead, which is apparent in some of the subsequent cases. Whether it would be better to call such an instrument accurately what it certainly was at common law, a lease without impeachment of waste, or to endeavor to reconcile all the decisions by calling it a conditional sale, is not necessary at present to discuss. The point to be noted is that the rules applicable to sales are not to be applied indiscriminately to such instruments, but each is to be construed like any other contract by its own terms. The defense in the present case is an ingenious misapplication of the principle of a sale. Appellant in compliance with his obligation under the lease paid a minimum royalty each year, and at the end of his term had paid more royalty than would have been required by the coal actually mined. He remained in possession of the land for a year under arrangement with one of the owners, and then took a new lease, under which the royalties now sued for accrued. He now claims to defalk the overpayments under the old lease, on the ground that he had paid for the coal and was entitled to it without further charge, because under his continued possession he could take it away without a trespass. The defect of this view is in the assumption that he had paid for the coal. He

had not. He had paid his rent on the stipulated terms, but he had paid nothing for the coal in place. His sole claim and title to that was to mine it during the term of the lease. As to it he was in the position of a lessee of a house, bound to pay rent whether he occupied it or not. The fact that he paid without occupying it would not excuse his liability for further rent if he accepted a new lease. Appellant admits that if he had gone out of possession at the termination of his lease he would have had no further claim to the coal, but his reason assigned is not the correct one. The right to remove the coal would have ended, not because the lessee had forfeited or abandoned his property in it, but because he had never acquired any such property; his right to do so being expressly limited to the term covered by the lease." In *D., L. & W. Railroad Co. v. Sanderson*, supra, the question was as to who should pay the taxes on the coal as land, the lessor or lessee under a coal lease, and *Trunkey, J.*, distinctly stated that no question arose "respecting the grantors' security for the purchase money, nor of their power to subject their right under the deed to the lien of a mortgage."

Here the question is as to the power of the grantor, Dana, to subject to the lien of a judgment the interest remaining in him under the agreement with the Wilkes-Barre Coal & Iron Company. If the lessee had paid the rental of \$20,000 for the first year, but had mined no coal, and in the second year, on its default in payment of a quarter's rent, the lessors had, in accordance with the terms of the lease, declared it terminated and resumed possession under the forfeiture clause, the lessee could not thereafter have mined and removed any coal because it had paid \$20,000 for the first year. This is the clear meaning and intent of the contract. That sum would have been retained simply as rent paid, and received as such, for the right to occupy and use the land by removing the coal therefrom for one year. *Lehigh & Wilkes-Barre Coal Co. v. Wright*, 177 Pa. 387, 35 Atl. 919; *Lehigh Valley Coal Co. v. Everhart*, 206 Pa. 118, 55 Atl. 864. It is only "during the continuance of the lease"—that is, before the rights of the lessee have terminated by a forfeiture of them—that it can, during any six years following an annual payment of \$20,000, appropriate to the payment of coal mined so much of that sum as has not been appropriated in any prior year to the payment of coal mined. After the expiration of six years no such appropriation can be made, and the minimum royalty is to be retained purely as rent for the year's occupancy of the land. The agreement of the parties is that the minimum rental of \$20,000 may be applied by the lessee on account of the purchase money of the coal, provided it

will actually purchase and acquire title in the manner pointed out in the agreement, viz., by mining it within six years. Until it is so mined the legal title remains in the lessors, and if not taken from them within six years during the continuance of the lease in the manner stated, the money paid them belongs to them as rental for their land which had been occupied by the lessee, though not used and appropriated by it as it had the right to do. This was just the situation when the interest of Dana in the coal land was seized and sold under the execution against him. If the coal had all been mined, the worked-out space would have reverted to him, and what had not been worked out was under a continuing contingency of reverting to him by a forfeiture of the lease. He still had an interest in the coal as land, title to portions of which, and in the end to all of which, he had agreed should pass from him and become vested, not only equitably, but legally, in the lessee, as from time to time it acquired the legal title to the coal by mining and removing it. But until the legal title was so taken from him it remained in him, as in the case of any vendor of real estate. This is the title that was still in him when it was sold from him by the sheriff to Birbeck and Van Horn, and, having acquired it, they are now entitled to all the rights under it. The one involved in this case is the right to the royalties, which, under the agreement of August 30, 1870, are to be regarded as pro tanto purchase-money payments for the coal in place, if mined and removed within a stipulated time. The title thereto is acquired by using these royalties within the stipulated period of six years during the continuance of the lease as payments for coal actually taken out and away.

As the question raised on this appeal did not arise in any of the cases holding a lease like the present to be a sale of coal in place as land, they are not to be regarded as in conflict with the view here expressed. Though expressions in some of them are apparently irreconcilable with it, it is to be remembered, as is said in *Denniston v. Haddock*: "The rules applicable to sales are not to be applied indiscriminately" to these leases; and when, as here, the question is as to the right of the grantor or lessor to subject the interest in the land which remains in him to the lien of a judgment or mortgage, no other doctrine than the one announced by the court below can accord with reason or the authorities relating to the interest retained by a vendor under an agreement for the sale of his land.

The order of the court below discharging the rule for judgment is affirmed.

MESTREZAT, J., dissents.

Appeal of YORK HAVEN WATER & POWER CO.

(Supreme Court of Pennsylvania. June 22, 1905.)

1. TAXATION — ASSESSMENT — PROPERTY IN TWO COUNTIES.

Where a power company erected its power house on a part of a 400-acre farm, that portion of the farm was separated from the remainder, and it did not matter where the mansion house on the farm was located, as it would not, under Act June 1, 1883 (P. L. 51), providing that, where county lines divide a tract of seated land, assessments shall be made in the county in which the mansion house is situated, be affected as to the place of tax by such fact.

2. COUNTIES—BOUNDARIES.

Under Act Aug. 19, 1749 (1 Smith's Laws, p. 198), the boundary line between Lancaster and York counties is the ordinary low-water mark on the west side of the Susquehanna river, and not the lowest line reached as the result of extreme drought.

3. TAXATION—ASSESSMENT—APPEAL—REVIEW.

The findings of fact by the lower court on appeal from the tax assessment will not be set aside, unless clearly erroneous.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 879, 884, 886.]

Appeal from Court of Common Pleas, Lancaster County.

Appeal of York Haven Water & Power Company from decree dismissing appeal from assessment by county commissioners. Affirmed.

The following is the opinion of the court below:

"The York Haven Water & Power Company is a corporation organized for the purpose of supplying water and power and of generating electricity by means of water power. It owns a tract of about 400 acres of land in York county, bounded on the east by the Susquehanna river, on which is erected a mansion house, barn, and other farm buildings, and a warehouse wherein is kept materials used in and about its business. It has erected a crib dam several thousand feet long in the Susquehanna river, south from which runs a retaining wall, which is part of the dam, at the end of which is erected a power house, where the said company generates electricity by means of the water power of the river. This power house, with machinery, is admitted by an officer of the company to be worth \$500,000, the amount at which it is assessed. The dam and most of the retaining wall are in Lancaster county. The county commissioners of Lancaster county and the township authorities of Conoy township claim that the power house and all of the retaining wall are also located in Lancaster county, and the assessor of Conoy township has assessed and returned it as liable for tax in Lancaster county. From this action the York Haven Water & Power Company has taken this appeal. It contends that its power plant is not taxable in Lancaster county, but, if taxable at all for township and county purposes, which question is not raised by the

appeal, it should be taxed in York county, first, because it is erected on part of the 400-acre tract of land, the mansion house on which is located in York county, and, even though the power plant is located across the boundary line in Lancaster county, the whole must be taxed as one tract, and that in the county where the mansion house is located; second, because the power house is located in York county.

"The first contention of the appellant is based on the act of assembly of June 1, 1883 (P. L. 51), section 1 of which is as follows: 'The assessors of the several counties within this commonwealth shall, on seated lands, make the assessment in the county in which the mansion house is situate, when county lines divide the tract.' With the exception that this act applies to counties, it is in the exact language of the fifty-ninth section of the act of July 11, 1842 (P. L. 331), which applies to townships. The act of 1842 has received a construction by the superior court in the case of *Com. v. Wheelock*, 13 Pa. Super. Ct. 282, which will assist us in applying the act of 1883 to the present case. In that case (*Com. v. Wheelock*) A. was the owner of a tract of land, part of which, on which was erected the mansion house, was in a township, and a small part of which was in a borough. On the part located in the borough was erected a house occupied by the owner's mother and sister, rent free. It was decided that the house in the borough was taxable in the borough and not in the township where the mansion house was located, because it was not used as part of the farm. Judge Rice, in delivering the opinion of the court, says (page 287): 'Possibly this house is subject to assessment in the borough, and upon reflection we are inclined to the opinion that this is the correct view. It appears to be in the exclusive occupancy of the owner's mother and sister as a dwelling, and it does not appear it is used as part of, or in connection with, the farm. If the owner had demised it, reserving a rent, it would seem clear that this would be a severance of it from the rest of the farm, which would make it subject to taxation as a distinct tenement. The fact that the owner's mother and sister pay no rent, if such be the fact, does not seem to us to affect the question. The controlling fact is that it is in their exclusive occupancy, and is not used in connection with, or as a part of, the farm.' When the York Haven Water & Power Company erected its power house on a part of this 400-acre farm, if it is on a part of it, that portion of the farm was severed from the remainder. It was no longer used as part of, nor in connection with, the farm, but for a separate and independent purpose. That is the controlling fact. It does not matter, therefore, where the mansion house is located, if it is in another county; for it would not, under the terms of the act of 1883, draw the portion

of the tract on which the power plant is erected to it for the purpose of taxation. We are of the opinion, however, that the power plant is not erected on the 400-acre farm. That farm only extends to low-water mark on the Susquehanna river, and we believe the power house is below low-water mark. The location of the mansion house on the 400-acre tract could not change the place where the power house is to be taxed. The act of 1883 only applies where the tract is divided by county lines, and does not apply to a separate tract, such as we have in this case.

"The second contention of the appellant is that the power house is located in York county. The boundary line between York and Lancaster counties is fixed by the act of August 19, 1749 (1 Smith's Laws, p. 198), as follows: 'All and singular the lands lying within the province of Pennsylvania aforesaid to the westward of the River Susquehanna * * * bounded eastward by the said River Susquehanna.' It has been agreed by the parties that low-water mark on the western side of the river marks the boundary line between York and Lancaster counties. This is most favorable to York county, and puts the boundary line as far east as it can possibly be, according to the act of assembly fixing the boundary. The Supreme Court has held that the boundary line on navigable rivers, and the Susquehanna river is made such by act of assembly, is at low-water mark. *Stover v. Jack*, 60 Pa. 339, 100 Am. Dec. 566; *Poor v. McClure*, 77 Pa. 214; *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 47 Atl. 745, 58 L. R. A. 206, 80 Am. St. Rep. 850. Low-water mark is defined in 2 Farnham on Waters, 1462, to be ordinary low-water mark, unaffected by drought; that is, the height of the water at ordinary stages of low water. In *Stover v. Jack*, 60 Pa. 339, 100 Am. Dec. 566, Justice Agnew says: 'The defendant alleged it to be an island surrounded by water, except at very low stages. The court held that low water, as contradistinguished from high water, does not mean the lowest water the stream may exhibit under special and extraordinary circumstances, and the locus in quo is an island if the water of the river flows around it, at its ordinary stage, unaffected by floods and drought. This is assigned for error, and it brings up for our decision what is meant by low-water mark as a terminus or boundary. * * * It is also a well-known fact that in the seasons of extreme low water many of the islands of the principal rivers are not entirely surrounded with water, but may be reached from the shore dry shod. All the circumstances show that to adopt any other rule than ordinary low-water mark, unaffected by drought, as the limit of title, would carry the rights of riparian owners far beyond boundaries consistent with the interests and policy of the

state, and would confer title where heretofore none has been supposed to exist. No one has ever thought that an island, cut off from the mainland by the stream in ordinary stages of low water, could be added to the land of an adjacent proprietor merely because in the very dry season of the year the stream had almost disappeared, and no water flowed over the intervening dry and sandy or pebbly bed. The doctrine that low-water mark is the extremest verge to which a long drought may reduce the stream would lead to such results. Ordinary high water, and ordinary low water, each has its reasonably well-defined marks so nearly certain that there is not much difficulty in ascertaining it. The ordinary rise and fall of the stream usually finds nearly the same limits. But to bound title by a mark which is set by an extraordinary flood or an extreme drought would do injustice and contravene the common understanding of the people. We are of the opinion, therefore, that the plaintiff's title was bounded by ordinary low-water mark.' To the same effect see *Wood v. Appal*, 63 Pa. 210; *Poor v. McClure*, 77 Pa. 214; *Hartley v. Crawford*, 81 Pa. 478.

"The testimony submitted to us on this appeal, considered in the light of the rule as thus laid down, convinces us that low-water mark in the Susquehanna river, at the point where the power house of appellant company is located, is to the west of said power house. On the part of Lancaster county, six witnesses have been called to prove the location of low-water mark at the point where the said power house is erected. Five of them testify that a rock called 'Ring Rock' is the low-water mark. The testimony of one of these witnesses is weakened in his cross-examination, but the remaining four testify quite positively on this point. They were all men who are, and have been, familiar with the river for from 30 to 50 years, and have crossed it frequently at this point. Two, in fact, have been ferrymen, and all know the location of Ring Rock, and of the power house in question. They testify that Ring Rock is the place to which boats were tied, even in times of very low water, and are corroborated by one of the witnesses for appellant, who says that even in 1883, when the water reached one of the lowest stages ever known, boats could be tied to this rock, if the chain were 15 or 20 feet long. These witnesses also testify that Ring Rock is from 65 to 100 feet west of the power house, and that there is wet and swampy ground to the west of the rock. One witness says that in 1888, when the water was more than ordinarily low, the foreman of the stone quarry at this point cut a low-water mark in a rock which marks low water about as far west as Ring Rock is located. The witnesses also testified that the company owning the paper mill, which was erected here in 1884, filled up the river at or near this point, and caused the line of low water to recede further out into the river.

They also testify that, in order to dig foundations for the power house, it was necessary to use cofferdams to keep the water of the river out. All these witnesses testify quite positively that all of the power plant is below low-water mark and in Lancaster county. In contradiction of this testimony the appellants have called nine witnesses, some of whom only testify as to the condition of the river at this point during the last few years, or after the paper company had filled up the river as described by the witnesses on behalf of Lancaster county. Three of these nine witnesses have lived in the vicinity for many years, namely, John Ohrendorf, Daniel Repman, and Sherman Walker. They testify that at very low water, namely, in 1883 and in 1888, the water had receded to a point from 12 to 15 feet east of the power plant; but they cannot say where low-water mark was in ordinary low water. One other witness testifies that the paper mill company did fill up the creek which flows into the river near this point, but did not fill up the river at the time the mill was erected. Another witness, William J. Childs, an hydraulic engineer, says, by his measurements at the time the power plant was built a year or two ago, low-water mark was east of the power plant. All the witnesses who testify on the subject admit that part of the power plant is east of low-water mark. Some of them testify that it was largely built on dry ground. None of the witnesses, however, fix any mark or monument on the land as the way in which they fix low-water mark, though several do so by an imaginary line from the head of Wissler's Island.

"As marks or monuments on the ground prevail over courses and distances mentioned in a survey, so the testimony of witnesses who fix low-water mark by a monument or mark in the ground, such as Ring Rock, to which even in times of low water they tied their boats, must prevail over that of witnesses who do not fix it by some such mark or monument. We are led to accept the testimony of the witnesses who fix Ring Rock as low-water mark, in preference to the testimony of those witnesses who fix it at 12 or 15 feet east of the power house, for the additional reason that these latter witnesses fix that point because it was the lowest low-water mark in their observation, and admit that they cannot fix it at ordinary low-water mark. And the higher courts have said that ordinary low-water mark fixes the boundary. Nor do we think that the testimony of those witnesses who testify to present conditions, and that the power house was built on dry ground, which is a present condition, can affect the location of low-water mark. We find from the testimony that the paper mill company did fill in the river at this point, and caused the water line to recede eastward, though we do not think that the testimony shows that it caused it to recede east of Ring Rock in times of ordinary low water. Any

natural changes on the edge of a river may change the line of low water, but such is not the case if the changes are made by artificial causes. If such changes could be made by artificial causes, islands, separated from the mainland by a narrow stream, might be changed from one county into another by filling up the channel which separates them from the mainland. *Poor v. McClure*, 77 Pa. 214, and *Ball v. Slack*, 2 Whart. 508, 30 Am. Dec. 278.

"If, however, the act of the York Haven Paper Company in filling up the river could change the line of low water, then the act of appellant in raising the water of the river to a point some 400 feet west of the power house would fix the line at that point. The rule would have to work both ways. The dam of appellant begins at or near the middle of the river, and extends diagonally towards the York county side, near which it narrows, and by the retaining wall is run down to the power house, at which point it is 400 feet wide. The water is thus raised about 24 feet above the surface of the river at this point. Judge Pearson, in the case of *O'Connor v. Bigler*, 2 Pears. 219, says that the surface of the water as raised by the dam became low-water mark. This case was affirmed by the Supreme Court in *Bigler v. O'Connor*, 2 Wkly. Notes Cas. 180, though the point as to what was low-water mark was not raised on the appeal. We do not think, however, that this case should prevail against the cases we have cited above, which show that artificial causes cannot change the line of low-water mark. We are therefore of the opinion that neither the act of the paper mill company in causing low-water mark to recede eastward, nor the act of the appellant in causing it to extend westward, can change the line of ordinary low water; and we find as a fact that it is located at Ring Rock, a distance of from 65 feet to 100 feet west of the power house, and that consequently the power house is in Lancaster county.

"We must therefore dismiss the appeal, at the cost of appellant."

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

W. U. Hensel, for appellant. Bernard J. Myers, W. R. Brinton, and N. F. Hall, for appellee.

FELL, J. The question raised by this appeal is whether the appellant's power plant should be assessed for taxation in York county or in Lancaster county. The facts that give rise to it are these: The appellant purchased a tract of 400 acres of farm land in York county, on which there were a farmhouse, barns, and other farm buildings. The eastern boundary of the tract was the Susquehanna river, where it had a frontage of three-fourths of a mile. It constructed crib dams, which extend

into the river, and a race, by which the water is conducted to a power house 278 feet long and 49 feet wide. It is agreed that the boundary line between York and Lancaster counties is low-water mark on the western bank of the Susquehanna river. The disputed question of fact is whether the power plant is east or west of this line. All of the witnesses agreed that a part of the plant is east of low-water mark. The court found that the whole of it is east. The conflict in the testimony arose mainly from the different views of the witnesses as to what should be considered low-water mark, whether the lowest line the water has ever been known to reach, or, as expressed by some of them, "the lowest kind of low-water mark," or the line of ordinary low water, not the effect of an extreme drought. The learned judge, following the decision in *Stover v. Jack*, 60 Pa. 339, 100 Am. Dec. 566, held that the low-water mark was the line to which the water receded at ordinary states of low water, and ascertained the location of this from the testimony of witnesses who had observed the river for a long period of time, and who fixed the line of low-water mark by monuments on the ground. The case was considered and decided on right principles, both in determining what was low-water mark and the weight of the evidence. We should not set aside the finding of fact by the court, unless convinced of clear error. From a careful review of the testimony we find nothing to lead us to doubt its correctness.

It is, however, contended that, if the power plant is located east of the line of York county, it should be assessed in that county as a part of the tract on which the mansion house and other buildings are located. This contention is based on the act of June 1, 1883 (P. L. 51), which provides that, where county lines divide a tract of seated land, the assessment shall be made in the county in which the mansion house is situated. The act does not apply to this case. The appellant was incorporated for the purpose of supplying water and power and of generating electricity by means of water power. By the purchase of the farm it secured valuable water rights, and has utilized them by the construction of a dam in the river and a race and power house on its margin. The improvements are valued at \$500,000, and occupy only a few acres at one side of the tract. These acres are practically severed by their use from the rest of the tract, and are applied to a new and entirely distinct use, wholly unconnected with the use to which the remainder is put. They are not a part of nor appurtenant to the farm. The fifty-ninth section of the act of July 11, 1842 (P. L. 331), which contains a similar provision as to lands divided by borough or township lines, was

held not to apply to a house in a borough not used in connection with nor as a part of a farm. *Commonwealth v. Wheelock*, 13 Pa. Super. Ct. 282.

The order of the court is affirmed, at the cost of the appellant.

MOORE v. CITY OF LANCASTER.

(Supreme Court of Pennsylvania. June 22, 1905.)

MUNICIPAL CORPORATIONS—NEGLIGENCE OF CITY SURVEYOR—LIABILITIES OF CITY.

Where a city surveyor gave a wrong grade to a property owner, and he built in accordance therewith and thereafter sold the property, if any right of action against the city existed in the original owner, it did not run with the land, so as to authorize suit by his grantee.

Appeal from Court of Common Pleas, Lancaster County.

Action by Harry H. Moore against the city of Lancaster. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

See 58 Atl. 890.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

W. U. Hensel and W. R. Harnish, for appellant. Edwin M. Gilbert, for appellee.

FELL, J. This action was to recover damages to real estate caused by the grading of a city street. The main and decisive question is raised by the assignment of error to the refusal of the court to take off a nonsuit. The facts established at the trial, or of which offers of proof were made and rejected, were these: In 1877 a general plan fixing the lines and grades of the streets of the city of Lancaster was approved. In 1893 the owner of a building lot applied to the city regulator for the grade line. The regulator gave her a line about two feet above the established line, and she built two houses to conform to the line given her. In 1899 she sold the houses, and in 1900 her grantee conveyed them to the appellant. In the same year the city caused the pavement in front of the houses to be lowered to the grade established in 1877.

It is alleged in the statement of claim that the city unlawfully changed the grade of the street from the grade given to the former owner in 1893; and that because of this change the value of the property has been depreciated. There has been no change of the grade line since it was originally fixed in 1877. The whole difficulty has arisen from the mistake of the regulator in giving an incorrect line to the owner in 1893, and the real ground of complaint is, not that the city has cut the street down to the established grade, but that an incorrect line was given to the plaintiff's predecessor in title, by reason whereof she built the houses now owned by

the plaintiff at a greater elevation than she otherwise would have built them. The person injuriously affected by the mistake of the regulator was the owner in 1893; and, if she had a right of action against the city for the negligence of its officer, the right did not run with the land, and the plaintiff is as much a stranger to it as he would be to a right of recovery against a builder who had negligently built the houses within the line of the street, or above or below the established grade.

The argument that the plaintiff may recover, because it is the physical change, and not the establishment, of a grade on the official plans that gives a right of action, and that damages are not recoverable for the establishment of a grade until the work of grading is begun, is misleading. It is based on the erroneous assumption that as to the plaintiff the city is bound by the grade line given by the regulator to his predecessor in title, and that it is estopped to assert that this line is not the correct line.

The judgment is affirmed.

SEIBEL v. FIREMEN'S INS. CO.

(Supreme Court of Pennsylvania. June 22, 1906.)

INSURANCE—ACTION ON POLICY—BOOKS AND ACCOUNTS.

Where a policy of insurance provided for the production of its books and accounts after loss at such a reasonable place as the company might request, and it had its principal office out of the state, and after loss notified the insured to produce his books and accounts at a reasonable place to be designated, but failed to designate any place, failure to produce such books and accounts was no defense to an action on the policy.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1348.]

Mitchell, C. J., dissenting.

Appeal from Superior Court.

Action by Martin Seibel against the Firemen's Insurance Company. Judgment for defendant was reversed by the superior court (24 Pa. Super. Ct. 154), and it appeals. Affirmed.

Argued before MITCHELL, C. J., and DEAN, FELL, POTTER, and ELKIN, JJ.

W. U. Hensel, for appellant. H. M. North and J. W. Johnson, for appellee.

MESTREZAT, J. The superior court, in a clear and convincing opinion by Judge Henderson, has demonstrated the correctness of its conclusions on the material questions involved in this case. The policy provides that the insured, "as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made." In its letter to the

insured, the defendant company says: "We demand, in accordance with said policy (see lines 83 to 85 both inclusive), that you shall produce for our examination all books of account, bills, invoices, and other vouchers or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made." The learned superior court held, under the above stipulation of the policy, that, "if the defendant desired to examine the books of account, etc., of the plaintiff, it became its duty, not only to notify him of the fact, but to appoint a place at which they might be produced for inspection, which place was not to be arbitrarily fixed by the company, but must be a 'reasonable' one, as provided for in the contract." This is so obviously correct that it needs no argument to support it. By the terms of the policy, the contract of the parties, the books, etc., were to be produced when required by the company and "at such reasonable place as may be designated by this company or its representative." Before the insured was required to act at all in the matter, it was incumbent on the company, not only to request the information, but also to designate the place where it should be produced. The initiative in both respects was with the company, and until it acted the insured could be charged with no default. He was not required to inform the company of the loss of his books, accompanied by an offer to procure copies, until the company had made it necessary for him to produce them by a demand for their production at a designated place. Until the company had complied with this prerequisite to its right to have the books, he could assume that it did not desire them.

The learned counsel for the defendant company concedes, what is a fact, that it did not designate a place at which the insured was requested to produce the books, as it was required to do by its contracts, but seeks his printed brief to defend its action in neglecting to do so by saying: "In the absence of any particular place being designated, the home office of the company, or the address of its adjuster, as shown by its correspondence, or even Lebanon, were sufficient indications of where the documents required should be sent. At least they could have been furnished to the appraisers." This suggestion ignores the fact that the rights as well as the duties of the parties in the premises are fixed by their written contract, and that the contract neither requires the insured to produce the documents at any of the numerous places named, unless designated by the company, which was not done, nor does the contract compel the defendant company to receive them, if they had been produced, unless the place had previously been designated by the company. It is therefore apparent that the insured

could not produce the books in compliance with the terms of the policy until the company had designated the place at which it would inspect them.

This case is clearly distinguishable from *Seibel v. Lebanon Mutual Insurance Company*, 197 Pa. 106, 46 Atl. 851. The provisions in the two policies relative to the production of books, etc., are similar. In that case the company wrote the counsel of the insured a letter, quoting the provision, and made a formal demand that the information be forwarded to the office of the company at Lebanon, Pa., by mail or otherwise. The insured made no effort to comply with the request until after the suit had been brought, and, as stated in the opinion of this court, even then not in accordance with the demand. It was held that the provision of the policy requiring the production of the books "was a part of the contract between the parties," and that, as the insured had failed to produce his books after a proper demand, he could not recover on the policy. There the company made the demand and also designated a reasonable place, Lebanon, Pa., for the production of the books. Here the company designated no place at which the books should be delivered, but made the demand that they should be produced "at such reasonable place as may be designated by this company or its representative," leaving the inference that it would name a place at which they were to be delivered for inspection. The distinction between the cases is apparent and most material.

The other question raised by the appellant was properly disposed of by the superior court.

The assignments of error are overruled, and the judgment of the superior court is affirmed.

MITCHELL, C. J., dissents on grounds indicated in Judge Morrison's opinion. 24 Pa. Super. Ct. 154.

LEITZEL et al. v. HARRISBURG TRACTION CO.

(Supreme Court of Pennsylvania. June 22, 1905.)

STREET RAILROADS—NEGLIGENCE—INJURY TO CHILD ON TRACK.

Street railroad company held not liable for injuries to a child stepping suddenly in front of a car.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 202, 217.]

Appeal from Court of Common Pleas, Dauphin County.

Action by Raymond H. Leitzel, by his next friend, William H. Leitzel, and another, against the Harrisburg Traction Company. From an order refusing to take off a nonsuit, plaintiffs appeal. Affirmed.

The following is the opinion of the lower court on the motion to take off nonsuit:

"The plaintiff Raymond H. Leitzel, a boy 9 years of age, and a companion about 12 years of age, were following after a loaded wagon drawn by a team of four horses on Derry street, just outside the limits of the city of Harrisburg. The wagon and the boys were going in the direction of the city, and the defendant's car was moving upgrade in the same direction. The driveway was rough, having been shortly before filled up with crushed stones, was about 17 feet wide, and ran along and parallel with defendant's tracks. The wagon was visible to the motorman on the car for a distance of 1,200 or 1,300 feet from the point where the accident occurred. The plaintiff's companion climbed upon the wagon, but was put off by the driver. The plaintiff did not succeed in getting on, and walked about the wagon for some distance, about 2 or 3 feet from it, pretty close to it. The plaintiff testified in chief that about the time the injury was received he was walking between the wagon and the tracks; there being a space between them about 2 feet wide. On cross-examination, however, he testified that he was walking right behind the wagon until he stepped out and the car struck him. The other boy testified that he had already gotten off the wagon and that the plaintiff was walking behind him, and went to go across the tracks and stepped in front of the car. The corner of the fender struck him, and he fell on the side of the track from which he came. It was also in evidence that the motorman sounded his gong for at least 100 feet before the accident, and that the car was stopped within a few feet of the place where the boy was struck; the front wheel of the car only going over his leg, and the car being stopped before the second wheel of the truck came in contact with him. Upon this state of facts we considered it our duty at the trial to withdraw the case from the jury, because, in our judgment, it disclosed no evidence of negligence on the part of the defendant. It will be observed that it was not then, nor is it now, contended by the plaintiffs that the defendant was negligent because of the rate of speed at which the car was moving, or because of a failure to sound the gong or to have the car under control, or because of any other act of omission or commission, but solely because the motorman did not anticipate the sudden movement of the plaintiff upon the track in front of the car and avoid the collision with him.

"The plaintiff contends that the case should have been submitted to the jury, and in support of his contention refers us to the cases of *Jones v. United Traction Company*, 201 Pa. 344, 50 Atl. 826, and *Kroesen v. Railway Company*, 198 Pa. 26, 47 Atl. 850, as ruling this case. An examination of those cases will show a marked and essential difference

between them and the case at bar. The former case was that of a very young child, two years old, wandering about and upon the tracks of the defendant; and because she was wandering, and therefore likely to turn one way or the other, all of which was apparent to the motorman in time to avoid collision with her, his failure to anticipate that she would wander in front of his car and thus avoid the collision was held evidence of negligence sufficient to go to the jury. In the latter case a child four years of age was crossing the track. She had already crossed and was about to recross. She was in a state of alarm and confusion, standing in the middle of the track, having walked there, a distance of 12 feet, while the car, when she started to recross, was 120 feet away. Had the motorman looked ahead, he would have seen the child standing in the middle of the track, confused and alarmed, and because of her state of alarm unable to avoid the car. The case was held to be for the jury. In the one case there was presented to the motorman a child wandering upon the track and likely to move in front of the car; in the other case, a child standing in the middle of the track, unable, by reason of her alarm and confusion, to move out of danger. The negligence in both those cases consisted either in not seeing the situation of the child, or, if seeing it, in entirely ignoring it. The situations presented in them were quite different from that which presented itself to the motorman in the present case. Here the boy was following the wagon on the roadway, with nothing to indicate that he would suddenly turn upon the track, and in this respect especially is the case distinguishable from that of *Jones v. United Traction Company*, 201 Pa. 344, 50 Atl. 826, in which there was everything to suggest the likelihood of the child getting in front of the car. The plaintiff was following after the wagon close to the track. The car was proceeding within the control of the motorman and at a very slow rate of speed, at the same time signaling its approach. The motorman could see the wagon and the boys following it, and for that reason evidently he was moving towards them and the team slowly and sounding his gong.

"What was there in the situation before him to suggest to him or require him to anticipate that the plaintiff, who was intent upon following the wagon, so far as the motorman could see, just as the car reached him, would step suddenly to the side upon the track in

front of it? There is nothing in the evidence that we can discover. In what, then, did the motorman fail? Was it his duty to refrain from passing the boys and the wagon? Was it his duty to follow behind them until the wagon or the boys left the street? Was it his duty to stop the car and chase the boys away from behind the wagon before he proceeded past it? If such was not his duty, of what act of negligence was he guilty? What act of omission or commission has he been guilty of which would make him blamable for the unfortunate injury to the boy? He sounded his gong. He approached the boys and the wagon with the car under his control, and at a very slow rate of speed, and just as he reached them the plaintiff stepped in front of the car and was injured. It is not the case of running upon him while in the space between the tracks and the wagon, so that he was caught there and because of the narrow way was struck by the fender, for the evidence shows that he stepped upon the tracks. His collision with the car was due to his sudden movement towards and upon the track. It is the duty of the plaintiff to show that his injury was due to some act of negligence on the part of the defendant. This, as we view the evidence, he has not done. We think the case comes within the class of cases where a child suddenly and unexpectedly runs or steps in front of a moving car, and gives rise to an imminent danger against which there is no opportunity to guard, as exemplified in the following cases: *Chilton v. Central Traction Co.*, 152 Pa. 425, 25 Atl. 606; *Funk v. Electric Traction Co.*, 175 Pa. 559, 34 Atl. 861; *Kline v. Electric Traction Co.*, 181 Pa. 276, 37 Atl. 522; *Pletcher v. Scranton Traction Co.*, 185 Pa. 147, 39 Atl. 837; *Gould v. Union Traction Co.*, 190 Pa. 198, 42 Atl. 477; *Miller v. Union Traction Co.*, 198 Pa. 639, 48 Atl. 864.

"Upon a careful review of the evidence submitted by the plaintiff, we are of the opinion that it was not sufficient to justify the jury in finding that the defendant was negligent, and that therefore the case was properly withdrawn from their consideration. The motion to take off the nonsuit is overruled."

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

John G. Gilbert and Charles B. McConkey, for appellants. Samuel J. M. McCarrell and Wolfe & Bailey, for appellee.

PER CURIAM. Judgment affirmed, on the opinion of the court below.

MOTTER v. KENNETT TP. ELECTRIC CO. et al.

(Supreme Court of Pennsylvania. June 22, 1905.)

CORPORATIONS—CONSOLIDATION—VALIDITY.

Act May 29, 1901 (P. L. 349), making it lawful for corporations organized under the act of 1874 (P. L. 73), or any of its supplements, to buy the stock of any other corporation and merge its corporate rights with those of any other corporation, authorizes a gaslight company, a gas heating company, and an electric company, territorially the same, to consolidate in the manner provided by the act.

Appeal from Court of Common Pleas, Dauphin County.

Bill by S. L. Motter against the Kennett Township Electric Company and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The bill stated that the defendants are three corporations created under the act of April 29, 1874 (P. L. 73), and the supplements thereto, and that by virtue of letters patent granted to them the Kennett Gaslight Company is authorized to manufacture and supply to the public gas for light only in a certain locality, that the Kennett Gas Fuel & Heating Company is authorized to manufacture and supply to the public in the same locality gas for all purposes for which gas can be used other than for light, that the Kennett Township Electric Company is authorized to supply light, heat, and power by means of electricity to the public in the same territory as the other two companies, and that the appellees, proceeding in due form of law, entered into an agreement for the merger and consolidation of the three corporations into a new single corporation, to be called the Kennett Township Gas & Electric Company, whereupon the plaintiff filed his bill, praying that the three corporations, appellees, and their respective presidents, secretaries, and directors, be restrained from filing, or presenting for filing or for record, the said agreement or a copy thereof in the office of the Secretary of the commonwealth, or from accepting letters patent from the commonwealth purporting to erect and create a new corporation having the rights, privileges, and franchises now belonging to the said three companies, or from doing any other acts or things having for their purpose the consummation of the terms and the accomplishment of the objects of said agreement or merger and consolidation. The demurrer of the defendants to the whole bill admitted the truth of all the facts therein contained, but alleged that they are not sufficient to support the plaintiff's action, averring that the defendants are authorized and empowered by law to merge and consolidate, and form a single corporation by the name of Kennett Township Gas & Electric Company, possessing all the property, rights, privileges, and franchises theretofore belonging to each of the said three corporations, appellees.

Weiss, P. J., after stating the case, filed the following opinion in the court below:

"Among the matters set forth in the bill is the fact that by the terms of the agreement entered into by and between the three defendant corporations it is provided, among other things, that 'the stockholders of the Kennett Township Electric Company shall receive capital stock of the new corporation to the amount of \$10,000 at par, consisting of 100 shares, which stock shall be divided among the stockholders pro rata in proportion to their respective holdings of stock in the Kennett Township Electric Company.' It is also a fact that the plaintiff is the holder and owner of 40 shares of the capital stock of the Kennett Township Electric Company, and that at the meetings held by the stockholders of that company to vote upon the question of the adoption or rejection of the agreement entered into by the directors of each of the three corporations he voted in favor of the rejection and against the adoption of the agreement to merge and consolidate, though a majority in amount of the stock of the company of which he was a shareholder, together with a majority in amount of the stock of the other two companies, voted for the adoption of the said agreement. If there were any complaint that it is sought by the terms of the agreement to impose upon him stock of the new company intended to be formed for the stock he holds in the Kennett Township Electric Company, an injunction might probably, for this reason, be granted. The act of May 29, 1901 (P. L. 349), in its fifth section (page 352) makes provision for the payment of the value of the stock of a dissenting holder; but he does not ask an injunction for this reason, and, so far as we know, has not made application to the proper court for the appointment of appraisers, and it must be assumed that he is not dissatisfied with this feature of the agreement. The cause is made to rest on the sole ground that it is unlawful for the three defendant companies to merge and consolidate in and with the proposed new company. The act of 1901 is an act supplementary to the corporation act of 1874, and provides 'for the merger and consolidation of certain corporations.' The act of 1874 authorizes the formation of certain corporations. The act of 1901 authorizes a merger and consolidation. In its features relating to the method of procedure, the latter act is almost a rescript of the act of March 24, 1865 (P. L. 49), authorizing the consolidation of certain railroad companies. It makes it lawful for a corporation organized under or accepting the provisions of the act of 1874, or any of its supplements, to buy and own the capital stock of any other corporation and to merge its corporate rights with and into those of any other corporation, and authorizes the transfer of the property and franchises of either [both] of such companies intending to merge, and the investiture of

such rights and privileges in the company into which such merger is sought to be made; and thereupon the rights, property, privileges, and franchises theretofore vested in each of the existing companies shall become vested in the new corporation.

"The provision of the first section of the act of 1901, which relates to the purchase and ownership of the capital stock by one from another which may intend to merge, is at variance with the subsequent sections providing for the meetings of the stockholders to vote upon the adoption or rejection of the agreement to merge, if by that is meant the acquisition and ownership of the capital stock by one or another or others before a consolidation can be completed. There would be no stockholders of the selling company to vote for or against the adoption of the agreement to merge at the special meeting required to be called for that purpose. It must be taken to signify that the stockholders of the existing companies may agree to accept capital stock of the company to be formed by the merger in payment of the stock held by them in the corporation intending to merge. The certificate required by the act of 1874 requires no more, in this behalf, than that the number of shares subscribed by each person shall be designated, together with the number and par value of the shares into which the capital stock is to be divided. The subscriber to stock pays the unpaid part of his stock when the incorporated company issues and delivers it. So he may sell his stock in an existing company intending to merge with another into the merged company, and take stock in the consolidated corporation when the merger is consummated. The capital stock of a corporation is owned by the shareholders, of course, and the corporation could not buy or sell the capital stock. What may and must be done to effectuate a merger is the execution of a joint agreement by the directors of corporations intending to consolidate, which must contain the matters prescribed by the act, and must be submitted to the stockholders of each company at separate meetings to be called for the consideration of the agreement and its adoption or rejection by ballot. A vote by a majority in amount of the entire capital stock of the companies intending to merge, and the required certification, authorize the agreement to be taken as the act of consolidation.

"In this case the gaslight company and the gas fuel and heating company and the electric company seek to merge and consolidate. The act of May 8, 1889 (P. L. 136),

amends subdivision 11 of section 2, second class, of the act of 1874, and makes it read, 'the manufacturing and supply of gas, or the supply of light, heat and power by means of electricity, or the supply of light, heat or power to the public by any other means.' The Kennett Gaslight Company is authorized to manufacture and supply gas for light only, the Kennett Gas Fuel & Heating Company to manufacture and supply gas for all purposes for which gas may be used other than for light, and the Kennett Township Electric Company to supply light, heat, and power by means of electricity to the public. Territorially they are the same. There is thus a gaslight company, a gas heating company, for fuel is used to produce heat, and an electric company. The exercise of their separate functions and franchises comprises light and heat by gas, and light, heat, and power by means of electricity; and the language of the amended clause covers the manufacture and supply of gas, or the supply of light, heat, or power by means of electricity. The defendant companies and their respective shareholders have manifested their intention, in the way pointed out by law, to conjoin their several rights, privileges, and franchises, which are alike in their general features and authorized to be exercised by the same general law, in one body politic by a different name but for the same purposes in the same territorial limits; and it does not appear that so doing violates any law or constitutional inhibition. On the other hand, there is authority to enter into the proposed agreement of merger and consolidation, and for the formation of a new company thereby, having the powers, privileges, and franchises of the corporations intended to be merged. Having the right to merge and consolidate, and having proceeded in the manner directed by law, it follows that the agreement of merger and consolidation, together with the certificate of the secretaries of the companies to the result of the balloting certifying the fact, may be filed in the office of the Secretary of the commonwealth, and the matter concluded as provided by law without hindrance.

"The relief prayed for in the bill by the complainant is refused, and the bill dismissed, at his costs."

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

John G. Gilbert, for appellant. John G. Johnson, C. H. Bergner, and Charles E. Morgan, for appellees.

PER CURIAM. Decree affirmed, on the opinion of the court below.

WUNDERLE v. ELLIS.

(Supreme Court of Pennsylvania. June 22, 1905.)

MORTGAGES — REDEMPTION — PERSONS ENTITLED TO REDEEM.

A lease provided for interest to be paid by the tenant on an antecedent mortgage, and the mortgaged premises had been so used in connection with other property that a severance would cause great injury. The lease had several years to run. *Held*, that after suit on the mortgage, when no interest was due, the tenant could tender the whole amount of the mortgage and demand an assignment.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Philip Wunderle against David M. Ellis, to compel assignment of a mortgage. From a decree refusing a preliminary injunction, plaintiff appeals. Reversed.

The bill averred that plaintiff was tenant of premises 445-447 New Market street, Philadelphia, under a lease dated July 27, 1899, for a term not to exceed 11 years; that the owners of said premises (Trouts by name) had executed a mortgage on said premises, dated December 16, 1895, which had been assigned to defendant (Ellis) March 28, 1904, and a writ of scire facias had been issued in common pleas No. 4 of Philadelphia county, of June term, 1904, No. 635, and on the same day said premises had been conveyed to one Brown; that under the terms of said lease tenant had the right to pay, out of the rents, interest on said mortgage, taxes, etc., and had in fact paid the same, and there was due him from the property about \$100 on account of overpayments by him; that said premises had been combined with other premises to form a large plant, and were used for the manufacture of candy by the plaintiff; that at the time suit was brought on the mortgage no interest was due; that the plaintiff had tendered the whole amount of debt, interest, and costs in said mortgage suit, and requested an assignment of said bond and mortgage, and this was refused; that plaintiff is willing and ready to pay all of said debt, interest, and costs, and a sale of said premises would be of irreparable damage to him. The bill prayed for an injunction and for an assignment of the mortgage.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

John G. Johnson, Wm. H. Wood, and Wm. H. Burnett, for appellant. W. B. Saul and E. O. Michener, for appellee.

MITCHELL, C. J. This is a perfectly clear case for the maintenance of the status quo until final hearing, and, unless the facts shall then be shown to be essentially different from what they now appear, it will be an equally clear case for payment and subrogation. The whole right of the defendant as holder of the mortgage is to have his money paid him, and his whole claim on the land is to hold it as security for such payment. When he is offered his money, his refusal to

take it is persuasive evidence that he is not enforcing his legal rights in good faith, but is seeking to use them for some ulterior and inequitable purpose. Even if this were not so, the general doctrine of subrogation is that, where a party can attain all his legal rights in either of two different ways, a court of equity will compel him to take that which will do the least injury to another having a junior interest in the subject-matter, and, if necessary, will subrogate the latter to the prior rights. It is conceded "that a junior mortgagee, judgment creditor, or other incumbrancer, who pays off a prior incumbrance in order to protect his own interest in the incumbered estate, will as a general rule be subrogated to all the rights of the senior incumbrancer, and, if necessary for his protection, may compel an assignment of the security." 27 Am. & Eng. Ency. of Law (2d Ed.) "Subrogation, IV, 3," p. 243. There is no good reason why the same relief should not be afforded under similar circumstances to a lessee for years, and there is authority for so holding. "A tenant for years may redeem, although his lease being made after the mortgage, and good against the mortgagor, is not good against the mortgagee." 2 Jones on Mortgages (6th Ed.) § 1066. And in *Hamilton v. Dobbs*, 19 N. J. Eq. 227, a case on all fours with the present, but not so strong, it was held by Chancellor Zabriske that a tenant for years who offers to pay off a mortgage debt has the right to redeem. He has not, perhaps, strictly the right to demand a written assignment of the mortgage, but stands by redemption in place of the mortgagee, and will be subrogated to his rights against the mortgagor and reversioner. He has the right to have the bond and mortgage delivered to him uncanceled, which in such case is in equity, and may be at law, a complete assignment.

The appellant presents a much stronger prima facie case than these principles require. He not only has a term with several years yet to run, but he shows a use of the land in connection with other land to which a severance would do great injury, and, further, under the terms of his lease, he had the right to apply the rent to the payment of taxes, interest on the mortgage, etc., and that he had so paid that, when suit was brought on the mortgage, there was no interest due and the property was in debt to him for money advanced. At common law a mortgagee could not be compelled to assign the mortgage on payment, but only to surrender it. In fact, in the absence of a system of record, the surrender of the instrument was the only secure evidence the mortgagor had of payment. Our act of May 28, 1715 (1 Smith's Laws, p. 94), in aid of the mortgagor, provided for compulsory entry of satisfaction by the mortgagee on the record. And so the act of June 24, 1885 (P. L. 157), provides in certain cases for the compulsory assignment of mortgages on tender of the amount due. It is argued that these acts do not cover the

case of a lessee or tenant, and therefore that he is without remedy. But these are common-law remedies, and even if it be conceded, which is by no means clear, that ordinary cases must be brought within their terms, it does not follow that equitable remedy should not be afforded when a case is shown to which equitable principles apply. The common law was opposed to assignments of choses in action, which it regarded as tending to litigiousness and maintenance. 2 Black. Comm. 442. The general recognition and enforcement of assignments are the growth of modern methods of business, and the development of equity founded on and following such methods. Bispham on Equity (7th Ed., 1905) § 164. There is no solid reason why the principle of subrogation, that where a party asserting a legal right can be fully secured in it and at the same time the interests of another in the subject-matter can be protected from impending injury, should not be applied in regard to the assignment of a mortgage and in favor of a lessee, as well as to any other case to which the principle is applicable.

Decree reversed, injunction reinstated, and directed to be continued until otherwise ordered after final hearing.

TALBOT v. SIMS.

(Supreme Court of Pennsylvania. Oct. 9, 1905.)

MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where, in two successive days, four stones fell from defective "dogs" connected with a derrick, and an employé, with knowledge thereof, continues his work and is injured on the third day by another stone falling, he cannot recover, though he called the attention of the foreman to the defect, who said that no change would be made.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 583, 641-647.]

Appeal from Court of Common Pleas, Delaware County.

Action by Elias Talbot against Charles A. Sims, trading as Charles A. Sims & Co. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and DEAN, BROWN, MESTREZAT, and POTTER, JJ.

O. B. Dickinson and John E. McDonough, for appellant. J. B. Hannum, for appellee.

BROWN, J. The appellant, a stone mason, was employed by the appellee in October, 1903, in his construction of a stone wall. The stones were carried to it by a boom derrick, after being hoisted by the aid of "dogs." He had worked for the appellee at the same kind of work for several months before the accident, during which time the same kind of "dogs" were used. On October 6th two stones slipped from them within an hour and

fell at the place where he was working. He and the foreman saw them fall. When the second one fell, he said to the foreman: "Paddle, them dogs ain't no good. Why don't you get a pair of the round dogs?" To which the foreman replied: "You can't get nothing. There is not but one pair of round dogs on the job." A third stone slipped and fell the next day, October 7th. This was also seen by the appellant and the foreman. About an hour later a fourth one fell, when he again reminded the foreman, who had seen the fall, that the "dogs" were "no good" and would not "hold." On October 8th a fifth stone fell and struck him, causing the injuries of which he complains. A judgment of nonsuit was directed by the court below, but the specific ground on which it was entered was not stated by the learned trial judge. He refused to take it off, because he was of opinion that the plaintiff had voluntarily continued to subject himself to danger after he had known its imminence, intimating at the same time that the contributory negligence of a fellow servant was a bar to a recovery.

Two days in succession the appellant saw the peril which overhung him every time the stones were lifted by the derrick and suspended over him. His testimony is that, as the stones were constantly slipping from the "dogs," he was "on the lookout all the time to see if the stones would fall," and "kept close watch on them, all the time afraid a stone would slip out." At the time the fifth one fell he could not have been on the lookout, and he did not, by his own vigilance, upon which he undertook to rely, protect himself from the constantly imminent danger, to which he voluntarily continued to subject himself after he knew his employer had not guarded against it and had not promised to do so. The only actual notice of the defective "dogs" that he pretends was given to his employer was that to the foreman, from whom he learned that no change would be made. From the testimony but one conclusion could have followed, if the case had been submitted to the jury, and that is that the danger was so imminent that the appellant was bound to heed it, and to know that if he continued to voluntarily subject himself to it, as he admittedly did, his employer would not be liable for the injuries he has sustained. The oft-repeated rule as to this is that an employé who continues in an employment, which, by reason of defective machinery or appliances, he knows to be dangerous, assumes the risk of any accident that may result therefrom, with the qualification that if in pursuance of the promise of his employer to remedy the defect, and the risk be not such as to threaten immediate danger, the employé continue in the employment and be injured without fault on his part, the employer may be liable. *Brownfield v. Hughes*, 128 Pa. 194, 18 Atl. 340, 15 Am. St. Rep. 667. Judgment affirmed.

In re KEISLER'S ESTATE.

Appeal of MERWINE.

(Supreme Court of Pennsylvania. Oct. 9, 1905.)

WILLS—CONTEST—UNDUE INFLUENCE.

In proceeding to determine the validity of a will, evidence held insufficient to sustain a finding that a will had been procured by undue influence.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 421-437.]

Appeal from Orphans' Court, Luzerne County.

In the matter of the estate of Hannah B. Keisler, deceased. From a decree dismissing appeal from the register of wills, Sally A. Merwine appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

D. L. Rhone, H. J. Kotz, Cicero Gearhart, and R. L. Burnett, for appellant. John M. Garman, William I. Hibbs, and S. E. Shull, for appellees.

POTTER, J. A will of Hannah B. Keisler was probated September 25, 1901, by the register of wills of Luzerne county, and letters testamentary granted to Milton Kresge, the executor named therein. On June 25, 1903, an appeal from the probate was taken by Sally A. Merwine, and after issue joined and hearing before the orphans' court the appeal was dismissed. This appeal is taken by the appellant below from the decree of the orphans' court dismissing the appeal from the register. There are 19 assignments of error, the last of which specifies as error the dismissal of the appeal.

From the facts as recited in the opinion of the court below it appears that the will, which was admitted to probate in Luzerne county, was dated May 29, 1901; that testatrix afterwards was taken to Stroudsburg, Monroe county, where she remained until her death, upon September 25, 1901; and that in the meantime another will was executed by testatrix on September 14, 1901. In this second will she recites the fact that she had removed to Stroudsburg, with the intention to make her home there for the remainder of her life. She directs that she be buried in the cemetery at Stroudsburg, and that the body of her deceased husband be removed from West Pittston and interred at Stroudsburg. She gives her personal property to her three children and a granddaughter, and directs that her real estate should be sold, and that her debts, funeral expenses, purchasing of cemetery lot, tombstone, also amount to be paid to the cemetery and the expenses of settling her estate, should be paid out of the proceeds, and only the balance was given to her sister, Mrs. Merwine. The finding of the court below that she gave her real estate to the appellant is therefore inaccurate to this extent. Although the appeal is from the probate of the

last will executed at West Pittston, the actual question before the court was whether the will dated September 14, 1901, and executed at Stroudsburg, was the last will and testament of the testatrix. The court found as follows: (1) That the legal residence or domicile of Hannah B. Keisler at the time of her death was at West Pittston, Luzerne county, and the register of wills of Luzerne county had jurisdiction. (2) That the testatrix possessed testamentary capacity at the time of the execution of the Stroudsburg will. (3) That the Stroudsburg will was procured by undue influence, exercised over testatrix by Sally A. Merwine, the appellant, and was therefore invalid and of no effect.

On the first question, that of domicile, the court having found as a fact that the testatrix had no fixed intention to change, and that her legal residence at the time of her death was at West Pittston, we will not disturb it. There was evidence to support this finding.

The question of testamentary capacity is not raised by the assignments of error, as the ruling of the court below upon that point was in favor of the appellant.

The main question raised by this appeal is that of undue influence. There is no evidence of any influence exerted directly by the appellant upon testatrix to make a will in her favor. The only part she took in procuring the making of the second will was to telephone to a lawyer to come to the house and see Mrs. Keisler, after the latter had expressed a desire to change her former will. She also wrote to the lawyer who had drawn the first will and had it in his custody, requesting him to send it to Mrs. Keisler. This she did at the latter's request. She was not present when the Stroudsburg attorney, Mr. Gearhart, saw the testatrix and discussed with her the making of a new will, nor when his stenographer, Miss Shiffer took her instructions as to how the will was to be drawn, nor when the will was executed. There is no evidence to show that appellant was informed before the will was made that any portion of the estate was to be left to her. There was evidence that Mrs. Merwine, who was a sister, was able to influence the testatrix in her conduct, but none of the witnesses testified that she did exercise any undue influence upon her. The appellees do not in their argument point out any such testimony. The evidence goes no further than such as this: Miss Hattie Denison, who nursed Mrs. Keisler at West Pittston, testified that Mrs. Merwine visited her (Mrs. Keisler) at that place, and came after her there and brought her away. She was brought to Stroudsburg August 1st by Mrs. Merwine, and witness remained with her until August 24th. Her mind was very much affected at that time, and she was easily influenced by some people. Later the same witness was recalled and testified: "Mrs. Merwine had the same effect on testa-

trix that I had when I first went there. Testatrix was a woman whom, by being kind to, you could take over to your side, and the ones that were with her were the ones that would have her to do whatever they wanted her to do. Mrs. Merwine was always very kind and very lovely to Mrs. Keisler, and never crossed her in any way. She sent her very lovely letters and beautiful flowers, and in every way was kind to her, and Mrs. Keisler, as her condition grew weaker, became more fond of Mrs. Merwine." There was nothing in this testimony to indicate anything more than a proper display of sisterly affection. Appellant also called a number of witnesses who testified that, both before and after she left West Pittston, Mrs. Keisler spoke to them of the kind treatment and good care she received from Mrs. Merwine, of how comfortable she was at her house, and how pleased she was to be with her mother and sister. She also complained that her children had neglected her. Mrs. Emma Coleman, a neighbor, of West Pittston, testified that shortly before she went to Stroudsburg testatrix complained to her of lack of care, and said: "I wish if only my sister would come up. I know that, if Sally would come up, she would care for me. I will give it to Sally, if Sally takes good care of me, for there ain't none of their father's here," says she. "He left me without anything but my three children, and if my children take care of me I will give them first chance, and if Sally will I shall give it to Sally." This was before the undue influence is alleged to have been exerted by Mrs. Merwine. The appellant herself was examined, and denied the charge of undue influence. She said that the suggestion that Mrs. Keisler should go back with her to Stroudsburg was made in the first place by Mrs. Keisler herself.

Without burdening this opinion with further reference to the testimony in detail, it is sufficient to say that it presents nothing which satisfies the legal definition of undue influence. The law on this subject has been so often considered and is so thoroughly settled that it is unnecessary to cite cases at any length. The opinion of the trial judge in *Caughey v. Bridenbaugh*, 208 Pa. 414, 57 Atl. 821, approved by this court, covers the entire ground. Under that case, and the decision in *Masterson v. Berndt*, 207 Pa. 284, 58 Atl. 868, the evidence in the present case fails to show the exercise of any undue influence by the appellant for the purpose of procuring the making of a will in her favor. It is true there was a change of mind upon the part of the testatrix, but this was not in itself any evidence of undue influence. We said in *Slater v. Slater*, 209 Pa. 194, 58 Atl. 287: "Had there been evidence of undue influence, the change of purpose might have had a strong corroborative bearing. But the change is not of itself evidence of undue influence. A change of mind is the right of every testator, and by itself is not evidence of any-

thing. It is only when a basis of evidence of undue influence is laid that the inquiry as to the change becomes relevant." In the latest reported case on the subject, *Allison's Estate*, 210 Pa. 22, 59 Atl. 318, a decree refusing to award an issue d. v. n. was affirmed on the opinion of the court below, in which latter opinion it was said: "A jury should not be permitted to guess that there was testamentary incapacity at the time the will was executed, or that the will was the result of undue influence, because they might think that a former will had made a better disposition of the testator's property than the will contested and that influence had been brought to bear on him to make the change. Testamentary incapacity or undue influence must be proved before a will can be legally set aside." And in the case of *Robinson v. Robinson*, 203 Pa. 401, 53 Atl. 253, which was cited and apparently relied on by the court below, the following language is quoted (page 435 of 203 Pa., page 265 of 53 Atl.) from the charge of the trial judge, and approved in the opinion of Justice Dean as a correct statement of the law: "A son may importune his mother to make a will in his favor. * * * He has a perfect right to do it, and if the only effect was to move her affections, or sense of duty, or judgment, he has a perfect right to do it. But if these importunities were such as the testator had not the power to resist, and yielded for the sake of peace and quiet or escaping from serious distress of mind, if they were carried to a degree by which the free play of testator's judgment or discretion or wishes were overcome, it is undue influence. He can coax her, but he must not drive her, either by moral coercion or physical force."

The nineteenth assignment of error is sustained, as is the eighteenth, seventeenth, and sixteenth. So, also, is the first, second, and fourth.

The decree of the court below is reversed, at the cost of the appellees, and it is ordered that the record be remitted to the court below for further proceedings in accordance with this opinion.

HOWLEY v. CENTRAL VALLEY R. CO.

(Supreme Court of Pennsylvania. Oct. 9, 1905.)

1. RAILROADS—MOTIVE POWER—ELECTRICITY.

Where a railroad was incorporated under Act April 4, 1863 (P. L. 62), providing that every company incorporated under it shall be entitled to exercise all the rights and privileges given by Act April 19, 1849 (P. L. 79), it was not restricted to the use of steam as a motive power, but can use electricity; nothing being stated in the act about the kind of power to be used.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 372.]

2. SAME.

A railroad company, where it is not limited as to the power to be used, is required to

use that which is best and most convenient for its operation, having due regard to the safety of the public.

Appeal from Court of Common Pleas, Luzerne County.

Bill by Martin Howley against the Central Valley Railroad Company to restrain construction of a railroad to be operated by electricity. From a decree dismissing the bill, plaintiff appeals. Affirmed.

From the record it appeared that the defendant company was incorporated under Act April 4, 1868 (P. L. 62). The prayer of the bill was as follows: "That the court issue a perpetual injunction directed to the defendant, restraining said defendant and all persons claiming to act under its authority, direction, or control from constructing or operating an electric railway over and upon the above-described land appropriated from the plaintiff, or between the cities of Wilkes-Barre and Pittston, and further restraining the defendant from laying over and upon the above-described land a 'third rail,' or any other appliance or thing peculiarly and solely adapted to the equipment or operation of an electric railway." Other facts appear by the opinion of the Supreme Court.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Charles L. McKeenan, M. N. Donnelly, and John McGahren, for appellant. H. B. Gill, C. F. Bohan, and James H. Torrey, for appellee.

BROWN, J. The appellee is a railroad company incorporated under Act April 4, 1868 (P. L. 62). In addition to locomotive engines, it uses electricity as a motive power, which is carried to motors on the cars through a third rail. After locating the route of its road over the land of plaintiff, it was unable to agree with him as to the amount of damages which he sustained, and, to secure the payment of the same, a bond was filed and approved by the court of common pleas. After its approval he undertook by force to prevent the construction of the railroad upon his property, but on a bill filed by the company was perpetually enjoined from so interfering with it. When he subsequently discovered that it intended to operate its road by electricity as one of its motive powers, he filed this bill, under the provisions of Act June 19, 1871 (P. L. 1360), alleging that it did not possess the right or franchise to so operate its road, and, if permitted to do so, he would be injured in his property rights. The court below was of opinion that he could raise this question under the act of 1871, but was precluded from doing so by the injunction perpetually enjoining him from interfering with the construction of the road. By that decree he was enjoined from interfering with the construction of the road, for the reason that the company had a right

to construct it; but if, in the operation of it after its construction, the appellee undertook to exercise a franchise which it did not possess, to the injury of the plaintiff, he was within the protection of the act of 1871. More need not now be said on this point. Sooner or later we must pass upon the right of a railroad company incorporated under the general railroad act to use electricity as a motive power, and for the purpose of doing so now we regard the question as properly before us.

Act February 19, 1849 (P. L. 79), was not passed for the incorporation of railroad companies, but for the regulation of those that might thereafter come into existence by special acts of assembly creating them. Up to that time no general law had been passed providing for their incorporation. Such an act, providing for their formation and regulation, was passed April 4, 1868 (P. L. 62), and under it the appellee was incorporated. This act provides that each company incorporated under it "shall be entitled to exercise all the rights, powers and privileges, and be subject to all the restrictions and liabilities of the act regulating railroad companies, approved the nineteenth day of February, one thousand eight hundred and forty-nine, and the several supplements thereto, as fully and as effectually as if said powers were specially incorporated in said charter." The charter of the appellee authorizes it to construct, maintain, and operate a railroad for public use in the conveyance of persons and property. The road cannot be operated nor its franchises exercised without motive power; but nothing is stated by the Legislature about the kind to be used. The act is silent upon the subject, and, in the absence of a direction in the statute creating the appellee that any particular power is to be used, the kind to be adopted must be left to the judgment of those operating the road. In occupying the land of the appellant for railroad purposes, the appellee took exclusive possession of it, and in operating its road upon it the appellant, who is excluded from it, has had no additional servitude imposed upon his fee because the cars happen to be moved by electricity, instead of by steam. In this respect the case differs from the construction of a street railway upon a public street with municipal consent; for the use of the street is not exclusively in the street railway company, but concurrently used by the public. In *Potter v. Scranton Traction Co.*, 176 Pa. 271, 35 Atl. 188, we said: "How far the franchise for a passenger railway, without specific limitations or prohibitions as to motive power, carries with it the right from time to time to operate it by new methods, developed in the progress of invention and experience, is an important question, which was referred to, but not decided, in *Reeves v. Phila. Traction Co.*, 152 Pa. 153, 25 Atl. 516, and in this case it is complicated by the fact that the change was not made until after the adoption of

the present Constitution. It is clear that the traction company, chartered since the Constitution, could not of its own authority make any change of motive power which would increase the servitude on the street, without the municipal consent." The foregoing, however, has no application to a case where the land occupied is in the exclusive possession and use of a railroad company. The Legislature, in granting the power to the appellee to take appellant's land for railroad purposes, might have annexed to such a power a condition that but one kind of motive power should be used in moving cars, to the exclusion of all others; but there is no such limitation on the power to take the land or to operate the railroad constructed upon it.

Turning to the act of 1849, to the provisions of which the appellee is subject, there is no limitation found upon the kind of motive power that is to be used by railroad companies. By the second section (page 80) of the act they are authorized "to purchase, receive, have, hold, use and enjoy goods, chattels and estate, real and personal, of what kind and nature soever, as may be necessary or convenient to the procuring, owning, making, maintaining, regulating and using their railroad, the locomotives, machinery, cars, and other appendages thereof, and the conveyance of passengers, the transportation of goods, merchandise and other commodities." By section 18 (page 86) it is provided "that upon the completion of any railroad authorized as aforesaid, the same shall be esteemed a public highway for the conveyance of passengers, and the transportation of freight, subject to such rules and regulations, in relation to the same, and to the size and construction of wheels, cars and carriages, the weight of loads, and all other matters and things connected with the use of said railroad, as the president and directors may prescribe and direct: Provided, that the said company shall have the exclusive control of the motive power." Though the owners of cars had the right to have them conveyed on railroads, the motive power conveying them was to be under the exclusive control of the company. What motive power? The motive power which the company had adopted. At that time, as is a matter of common knowledge, several kinds of motive power had been adopted and were in use. Some of the roads were operated by horses, others by inclined planes by means of cables operated by stationary engines and others by the ordinary locomotive.

But it is contended that the powers conferred by the statutes on the corporations which they create must be construed in the light of conditions existing at the time they were passed, and in the present case, as electricity was not known as a motive power in 1849, and even in 1868, the appellee has no right to use it, and must be confined to the then known motive powers for railroads. If this doctrine were to prevail, the rails of

railroads would still be confined to the strap rail, nailed upon wooden stringers, with snake heads not infrequently forced up through the floors of the cars, instead of the present heavy steel rails insuring the absolute safety of the running of cars; pigmy locomotives, burning only wood, would still haul a few light cars at a slow pace on uncertain schedules, instead of the present massive engines, which, with safety and at speed not dreamed of fifty years ago, carry long trains of cars filled with passengers and freight; and the old hand brake would not be supplanted by the air brake. These and many other appliances and devices, utterly unthought of in the days of the legislation under which our present railroads came into being could not be used. In the absence of a limitation upon the power of a railroad company to use any appliances, or of a prohibition as to the use of any particular one, it is the duty of the company to use what, in the light of its observation and experience, is best and most convenient for it in the operation of its road, having at all times due regard to the safety of the public which it was created to serve. In such a case its duty fixes the measure of its powers in performing it. What it manifestly ought to do in exercising its franchises it may do, unless forbidden by its supreme law—the will of its creator as expressed in the words giving it life.

In *Millvale Borough v. Evergreen Railway Co.*, 131 Pa. 1, 18 Atl. 993, 7 L. R. A. 369, the road of the railway company was originally built and operated as a narrow gauge steam railroad, and it was contended that it could not widen the same to a broad gauge. Of this contention it was said: "It might as well be argued against the proposed change of gauge that because a particular kind of rail was in vogue and was actually adopted and used by a railroad company at and after the time of the construction of its road, it could never adopt another, but was concluded by its first choice, upon the theory of an exhaustion of its power. It will be seen at once that such an argument is entirely fallacious and untenable. Instead of such being the law, we have always held that railroad companies not only have the right, but are by law bound, to make use of the latest and best inventions and appliances tending to promote the comfort and safety of the public. This is notably the case in the matter of spark arresters, and is equally applicable to couplings and other contrivances. The writer remembers when the strap rails, laid upon longitudinal stringers and fastened down with spikes, were in common use on steam railroads, and he also remembers that snake heads at the end of the rails resulted from this method, occasioning frequent accidents and loss of life. When the T-rails came into use, it became the undoubted legal duty of the old companies to abandon the flat rail and use the new one, and any company failing to perform this

duty would very quickly have received forcible and emphatic admonition to that effect both from juries and courts."

In *Halsey v. Rapid Transit Street Railway Co.*, 47 N. J. Eq. 380, 20 Atl. 859, the question of the right of the railway company to use electricity as a motive power was raised, and Van Fleet, V. C., in delivering the opinion of the court, said: "The right of the defendant to use electricity as its motive power is clear. The defendant was organized under a general statute, authorizing seven or more persons to associate themselves together, by articles in writing, for the purpose of forming a corporation to construct, maintain, and operate a street railway for the transportation of passengers. Rev. Supp. p. 353. The motive power to be used by corporations formed under this statute is in no way limited or defined. The statute does not say that they shall use animal, mechanical, or chemical power. It says nothing at all on the subject of power. Hence, under the general grant of power to maintain and operate a street railway, it would seem to be clear that a corporation formed under this statute takes, by necessary and unavoidable implication, a right to use any force in the propulsion of its cars that may be fit and appropriate to that end, and which does not prevent that part of the public which desires to use the street according to other customary methods from having the free and safe use thereof. While the rule is elementary that public grants are to be strictly construed, still it is also well established that where a corporation is authorized by a general grant to exercise a franchise or to carry on a business, and the grant contains no words either defining or limiting the powers which the corporation may exercise, it will take by implication all such powers as are reasonably necessary to enable it to accomplish the purposes of its creation. I am therefore of opinion that if there was no other legislation on this subject than that just mentioned, and that it was made to appear that electricity could be used for the propulsion of street cars without preventing the free and safe use of the street by other means of transportation, the defendant would, by force of the statute under which it was organized, have a right to use electricity as its motive power."

Another case that may be cited is *Wilmington City Railway Co. v. Wilmington Railway Co.* (Del. Ch.) 46 Atl. 12, where it is held: "It would seem that, when the broad term 'city railway' is used, the term must be taken to mean only what is essential to the definition of the term, and obviously no particular motive power is essential. Whenever a statute specifies a motive power to be used, the expression of that power may be construed to exclude any other. The general rules of construction seem to me to require this. But, when an exclusive right is given in general terms to a city railway, the effort to confine it to the particular motive powers in use at the time would seem to be as artificial and unauthorized as to confine it to the kind of rails then in use, excluding the idea of modern rails of steel and of great weight, or to limit the size and shape and quality of cars to those known at the time. All these things, including the motive power, are subordinate—mere means to make the franchise effective—and yet the expression of any of them might be so made as to so limit the grant. When no kind of motive power is mentioned, it should be taken to indicate that the Legislature means what it says, 'a city railway,' however propelled, whether by powers then familiar or those they know not of; in fact, any kind of power which the ingenuity of man may contrive that does not constitute an additional burden upon the highway, or an injury and annoyance to the public."

We have, it is true, as is contended by the appellant, designated railroads organized under the act of 1868 as steam railroads. *Potts v. Quaker City Elevated R. R. Co.*, 161 Pa. 896, 29 Atl. 108. But this designation has been adopted only as a natural one, to distinguish such railroads from street passenger railways, and in no case in which it has been used is there any intimation as to the limitation upon the power of a railroad company in the adoption of its motive power. With this question now before us, we are clear that the appellee is not prohibited from using electricity as a motive power, and if, in its judgment, the same ought to be used for the most efficient exercise of its right to operate its railroad, it may be used.

The decree of the court below is therefore affirmed, and this appeal dismissed, at the cost of the appellant.

OJSERKIS v. OJSERKIS.

(Court of Chancery of New Jersey. Nov. 8, 1905.)

1. DIVORCE—DESERTION—ABSENCE OF WIFE.

A wife's mere absence from her husband, though she wrongfully separated herself from him, is not in itself proof of a willful intent on her part to abandon him sufficient to entitle him to a divorce, unless he in good faith invited her to return or made known to her his willingness to receive her.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 114.]

2. SAME—OFFER TO RESUME MARITAL RELATIONS.

Where a husband, residing in New Jersey apart from his wife, and knowing of her absence in Austria, wrote a letter to a third person alleged to contain an offer for her to return, but such letter was not delivered to her, and no provision was offered to enable her to make the journey to her husband, who flatly declared that he would have nothing to do with her, such letter did not constitute such an offer on his part to resume marital relations as would constitute her continued absence an obstinate desertion.

Bill by Sigmund Ojserkis against Emma Ojserkis for divorce. Petition dismissed.

W. I. Garrison, for petitioner. Thomas S. Henry, for defendant.

GREY, V. C. (orally, after hearing argument by petitioner's counsel). I am satisfied what the judgment in this case should be, and do not care to hear from the defense in this matter. The petition in this cause is filed by Sigmund Ojserkis, alleged to be a resident of Atlantic City, in this state, stating that he was married on the 15th day of March, 1895, in Austria, to Emma Reiter, his present wife, and came to New York to live in March, 1900; that they lived in New York until March 1, 1901, when they removed to Atlantic City, where the petitioner has resided until the present time. The petition further alleges that about the 28th day of March, 1901, the defendant's wife left Atlantic City and without just cause deserted the petitioner, and went to live in New York, where the petitioner alleges and believes she resides at the present time. The petitioner further alleges that for more than two years last past the defendant has willfully, obstinately, and continued to desert the petitioner and refused to live with him. There are no children born of the marriage. The petitioner prays for a divorce. Annexed to the petition is the usual affidavit that there is no collusion between the petitioner and defendant. On motion an amendment has been allowed to the petition, the effect of which is to make it allege that the parties lived in New York City to March 1, 1901; and that the defendant deserted her husband there; and that the petitioner has resided in Atlantic City for two years, from March 1, 1901, until the present time, that is, until the filing of the petition. To the petition an answer has been filed, in which the defendant admits the marriage, and recites a number of facts, to the effect

that instead of the defendant having deserted the petitioner it was in truth the petitioner who deserted the defendant, alleging that he abandoned her in New York, leaving a letter stating that he had gone to South Africa and would not return, and advising her not to wait for him, but to go to her parents in Galatia, Europe. The defendant denies that she deserted her husband, denies that she refused to live with him, denies that the petition charging her with desertion is in any manner true, and claims that the charge is an unfounded imputation upon her. She denies that she was ever a resident of Atlantic City, as alleged in the petition as originally framed, and avers that the petitioner is not now, and never was, a resident of the state of New Jersey. These allegations are presented solely as an answer to the husband's petition for divorce. No cross-relief against the petitioner is in any way asked by the defendant by anything in the nature of a cross-petition.

The petition in this case was filed the 18th day of June, 1903. There is no denial of the marriage. On the contrary, both parties admit it. In addition to that it is proven by other witnesses that the petitioner and the defendant lived together for a number of years before their separation in the open and avowed relation of husband and wife. The actions of the parties themselves, and their public recognition and reputation of their connubial relations as husband and wife, are equivalent to proof of a formal marriage. It is undisputed between the parties that they came to New York from abroad some years after the marriage, and that they lived there as married people. They were living with each other as husband and wife in the city of New York in the month of March, and up or to or about the month of April, 1901. At that time a separation took place. It is undisputed that the brother of the defendant wife was in business in New York City with the petitioner, and it is also undisputed that, about the time when the separation took place (probably nearly coincident with it), the partnership or business theretofore carried on by the petitioner and his brother-in-law (brother of the defendant wife) was violently disrupted. At this point the differences between the parties began. They are so violently contradictory of each other in their parol testimony, as to every element which is necessary proof upon either side, that I find great difficulty in giving full credence to the statement of either party. I am quite unable to say that the parol proof on either side preponderates. There is testimony of persons who ought to be disinterested witnesses; but it is very difficult to say that they are disinterested witnesses, in view of the manner in which their testimony is given on the stand, and of their previous relations to the case and to the parties. All those who have given any testimony which might be of value in the determining of the case have manifested

in giving it a degree of feeling which has very seriously lessened its credibility and weight.

The proof is that the husband, in the month of March, or in the early part of April, 1901, left the city of New York and came to Atlantic City, having stopped in Philadelphia and there made inquiries with relation to his intended engagement in business in Atlantic City. There seems to be no doubt about the fact that he did actually do that. He says that before he started he told his wife he was going there. She says that she never had the slightest intimation that he was going to Atlantic City, or that he was going to any place that he disclosed to her. She says that theretofore he had frequently stayed up all night, and had taken his breakfast in his room; that on this occasion she took his breakfast up, expecting to serve it in his room. When she got there, she found, or was told by the bartender of the house, that he had gone away. She found a letter on the register, which was from her husband, in which he said that he had gone to South Africa, and that she need not expect anything more from him, and she had better go home to her parents. This letter, she says, was shown to two or three people, and afterwards, not knowing where he was, and being, as she says, broken-hearted, she tore the letter up and threw it away. She showed it to one person, Mr. Schlosser, who was on the stand here. He testifies that he knew Mr. Ojserkis' handwriting, and, while he cannot say positively that the letter was signed by him, he can say that it was in his handwriting, and that it stated that he was going to South Africa, and that the letter contained the substance of what the wife says was in it. Mr. Ojserkis declares he never wrote such a letter and never signed it. The nature of the testimony regarding this letter, dealing as it does with a physical thing, a writing done by the husband on a piece of paper received by the wife at a most important crisis of their married life, is such that it is impossible that either of them could have been mistaken about it. One or the other must have committed perjury. The testimony with regard to that letter is an example of the sort of evidence with which the court is confronted in determining this case.

There is no doubt whatever that from about April, 1901, there was a following period of two years, in which the wife was separated from the husband. The wife contends that, although it is true that she lived apart from him, yet during the whole of that period she was willing and anxious to come back to him, if she had only known where he was and had the means to return. She says that he never furnished her with any money, though he knew where she was. That appears to be true, because he admits that he wrote letters which he ordered to be delivered or shown to her, and he does not appear to have sent her any money. He does

not claim to have written to her directly. A period of two years of separation has elapsed, and it is that period which the petitioner alleges was one of willful, continuous, and obstinate desertion on the part of the defendant wife, on which he files his petition for divorce in this case. She denies that her separation from him was willful, because she says her return to her mother was necessitated by her husband's failure to provide a home for her, and was immediately occasioned by the letter which she says he wrote, in which he told her to go home to her mother. There seems to be no doubt that the husband did not, during those two years, furnish her any means, and it was quite natural and reasonable that, as she had no means, she should go home to her mother. Nothing in the testimony leads me to believe, therefore, that her going home to her mother was occasioned by any willful purpose to desert her husband. She had nowhere else to go. The husband himself does not say that he furnished her money or support whereby she could have continued in this country, nor does he appear during these two years to have taken steps to care for his wife. The wife's mere absence from her husband is not in itself proof of a willful intent on her part to abandon him. The petitioner has failed to prove a willful desertion by the wife, which is an element in the case essential to the making of a decree.

It is also disputed, on the part of the wife, that she had any disposition or wish to stay away from her husband. The obstinacy of her alleged desertion is therefore challenged. The decisions in this state have established several rules of interpretation regarding the conduct of the husband and wife, touching this element of obstinacy in desertion cases. One of the best established is that, even if a wife shall have wrongfully separated herself from her husband, yet, if there remains any hope or probability that the wife might by the husband's application be induced to return to him, it is his duty to invite her to return, or make known to her his willingness to receive her. If he does not indicate his willingness to receive her, the desertion on her part has not the quality of obstinacy which the law requires to exist for the justification of the husband in seeking a divorce. *Bowly v. Bowly*, 25 N. J. Eq. 406. The husband in this case does not contend that his wife's disposition and conduct in absenting herself was so settled and so hostile to him that it was useless to ask her to return. He admits that he thought she might be induced to come back, and claims that he made such efforts to induce his wife to return as he was reasonably called upon to exert. He swears that he sent her, while she was in Vienna, a letter inviting her to return, and that that message came back to him without any response from her. There is no corroborating proof of that fact. All the husband could know is that he sent the letter, and that he received it back again. He was not present

in Vienna when it was shown to his wife. This testimony as to the sending and return of the letter stands wholly on the unsupported evidence of the husband. No other witness swears that any such invitation was exhibited to the wife during her absence in Vienna, where the petitioner appears to have known that she was. It is an essential element in the proofs. The husband alone cannot carry the burden of proof. *McShane v. McShane*, 45 N. J. Eq. 341, 19 Atl. 465.

On the other hand, the wife says that the incident was that while in Vienna somebody brought a letter, said to be from her husband, but did not even show it to her, did not tell her where her husband was, and that she did not know where to communicate with him. She declares she did not herself receive the letter, that it was only shown to her. In fact it is not claimed that any letter was sent to her by mail or direct conveyance. The claim is that it was shown her by a messenger. I am called upon to say whether that sort of an application by a husband to a wife was such an effort as a reasonable and just man, who wanted his wife to return, should make, in order to induce her to come to him, that they might resume their connubial relations. I have no hesitation in saying that I do not think a letter—not sent directly to the wife, not expressing to her in terms of affection and interest any hope of a renewal of their marital relations, but carried in the hand of a messenger and shown but not delivered to her, which did not state the place where the husband was, neither sent nor arranged to pay her any money (though the husband knew that to come to him she would have to cross the ocean for 3,000 miles), and did not suggest any plan whereby she might return to him—I say that is not such a proposition as a reasonable and just man ought to make to a wife, from whom he had absented himself. That he sent her any letter shows that he did not think, as between him and her, it was impossible that she could be induced to return to him. Nothing in the case indicates that he believed that, or that he had any occasion to believe it.

I have abandoned any hope of reconciling the parol testimony of these parties, because, wherever there is a statement of importance upon one side, the statement of the other appears to contradict it. The letters which were written do not need any reconciliation, they are settled in the writing, and they undoubtedly expressed the feelings of the writer at the time they were written. The petitioner lays great stress, and I think with justice, upon the letter which has been marked Exhibit P1, dated New York, April 4th, and has been proved to be in the year 1903, written by the defendant, signed by the name of Emma. She admits that she wrote it, so that the identity of the letter and the time when it was written are substantially undisputed. She says that this is the second letter which she wrote to the petitioner, and that the first letter received by him has not

been produced. She says she also wrote another letter which would be the third letter. That also is not produced here. The petitioner says there were no such other letters. The letter of April 4th, which is produced here, is not one, in my judgment, which shows that the defendant wife had much affection for her husband, although she says it existed. It is possible that it might have been written under such a sense of exasperation that she expressed herself with a violence which did not represent her real feelings.

The sister of the defendant testifies that the husband flatly refused to have anything to do with the defendant. All the witnesses produced on the part of the defendant, Mr. Schlosser, the sister, and I think one other witness, who testifies as to the declarations of the petitioner touching the renewal of his relations with his wife, show that the petitioner flatly declared that he would not live with her, that he did not want to have anything to do with her. Nobody on the stand, the petitioner, or anybody else, has ever stated any fault in this wife, except one, and that was that she was a sister of her brother, whom the petitioner conceived had wronged him. This element, as a potent factor in the differences between this husband and wife, crops out at almost every phase of the case. In the letter written by the petitioner he refers to the brother of the defendant, and to the fact that he had prosecuted the brother, although he had to go 3,000 miles to do it. All the allusions to this incident go to indicate that the real essence of the differences between these parties lies in the husband's sense and resentment of the wrong which he believes has been done him by the defendant's brother. He wants to visit upon the wife the vengeance which he has been unable to vent to the full upon her brother. That vengeance he has nursed and kept warm, saying that he would have nothing to do with her as long as her brother was alive. Such expressions do not exhibit a spirit which enables the petitioner to say that, against his will and consent, and obstinately adhering to a determination to abandon him, his wife has, for two years, willfully and continuously deserted him.

The husband must, under the law of this state, during the two years of alleged desertion, have been in a frame of mind willing to take the wife back. The proof in this case in my view is conclusive that the husband was not willing to take the wife back. He resented the kindly intended interference of Mr. Schlosser, who received from the petitioner the treatment which usually comes to those who seek to make peace between husband and wife. The husband's letter to Mr. Schlosser shows that he resented even the approach to a reconciliation. Can it be said that a man who is in such a frame of mind is deserted by his wife against his will? Her absence was not

against his will. It was agreeable to him. He did not want her, and he is not now in a position to say that her absence was an obstinate desertion. If counsel will look at the case of *Cornish v. Cornish*, 28 N. J. Eq. 208, and the case of *Bowlby v. Bowlby*, ubi supra, they will find that it is finally settled in this state, by the rulings of the court of appeals, that, unless the circumstances between the parties are such that it is a hopeless and useless thing on the part of the husband to invite his wife to return, it is the duty of the husband, even if the wife has wrongfully left him, to approach his wife with such steps to induce her to return as, under the circumstances of the case, are due from him.

I have not ignored the fact which probably explains the strenuousness of the petitioner's attack, namely, that the wife has obtained in a New York court a decree for support against him, which compels him to pay her permanent alimony of \$8 per week. He evidently hopes, by obtaining in this case a decree for divorce a vinculo matrimonii, to relieve himself from the obligations of the New York court's order. The dismissal of the petition in this case, which I feel bound to advise, will free the petitioner from the obligation of the order made in this suit, which operates to allow the wife, during the pendency of this suit, \$4 a week in addition to the alimony given by the judgment of the New York court. The defendant wife does not here ask any decree for permanent alimony, by cross-petition or otherwise.

A decree will be advised dismissing the petition, with costs.

RIDGEWAY v. CORPORATION LIQUIDATING CO.

(Court of Errors and Appeals of New Jersey. June 19, 1905.)

1. FRAUDS, STATUTE OF—COLLATERAL UNDERTAKINGS—EVIDENCE.

On the issue of whether a promise to pay for lumber was original or collateral, the fact that the seller charged the lumber to other parties than the promisor is to be considered, but is not conclusive.

2. SAME.

The act of a seller in charging lumber to third persons, to whom the buyer ordered the lumber to be delivered and to whom he requested the seller to charge the same, with the amount delivered to them, respectively, was not inconsistent with a claim by the seller that the buyer's order was original and not collateral.

Error to Circuit Court, Union County.

Action by Wilbur J. Ridgeway against the Corporation Liquidating Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Jeremiah A. Kiernan, for plaintiff in error.
Patrick H. Gilhooly, for defendant in error.

PER CURIAM. When this case was first before the court, there appeared to be no

judgment that could be reviewed. The record has been so corrected that the case has been considered upon the assignments of error. The judgment is attacked upon the sole claim that there was error committed by the trial judge in refusing to direct the jury that no recovery could be had upon certain items of the plaintiff's claim against defendant. The defendant's contention was that its undertaking, if any had been proved, was a collateral one to the undertaking of two persons to whom the lumber (for the price of which those items were claimed) had been delivered, and to whom they had been charged in plaintiff's books of account, and that, as its undertaking was not in writing, it was void by the statute of frauds.

Whether defendant undertook to pay for this lumber, and whether its undertaking was original or only collateral, was a question to be submitted to the jury. *Hetfield v. Dow*, 27 N. J. Law, 440; *Gallagher v. McBride*, 66 N. J. Law, 380, 49 Atl. 582. If there was evidence of an original contract, the trial judge did not err in refusing the direction asked. The fact that plaintiff had charged the lumber to other parties was to be considered in determining the question, but it is not conclusive as to whom the credit was given. There was evidence from which the jury might find that defendant ordered the lumber and directed its delivery to other persons and requested plaintiff to charge each of them, respectively, with that delivered to them. If believed, this mode of keeping the account was in no respect inconsistent with defendant's undertaking being an original and not a collateral one. There being evidence on which defendant's liability could be found, there was no error in the refusal complained of.

The judgment must be affirmed.

BLOOMFIELD v. BOARD OF CHOSEN FREEHOLDERS OF MIDDLESEX et al.

(Supreme Court of New Jersey. Sept., 1905.)

1. BRIDGES—ESTABLISHMENT—BOARD OF FREEHOLDERS—AUTHORITY.

There being no statute limiting the power of the board of chosen freeholders in the letting of contracts for bridge construction, they are limited only by the rule that their acts must be in good faith and as a result of an honest exercise of discretion.

2. SAME—CONTRACTS—PLANS SUBMITTED BY BIDDER.

Where the original plan prepared for the construction of a public bridge was not feasible, and expedition in the construction of the bridge was imperative, it was not an abuse of the discretion of the board of chosen freeholders to award the contract for the bridge on a plan submitted by a bidder, without competitive bidding.

Suit by Charles A. Bloomfield against the board of chosen freeholders of Middlesex and

others. On an application to vacate the allocatur upon a writ of certiorari. Granted.

Alan H. Strong, J. Clarence Conover, and H. Brewster Willis, for the motion. Willard P. Voorhees, opposed.

FORT, J. The testimony taken in this matter establishes clearly, by all the proof, that the original plan prepared by the engineer for the construction of the Milltown bridge was not a good one. Dr. Dietz, the only witness called by the prosecutor (who was also the agent of the unsuccessful bidder on the original plan), says it was "a very impracticable plan—a very poor one indeed." Mr. Leahy, an engineer of large experience, also states that the plan upon which the contract has been awarded is much better than the one that was originally prepared. As to the plan upon which the contract here under review was made, all agree that it is the best and safest construction for the bridge required at the point in question. I must therefore take it as an established fact that the freeholders acted for the best interests of the county in determining not to build the bridge in accordance with the original plan, but to build it upon the plans upon which they have contracted to build it. That eliminates from the case every question save one, viz.: Were the proceedings under which this contract was awarded fraudulent or an abuse of the discretion vested by law in the freeholders?

It is not contended that any law requires that the freeholders must let contracts for the construction of bridges to the lowest bidder, nor that they are required to let them upon the plans and specifications upon which they have invited bids. No statute is cited which limits the power of the board of freeholders in the letting of contracts for bridge construction. They are therefore limited only by the rule that their acts must be in good faith and as the result of an honest exercise of the discretion vested in them as public officials. *Ryan v. Paterson*, 66 N. J. Law, 533, 49 Atl. 587. No fraud is alleged or shown in this case in awarding the contract sought to be reviewed by the writ applied for. Is palpable abuse of discretion shown? The proof satisfies me, not only that the plan upon which the contract has been let is the best, but that the price is a fair one for the work proposed. Dr. Dietz's testimony that the cost of construction is a few hundred dollars excessive I do not think of sufficient value, from an expert standpoint, to justify the allowance of a writ to review the action of the freeholders.

The action of the freeholders in awarding this contract on a plan submitted by a bidder, and without competitive bidding, is, as a general proposition, very objectionable, and in a case not shown to be one of emergency, and therefore finding some justification in public necessity, would of itself be sufficient cause for a review, and, as I think, for the setting aside of a contract made under such circumstances. The practice pursued here

does not commend itself to me as wise, and can only be justified on grounds of urgent public necessity. The conditions present in this case make expedition in the construction of the Milltown bridge imperative.

For these reasons I will sign an order vacating the allocatur upon the writ in this case. No costs will be allowed to either party against the other.

ATTORNEY GENERAL ex rel. WOOD v.
ROWE, City Clerk.

(Supreme Court of Rhode Island. Oct. 31, 1905.)

ELECTIONS—NOMINATION PAPERS—QUALIFICATIONS OF SIGNERS.

Pub. Laws 1902, c. 1078, § 8, provides that the signing of nomination papers is a disqualification for participation in the caucus of any political party, and that participation in a caucus is a disqualification to sign nomination papers. *Held*, that an elector is not disqualified from signing a nomination paper for a Prohibition candidate for Governor, a Socialist candidate for the Legislature, and a "Good Government" candidate for a municipal office, all of whom are to be voted for at the same election.

Mandamus by the Attorney General, on the relation of W. L. Wood, to compel John W. Rowe, as city clerk of the city of Pawtucket, to place the names of certain persons on an official ballot. Writ granted.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

John J. Fitzgerald, for relator. Edward W. Blodgett, for respondent.

BLODGETT, J. This is a petition for a writ of mandamus to require the respondent to place the names of Hiram S. Johnson, as alderman, and James O. Aitken, Samuel B. Fuller, and the relator, upon the official ballot of the Fourth Ward of the city of Pawtucket, all as "Good Government" candidates for the offices of alderman and common councilmen, respectively, from said ward, for the election to be held on November 7, 1905, and the single question presented is as to the qualifications of three signers to the nomination papers of the relator therefor. It is agreed that the relator has 49 qualified electors upon his nomination papers, and if two electors who signed nomination papers for a Prohibition nomination for Governor, and one elector who signed the Socialist nomination paper for Governor, within the 14 calendar months next preceding, are not thereby disqualified as signers of the relator's nomination papers, that the relator then has the names of more than 50 electors required by law, and the writ should issue, and, if they are not so qualified, that the writ must be denied.

A similar question was presented in *Attorney General v. Clarke*, 28 R. I. 470, 59 Atl. 395, in which the statutory provisions

relative to such nominations are considered, where the court held as follows (page 475 of 26 R. I., page 397 of 59 Atl.): "By the provisions of section 8, c. 1078, Pub. Laws 1902, it will be observed that the signing of such nomination papers is a disqualification for participation in the caucus of any party, and that the participation in the caucuses of such a party is a disqualification to sign the nomination papers in question, but that the signing of the nomination papers in the one case is not a disqualification for the signing of nomination papers in the other." The statute of this state defines a political party as follows, viz. (section 1, c. 1078, p. 35, Pub. Laws 1902): "In the cities of Providence, Newport, and Pawtucket, the caucuses of all political parties shall be held in accordance with the provisions of this act, and such provisions shall apply only in said cities. For the purposes of this act, a political party is hereby defined to be one which at the next preceding annual election of state officers cast for its candidate for Governor at least two per cent. of all the votes cast in the state for that officer. Caucus and convention nominations shall be made only by political parties."

It is doubtless true that for many years there have been both a Socialist political organization and a Prohibition political organization in many of the states, having a national committee, holding national conventions, adopting a national platform, and nominating candidates for national, state, and municipal offices. Yet, tested by this statute, at the present time neither of said organizations has the legal right in the cities of Providence, Pawtucket, and Newport to nominate candidates by caucus or convention, because of the failure to cast 2 per cent. of the total vote cast for Governor at the last election. But the Legislature has seen fit to limit the disqualification to sign a nomination paper in these cities in certain respects only, and has not included the signing of the nomination papers for a different office and for a candidate representing a different political principle among them. However much it may seem to contravene the general purposes of the law as originally designed, it is nevertheless true that the Legislature has not as yet disqualified an elector in said cities from signing a nomination paper for a Prohibition candidate for Governor, a Socialist candidate for the Legislature, and a "Good Government" candidate for a municipal office, all of whom are to be voted for at the same election.

In *Attorney General v. Clarke*, supra, "willful and deliberate forgery" and fraud were affirmatively found to have been practiced, and the writ was denied. No such elements appear in this case, and we are of the opinion that the requirements of the existing statute have been complied with, and grant the prayer for a writ of mandamus.

GUNN v. UNION R. CO.

(Supreme Court of Rhode Island. July 15, 1905.)

1. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—RIGHT TO TRIAL BY JURY.

The provisions of the federal Constitution prohibiting a state from depriving any person of life, liberty, or property without due process of law, or denying to any person within its jurisdiction the equal protection of the law, do not require a trial by jury in suits at common law in a state court.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 933.]

2. SAME—STATE CONSTITUTION.

By the charter of Rhode Island the validity of its laws was made dependent upon their not being contrary, but as near as might be agreeable, to the laws of England; regard being had to the nature and constitution of the place and the people. Pub. Laws 1636-1705., p. 26, provided for a second jury trial as of course, which remained the law of the colony and of the state until 1878, and from 1732 (Dig. 1730, p. 24) to 1844 a third trial could be had as of course on a writ of review, and from such third jury trial prior to the Revolution an appeal to the King in council might be had, on which appeal judgments and verdicts were reversed without remanding for a new trial. Const. art. 1, § 15, providing that the right of trial by jury shall remain inviolate, was adopted in 1843. *Held* that, in view of the conditions prevailing in Rhode Island, Gen. Laws 1896, c. 251, § 11, authorizing the Supreme Court to direct judgment without any further trial by jury, is not unconstitutional.

Action by Thomas Gunn against the Union Railroad Company. Heard on motion of plaintiff to vacate an order directing the cause to be remanded with direction to enter judgment for defendant (58 Atl. 452). Motion denied.

Argued before DOUGLAS, C. J., and DU-BOIS, BLODGETT, JOHNSON, and PARK-HURST, JJ.

Charles E. Gorman, for plaintiff. Henry W. Hayes, Frank T. Easton, Lefferts S. Hoffman, and Alonzo R. Williams, for defendant.

BLODGETT, J. After the filing of the opinion in this case, directing the cause to be remanded to the common pleas division with direction to enter judgment for the defendant (26 R. I. 112, 58 Atl. 452), the plaintiff has filed a motion of which the following is a literal transcript: "The defendant comes and moves to vacate the order of the court directing a verdict to be entered for the defendant because said court has no jurisdiction to enter such order and because said order deprives the plaintiff of his property without due process of law in violation of section 10 of article 1 of the Constitution of the state and of the provisions of the United States wherein a state is prohibited from depriving any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction equal protection of the law. Charles E. Gorman, C. Woodbury Gorman, Attorneys for the Plaintiff." Assuming that the word "defend-

ant" as first used is inadvertently used in place of the word "plaintiff" to designate the moving party, and further assuming that the word "verdict" is inadvertently used in the motion instead of the word "judgment," we proceed to a consideration of the constitutional questions raised therein, observing that the case is now before the full court only on such questions, even if the opinion of the court *supra* were not *res adjudicata* as to the statutory authority for the action of the court.

At the argument, as well as at the reargument made necessary by certain changes in the membership of the court, the sole ground urged by the plaintiff that the act in question was unconstitutional was that he was deprived of his property without due process of law, inasmuch as the order of the court directing the entry of judgment, because of the insufficiency of the evidence to sustain the verdict, was an infringement of his constitutional right of trial by jury. The constitutional provision as to trials by jury is not the same in all the states. Thus, in the Constitution of Maryland (1867), the following provision occurs: "Art. 5. That the inhabitants of Maryland are entitled to the common law of England and the trial by jury according to the course of that law." In the Constitution of Rhode Island (article 1, § 15) it is thus expressed: "The right of trial by jury shall remain inviolate." In strictness of construction this is an entirely separate provision from those provisions of the Constitution set forth in the record; but inasmuch as both parties have chosen to consider this provision as ancillary to the other, and inasmuch as we are advised that the same question has been raised in other cases now pending and awaiting our decision in the case at bar, we shall consider the question thus broadly presented as though it were a question of the constitutional power of the court to set aside a verdict in a civil case for insufficiency of evidence and to enter judgment thereafter, without remanding the cause for a new trial.

In its federal aspects the question thus raised is resolved adversely to the plaintiff by the recent decision of the Supreme Court of the United States in *Maxwell v. Dow* (1899) 176 U. S. 581-594, 20 Sup. Ct. 448, 44 L. Ed. 597, where the court says: "In *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678, it was held that a trial by jury in suits at common law in the state courts was not a privilege or immunity belonging to a person as a citizen of the United States, and protected, therefore, by the fourteenth amendment. The action was tried without a jury by virtue of an act of the Legislature of the state of Louisiana. The plaintiff in error objected to such a trial, alleging that he had a constitutional right to a trial by jury, and that the statute was void to the extent that it deprived him of that right. The objection was overruled. Mr. Chief Justice

Waite, in delivering the opinion of the court, said: 'By article 7 of the amendments it is provided that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This, as has been many times decided, relates only to trials in the courts of the United States. *Edwards v. Elliott*, 21 Wall. 532, 557, 22 L. Ed. 487. The states, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the state courts is not, therefore, a privilege or immunity of national citizenship, which the states are forbidden by the fourteenth amendment to abridge. A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 280, 15 L. Ed. 372. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land—that is to say, with the Constitution and laws of the United States made in pursuance thereof—or with any treaty made under the authority of the United States.' This case shows that the fourteenth amendment, in forbidding a state to abridge the privileges or immunities of citizens of the United States, does not include among them the right of trial by jury in a civil case in a state court, although the right to such a trial in the federal courts is specially secured to all persons in the cases mentioned in the seventh amendment."

This language is, of course, conclusive as to the scope of the provisions of the Constitution of United States as affecting the guaranty of jury trial in civil actions by the states. If further discussion of the meaning and effect of the words "law of the land" and "due process of law" were required than is contained in *Gunn v. Union R. Co.*, 23 R. I. 301, 49 Atl. 1004, there may be added this language of Mr. Justice Bradley in *Missouri v. Lewis*, 101 U. S. p. 31, 25 L. Ed. 989: "We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent its doing so. * * * Where part of a state is thickly settled, and another part has but few inhabitants, it may

be desirable to have different systems of judicature for the two portions—trial by jury, in one, for example, and not in the other. * * * If a Mexican state should be acquired by treaty and added to an adjoining state, or part of a state, in the United States, and the two should be erected into a new state, it cannot be doubted that such new state might allow the Mexican laws and judicature to continue unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any fair construction of the fourteenth amendment." And in *The Justices v. Murray*, 76 U. S. 278, 19 L. Ed. 658, it is further said that, inasmuch as the first ten amendments to the Constitution were limitations upon the power of the federal government and not upon the states, "it follows that the seventh amendment (relating to trial by jury) could not be invoked in a state court to prohibit it from re-examining, on a writ of error, facts that had been tried by a jury in the court below."

It is, of course, obvious that the question here presented is restricted to an inquiry as to the power of the court in civil cases only. The provision of our Constitution as to criminal cases differs, indeed, from the provision of the Constitution of the United States and from the constitutional provision of a great majority of the other states in that it contains no reference to former jeopardy, and is as follows: Article I, § 7: " * * * No person shall after an acquittal be tried for the same offense." This provision in *State v. Lee*, 10 R. I. 495, was properly held by this court to mean "that no person who has once been fairly acquitted by a jury upon a proceeding purely criminal can again be put upon trial without his own consent." The inherent power of the court in the absence of a constitutional provision in that behalf is forcibly illustrated in the recent case of *State v. Lee* (1894) 65 Conn. 271, 30 Atl. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202, in which the case is thus stated by the court: "The defendant was indicted for the crime of murder in the second degree, was acquitted upon trial to the jury, and this is an appeal by the state, in the nature of a motion for a new trial, on the ground of alleged errors in the charge of the court and in the admission and exclusion of evidence," and a new trial was granted thereon, the court saying (page 272 of 65 Conn., page 1111 of 30 Atl. [27 L. R. A. 498, 48 Am. St. Rep. 202]): "The principle of finality is essential, but not more essential than the principle of justice. A final settlement is not more vital than a right settlement. The adjustment of these principles in the establishment of procedure by means of which the final judgment shall not only settle the controversy, but settle it in accordance with law, is determined in each jurisdiction by considerations of public policy and not by funda-

mental principles of jurisprudence." In *Gunn v. Union R. R. Co.*, 23 R. I. 291, 49 Atl. 999, *supra*, this court held that article I, § 15, of the Constitution, "means simply that in those proceedings in which a right to trial by jury existed at the time of the adoption of the Constitution the right shall continue; the Constitution requiring the conservation, not an extension, of the right of jury trial." And see cases cited. What, then, is the meaning of the words "trial by jury?" They are thus defined by Mr. Justice Gray in *Capital Traction Co. v. Hof* (1898) 174 U. S. 13, 19 Sup. Ct. 585, 43 L. Ed. 873: "'Trial by jury,' in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of 12 men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of 12 men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books."

The power of the court to set aside a verdict in a civil case and the power of the court to direct a verdict in such a case are evidently identical in nature and in substance. In what cases, then, may these powers be exercised by the court? In *Treat Mfg. Co. v. Standard Steel & Iron Co.* (1895) 157 U. S. 674, 15 Sup. Ct. 718, 39 L. Ed. 853, the rule is thus established by Chief Justice Fuller: "This was an action of trespass on the case. At the conclusion of the trial defendants moved the court to charge the jury to find the issues for defendants, which motion was granted, and the jury was directed, upon the whole case, to return a verdict for defendants, plaintiff duly excepting. Thereupon the jury returned a verdict accordingly, plaintiff moved for a new trial, which was denied, and judgment was given against plaintiff on the verdict. * * * The only ground relied on to sustain the jurisdiction of this court is that the case 'involves the construction or application of the Constitution of the United States,' because plaintiff in error was deprived of the right of trial by jury. But it is well settled that where the trial judge is satisfied upon the evidence that the plaintiff is not entitled to recover, and that a verdict, if rendered for plaintiff, must be set aside, the court may instruct the jury to find for the defendant. *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170; *Marion County v. Clark*, 94 U. S. 278, 24 L. Ed. 59; *Herbert v. Butler*, 97 U.

S. 319, 24 L. Ed. 958. If the court errs as matter of law in so doing, the remedy lies in a review in the appropriate court. Writ of error dismissed."

Schofield v. Chicago & St. Paul R. R. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224, resembles the case at bar in this respect. The plaintiff was struck from the rear while driving parallel with and attempting to cross a railroad track upon which the view was unobstructed for a considerable distance. He did not look behind him before crossing (page 617 of 114 U. S., page 1126 of 5 Sup. Ct. [29 L. Ed. 224]), and the "train was not a regular one and no train was due at the time of the accident, it was moving at a high rate of speed, it did not stop at the depot" (behind the plaintiff), "and it gave no signal by blowing a whistle or ringing a bell after it passed the depot." In the case at bar the plaintiff backed from between the horses and coal team toward the track of the approaching car, also without looking, and was struck from the rear. In the former case the court held "that the plaintiff, by his own showing, was guilty of contributory negligence, whatever negligence there may have been on the part of the defendant," and sustained the direction of a verdict for the defendant, observing (page 618 of 114 U. S., page 1127 of 5 Sup. Ct. [29 L. Ed. 224]): "It is the settled law of this court that when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Improvement Co. v. Munson*, 14 Wall. 442, 20 L. Ed. 867; *Pleasants v. Fant*, 22 Wall. 116, 22 L. Ed. 780; *Herbert v. Butler*, 97 U. S. 319, 24 L. Ed. 958; *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980; *Griggs v. Houston*, 104 U. S. 553, 26 L. Ed. 840; *Randall v. Balt. & Ohio Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; *Anderson County Com'rs v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; *Baylis v. Travellers' Insurance Co.*, 113 U. S. 316, 5 Sup. Ct. 494, 28 L. Ed. 989. This rule was rightly applied by the Circuit Court to the present case. Judgment affirmed."

In *Coughran v. Bigelow* (1896) 164 U. S. 301, 17 Sup. Ct. 117, 41 L. Ed. 442, error was alleged in ordering a nonsuit, and the court, after referring to certain cases cited by the appellants, continues (page 307 of 164 U. S., page 119 of 17 Sup. Ct. [41 L. Ed. 442]): "The foundation for those rulings was not in the constitutional right of a trial by jury, for it has long been the doctrine of this court that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon

whom the onus of proof is imposed, and that, if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly, and, if the jury disregard such instruction, to set aside the verdict. *Parks v. Ross*, 11 How. 362, 13 L. Ed. 730; *Schuchardt v. Allens*, 1 Wall. 359, 17 L. Ed. 642; *Pleasants v. Fant*, 22 Wall. 116, 120, 22 L. Ed. 780. And in the case of *Oscanyon v. Arms Co.*, 103 U. S. 264, 26 L. Ed. 539, it was said by Mr. Justice Field, in delivering the opinion of the court, that the difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is 'rather a matter of form than of substance.'" And further discussing *Central Transportation Co. v. Pullman's Car Co.* (1890) 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, continues: "It is the clear implication of this case that granting a nonsuit for want of sufficient evidence is not an infringement of the constitutional right of trial by jury."

In *Metropolitan Co. v. Moore* (1886) 121 U. S. 558, 7 Sup. Ct. 1334, 30 L. Ed. 1022, the court considered the meaning of the term "insufficient evidence," and held as follows (page 568 of 121 U. S., page 1340 of 7 Sup. Ct. [30 L. Ed. 1022]): "We see no reason, however, for supposing that the language in section 804, 'for insufficient evidence,' is to be limited to evidence insufficient in point of law. The words themselves do not import any distinction. It is admitted that according to established rules of procedure in such cases it is customary and proper for courts of justice, sitting in the trial of causes by jury, to set aside verdicts and grant new trials in both classes of cases; that is, where the verdict rests upon evidence which is either insufficient in law or insufficient in fact. Strictly speaking, evidence is said to be insufficient in law only in those cases where there is a total absence of such proof, either as to its quantity or kind, as in the particular case some rule of law requires as essential to the establishment of the fact. Such, for instance, would be the case where a fact was attested by one witness only, when the law required two, or when the alleged agreement was proven to be verbal, when the law required it to be in writing. In such cases a verdict might be said to be against law, because founded on insufficient evidence. Insufficiency in point of fact may exist in cases where there is no insufficiency in point of law; that is, there may be some evidence to sustain every element of the case, competent both in quantity and quality in law to sustain it, and yet it may be met by countervailing proof so potent as to leave no reasonable doubt of the opposing conclusion. * * * So upon the whole evidence in the case the testimony in support of the cause of action, or of the defense, may be so slight, although competent in law, or the preponderance against it may be so convincing, that a verdict may be seen to be plainly unreason-

able and unjust. In many cases it might be the duty of the court to withdraw the case from the jury, or to direct a verdict in a particular way, and yet in others, where it would be proper to submit the case to the jury, it might become its duty to set aside the verdict and grant a new trial. That obligation, however, is the result of a conclusion of fact, and in such cases the ground of the ruling is that the verdict is not supported by sufficient evidence, because it is against the weight of the evidence. Therefore it was said by this court in *Randall v. Baltimore & Ohio Railroad*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003: 'It is the settled law of this court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.' In many cases, therefore, the evidence is insufficient in law, because insufficient in fact."

We have thus considered at some length the decisions of the highest tribunal in the land because they clearly show the power even of a court created by a sovereignty of derived and delegated authority. The Constitution of the United States (article 3, § 2), as adopted, provided, with certain exceptions as to original jurisdiction not germane to this inquiry, as follows: "In all other cases the Supreme Court shall have appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Congress shall make." This power was obviously limited and restricted by the seventh amendment, which was ratified in 1791, and is as follows: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The observations of Alexander Hamilton in "The Federalist" (No. 83) show the condition prevailing in the several states as to the extent of the right of jury trial prior to the adoption of the Constitution: "The great difference between the limits of the jury trial in different states is not generally understood. And as it must have considerable influence on the sentence we ought to pass upon the omission complained of in regard to this point, an explanation of it is necessary. In this state [New York] our judicial establishments resemble, more clearly than in any other, those of Great Britain. We have courts of common law, courts of probates (analogous in certain matters to the spiritual courts in England), a court of admiralty, and a court of chancery. In the courts of common law only the trial by jury prevails, and this with some exceptions. In

proceeds in general either according to the course of the canon or civil law, without the aid of a jury. * * * In Connecticut they have no distinct courts either of chancery or of admiralty, and their courts of probates have no jurisdiction of causes. Their common-law courts have admiralty, and, to a certain extent, equity, jurisdiction. In cases of importance their General Assembly is the only court of chancery. In Connecticut, therefore, the trial by jury extends in practice further than in any other state yet mentioned. Rhode Island is, I believe, in this particular, pretty much in the situation of Connecticut. * * * In the four Eastern states the trial by jury not only stands upon a broader foundation than in the other states, but it is attended with a peculiarity unknown, in its full extent, to any of them. There is an appeal of course from one jury to another, till there have been two verdicts out of three on one side. * * * The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit that the changes which are continually happening in the affairs of society may render a different mode of determining questions of property preferable in many cases in which that mode of trial now prevails. For my part I acknowledge myself to be convinced that even in this state it might be advantageously extended to some cases to which it does not at present apply, and might as advantageously be abridged in others. It is conceded by all reasonable men that it ought not to obtain in all cases. The examples of innovations which contract its ancient limits, as well in these states as in Great Britain, afford a strong presumption that its former extent has been found inconvenient, and give room to suppose that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing to fix the salutary point at which the operation of the institution ought to stop; and this is with me a strong argument for leaving the matter to the discretion of the Legislature. This is now clearly understood to be the case in Great Britain, and it is equally so in the state of Connecticut; and yet it may be safely affirmed that more numerous encroachments have been made upon the trial by jury in this state since the Revolution, though provided for by a positive article of our Constitution, than has happened in the same time either in Connecticut or Great Britain."

The provision of section 11 of chapter 251, Gen. Laws 1896, empowering this court to "direct entry of judgment, and the date thereof, as the case may be, and may make such other or further orders as to costs or otherwise, in the cause, as to law and justice shall appertain," finds its historical origin and precedent from the petitions from

the colonial courts here to the King in council in colonial times, and its parallel is found in the legislation of other states. The provision commonly appearing therein is to the general effect that the appellate court may make such order or enter such judgment as the court below should have made or entered. While the right to order a peremptory nonsuit or to direct or set aside a verdict differs in some respects from the right to reverse a judgment, it is nevertheless true that the power to do one of these acts is essentially the same as the power to do another of them. It therefore becomes instructive to examine the decisions of the courts of other states in this behalf.

Thus, in *Borg v. C., R. I. & P. Ry. Co.* (1896) 162 Ill. 348, 44 N. E. 722, the court says: "The successive Constitutions of this state have each guaranteed the right of trial by jury as enjoyed at and before the adoption of such Constitution, and have preserved the right to that method of trial as it previously existed. * * * The right of trial by jury at the time of the adoption of the Constitution was understood to exist subject to the power of this court, subsequently extended to the Appellate Court, to review the judgments of trial courts on the facts, and to reverse such judgments without remanding the cause for a new trial; and it was this right of trial by jury as so enjoyed which was preserved and protected by the Constitution. The practice of reversing judgments without remanding the cause was continued in this court, and a great number of cases were so reversed up to the organization of the Appellate Courts, as will appear from an examination of the Reports, and the power so exercised in this court was not questioned. * * * We have seen that the right of trial by jury as it was enjoyed at the time of the adoption of the present Constitution was not the right of an indefinite number of jury trials in the same cause, where an Appellate Court, on a review of the case, should find that a recovery would be merely a perversion of justice. Such right of trial by jury was never deemed to be invaded by the reversal of a cause without remanding it for another trial. Parties still have the right to submit controversies of fact to the consideration of a jury, and the successful party gains all the advantages and benefits following a verdict under the well-established rules of the courts, arising from superior opportunities to judge of the credibility of witnesses. But when, with all the advantages accorded to them, it appears to the Appellate Court that there can not be a recovery which should be allowed to stand, no constitutional right is invaded by a refusal to remand the case for successive trials which must necessarily be followed by successive refusals." See, also, *Siddall v. Jansen et al.*, 143 Ill. 537, 32 N. E. 384.

In *Davies v. People's Ry. Co.* (1900), 159 Mo. 1, 59 S. W. 982, the facts were almost identical with the facts in the case at bar. The plaintiff was unloading beams from a wagon near a street railroad track, "and in order to do this he was compelled to stand in the rear and slightly to the west of the west hind wheel of the wagon, thus exposing himself to the danger of being struck by a passing car. At the time of the accident the plaintiff was standing with his back to the approaching car, and was prying up the end of a beam, while his assistants were fastening the hoisting apparatus around it. He did not see or hear the car, and the parties in charge of it failed to check its speed or to ring a bell, or give any warning whatever of its approach. For some distance south of the point where the plaintiff was at work there was a full and unobstructed view of defendant's track. The plaintiff admitted on cross-examination that there was barely enough space between the track and the wagon to allow a man to stand sidewise along the side of the wagon and escape injury from a passing car, and that while he was unloading this particular wagon two other cars had passed, and, being warned of their approach, he merely had to step aside or turn half way around to escape injury. He also admitted that he had been employed for some time at the work, that cars were continually passing, and that he was aware of the danger. * * * Under these facts, what was there for the determination of the jury that the case should have been submitted to it? Certainly it must go by the saying that the voluntary assuming of a position upon or so near to the tracks of a street railway, over which cars are run every few minutes, that they cannot pass without inflicting an injury to the party so positioned, unless the intervention of some independent agency occurs to prevent it, is an act in itself of the grossest negligence. If in taking the position assumed by the plaintiff, and at the same time engaging in an undertaking, as he says he was, that prevented his seeing or hearing the approach of the cars upon defendant's road, that he knew were due and liable to pass along at any moment, does not constitute an act of negligence that must be said to have contributed to the injury resulting to him, on account of being run against by one of defendant's cars pursuing its usual course upon the tracks, it would be idle to search the field of practical experience for an illustration of what is termed in law an act of contributory negligence. The plaintiff had no right to assume a place of danger upon defendant's tracks and deliberately engage in an undertaking in such a manner as to deprive himself of the benefit of the sense of sight and hearing, the common avenues through which the approach of danger is communica-

ted, and trust that defendant's agents in the course of their employment would be more considerate and watchful for his safety than he himself. * * * It is not the right of a jury, whose office begins and terminates with the consideration and determination of facts (as in a case like this), to consider and pronounce the legal conclusion flowing from the admitted or ascertained facts. That is the sole prerogative and duty of the court, and can never be properly surrendered to the jury. When the plaintiff himself has shown a state of facts, the existence of which if shown by defendant would have entitled it to an instruction, to the effect that if the jury found the same to be true, the plaintiff was not entitled to recover, and the verdict must be for defendant, what would be the necessity for, and what the office of a jury? The court in writing the instruction in such a case would have pronounced the law's judgment upon the facts, as agreed by plaintiff, and the jury's ratification of it by a verdict would be unnecessary and meaningless, as its disapproval by an adverse verdict would be contemptuous and unwarranted, and the possibility for such latter expression should never be afforded to a jury. * * * While under the pleadings, it is true, the burden of proving plaintiff's alleged contributory negligence was primarily upon defendant, that burden was relieved by the plaintiff himself testifying to a state of facts making good the averment of defendant's answer, and as against plaintiff the court could apply to the facts he disclosed, the law's judgment thereon. As to plaintiff, the situation was as upon facts agreed. If the plaintiff was not entitled to recover for the injuries inflicted upon himself by defendant's cars, on account of his contributory negligence, then no possible good could come from a further prosecution of the inquiry as to the extent of defendant's negligence in the premises. The doctrine of comparative negligence has no recognition in this court, and as there was neither allegation nor proof by plaintiff that the injury to him was wantonly or willfully inflicted by the agent of defendant in charge of its cars, there was nothing left for the jury after plaintiff's contributory negligence was shown by his own statement of the facts. The peremptory instruction asked by defendant at the close of plaintiff's testimony should have been given by the court, and for its refusal, its judgment should be reversed, and it is so ordered. All concur."

In *Central R. R. Co. v. Kent* (1893) 91 Ga. 687, 18 S. E. 850, the court say (page 690 of 91 Ga., page 851 of 18 S. E.): "It sufficiently appears from the foregoing that when the decision reported in 87 Ga. and 13 S. E. was made, a majority of this court were convinced that, under the evidence as it then appeared in the record, in no view of the

case was the plaintiff entitled to recover. In other words, we were fully satisfied that the washout which produced the calamity resulting in the plaintiff's injuries was caused by the act of God, and that there was no want of diligence on the part of the company in failing to discover it in time to give notice of it to the plaintiff. Accordingly, another new trial was granted, and it resulted in a third verdict, upon substantially the same facts, in favor of the plaintiff. At the last trial there was some additional evidence, but all the members of the court are satisfied that it does not in any material or substantial particular change or vary the case upon its actual merits as it appeared when here the last time. Entertaining this view, Justice Simmons and the writer felt constrained to set the verdict aside, and also to order that the case be dismissed. All of us feel certain that the full truth of this case has been developed, and that further trials of it could not bring out anything new that would be material in substance. On each trial, the plaintiff has undoubtedly made out a prima facie case. This it was easy to do, in view of the presumption of negligence raised by the law against railroad companies; but the majority are decidedly of the opinion that, on the last two trials at least, the company has conclusively and satisfactorily rebutted this presumption, and has shown itself free from all negligence or blame. It is manifest, we all think, that the plaintiff can never show a materially different state of facts; that is, can never show a state of facts that will, or should, break down what two of us regard as a perfect reply to the plaintiff's case. Of course, a court cannot, and should not, generally undertake to foresee or predict what a party can or can not prove; but after a case has been tried time after time, and this court, in view of all the records sent up and of the character of the case, is fully satisfied that in the very nature of things nothing more can be shown which could or ought to change or affect the final result, we may with propriety say it is beyond the power of a particular party to show a materially different state of facts, especially when that party has all along been represented by able, faithful, and exceedingly diligent counsel, whose efforts in his behalf make it certain that they have brought out all in his favor and all against the company which could be proved, and who do not themselves suggest anything material in his favor or against the company which further investigation might bring to light. We mean to say that neither the record, nor the argument of this case, either upon the merits or upon the motion to reinstate, suggests any reasonable ground to infer that there is any probability that, upon another trial, any new fact or circumstance would be elicited which could or ought to affect the result. The plaintiff and his witnesses are thoroughly committed to their theory and version of the case, and so are the-

defendant and its witnesses. All the witnesses who have testified more than once have, in the main, thus far been consistent with themselves, and the new evidence at the last trial did not add any material features to the case as already developed. The policy of the law requires that long and tedious litigation should come to an end, and the direction given in this case was made in accordance with this policy. See the cases cited below. The defendant in two successive trials has vindicated its diligence to the satisfaction of a majority of the court, and there is not the slightest reason to conjecture it would not do so again and again. To protract this litigation would not only unnecessarily impose on the defendant the trouble and expense of so doing, but would be profitless to the plaintiff himself. * * * Their position (i. e., counsel for defendant in error) as we understand it, is that this court had no power to give the direction it gave in this case. We hold otherwise, and are free from doubt in so doing. Section 218, par. 2. of the Code [Ga. Code 1882], undoubtedly empowers this court to make a final disposition of a cause; and section 4284 expressly declares that it may 'award such order and direction to the cause in the court below as may be consistent with the law and justice of the case.' These sections certainly confer very large and ample powers upon this court—large enough, in our opinion, to authorize the direction given in the case at bar. In *Harris v. Hull, Ex'r*, 70 Ga. 838, 839, Justice Hall said: 'One great purpose in establishing this court was to terminate suits, and with this view it is made its duty not only to grant judgments of affirmance or reversal, but any other order, direction, or decree required, and, if necessary, to make a final disposition of the cause (Code, § 218), and it is empowered to give to the cause in the court below such direction as may be consistent with the law and justice of the case. *Id.* § 4284. Litigation should never be protracted where this, with due regard to the rights of parties, can possibly be avoided. "Interest reipublicæ ut sit finis litium" is a maxim so old that its origin is hidden in a remote antiquity, and the policy which it inculcates is so essential as not to admit of question or dispute.'" And see *Railway Co. v. Morgant* (1892) 56 Ark. 213, 19 S. W. 751; *Jones v. Telegraph Co.* (1875) 101 Tenn. 442, 47 S. W. 699; *Brownsville v. Basse* (1898) 43 Tex. 440; *Smith v. Times Pub. Co.* (1897) 178 Pa. 481, 36 Atl. 296, 35 L. R. A. 819.

In *City of Spring Valley v. Coal Co.* (1898) 173 Ill. 497, 50 N. E. 1067, affirming *Siddall v. Jansen*, *supra*, the court say (page 503 of 173 Ill., page 1068 of 50 N. E.): "The right of trial by jury which is preserved by the Constitution, is the right as it had been enjoyed before the adoption of that instrument. * * * The question whether a statute infringes the constitutional provision that the right to trial by jury as theretofore enjoyed

shall remain inviolate raises a purely historical question and nothing else. It is not to be determined by a consideration of what the Legislature ought to do in providing for the submission of issues to a jury, but such arguments are to be addressed to the Legislature. The right and the limitation upon the power of the Legislature to provide for the determination of controversies by other tribunals are to be decided by an investigation of the question how the right had been enjoyed when the Constitution was adopted. This has always been the rule."

In tracing the history of jury trial in Rhode Island, conditions unique in American history are presented. For 180 years, from the granting of the colonial charter by Charles II in 1663, to the adoption of the present Constitution in 1843, the fundamental instrument of government was the original creation of the King of Great Britain, being at the time of its abrogation the oldest constitutional charter in the world (1 Arnold, *Hist. R. I.* 294). More liberal than any other colonial charter when granted, in many respects, the powers, duties, rights, privileges, and restrictions imposed, conferred, and granted thereby endured until a time within the memory of many thousands of persons now living. The lapse of more than two centuries, with the resulting changes in social and political conditions, has caused this instrument to appear to us of to-day to be antiquated and circumscribed in respect of those provisions which at the time of their creation were far in advance of their time and were of unprecedented liberality, and have also rendered it exceedingly difficult for us to realize that our legal rights are still determined, limited, and defined, in no small degree, by constitutional perpetuation of the provisions of this charter and of the legislation enacted by its authority. A free charter of practical self-government was granted in these terms: "And from time to time, to make, ordain, constitute or repeal, such laws, statutes, orders, and ordinances, forms and ceremonies of government and magistracy, as to them shall seem meet, for the good and welfare of the said company, and for the government and ordering of the lands and hereditaments, hereinafter mentioned to be granted, and of the people that do, or at any time hereafter shall, inhabit or be within the same; so as such laws, ordinances and constitutions, so made, be not contrary and repugnant unto, but as near as may be, agreeable to the laws of this our realm of England, considering the nature and constitution of the place and people there; and also to appoint, order and direct, erect and settle, such places and courts of jurisdiction, for the hearing and determining of all actions, cases, matters and things, happening within the said colony and plantation, and which shall be in dispute, and depending there, as they shall think fit."

The ample scope of the powers granted

in this charter more clearly appears when it is compared with the charter of 1691 of Massachusetts. In the latter instrument the crown reserved the right to appoint the governor, and power was given to the "great and Generall Court," to pass only such laws as "be not repugnant or contrary to the Laws of this our Realm of England," without containing the qualifying clause contained in the Rhode Island charter that such conformity need only be "as near as may be considering the nature and the constitution of the place and people there." Even so restricted, these laws were to be first presented to the royal governor for his approval in writing or otherwise were to be of no effect; and even when so approved were then to be submitted to the crown for approval within three years after such presentation.

Similarly the commission granted in 1679, creating the royal province of New Hampshire, reserved the appointment of the governor (or president) to the crown. And the powers of legislation conferred on the General Assembly and the power of the crown in respect of the same are thus expressed and limited: "At ye meeting of which Gen. Assembly we do hereby will, authorize and require ye Pres. of ye said Councell to mind them in ye generall, what is to be intimated in ye proclamation aforesaid. That he recommend them ye making of such Acts, Laws, and Ordinances, as may most tend to ye establishing them in obedience to our authority; their own p'servation in peace and good Governmt, and defend against their enemies, and that they do consider of the fittest ways for raising of taxes, and in such proportion as may be fit for ye support of ye sd Governmt. And our will and pleasure is, and we do hereby declare, ordain, and grant, that all and every such Acts, Laws, and ordinances, as shall from time to time be made in and by such general Assembly or Assemblies, shall be first approved and allowed by the Pres. and Councell for the time being, and thereupon shall stand and be in force until ye pleasure of us, our heirs and successors, shall be known, whether ye same Laws and ordinances shall receive any change or confirmation, or be totally disallowed and discharged. And, therefore, our will and pleasure is, that ye Pres. and Councell do, and shall from time to time transmit and send over unto us, our heirs and successors, and our and their Privie Councell for the time being, all and every such acts, Laws and Ordinances, by the first ship yt shall depart thence for Engd, after their making."

Indeed, in all the other colonies, except Maryland and Connecticut, the King possessed the power of abrogating the laws, and they were not final in their authority until they had passed under his review. In marked contrast to these limitations and restrictions is to be placed the official opin-

ion of the Attorney General and the Solicitor General, rendered in 1731 to George II, in response to a letter from Gov. Joseph Jenckes, upon a memorial from certain citizens of Rhode Island, complaining that a certain act of the General Assembly relative to the emission of paper money was in violation of certain acts of Parliament and Orders in Council. 4 R. I. Col. Rec. p. 461. The crown officers say, in giving their opinion: "In this charter, no negative voice is given to the governor, nor any power reserved to the crown, of approving or disapproving the laws to be made in this colony." As to the question stated, "Whether His Majesty hath any power to repeal or make void the above-mentioned act of assembly, we humbly conceive, that no provision being made for that purpose, the crown hath no discretionary power of repealing laws made in this province; but the validity thereof, depends upon their not being contrary, but as near as may be, agreeable to the laws of England, regard being had to the nature and constitution of the place, and the people. Where this condition is observed, the law is binding; and where it is not, the law is void as not warranted by the charter."

In apparent exercise of the ample authority contained in the charter "also to appoint, order and direct, erect and settle such places and courts of jurisdiction for the hearing and determining of all actions, cases, matters and things happening within the said colony and plantation, and which shall be in dispute and depending therein as they shall think fit," in 1677 the General Assembly enacted the following statute (Pub. Laws R. I. 1636-1705, p. 26):

"A rehearing after Iudgement Granted. It is Enacted & we do declare yt Either the Plaintiff or Defendant Shall Each of them haue Liberty of one rehearing if Either of them desire it & no more Provided he that Desire it whether Plaintiff or Defendant Shall give in Double bond of wt ye Defendant gave for his former Appearance wch bond together wth four pounds or ye Uallue of ye Bill of Costs Shall be given into ye Recorders Office within Ten days after Iudgement Granted & this Cost not to be Recoueable Again Except ye Iury See Good Cause to give it & for this Cause the Execution Shall remain, in the Recorders Office Tenn dayes after Iudgement Granted before it goe forth and so ye Recorder shall Stop ye Execution wch Shall be notice Sufficient for the Other party to Prepaire for a Tryall according to Law

"The next Court And it is Enacted That in all Cases wherein any Perticular Person is ye Prosecutor he or they Shall pay the Iury."

This right of a second jury trial as of course, either in the same court or by appeal in another court, and without showing error of law or misconduct in the first trial, though a distinct departure from the rule of the common law, nevertheless remained in force in

Rhode Island for more than 200 years, being finally abolished by Pub. Laws R. I. p. 103, c. 674, April 12, 1878, and Pub. Laws 1879, p. 113, c. 743, March 10, 1879. In *United States v. Wonsou* (1812), 1 Gall. 5, Fed. Cas. No. 16,750, Mr. Justice Story, then holding the United States Circuit Court for the District of Massachusetts, said (page 14 of 1 Gall. [Fed. Cas. No. 16,750]): "We should search in vain then in the common law, for an instance of an appellate court retrying the cause by a jury while the former verdict and judgment remained in full force." While that case arose under the law of Massachusetts, the statute of Rhode Island then in force and referred to in the opinion (page 15 of 1 Gall. [Fed. Cas. No. 16,750]) was as follows (Rev. 1798, p. 150, § 8): "And be it further enacted, That any party aggrieved at the judgment of the Court of Common Pleas in any county, may appeal to the next Supreme Judicial Court to be holden in the same county, where both parties shall have the benefit of any new and further evidence; Provided the appellant shall give bond in the Clerk's office of the Court appealed from, within five days after the rising of the same, to prosecute such appeal with effect, and in default thereof to pay cost." And the court continues (page 16 of 1 Gall. [Fed. Cas. No. 16,750]): "If, indeed, the act [of Congress] of 1803 gives on all appeals this new trial, however consonant it may be with our own habits, we should recollect that it overthrows the established jurisprudence of at least three-fourths of the states, and abolishes a fundamental principle of the common law." In further commenting upon the provision of the seventh amendment to the Constitution of the United States relative to "suits at common law," etc., Mr. Justice Story continues (page 20 of 1 Gall. [Fed. Cas. No. 16,750]): "Beyond all question, the common law here alluded to is not the common law of any individual state (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. * * * Now, according to the rules of the common law, the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court, before which the suit is depending, for good cause shown, or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a venire facias de novo is awarded. This is the invariable usage settled by the decisions of ages."

These citations show at some length the peculiarities of the system of jury trial prevailing in Rhode Island almost from the beginning of the colony, and they show also that the rules of the common law of England are in many respects inapplicable upon the force and effect of the verdict of a jury in a civil case, under what Mr. Justice Story thus styles as "the common law" of this state. Not only was the verdict of a jury not a finality here, it was a mere nullity if appealed from; and our ancient records show that,

contrary to the rule of the common law, such verdicts were not only modified and reversed by the verdict of a jury, on the second trial on appeal, but they also show that which is even more unprecedented, in case the prevailing party, whether plaintiff or defendant, did not appear at the second trial, the court itself reversed the verdict of the jury and entered final judgment without remanding, even in actions relating to real estate.

Thus, at the September term, 1762, in Providence county is found the following record: "Thomas Broadway of Smithfield in our County of Providence Yoeman Appellant. Darius Sessions & Jabez Bowen Junr. both of Providence in our said County Merchants Appellees. The foundation of this Action was an Action of Entry sur Desisin Commenced and Prosecuted by the said Darius and Jabez against the said Thomas, at an Infer Court of common Pleas held at Providence, in and for the County of Providence on the Third Monday of June A. D. 1762. When and where the said Darius & Jabez obtained Judgement against the said Thomas for the Lands described in his Declaration with the Cost of Suit—Taxed and allowed at £32.5.10. from which Judgement the said Thomas appealed to this Court, the Case being now called the said Darius & Jabez refused to appear and defend the said Appeal—whereupon being Thrice called & not appearing he was Default It is therefore considered by this Court that the aforesaid Judgement of the Infer Court be reversed and the same is hereby reversed and the said Thomas is hereby assigned the Lands described as aforesaid and his of Suit in this behalf expended Taxed at £138.12.4." An examination of the papers in the case shows that the judgment below was rendered upon the verdict of a jury.

But this is not all. It not infrequently happened that the verdict on appeal reversed the verdict of the first jury. Accordingly, in 1732, a third jury trial was given as of course, in real actions relating to titles of lands (Dig. 1730, p. 24), and this right was further extended to all cases in 1743 (Dig. 1745, p. 282), in a proceeding entitled a "writ of review." This third jury trial might affirm, modify, or reverse the second verdict, and is even further evidence of the unwillingness to rely upon the infallibility of a single jury trial. This method of procedure was in force at the time of the adoption of the Constitution in 1843; section 1 of "An act granting reviews in civil actions" (Dig. 1822, p. 133) being as follows: "Be it enacted by the General Assembly, and by the authority thereof it is enacted, that either party aggrieved at the judgment of the supreme judicial court in any suit, in which one judgment only shall have been given against him, may at any time within one year review the same, and have one trial more in the same court; and on such review there shall be no further pleadings, but the cause shall be tried on the issue appearing on the record to have been originally joined by the parties; and the ex-

ecution upon such judgment given in the supreme judicial court shall not be stayed by such review, unless a bond shall be given as in this act provided; and such party shall have the liberty to offer any further evidence; and when either party shall bring a writ of review, and enter the same, the whole cause shall be tried, as if no judgment had been given therein; and the former judgment may be reversed in whole, or in part, or greater damages or less, or no damages, may be given, as the merits of the cause, upon law and evidence, shall require, in the same manner as though both parties had brought their writs of review." This method of procedure, by writ of review, was not repealed until the Digest of 1844 was enacted, after the adoption of the Constitution; and it is also proper to observe that it is the second jury trial on appeal which was abolished in 1878, leaving only the right to the first jury trial thereafter, and how little of the quality of finality attached to such a first verdict in a civil case has already been made to appear.

In criminal cases the powers exercised over verdicts by the courts in Rhode Island, almost from the granting of the charter, were such as unquestionably contravene our present constitutional provisions. Whether the powers exercised were granted or assumed, the action of the "General Court of Tryalls," then the highest court of the colony (saving always an appeal to the General Assembly), was the action of a court created by a General Assembly under the provisions of the charter of 1663, and which was still the fundamental instrument of the government of the state until 1843. An examination of the ancient records of this court in Newport county shows these cases, among others, in the years immediately following the granting of the charter of 1663:

"At The Gen'l Court of Tryalls held for his Maj'ties Collony at Newport the 18th day of October 1671. Upon Indictment by the Gen'l Atorney against Mathew Boomer of Newport for that the said Boomer did kill several Sheep that were not his owne and Converted them to his owne use which is Gran Larceny The said Boomer, Beinge in Court Cald apeerd and Answerd, pleads Not Guilty and Referrs himselfe for Tryall to God and the Cuntry—. The Jurrys Verdict Not Guilty. The Kings Atorney on the Kings behalfe desireing a stop of Judgment in the Case the Court alsoe beinge Unanimously dissatisfyed with the Jurrys Verdict doe see cause to grant the Atorneys Request and doe stop Judgment thereon. Therefore the Court doe see cause and doe continue his former bonds to be of full force untill the next Gen'l Court of Tryalls. * * * Att the Gen'l Court of Tryalls Held in his Maj'ties Name at Newport the sixth day of May 1672. Whereas Mathew Boomer of Newport was by the last Court of Tryalls bound to this Court, he beinge in Court Cald apeerd and proclamation beinge made in open Court whither any person had any thing or cause

to Eleadge against the said Boomer, and none comeinge in to Complaine this Court doe see Cause to acquitt the said Boomer of his Bonds paying fees—."

In the same year "Upon Indictment to the Gen'l Atorney against Francis Asleton (prisoner) for murdering John John Cockrum alias Cockerill: The said Asleton beinge brought into Court was called forth to Answer Ask'd whither Guilty or not Guilty, pleads Not Guilty and Referrs himselfe for Tryall to God and the Cuntry.

"The Jurrys Verdict. Not Guilty.

"The Court Centances is that the said Asleton doe Remaine in prisson until he hath paid his fees, which shall be paid out of his Estate already Sequestered and then the Rest to be Returned to him. And that the said Asleton shall within tenn daies Depart Rhode Island and to be kept close prissoner until he doth depart and shall not Returne againe to Inhabitt in any Towne of the Collony without leave from the Majestrates in each Towne: Upon his perrill.

In 1678, "Upon Indictment by the Gen'l Solicetor against Richard Cowley prissoner for faloniously stealing and taking away sheep which were the proper Estate of Mr. Caleb Carr sen. and Capt. John Joanes on the Island Quononoquit

"He beinge brought into Court and asked wither Guilty or Not Guilty pleaded not Guilty and referrs himselfe for Tryall to God and the Cuntry

"The Jurrys Verdict Not Guilty.

"The Court Committ him unto the keeper till called for The said Cowley beinge called for the keeper made answer that he had broken prisson and made his escape: The Court doe empower the Officers to seize on any Estate they can finde of the said Cowley's to pay their Just fees."

In 1681, "On Indictment of the Gen'l Solicetor against John Osbourne now prissoner for beinge a Rober ec. hee beinge brought into Court and his Indictment to him Read and he ask'd whether Guilty or not Guilty pleads Not Guilty.

"The Case Committed to the Jury.

"Verdict, Not Guilty.

"The Sentence of the Court is that John Osbourne shall depart this Collony within three Days after this 7th of October and shall not Continue here longer Except by leave of the Govenor, And if he bee found in this Collony Contrary to this Sentence then by warrant under the hand of the Governor, Dept Governor or any Assistant or more to bee apprehended and sent to prisson for his contempt there to Remaine till by Authority Released."

Unwarranted as these orders seem to be to-day, it is nevertheless unquestioned that these judges were not the irresponsible appointees of the crown, and thus not accountable to the people of the colony, but were elected annually by the people, and were thus responsible to them for any transgression of their authority or for any unwarranted as-

sumption of power. The powers exercised and the right asserted over verdicts and judgments by the overshadowing General Assembly are so well known as to require no extended comment. Its claim to the exercise of judicial powers finds its precedent in the act passed in 1647, under the charter of 1644, as follows (1 R. I. Col. Rec. 205): "And in case any man sues for Justice against an officer or other, and he cannot be heard, or is heard and cannot be righted by any Law extant among us, then shall the partie grieved petition to the Generall or Law-making Assemblie, and shall be relieved."

In 1680 "An Act Granting Appeals to the General Assembly, from the General Court of Tryals," was passed by which the General Assembly was specifically authorized to "Confirm, Alter, Amend or Reverse such Judgments and give a new Judgment thereupon as to the said Assembly shall appear to be agreeable to Law and Equity" (Dig. 1719, at page 33; Dig. 1730, p. 28), as follows:

"Be it enacted by the General Assembly, and by the Authority of the same. That in all Personal Actions, where either Plaintiff or Defendant, shall obtain two Judgments for him at the General Court of Tryals in one Action and Cause brought to the said Court; That the other Party against whom said judgments were given, shall have Liberty to Appeal to the next General Assembly, from the last Judgment for Relief, who may if they see Just and Reasonable Cause, Confirm, Alter, Amend, or Reverse such Judgments, and give a new Judgment thereupon, as to the said Assembly shall appear to be agreeable to Law and Equity: And that each or either Appellant or Appellee, shall and may have Liberty of giving in new Evidence upon such Appeal," &c.

In 1712 an act was passed (4 R. I. Col. Rec. 186) in effect repealing the act of 1680 in consequence of the decision of the Queen in Council, in 1710, adverse to the jurisdiction of the General Assembly in the case of *Brenton v. Remington* (4 R. I. Col. Rec. p. 48). In 1741 a so-called "Court of Equity" was established (Dig. 1745, p. 239), to which was given the power of reversing judgments as follows: "And that for the Future there be a Court of Equity appointed and established in this Government, to consist of Five Judges to be chosen annually by the General Assembly, and to be commissioned, any three of whom to be a Quorum; who are hereby empowered and authorized to hear all Appeals from the Judgments of the Superior Court in Personal Actions, and to give a Determination on said Appeals, by affirming, reversing, or altering the Judgments of said Superior Court, agreeable to Law and Equity, in as full and extensive Manner as the General Assembly hath been accustomed to do." In 1742 this act was

repealed by the act creating the procedure by "Writ of Review." (Dig. 1745, p. 282).

If Lord Bellamont may be believed, it was the ancient custom of the General Assembly to reverse the verdict of juries. In his official report to the Lords of the Board of Trade on the alleged irregularities of Rhode Island, made in 1699, he charges that (3 R. I. Col. Rec. 386): "Sec. II. The Generall Assembly assume a judicial power of hearing, trying and determining of civil causes, removing them out of the ordinary Courts of Justice and way of tryall, according to the course of the common law, alter and reverse verdicts and judgments, the Charter committing no judicial power and authority unto them." At this time the act of 1680 had not been repealed.

There remains for consideration one other tribunal to which appeals might anciently be taken from the verdict on a writ of review—the King in Council. The right of the crown to entertain appeals in civil cases from all colonial courts was asserted by the crown as early as 1698 in the following order in council addressed to the colony of Connecticut:

"Whitehall, March the 9th, 1698.

"His Majesty in council approving of what is proposed by the Council of Trade in their said representation, is pleased in order that the governor and company of the colony of Connecticut be required to take care that no obstruction of the course of justice be practised or allowed amongst them; but that the respective cases mentioned in the said representation, and any other whatsoever that may hereafter happen upon differences between man and man about private rights, be fairly heard and judged in the proper methods of the courts established in that colony. And in case the petitioners in the aforesaid causes, or any of them, or any other persons, shall think themselves aggrieved by the sentence or sentences which may be there given, they may thereupon be allowed to appeal to his Majesty in council. And that copies of all records and other proceedings in all such respective cases be transmitted hither, in order to a final hearing and determination thereof before his Majesty in council. And that in all such cases, the governor and company of the colony of Connecticut do take notice that it is the inherent right of his Majesty to receive and determine appeals from all his Majesty's colonies in America; and that they do govern themselves accordingly. And the right honourable the Council of Trade are to signify this his Majesty's pleasure to the governor and company of the colony of Connecticut accordingly."

In 1716 was decided the case of *Christian v. Corren*, which is thus reported in 1 P. Wms. 329:

"The Earl of Derby, King of the Isle of Man, made a decree in that island concern-

ing lands there; and the person, against whom the decree was made, appealed hither.

"One (and indeed the principal) question was, whether an appeal did lie before the King in council, there being no reservation in the grant made of the Isle of Man by the crown, of the subject's right of appeal to the Crown.

"And it was urged for the appeal by myself (who alone was of counsel with the appellant), that it appearing, in this case that H. 4. had granted the Isle of Man to the Earl of Derby's ancestors, to hold by homage and other services, though there was no reservation of the subject's right of appeal to the Crown, yet this liberty was plainly implied.

"For that such liberty of appeal lay in all cases where there was a tenure of the Crown; that it was the right of the subjects to appeal to the sovereign to redress a wrong done to them in any court of justice; nay, if there had been any express words in the grant to exclude appeals, they had been void; because the subjects had an inherent right, inseparable from them as subjects, to apply to the Crown for justice. And on the other hand,

"The King, as the fountain of justice, had an inherent right, inseparable from the Crown, to distribute justice among his subjects; and if this were a right in the subjects, no grant could deprive them of it; the consequence of which would be, that in all such cases, viz. where there were words exclusive of such right of appeal, the King would be construed to be deceived, and his grant void; also precedents were cited in point.

"Lord Chief Justice Parker, who assisted at Council upon this occasion, thought that the King in Council had necessarily a jurisdiction in this case, in order to prevent a failure of justice. * * * Whereupon their Lordships proceeded in this appeal, and determined in favour of the appellant."

Both the foregoing requirements of allegiance and tenure were fulfilled in Rhode Island, inasmuch as by the express terms of the charter it was provided as follows: "And further our will and pleasure is, and we do, for us, our heirs and successors, ordain, declare, and grant unto the said governor and company, and their successors, that all and every the subjects of us, our heirs and successors, which are already planted and settled within our said colony of Providence Plantations, or which shall hereafter go to inhabit within the said colony, and all and every of their children, which have been born there, or which shall happen hereafter to be born there, or on the sea, going thither, or returning from thence, shall have and enjoy all liberties and immunities of free and natural subjects within any the dominions of us, our heirs and successors, to all intents, constructions and purposes, whatsoever, as if they, and every of them, were born within the realm of Eng-

land." And the tenure of the lands was thus specified: "to be holden of us, our heirs and successors as of the manor of East Greenwich in our county of Kent, in free and common socage, and not in capite nor by knight service," etc., the manor of East Greenwich long having been a royal manor. And see Blackstone, Com. vol. 1, p. 108.

The first legislation of the colony subsequent to the charter of 1663 (relative to such appeals) is to be found in "An act for the calling of special courts," passed in 1666 (Dig. 1719, p. 18) for the benefit of "Merchants, sea-faring men or other transient persons," and which reserves to a party aggrieved "the liberty of appealing to His Majesty in Council in England as in other cases is usually allowed," apparently recognizing such a right of appeal as having existed as of right from the earliest times. It would serve no useful purpose to enlarge upon the many acts of colonial legislation regulating such appeals, or the rules and orders in council relative thereto. A summary of the action of the King in Council on 59 appeals from Rhode Island, between 1735 and 1776, as shown by the Privy Council Register, is to be found in the Report of the Proceedings of the American Historical Association of the United States, 1894 (p. 337), contained in a paper by Mr. Harold D. Hazeltine, as follows: "Twenty-two of these appeals were dismissed for nonprosecution, one of them being afterwards reaffirmed. In fifteen the decisions of the colonial courts were reversed and in two of these the Council sent directions to the lower tribunal. In eleven the decisions of the colonial courts were affirmed. Six previous decisions were varied, one of them chiefly as to the rate of interest on bills of credit for £28,179, the damages in another being reduced, a peremptory order issued in a third, and two of the remaining three being remitted. In one both the appeal and the cross-appeal were dismissed; one was referred back to the colonial court with special directions; the verdict in one was set aside and a new trial in the colony directed; one was simply dismissed and in the remaining one a peremptory order was issued to the colonial judges to carry out the Council's decision in a previous suit by the same parties."

The following case from our records in Newport county shows that after a judgment for plaintiff in the inferior court, followed on appeal by a second judgment for plaintiff in the superior court, and the latter judgment confirmed by a verdict and a judgment for the plaintiff on the "writ of review," the Privy Council on appeal reversed all the three judgments for the plaintiff and dismissed the case. The record shows that in 1741 Joseph Power brought an action of account against David Vanburgh and Samuel Carpenter. In the inferior court of common pleas in Newport county, "and thereby laid his damages at £3,000 current money of

New England. To which Action the Petitioners appeared and pleaded that they had fully Accounted with the said Power. And Issue being joined the said Action came on to be tried" and Power received judgment for £459.13.8 and costs. "Whereupon the Petitioners Appealed from the Judgment of the said Inferior Court to the then next Superior Court of Judicature and thereupon the said Judgment of the said Inferior Court was on the 27th of March, 1744, affirmed with costs of Suit in the said Superior Court." That thereafter the petitioners brought their writ of review, and that "the said Action came on to be tried at a Superior Court of Judicature held on the 26th of March 1745 on the Petitioners said Writ of Review when the Jury found the following Verdict—Viz. 'We find that the plaintiffs on Review shall Account with the Defendant, which Verdict was accepted.—'" The record thus shows the appeal to the King in Council, as follows:

"The Lords of the Committee in Obedience to Your Majestys said Order of Reference this day took the said Petition and Appeal into their Consideration, and heard all partys therein concerned by their Counsel learned in the law, and do thereupon Agree humbly to Report as their Opinion to Your Majesty, that the said Verdict should be Discharged and set aside, and that the said several Judgments should be reversed, and the said Action be discharged and dismissed.—"

"His Majesty this day took the said Report into Consideration and was pleased with the Advice of His Privy Council, to Approve thereof, to Order, as it is hereby Ordered, that the said Verdict be discharged and set aside, the said several Judgments reversed, and the said Action discharged and dismissed.—"

"Whereof the Governor and Company of His Majestys Colony of Rhode Island and Providence Plantations for the time being, and all others whom it may concern, are to take Notice and govern themselves accordingly."

We have thus seen that, acting under a charter conferring unusual powers, the General Assembly in 1677 first enacted the provision for a second jury trial as of course, and that such was the law of the colony and of the state for more than 200 years, until 1878: that such legislation, as expressed by Mr. Justice Story, "abolished a fundamental principle of the common law" of England in this respect; that from 1732 to 1844, a period of more than 100 years, a third trial could be had as of course, on a writ to review; that even from such third jury trial on appeal to the King in Council prior to the Revolution prior judgments and verdicts were reversed without remanding for new trial: that a single verdict was reversed on appeal by the appellate court itself upon default of appearance of either party to

the appeal, even in actions relating to real estate. To these observations may be added the words of Chief Justice Ames in *Taylor & Co. v. Place*, 4 R. I. 352, note: "It is beyond question, however, that in colonial times, prior to 1741 and subsequent thereto, and especially after the trammels of the mother country had been removed by the Revolution, the General Assembly, by way of petition in the nature of an appeal, exercised a controlling power over the judicial determinations of the courts of the colony, giving, in what they deemed 'hard cases,' a relief called by them equitable relief, though without the slightest attention to the principles or restraints of any established system of equity jurisprudence. Prior to the adoption of the Constitution the verdict of a jury in a civil case possessed no element of finality, if appealed from or if reviewed, and such elements of finality as then appertained to jury trials in civil cases arose only after at least two concurring verdicts free from error in law as well as from misconduct at the trial, and to obtain two such concurring verdicts three jury trials might be required. It is obvious that this was a very different requirement from the requirement of the common law of England in this respect, and upon which the argument of the plaintiff is based. His contention, indeed, would require the court to impute to the finding of a verdict by a jury a finality prior to the adoption of the Constitution which could, at least, only be given by two juries, and which might require the consideration of three juries; and this without reference to any action of King or of General Assembly. As it is evident that the precedents and principles of the common law of England were not decisive of the effect of a verdict of a jury in a civil case in Rhode Island under the law of the state as it existed at the adoption of the Constitution, so it is equally evident that the anomalous and unique conditions which prevailed here are not precedents in states in which the rule of the common law of England in this respect has always remained in full force.

Tested even by the rule of that common law as authoritatively expounded in the decisions cited from the Supreme Court of the United States, we are clearly of the opinion that a verdict should have been directed for the defendant in the case at bar, and, if rendered for the plaintiff, should have been set aside. Nor do we see any lack of constitutional authority in the Legislature to enact the statute under which the court has acted, or in the action of the court thereunder on the facts disclosed in the case at bar. We are of the opinion, further, that the plaintiff has not been deprived of his property without due process of law, as contended by him on the record and at the argument, and that the motion to vacate the order in question must be denied.

STEARNS, Atty. Gen., et al. v. NEWPORT HOSPITAL.

(Supreme Court of Rhode Island. June 29, 1905.)

1. CHARITIES—TRUSTEES—POWERS OF TOWNS.
Under the express provisions of Gen. Laws 1896, c. 38, § 2, towns may take, hold, and manage real and personal estate in trust for any charitable, other than religious, uses.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Charities, § 30.]

2. SAME—SUPERVISION BY MUNICIPALITY.

The capacity given a municipality by Gen. Laws 1896, c. 38, § 2, to become a trustee of a charitable trust on appointment, does not give the municipality a supervisory jurisdiction over funds intrusted to other trustees, although such funds may be so administered as to help or hinder the performance of the duties of the municipality, and the trustees of such funds are not accountable for the administration of their trust to the municipality in which it is located.

3. HOSPITALS—EX OFFICIO TRUSTEES.

A mayor of a city, who is ex officio one of the trustees of a hospital located in the city, but not under the supervision of the city as trustee, should exercise his own judgment and perform his duties as trustee without dictation from any other branch of the city government.

4. SAME—ACTIONS FOR ENFORCEMENT—PARTIES.

A mayor of a city and ex officio trustee of a hospital located in the city is not, as such, nor in his individual capacity as a citizen and taxpayer, a proper party complainant in a suit against the trustees of the hospital to correct alleged abuses of trust and to remove such trustees, but the Attorney General is the proper person to represent the public in any judicial inquiry into the conduct of the trustees.

5. CHARITIES—CONSTRUCTION—CHARTER PROVISIONS.

A corporation may generally execute a trust not expressly forbidden by its charter, if the purposes of the trust are germane to the object stated in the act of incorporation; and the scope of an act establishing a public charity should not be constrained by construction of its words, so as to forbid the action of the trustee corporation in ways germane to those specified in its charter.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Charities, § 30.]

6. SAME.

Laws 1873, p. 222, constituted certain persons a corporation for the purpose of establishing and maintaining a hospital to receive, care for, and heal the "sick or hurt," and authorized it to take and hold real and personal estate for that purpose. Laws 1893, p. 554, amended the act of 1873, so as to authorize the corporation to hold property and to apply the same to the support and maintenance of the hospital, or to the care of "sick, hurt, injured, or infirm persons." A will, admitted to probate after the passage of the original act, but before the passage of the amendment, bequeathed and devised property to the hospital in trust to apply the same to taking care of "sick, hurt, injured, or infirm poor persons." *Held*, that the hospital corporation was authorized by its original charter, and without the aid of the amendment, to accept and administer the trust declared in the will.

7. SAME—PURPOSES OF GIFT.

Under a will giving property to a hospital corporation in trust to apply the same and the proceeds and profits thereof to receiving, healing, and taking care of sick, hurt, or infirm poor persons free of charge as far as may be,

and declaring that the object of the trust was to benefit as many such poor persons as practicable, it was not the imperative duty of the hospital to maintain a ward for the care of contagious diseases, and its failure to do so was not a breach of trust, regardless of the effect that the action of the trustees in such respect might have upon the performance by the city in which the hospital was located of the duties imposed by Gen. Laws 1896, c. 40, § 13, and chapter 94, §§ 15-17, requiring towns to guard against the spread of contagious diseases, and to establish quarantine regulations, etc.

8. SAME—ADMINISTRATION OF FUNDS—USE OF CAPITAL—DISCRETION OF TRUSTEES.

Where a will giving property to a hospital corporation in trust to apply the same and the proceeds, issues, and profits thereof to the receiving and taking care of sick and injured poor persons provided that the object of the trust was to benefit as many such poor persons as practicable, and at the same time provide a permanent source of aid and relief, and authorized the employment of the trust funds and property for the general support and maintenance of the hospital so far as might be requisite to perpetuate the charity thereby created, it was left to the judgment of the trustee to determine in the first instance whether the corpus of the estate might be used to meet current expenses; and the propriety of its action in a particular case would depend upon the attendant facts.

9. SAME.

The use of a part of the capital in the erection of buildings for the accommodation of sick persons was directly in pursuance of the conditions of the trust.

Bill in equity by Charles F. Stearns, Attorney General, and others against the Newport Hospital. Heard on demurrer and answer. Case to stand for hearing.

Argued before DOUGLAS, C. J., and DU-BOIS and BLODGETT, JJ.

J. Stacy Brown, for complainants. Darius Baker and Rathbone Gardner, for respondent.

DOUGLAS, C. J. The defendant is a corporation established in the city of Newport, under an act of the General Assembly passed February 12, 1873 (Laws 1873, p. 222), of which the first two sections are as follows:

"Section 1. Benjamin Finch, T. Mumford Seabury, George C. Mason, Edward King, George A. Richmond, R. B. Cranston, Henry Ledyard, Samuel Engs, David King, Austin L. Sands, Henry E. Turner, William H. Brickhead, George S. Engs, and their associates who may be hereafter admitted members of the corporation hereinafter created according to the by-laws thereof, are incorporated and made a body corporate and politic by the name and style of the 'Newport Hospital,' for the purpose of establishing and maintaining a hospital in Newport for the purpose of receiving, caring for, and healing the sick or hurt by accident or otherwise, with the rights and privileges and subject to the duties and liabilities provided for corporations in general by the provisions of chapter 139 of the General Statutes.

"Sec. 2. The said corporation may take and receive, hold, purchase and possess real and personal estate, to be used and improved for the erection, support and maintenance of said

hospital in the city of Newport: Provided that the income of its real and personal estate together does not in any one year exceed the sum of twenty thousand dollars; and the property and estate of said corporation, both real and personal, shall not at any time be liable to be assessed in the apportionment of any state or town tax."

An act was passed March 10, 1893 (Acts 1893, p. 554), amending section 2 of this act so that it should read as follows:

"Sec. 2. The said corporation may continue to hold all property heretofore given or conveyed to it and shall have power to take and hold all property which may hereafter be given or conveyed to it for the purpose of being invested for or in any way applied to the support and maintenance of said hospital or for the caring for and healing of sick, hurt, injured, or infirm persons in said Newport, and to take and execute all trusts in relation thereto, and to do all things appertaining to the receiving of property and estate and of applying the same to the support and maintenance of said hospital and to the care and healing of sick, hurt, injured, or infirm persons that a natural person could lawfully do. And the property and estate of said corporation, both real and personal, shall be exempt from taxation, provided that the income of its real and personal estate together does not in any one year exceed the sum of fifty thousand dollars."

In November, 1882, after the organization of the defendant corporation under its charter, but before the passage of the foregoing amendment, the will of John Alfred Hazard was admitted to probate in Newport, and by the terms of said will the residue of his estate was devised and bequeathed to the Newport Hospital, its successors and assigns, forever, in trust, as follows:

"(1) To set apart and invest five thousand dollars, raising said sum by sale of my real estate, if necessary, and pay and apply the income thereof to and for the use of Samuel C. Clinton (a man of color who has worked for me many years) as long as he shall live. (2) To set apart and invest, also, ten thousand dollars, raising said sum by selling my real estate, if needful, and pay the income thereof to Mrs. Rebecca Stanley (daughter of Capt. John Wood, formerly of said Newport) for and during her natural life. (3) To forever keep in good order the monuments, graves, ground, and fences of the Easton Burial Lot on my farm at Sachuest Beach, in Middletown in said state. (4) To forever use and apply the whole residue and remainder of said trust property, and the proceeds, rents, issues, profits and income thereof, to and for the receiving, healing, and taking care of sick, hurt, injured, or infirm poor persons at said hospital, free of charge to such poor persons or patients as far as may be, and under and pursuant to such rules and regulations in the premises as the trustees, directors, or managers of said hospital may from time to time

in their discretion prescribe forever, the object hereof being to benefit as many such poor persons as practicable, and at the same time provide and secure a permanent source of aid, remedy and relief, to which end the employment of said trust funds and property for the general support and maintenance of said hospital is hereby authorized, so far as may be requisite, to uphold it and preserve it and perpetuate the charity hereby created and designed. Said Newport Hospital corporation, and the trustees, managers, or directors thereof, shall always have power to sell and change the investment of said trust property and every portion and parcel thereof, whenever and as often as it may seem desirable to do so, and to perform every act requisite to effect such sales and changes, holding and investing the proceeds of every such sale upon and in conformity to the trusts herein declared of and concerning said trust property, and with continuous power to sell and change investments as aforesaid.

"But I particularly desire and recommend that no part of my said farm in Middletown shall ever be sold, or in any way aliened or disposed of, except by lease or leases for a term of not more than ten years each from time to time as may seem proper. In case said Newport Hospital shall refuse to accept said trusts, or if ever, from any cause, it cannot be trustee or act or continue to act as trustee hereof, or cannot be compelled to execute said trusts, then it is my will and expectation that new and competent trustees shall be substituted and appointed to take and hold said trust property and perform said trusts, and that the requisite and appropriate proceedings and conveyances shall be ordered in the premises by the Supreme Court of said state or other proper court having equity jurisdiction in such matters."

This bill is brought against the Newport Hospital by the Attorney General, representing the public as beneficiary under the charitable trust created by the will of John Alfred Hazard, and by Patrick J. Boyle in his capacity as mayor of the city of Newport, acting under the direction of a resolution of the city council of said city, which instructs him, in his name as a trustee ex officio of the Newport Hospital, or in the name of the city, to institute proceedings, and also as a taxpayer of the city of Newport for himself and such other taxpayers as may join therein. The bill recites the charter of the defendant and the trust provisions of the will aforesaid, and alleges that at the time of the probate of the will the Newport Hospital could not legally take such a devise and bequest; that the hospital illegally took possession of the property, becoming a trustee in its own wrong, and has ever since remained in the wrongful possession thereof; that, while thus in wrongful possession, the respondent has violated the terms of the trust in that it has expended a portion of the principal of the trust estate; that it has further violated its trust by bor-

rowing money upon the security of the principal of the trust estate, quoting as the foundation of this charge the last account of the treasurer of the hospital, and a statement in a recent report of the trustees to the effect that they had anticipated the further sale of land belonging to the corpus of the trust estate by incurring a debt; that by this use of the principal of the estate it has so diminished the income thereof that it has closed a ward which it formerly conducted for the treatment of contagious diseases, and has refused to open said ward, although requested so to do by the board of health of the city of Newport, alleging a lack of funds available for this purpose; that the city council, relying on the provisions of the Hazard trust to secure treatment of indigent persons suffering from contagious diseases, have made no other provision therefor, and that there is therefore no means of caring for such persons; that the continued expenditure of the principal of the trust estate, and the assumption of obligations in anticipation of the sale of land which is a part of the corpus of the trust estate, will ultimately result in its extinction; that the hospital has received from taxpayers of the city of Newport moneys amounting to upwards of \$100,000 for the endowment of free beds for the use of poor persons suffering both from contagious and noncontagious diseases; and that these funds have been so negligently invested that there are now no free beds for contagious cases. The relief asked for is an accounting of the dealings of the respondent with the trust estate, an injunction against the expenditure of any more of the principal of the trust estate, a schedule of the balance and securities held by it for the benefit of the trust, and a list of all notes, mortgages, and other obligations incurred by the respondent and chargeable to the trust estate, and, finally, the appointment of new and competent trustees under the will of John Alfred Hazard. The respondent has filed a demurrer to the bill, on the ground that Patrick J. Boyle, in his several capacities, is not a proper party to this suit, and has also answered, denying certain allegations of fact and claiming certain defences in law.

The questions of law raised are: (1) Is Patrick J. Boyle, in his capacity as mayor of the city of Newport and ex officio trustee of the Newport Hospital, or individually as a taxpayer of the city, for himself and other taxpayers, a proper party complainant to this bill? (2) Was the respondent, the Newport Hospital, at the time of the probate of the will of John Alfred Hazard, in November, 1882, competent to take the residue of the estate of said John Alfred Hazard under said will, and to administer the trusts thereof, and is it now competent so to do? (3) Is the respondent, as trustee under the will of John Alfred Hazard, under obligation to open and maintain a ward of its hospital for the

treatment of poor persons suffering from contagious diseases, and can the city of Newport, by reason of the existence of said trust, transfer to the respondent the duty which rests upon it as a municipality to care for poor persons suffering from contagious diseases? (4) Are the allegations as to the use by the respondent of moneys given to it for the endowment of free beds relevant to any issue raised in the cause or to the relief asked for by the bill? (5) Have the acts of the trustees of the respondent, as alleged in the bill, created the resulting contingency, under the will of John Alfred Hazard, calling for the appointment of new and competent trustees? Several of these questions are based partly upon new matter introduced by the answer, and cannot strictly be considered as upon demurrer. They have, however, been argued before us, and may be considered as if they had been raised by exceptions to these parts of the answer.

1. The first question must be decided in the negative. The complainant's counsel argues that a municipal corporation, being charged with the duty of caring for the poor, is competent to hold in trust funds given to it for that purpose, citing *Lawrence County v. Leonard*, 83 Pa. 206; *In re Robinson's Estate*, 63 Cal. 622; *Webb v. Neal*, 5 Allen, 575; *Philadelphia v. Elliott*, 3 Rawle, 170. The law is undoubtedly so in this country (2 Dillon, *Munic. Corp.* § 567). but the citation of authorities is quite unnecessary in this case, as our statute provides that "towns may take, purchase and hold real and personal estate, and alienate and convey the same; and may also take, hold and manage the same in trust for any charitable other than religious uses." Gen. Laws 1896, c. 36, § 2. But this capacity to become trustee upon appointment gives the city no supervisory jurisdiction over funds intrusted to other trustees, though such funds may be so administered as to help or hinder the performance of the duties of the municipality. The Newport Hospital is not accountable for its administration of the Hazard trust to the city of Newport, and the mayor, as one of the trustees of the hospital, should exercise his own judgment in the performance of his duties upon the board, without dictation from any other branch of the city government.

It is not argued that his appearance in either of his other capacities can be sustained. It is a novel situation for a trustee of a public charity to appear in this court as complainant against himself and his co-trustees, alleging that they have abused their trust and ought to be removed. As a citizen and taxpayer, he has no standing in this cause. The trust was not intended to benefit him by diminishing his private charities or public burdens. Incidentally it may have that result, but the intention of the founder was to increase the comfort of the poor and sick, not to substitute his aid for the benefits which they could already claim under

the law. There is no limitation in the declaration of trust to the benefit of poor people who have a settlement in the city of Newport and are entitled to the care of the city. The bounty of the testator may be extended to aliens and sojourners, as well as to citizens, if the trustees of the hospital choose to receive such "sick, hurt, injured, or infirm poor persons" into their institution, and the expense of the care of such persons may exhaust the whole revenue of the trust. The trust is a public one, and the Attorney General is the proper person to represent the public in any judicial inquiry into the conduct of the trustee in administering it. *Tudor on Charities* (3d Ed.) 323. In *Burbank v. Burbank*, 152 Mass. 254, 25 N. E. 427, 9 L. R. A. 748, the court say: "This duty of maintaining the rights of the public is vested in the commonwealth, and it is exercised here, as in England, by the Attorney General." To the same effect are *Green v. Blackwell* (N. J. Ch.) 35 Atl. 375; *Nelson v. Cushing*, 2 Cush. 519; *Ass'n for Relief of Indigent Females v. Beekman*, 21 Barb. 565.

The demurrer to the joinder of Patrick J. Boyle in any of his said capacities as complainant in this bill must be sustained.

2. The second question must be answered in the affirmative. The objects of the hospital are similar to those contemplated by the trust. The difference between the language of the charter, as originally passed, and of the will, is slight. The hospital is to care for the sick and hurt. The will provides for the sick, hurt, injured, and infirm. The scope of an act establishing a public charity is not to be constrained by construction of its words, so as to forbid the action of the corporation in ways germane to those specified in its charter. It is no violent interpretation of language to include infirm persons among sick and hurt, and the decision in any particular case, whether the infirmity of an applicant for care amounts to sickness or hurt, may fairly be left to the decision of the officers of the corporation. The law allows the broadest interpretation of the powers of a charitable corporation when the question is as to the inclusion of objects who need its aid.

A corporation may generally execute a trust not expressly forbidden by its charter, if the purposes of the trust are germane to the objects stated in the act of incorporation. In *Vidal v. Girard's Executors*, 43 U. S. 127, 189, 11 L. Ed. 205, the Supreme Court of the United States hold that there is no objection in point of law to a corporation taking property upon a trust not strictly within the scope of the expressed purposes of its institution, but collateral to them. In *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401, the same court say: "A corporation may hold and execute a trust for charitable objects in accord with or tending to promote the purposes of its creation,

although such as it might not, by its charter or by general laws, have authority itself to establish or spend its corporate funds for." In *De Camp v. Dobbins*, 29 N. J. Eq. 36, it is held that only the state can interfere to question the holding of trust funds by a corporation of a value beyond the amount allowed by its charter, citing *Perry on Trusts*, § 45; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633; *Wade v. Am. Col. Soc.*, 7 Smedes & M. 663, 45 Am. Dec. 324. And it is said, further: "This court, which will not suffer a trust to fail for want of a trustee, will uphold a trust for a reasonable time, when necessary, in order to enable the trustee to obtain the requisite authority to take and execute it," citing *Bridges v. Pleasants*, 39 N. C. 26, 30, 44 Am. Dec. 94; *Inglis v. Trustees of Sailors Snug Harbor*, 3 Pet. 115, 7 L. Ed. 617. Other cases to the same general purport are cited by the defendant's counsel, e. g., *Phillips Academy v. King*, 12 Mass. 546, approved in *Inhabitants of First Parish v. Cole*, 3 Pick. 232; *Sohier v. St. Paul's Ch.*, 12 Metc. 250; *Wetmore v. Parker*, 52 N. Y. 450; *Kerr v. Dougherty*, 59 How. Prac. 44.

The counsel for the complainant cites no case or authority to the contrary. The reference which he makes to 5 Am. & Eng. Ency. L. (2d Ed.) 922, is directly against his contention. The author of the article says in that place: "While it may be somewhat doubtful whether a corporation could stand seized to a charitable use prior to the statute 43 Eliz., it is now well settled that a corporation may act as trustee, if the trust be not repugnant to or inconsistent with the purposes of its organization."

We conclude, therefore, that the Newport Hospital was amply competent to accept and administer the charitable trust declared in the will of John Alfred Hazard under the provisions of its original charter, without the aid of the amendment.

3. The third question is not directly argued by the complainant's counsel, but the inability of the hospital to continue its care of contagious diseases is cited by him as proof that it has wasted the trust funds committed to its care. It cannot be successfully maintained, under the terms of the will, that it is the imperative duty of the trustee to maintain such a ward. The widest reasonable discretion is given to the hospital in the application of the trust fund to the relief of the beneficiaries. It may well appear that the object of the gift, which the testator declares to be "to benefit as many such poor persons as practicable," can be attained most successfully by excluding persons afflicted with contagious diseases, and the trustee must decide whether such is the case at all times while the trust continues. An erroneous decision of such a question would not in any event constitute a breach of trust.

It is of no importance, in this connection.

what effect this action of the trustees has had upon the performance by the city of Newport of its duties imposed by Gen. Laws 1896, c. 40, § 13, and chapter 94, §§ 15-17. The duty of the city is fixed by law. The discretion of the hospital depends upon the terms of the will.

4. The allegation of the bill to which the fourth question relates is that the respondent had received contributions from charitable persons for the establishment of free beds in the hospital, and has expended portions of the capital of the Hazard trust fund in making up deficiencies in the income of the free bed fund. It is alleged, further, that such deficiencies were caused by mismanagement of the free bed fund. Obviously the latter inquiry is foreign to the scope of this bill. We are here concerned with the respondent only in its administration of the Hazard trust. The appropriation of some portion of the capital of the Hazard fund to the current expenses of the hospital is the principal ground urged against the conduct of the trustee.

It is argued by the complainant's counsel that the will, by fair implication, requires that the capital of the fund shall be preserved in perpetuity, and that any expenditure out of the fund beyond the income thereof is a breach of trust, which invokes the interposition of the court. To this it is replied that there is no express limitation of the power of the trustee to expend the capital in the words of the will; that it is forever to use and apply "the whole residue and remainder of said trust property," as well as "the proceeds, rents, issues, profits, and income thereof" for the purposes of the trust; and that, the object being "to benefit as many such poor persons as practicable, and at the same time to provide and secure a permanent source of aid, remedy, and relief," the further provision, "to which end the employment of said trust funds and property for the general support and maintenance of said hospital is hereby authorized, so far as may be requisite, to uphold it and preserve it and perpetuate the charity hereby created and designed," is a sufficient authority to the trustee to expend part of the capital, if, in its opinion, such expenditure is desirable. We do not find in the provisions of the will either a definite prohibition or a plenary license on this subject. The testator desired that the trust he created should continue indefinitely, and he also hoped that it would be so managed as to do the most possible good. It is very evident that any habitual encroachment upon the principal of the fund would tend to defeat the object of the testator with respect to its perpetuity. But it is also conceivable that in stress of necessity a portion of the capital might be usefully employed even in the defraying of current expenses, and the fund again be restored by accumulation of income after the exigency had passed. Here again, in the first instance, the judgment of

the trustee must determine its conduct. The answer denies many of the allegations of the bill in this regard, and the determination of the question, as applied to the past administration of the trustee, must be left until the issues of fact are made up and evidence has been taken upon them. We may say, however, at the present time, that the use of a part of the capital in the erection of buildings for the accommodation of sick persons is, in our opinion, directly in pursuance of the conditions of the trust. If no income in money is derived from the funds which have been paid for the buildings, the use of the buildings takes the place of such income.

As neither the demurrer nor the legal defenses set up by the answer are to the whole bill, the questions as to the conduct of the trustee, which take the form of issues of fact, remain for consideration. If the Attorney General desires to controvert the assertions of the respondent, and shall file a replication within 20 days, evidence may be taken on these issues, and the case will proceed; otherwise, it will stand for hearing upon bill and answer.

ROBBINS v. BANGOR RY. & ELECTRIC CO.

(Supreme Judicial Court of Maine. Nov. 20, 1905.)

1. WATERS—PUBLIC WATER SUPPLY—RIGHTS UNDER CONTRACT.

The promoters of a water company contracted with the town for water for municipal purposes. The contract provided that the promoters should organize a corporation to which the contract should be assigned. It was also provided in the contract, among other things, that "the rates for water used in dwelling houses shall not exceed the following: For each dwelling house containing a family of not more than four persons, with one faucet for use within the tenement, five dollars per annum; for each additional person in the family, fifty cents per annum; for the first wash hand basin set, two dollars per annum; for each additional hand basin, one dollar per annum; for one bathing tub, three dollars per annum; for one additional bathing tub, one dollar per annum; for one water-closet three dollars per annum; for each additional water-closet, one dollar per annum; for a dwelling house occupied by two or more families, each family to pay three-quarters of the above rate per annum." The corporation thus provided for was organized, accepted the assignment, and assumed and agreed to perform all the duties and obligations which the promoters had agreed to perform, according to the terms of the contract. The corporation built a system of waterworks and entered upon the business of supplying water to the town under its contract, and to the inhabitants for power and for domestic purposes. It charged annual or flat rates, payable semiannually in advance, for the supply of water to dwelling houses, according to the terms of the promoter's contract, and to hotels, boarding houses, and other buildings, at other varying amounts. All the franchises and other property of the water company have now come to the defendant. Before this petition was brought, the corporation owning the plant revised its schedule of rates, and thereafter charged customers meter rates, monthly, for all water services, except to "dwelling houses containing families," the rates for

which were left unchanged. The corporation then classified the petitioner's house as a boarding house, and for that reason, and also because of an alleged waste of water, put in a meter, and thereafter charged the petitioner with meter rates. The petitioner, claiming the building to be a "dwelling house containing a family," declined to pay at meter rates, but tendered the full amount due according to the flat rates for dwelling houses. Thereupon the company shut off the water.

Upon a petition for mandamus, praying for restoration of the service, it is *held*:

While a town is not an agent of the individual citizens, and authorized to make contracts binding upon them personally, yet when a person or corporation, as a consideration, or even as a mere inducement for the making of a hydrant contract with a town for fire purposes, engages to supply water to the inhabitants at rates not exceeding certain specified sums, and so obtains the contract and its benefits, the contractor is under obligations to fulfill the agreement as to services and rates to individual water takers.

2. SAME—CONTRACT OF PROMOTERS.

If a corporation expressly or impliedly adopts a contract made by its promoters, and thereby obtains its benefits, it must take it with its obligations and burdens. It must do what the promoters agreed to do, and so must all its successors, taking its property rights and franchises by conveyance.

[Ed. Note.—For cases in point, see vol 12, Cent. Dig. Corporations, § 1790.]

3. MANDAMUS—WHEN LIES.

Mandamus lies by an individual to compel a water company which is a public service corporation to supply water to him.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 289.]

4. WATERS—WATER COMPANIES—RATES.

A public service corporation may adopt reasonable rules and regulations for the conduct of its business, to which individual water takers must conform. It may require payment for a reasonable time in advance, and it may cut off water from a customer who refuses or neglects to pay reasonable rates.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 276.]

5. SAME—CHANGE OF SCHEDULE.

A public service corporation may revise or change its schedule of rates, if no contract prevents, provided that the new rates are reasonable and do not discriminate. Within these limitations a water company may change from an annual or flat rate to a meter rate.

6. SAME—WATER METERS.

In case of unnecessary waste, a water company may apply a meter and charge reasonable meter rates.

7. SAME — WATER CONTRACT — DWELLING HOUSE.

A house occupied as a place for carrying on the business of keeping boarders, although while prosecuting the business, and as a means of prosecuting the business, the occupant and his wife and children live in the house also, is not a "dwelling house containing a family," within the meaning of a water contract fixing a rate for dwelling houses containing families, but is a boarding house.

8. SAME.

Under this definition the court finds that the plaintiff's house was not "a dwelling house containing a family," within the meaning of the contract, and his petition, based upon that contention, must be dismissed.

9. SAME—REASONABLENESS OF RATES.

The petition in this case is not framed to raise the question, nor are there sufficient data shown to enable the court to determine. whether the meter rates charged to the petitioner for

the house as a boarding house are excessive or not. Nor does the court say that the rates which the defendant demands are or are not unjust, by reason of unlawful discrimination in the classification made by it, and in the charges made to the several classes; nor that the defendant has or has not the right to demand as much of the petitioner as it does for the unpaid water service.

(Official.)

Report from Supreme Judicial Court, Penobscot County, at Law.

Petition of Chester W. Robbins for writ of mandamus to the Bangor Railway & Electric Company. Case reported, and petition dismissed.

Petition for a writ of mandamus to require the defendant company to furnish water to the petitioner at a house owned by him in Old Town and occupied by a tenant. Heard upon the petition and answer, as upon an alternative writ and return, and, at the conclusion of the evidence, the case was reported to the law court for "a determination as to whether a peremptory writ of mandamus shall issue or the petition be dismissed."

Argued before EMERY, STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Clarence Scott, for petitioner. E. C. Ryder, for defendant.

SAVAGE, J. Petition for a writ of mandamus to require the defendant company to furnish water to the petitioner at a house owned by him, and occupied by a tenant, in Old Town. The case was heard upon the petition and answer, as upon an alternative writ and return, and, at the conclusion of the evidence, the case was reported to this court for its "determination as to whether a peremptory writ of mandamus shall issue, or the petition be dismissed. Some technical questions of procedure and pleading have been argued, but as the case comes up on report, it is unnecessary to consider them. Pillsbury v. Brown, 82 Me. 450, 19 Atl. 858, 9 L. R. A. 94; Elm City Club v. Howes, 92 Me. 211, 42 Atl. 392; Rush v. Buckley, 100 Me. 322, 61 Atl. 774.

The essential facts are these: On October 16, 1889, Laughton & Clergue were promoters of a water company to be incorporated in Old Town. In fact the organization had been partly perfected at that time, but the approval of the certificate of incorporation by the Attorney General was not given until October 24, 1889. October 12, the inhabitants of Old Town, in town meeting assembled, appointed a committee to make a contract with "Laughton & Clergue, or such corporation as Laughton & Clergue may organize, or with any other party or parties, to furnish and supply the town of Old Town with water for proper municipal purposes." October 16th, the committee, acting for the town, entered into a contract with Laughton & Clergue which provided that Laughton & Clergue should organize a corporation, which

should accept an assignment of the contract and undertake to carry it out. In the contract the promoters also agreed, among other things, to put in 60 hydrants for the use of the town for fire purposes for a rental named, and to be paid by the town. They also agreed to furnish water for a display fountain, and for certain other public purposes. The fifth paragraph of the contract reads as follows:

"Said first party (the promoters) agrees that the rates for water used in dwelling houses shall not exceed the following: For each dwelling house containing a family of not more than four persons, with one faucet for use within the tenement, five dollars per annum; for each additional person in the family, fifty cents per annum; for the first wash hand basin set, two dollars per annum; for each additional hand basin, one dollar per annum; for one bathing tub, three dollars per annum; for each additional bathing tub, one dollar per annum; for one water-closet, three dollars per annum; for each additional closet, one dollar per annum; for a dwelling house occupied by two or more families, each family to pay three-fourths of the above rate per annum."

Thereupon Laughton & Clergue completed the organization of the corporation known as the Penobscot Water & Power Company, to which they assigned the contract. The corporation accepted the assignment and assumed and agreed to perform "all the duties and obligations by said Laughton & Clergue to be performed according to the terms of said contract." Among the corporate purposes of the Penobscot Water & Power Co. was "the construction of waterworks and laying of pipes in any place or places, and buying, selling, or leasing of water." The corporation built a system of waterworks in Old Town, and entered upon the business of supplying water to the town under its contract, and to the inhabitants for power and for domestic purposes. Annual or flat rates were fixed by the corporation payable semi-annually, in advance, for the supply of water to dwelling houses according to the terms of the Laughton & Clergue contract, and to hotels, boarding houses, and other buildings and places at other and varying amounts.

June 1, 1891, the Penobscot Water & Power Company conveyed all its franchises and other property to the Public Works Company, by which they were conveyed, April 7, 1905, to the defendant corporation. The business of supplying water to the town or city of Old Town has been carried on continuously by these corporations in succession to the present time. And the water system referred to has been the only source of public water supply for the city or its inhabitants during all this time.

About the beginning of the year 1903, the Public Works Company, then owning the plant, revised and changed its schedule of rates, and thereafter charged customers ac-

cording to the new schedule. For water supplied to dwelling houses containing families the rates were left unchanged, being the same annual amounts provided for in the Laughton & Clergue contract. All other services were metered, and were charged for monthly, according to the amount of water supplied. The charge for water used for power was 11 cents for the first 10,000 cubic feet, 8 cents for the second 10,000 feet and 6 cents per 10,000 feet for all water in excess of 20,000 feet in each month. For all other metered service, including hotels and boarding houses, the charge was 25 cents per 100 feet for the first 2,000 feet, 20 cents per 100 feet for the second 2,000 feet, and 15 cents per 100 feet for all water in excess of 4,000 feet in each month.

The petitioner, an inhabitant of Old Town, owned a house on Main street, which was piped for water, and connected with the water company's mains. The house was occupied from time to time by tenants, who kept boarders. From the outset down to 1904, this house was classed as a dwelling house, and the company charged and the petitioners paid the annual flat rates for dwelling houses, which were named in the Laughton & Clergue contract. In the later years, the tenant's own family consisted of five persons. The number of boarders varied, but was estimated by the company. The company charged and the petitioner paid for 15 persons in the family, boarders and all, \$5 semiannually. In 1902 or 1903, a water closet was put into the house for which the petitioner paid at the rate of \$5 per annum. Prior to January, 1904, the company complained to the owner of waste of water, through defects in piping and plumbing. It also claimed that the house should properly be classed as a boarding house and pay according to the meter rates established for boarding houses. About the beginning of 1904 the company notified the petitioner of its intention to put in a meter. A meter was put in April 6, 1904. In May following, a bill was rendered to the petitioner for flat rates from January 1, 1904 to April 1, 1904, and for 3,003 feet of water in April, at meter rates for boarding houses. From that time on the petitioner was charged at meter rates. He declined to pay, and on September 10, 1904, the company shut the water off. There was then due, according to its rates, the sum of \$23.71 for water from January 1, 1904. Both before and after the water was shut off the petitioner tendered the full amount due according to the flat rates for dwelling houses, and now offers to pay the same. He prays that the company be commanded to restore his service.

Upon these facts, concerning which there is little dispute, the defendant contends that the petitioner is not entitled to mandamus against it, as a matter of law. It says that the petitioner's rights, if any, rest in contract, and, so far as alleged in the petition, in the

Laughton & Clergue contract, that the contract was made by the town, and that the petitioner was not a party to it, or in any privity with the parties, and that mandamus will not lie to enforce contractual duties in any event. Furthermore, it is argued that the defendant is not bound by the Laughton & Clergue contract. We will consider the last proposition first.

It is not necessary to inquire when and how far and in what manner a corporation is bound by the engagements entered into by its promoters. It is at least settled that if the corporation adopts such a contract expressly or impliedly, and obtains its benefits, it must take it with its obligations and burdens, cum onere. It must do what the promoters agreed to do. 23 Am. & Eng. Ency. 241; 10 Cyc. 262; note to Pittsburg Mining Co. v. Spooner, 17 Am. St. Rep. 161. In this case, the Penobscot Water & Power Company took an assignment of the Laughton & Clergue contract and its benefits and expressly assumed its obligations. That contract limited the rates for water supplied to dwelling houses containing families. The corporation became bound by that limitation. While a town is not an agent of the individual citizens, and authorized to make contracts binding upon them personally, we have no hesitation in saying that when a person or corporation as a consideration, or even as a mere inducement, for the making of a hydrant contract with a town for fire purposes, engages to supply water for the inhabitants at rates not exceeding certain specified sums, and so obtains the contract and its benefits, the contractor is under obligations to fulfill the agreement as to service and rates to individual water takers. And the rights of the Penobscot Water & Power Company, with the corresponding duties and obligations, have come to the defendant.

It is true that mandamus is not the proper remedy for the enforcement of mere contractual duties. It does not lie to enforce rights of a private or personal character, or obligations resting entirely upon contract, and not involving any question of trust or official duty, or growing out of public relations. 2 Spelling on Extraordinary Relief, § 1379. But that is not the situation in this case. The defendant is a public service corporation. By undertaking a public service, namely that of furnishing a supply of water for the public, it comes under obligations to the public, not only to the public as a whole, but to the public as individuals, and that independent of its contract duties. It must serve impartially, or on equal terms and at reasonable rates, all who apply for service. Indeed, from the existence of such a public duty, the law will imply a contract, if necessary, with each of the inhabitants served. McEntee v. Kingston Water Co., 165 N. Y. 27, 58 N. E. 785. It is the duty of the defendant as a public service corporation to supply water to this petitioner at reasonable

rates, fairly, and without discrimination. Kennebec Water District v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856. The duty is a public one which does not depend on the Laughton & Clergue contract, although that limits the maximum rate in some instances, but it arises from the character of the service it undertakes to perform. Because a duty of this kind is public, each owner of a building which may be served is entitled to have the water served to him. That is his particular, personal right, and is independent of the rights that others or the general public may have. He does not hold that particular right in common with the public. Mandamus lies to enforce the performance of public duties. It does not lie at the suit of an individual for the enforcement of those rights which he holds in common with the public at large, but it does lie when his personal and particular rights have been invaded beyond those that he enjoys as a part of the public, and that are common to everyone. Sangerville v. County Commissioners, 25 Me. 291; Baker v. Johnson, 41 Me. 15; Weeks v. Smith, 81 Me. 538, 18 Atl. 325; Knight v. Thomas, 93 Me. 494, 45 Atl. 499. The petitioner therefore may prosecute the writ.

It is not questioned but that a public service corporation may adopt reasonable rules and regulations for the conduct of its business, to which the individual water takers must conform, that it may require payment for a reasonable time in advance, or that it may cut off water from a customer who refuses or neglects to pay reasonable rates. Wood v. Auburn, 87 Me. 287, 32 Atl. 906, 29 L. R. A. 376. And we think there can be no question of the right of such a corporation to revise and change its schedule of rates, if no contract prevents, provided that the new rates are reasonable, and do not discriminate. Within these limitations, it may change from an annual or flat rate to a meter rate. In fact, a reasonable meter rate seems the more equitable and just. We have recently discussed what are reasonable rates in Kennebec Water District v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856, and Brunswick & Topsham Water District v. Maine Water Co., 99 Me. 371, 59 Atl. 537, and this case calls for no further discussion. Nor do we think there can be any doubt that in case of unnecessary waste the company may apply a meter, and charge reasonable meter rates. Again, while it may be lawful to classify water takers, not arbitrarily, but upon reasonable grounds, as for instance as between boarding houses and private dwelling houses, and while it may be true in instances that a charge to small customers is not necessarily unreasonable, because in excess of what a large customer would have to pay for the same amount of water, still, as bearing upon the question of discrimination, it must be true that the quantity of water used and the cost

of the individual service are the principal elements for consideration in fixing the charges as between individual water takers or classes of takers. And it has been held that a public service company cannot make a difference in price according to the use made by the customer, nor is a discrimination proper based on the value of the service to the customer. *Baily v. Gas-Fuel Co.*, 193 Pa. 175, 44 Atl. 251; *Richmond Nat. Gas. Co. v. Clawson*, 155 Ind. 659, 58 N. E. 1049, 51 L. R. A. 744. And, of course, the water company had the right to establish reasonable rates for service to all customers not provided for in the Laughton & Clergue contract.

An application of these principles will eliminate from further consideration all essential questions except two, and these are questions of fact. The petitioner bases his claim upon the dwelling house clause in the Laughton & Clergue contract. He says that his house was a "dwelling house containing a family," within the meaning of that contract, and therefore that the maximum charge for a family of 15, exclusive of the water-closet, was \$10 a year, and further that the family in the house did not exceed 15 in number. All his tenders and his offer in the petition to pay are limited upon that theory. And if it were otherwise, the record does not disclose sufficient data to enable the court to pass upon the reasonableness of the meter rates themselves. The defendant on the other hand claims that the building is not a dwelling house within the meaning of the contract, but is a boarding house, and further that its predecessor was justified in putting in a meter, by reason of the unreasonable waste of water.

The decisive question, and the only one we need to consider, is whether the petitioner's building was a "dwelling house containing a family," as specified in the original contract, or was a boarding house. It is urged in the first place that the company itself has so classified it for quite a long period of years, and that, in consequence, its status is now fixed beyond the power of the company to change. The construction which the parties by their acts place upon a contract frequently is, in cases of doubt, of great value in determining what the contract meant. And when, by long-continued usage, they have given a practical construction to it, it may be beyond the power of one party to change it. *West Hartford v. Water Commissioners of Hartford*, 68 Conn. 323, 36 Atl. 786. But if it were to be assumed that such a usage should control, it ought to be a usage which has been practically fixed and unvarying. The case shows that all three of the tenants who have occupied the house since the petitioner bought it have kept boarders, but to what extent and under what conditions the two earlier tenants kept them does not appear. And as we shall hereafter see, the mere fact that boarders are kept in a house is not necessarily inconsistent with

the claim that it is a "dwelling house containing a family." Moreover, the house was first classified at a time earlier than the petitioner's ownership, and the record shows nothing in regard to the nature of the occupancy at that time, except that boarders were kept. This ground therefore is not tenable, and we must inquire further.

The building itself seems to have been built originally for family use. But it had been used by tenants for keeping boarders, and was being so used when the meter was put on. The tenant, his wife, and three sons lived there. The number of boarders was as low as 3 at times, and at others as high as 10, and perhaps more. The boarders were not transients. They stayed more or less permanently. The term "dwelling house" does not always have the same sense in all cases. It may mean one thing under an indictment for burglary or arson, and another under a homestead law, and another under a pauper law, and another under a contract or devise. A boarding house certainly is a dwelling house. So is a hotel; or a jail (*People v. Van Blaricum*, 2 Johns. 105); or a single room (*People v. Horrigan*, 68 Mich. 491, 36 N. W. 236).

But the Laughton & Clergue contract limited the meaning which might be given to the term "dwelling house." The phrase there is "dwelling house containing a family." The word "family" is also of flexible meaning. The meaning varies as the question arises under homestead laws, or exemption laws, or pauper laws, or under insurance policies or wills, or other conditions. Its primary meaning is a collection of persons who live in one house and under one head or management. *Dodge v. Boston & Prov. Railroad*, 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318. In that sense it has frequently been defined as synonymous with "household." Webster gives the primary meaning as "persons collectively who live together in a house or under one head or manager; a household, including parents, children, and servants, and, as the case may be, lodgers or boarders." This definition is sometimes quoted in the cases, but we have found no cases sustaining the definition as to boarders in which the matter of boarders was in issue or decided, except two, and they were decided on grounds not involved here. *Oystead v. Shed*, 13 Mass. 520, 7 Am. Dec. 172; *Race v. Oldridge*, 90 Ill. 250, 32 Am. Rep. 27. To constitute the family relation between persons so living together it must be of a permanent and domestic character, and not of those abiding together temporarily as strangers. *Tyson v. Reynolds*, 52 Iowa, 431, 3 N. W. 469. They must be living in one domestic establishment. *Pearson v. Miller* (Miss.) 14 South. 731, 42 Am. St. Rep. 470. Family means all whose domicile or home is ordinarily in the same house and under the same management or head. *Cheshire v. Burlington*, 81 Conn. 326. It is all the individuals who live together under

the control of another, including the servants. *Poor v. Hudson Ins. Co.* (C. C.) 2 Fed. 452. It embraces a household composed of parents or children, or other relatives, or domestics; in short, every collective body of persons living together within one curtilage, subsisting in common and directing their attention to a common object, the promotion of their mutual interests and social happiness. *Wilson v. Cochran*, 98 Am. Dec. 553. It may mean the husband and wife, having no children, or it may mean children, or wife and children, or any group constituting a distinct domestic or social body. *Grand Lodge v. McKinstry*, 67 Mo. App. 82. Lord Kenyon said: "In common parlance, the family consists of those who live under the same roof with the pater familias; those who form (if I may use the expression) his fireside." *The King v. Darlington*, 4 Term Rep. 800. The relation is one of social status, not of mere contract, and usually is held to include a legal or moral obligation on the head of the family to support the other members, and a corresponding state of dependence on the part of the other members for their support. 3 Words & Phrases, 2673, and cases cited.

If the foregoing definitions gathered from the cases give a correct view of the various phases of a family relationship as applicable to this case, from the judicial point of view, as we think they do, it is clear that boarders do not constitute the family or a part of it. A family living together in a house as a home is none the less a family, because incidentally there are boarders in the same house, and perchance eating at the same table. But a boarding house is none the less a boarding house, when used as such, because the boarding house keeper and his wife and children live in it while the business of keeping a boarding house is being carried on. The *Laughton & Clergue* contract limited the rates for "a dwelling house containing a family" to annual flat rates for specified amounts. It contemplated as we think a dwelling house containing a family living together in domestic and social relations in the house as a home, and not a place of carrying on the business of keeping boarders. The test is whether the petitioner's tenant occupied the house as a home for himself and his wife and children, and incidentally kept boarders also, or whether he occupied it as a place for carrying on the business of keeping boarders, although while prosecuting the business, and as a means of prosecuting the business, he and his wife and children live in the house also. Under this test, neither the size of the house, nor the number of the boarders are of importance, except as evidence that may have weight in determining which is the principal use for which the building is occupied.

Applying the test to the evidence in this case, we are satisfied that the petitioner's house should be classed as a boarding house, and that it is not within the limitation for dwelling houses in the *Laughton & Clergue* contract. The tenant used the house for

carrying on the business of keeping boarders, and his living there was incidental to that. That was his business, and his only business of any consequence, as he testified.

Accordingly the petitioner's claim is not sustained, and his petition must be dismissed. But we decide nothing more. The petition is not framed to raise the question whether the rates charged to the petitioner for the house as a boarding house are excessive or not. Neither, as we have already said, is there sufficient evidence upon which to answer such a question. Nor do we say that the rates which the defendant demands are or are not unjust by reason of unlawful discrimination in the classification made by it, and in the charges made to the several classes, nor that the defendant has or has not the right to demand as much of the petitioner as it does, for the unpaid water service. When a customer charges 25 cents a hundred feet to one customer for one use, and only 11 cents for 10,000 feet to another customer for another use, if the water be supplied from the same source, by the same system, in the same pipes, there is an apparent discrimination, but whether it is real or not cannot now be said. See *Baily v. Fayette Gas Fuel Co.*, and *Richmond Nat. Gas. Co. v. Clawson*, supra. Petition dismissed.

In re ATLANTIC & ST. L. R. CO. et al.
(Supreme Judicial Court of Maine. Nov. 7, 1905.)

1. RAILROADS — STATION PURPOSES — WHAT CONSTITUTE.

The land and right of way of railroad corporations, used for "station purposes," within the meaning of section 20, c. 18, Rev. St. 1883, or section 31, c. 23, Rev. St. 1903, must be determined from the existing conditions in each case.

2. SAME.

The statutory designation "for station purposes" includes such grounds at a station as are convenient, necessary, and actually used by the railroad for approaches and exits for the public requiring passenger and freight transportation, for the location of depot buildings, warehouses, platforms, fixtures, and apparatus for taking water and fuel supplies, lighting, heating, transmitting messages and giving signals, sidings for passing trains and shifting and storing cars and other property, switches, and space where passengers may get on and off trains and goods be loaded and unloaded.

3. SAME—QUESTION OF FACT.

When the facts are clear from undisputed evidence, the question whether the place of a proposed crossing of a railroad by a town way or highway is land or right of way used for station purposes may be one of law, but it must generally be considered one of fact.

4. APPEAL—REVIEW—QUESTIONS OF FACT.

At the hearing in the Supreme Judicial Court on the appeal from the decision of the railroad commissioners, evidence somewhat voluminous and conflicting was presented, and the presiding justice refused to rule as matter of law that the locus in quo was land and right of way of the railroad corporation used for station purposes, and found otherwise upon the evidence as matter of fact. *Heid*, that his rul-

ing was correct, and that his finding of facts could not be disturbed.

(Official.)

Exceptions from Supreme Judicial Court, Androscoggin County.

Appeal by the Atlantic & St. Lawrence Railroad Company and the Grand Trunk Railway Company of Canada from the decree of the railroad commissioners determining that a certain public highway within the city of Auburn, Androscoggin county, located by the county commissioners of said county over the land and right of way of the appellants, should cross the railroad track of the appellants by an underpass, and apportioning the expense of the construction and maintenance of the crossing.

At the hearing in the appellate court the appellants requested the presiding justice to rule as a matter of law that, upon the facts presented by the evidence, the decree of the railroad commissioners must be set aside, and the appeal sustained. This ruling was refused, but, instead thereof, the presiding justice ruled that the aforesaid decree be affirmed, with costs, and the appeal be dismissed. To this ruling and refusal to rule the appellants excepted. Exceptions overruled.

Argued before EMERY, STROUT, POWERS, PEABODY, and SPEAR, JJ.

C. A. & L. L. Hight, for appellants. Newell & Skelton, for appellees.

PEABODY, J. The proceedings in this case originated November 20, 1900, in the petition of various citizens of the city of Auburn, in the county of Androscoggin, to the county commissioners, asking for the location of a public highway within the city of Auburn over the land and right of way of the Atlantic & St. Lawrence Railroad Company, leased to the Grand Trunk Railway Company of Canada. The county commissioners, after notice and hearing, on the 2d day of April, 1901, filed with the clerk of the county commissioners their report for the location of the highway.

On the 23d day of March, 1903, the municipal officers of the city of Auburn petitioned the board of railroad commissioners to determine the manner and conditions of crossing the railway with said highway, and apportion the expense of the crossing. Upon this petition as amended June 13, 1904, after notice and hearing, the railroad commissioners, on the 16th day of August, 1904, made a decree determining that said highway should cross the track by an underpass, and apportioning the expense of construction and maintenance of the crossing. An appeal from this decree was duly taken and entered in the Supreme Judicial Court for the county of Androscoggin at the January term, A. D. 1905.

At the hearing on the appeal, evidence was introduced showing the location of the

intersecting tracks of the Maine Central Railroad and of the Grand Trunk Railway at Danville Junction, and of the buildings, signal houses, freighthouses, passenger depots, standpipes for water, carhouse, and pump-house; that the proposed crossing over the land and tracks of the railroad company was north of the depot, and from 50 to 75 feet north of the northerly switch of the longest siding, and 1,340 feet north of the center of the old county highway immediately south of the station, and 823 feet north of the northerly end of the station platform; and showing other conditions existing at and in the vicinity of the station and proposed crossing at the time of the location of the highway in 1901, and subsequently thereto, materially bearing upon the question at issue. The evidence also showed the transfer of freight between the two railroads; that the greater part of the freight transfer business was done south of the old county highway, near the junction of the two railroads; that the cars going west, delivered to the Grand Trunk Railway by the Maine Central Railroad, were sometimes placed on the westerly siding north of the county highway; that in handling these cars, and making them into trains, it was frequently necessary to pass over the switch 50 to 75 feet south of the proposed crossing, and to move them back and forth over the place of the proposed crossing, and for the trainmen, in making up trains and in shunting cars on and off the sidings, to work at the place where the crossing is located; that the long siding, which runs up to within 50 or 75 feet of the proposed crossing, was used principally in 1901 as a passing track for trains; that at the crossing, and for some distance south, is a fill from 20 to 23 feet in depth, making it unsuitable for the public to go there, either for the loading or unloading of freight, or in connection with the passenger service; that on the main line and on the passing track trains were at times obliged to stop for water at the station, and at times freight trains going east, stopping for water, extended over the point of the proposed crossing; that on the westerly side of the track was the pumphouse for the supply of water for the trains and the depot, since moved to a point north of the crossing on the main line; that it was and is now necessary for coal cars to be hauled upon the main line opposite the pumphouse, and that the coal therefor was unloaded from the main line; that in 1901 the most westerly track was used for the storage of cars; that shunting was sometimes done on the track next to the main line, but this track was principally used as a passing track; and that in 1902 the track next to the main line was extended north, and has since continued to be used as a passing track.

It was claimed by the appellants that upon the case presented by the evidence the proposed crossing was, as a matter of law,

through land or right of way of the railroad corporation used for station purposes; that there had been no adjudication by the railroad commissioners, as required by statute, on the question of public convenience and necessity for said crossing or way; and that, therefore, the laying out of said way by the county commissioners was illegal and void, and there was no legal foundation for the petition to the railroad commissioners to make the decree. They requested the court to rule, as matter of law upon the facts presented by the evidence, that the decree of the railroad commissioners must be set aside, and the appeal sustained. This ruling the court refused to make, and, instead thereof, ruled that the decree of the railroad commissioners should be affirmed, with costs, and that the appeal should be dismissed, to which ruling and refusal to rule the appellants excepted, and upon their exceptions the case comes before the law court.

The real question involved in the exceptions is whether the land and right of way of the railroad corporation at the point of the proposed crossing are land and right of way of a railroad corporation used for station purposes, within the meaning of section 29, c. 18, Rev. St. 1883, or section 31, c. 23, Rev. St. 1903. This statute is as follows:

"Sec. 31. No way shall be laid out through or across any land or right of way of any railroad corporation, used for station purposes, unless after notice and hearing the railroad commissioners adjudge that public convenience and necessity require it. When the tribunal having jurisdiction over the laying out of such way is satisfied, after hearing, that public convenience and necessity require such laying out, such proceedings shall be suspended and petition filed by such tribunal with the railroad commissioners for their adjudication hereunder." This provision originated in section 1, c. 167, p. 134, of the Laws of 1883.

A railroad exercises its franchise in the prosecution of its transportation business, subject to the rights of the public to extend highways over its right of way. *Chicago & Alton R. R. v. City of Pontiac*, 169 Ill. 155, 48 N. E. 485. In this state its tracks may be crossed by ways laid out in the same manner as other ways, but the manner, condition, and expense of the crossing are placed by statute under the jurisdiction of the railroad commissioners; and when the proposed location is over or across the right of way or land of any railroad corporation before it is finally established, there must be an adjudication by this tribunal that public convenience and necessity require it; the object being both to guard against the recognized dangers of railroad crossings, and to secure the rights of the public when its convenience conflicts with the convenience of the railroad.

It is claimed by the appellants that the term "right of way" in the statute quoted is

significant, as implying a more extended use than that of land acquired for station purposes; but we think this construction would logically lead to a harmful limitation of the authority conferred by statute upon municipal officers and county commissioners for laying out townways and highways. The intention of the Legislature in employing both these words was simply to embrace all the property of the railroad constituting station grounds affected by the location of the way.

The legislative intent in the language "land or right of way of any railroad corporation used for station purposes" has not been judicially determined in this state. In the United States the words "depot" and "station," as used in connection with railroads, are synonymous. *Goyeau v. Great Western R. Co.*, 25 Grant's Ch. U. C. 64. The term "station purposes" does not admit of any precise definition. Similar terms have been used in the statutes of other states, relating to railroads, and we may be aided in ascertaining the meaning of the words quoted in this case by analogous decisions. In the western and middle states, where railroads have been required by statute to maintain fences on each side of their right of way to keep cattle therefrom, to diminish the hazard to passengers and loss to cattle owners, depot grounds have been either expressly excepted from this requirement, or the courts, in construing the statutes, have determined that fencing out depot grounds was not required where the public was entitled to free access. *Jefferson, Madison & Ind. Railroad Co. v. Beatty*, 36 Ind. 15; *Evansville & Terre Haute Railroad Co. v. Willis*, 93 Ind. 507; *Morris v. St. Louis, Kansas City & Northern Railway Co.*, 58 Mo. 78; *Grosse v. Chicago & Northwestern Railway Co.*, 91 Wis. 482, 65 N. W. 185.

In *Davis v. Burlington & Mo. River Railroad Co.*, 26 Iowa, 549, under a statute exempting railroads from the duty of fencing in places where the public require access, the term "depot grounds" was applied to a tract of five or six acres extending along either side of the roadway, used for "loading and unloading freight and all purposes incident to the station, including switches and side tracks, elevators and warehouses." In *Smith v. C., M. & St. P. Railway Co.*, 60 Iowa, 512, 15 N. W. 303, it was held that a place a mile and a quarter from the depot buildings is not presumed to be station grounds, in the absence of proof showing it to be such. In Wisconsin in this class of cases the courts have given as a definition of "depot grounds" "the place where passengers get on and off trains, and where goods are loaded and unloaded, and all grounds necessary and convenient and actually used for such purposes by the public and by the railroad company. This includes switching and making up of trains, and the

use of side tracks for the storing of cars, and the place where the public requires open and free access to the road for the purposes of such business." *Grosse v. Chicago & Northwestern Railway Co.*, *supra*.

In Massachusetts the court, by Judge Holmes, under a statute providing for the taxing of land of railroad companies taken for station purposes, held that all the land described as land "for suitable station purposes, and for tracks and yard room to be used in connection therewith," was included in the term "station purposes," and should be taxed. *Norwich v. Worcester R. R. Co.*, 151 Mass. 69, 23 N. E. 721.

The definitions of "station grounds" in these decisions may be, in their particular application, narrower than should be given to the language "the right of way and land used for station purposes" under our statute; but the reasoning upon which the decisions are based is relevant to the question under consideration. Station grounds or depot grounds at convenient points along the lines of railroads are selected, embracing, not only the land of the right of way, but additional land of such extent as existing and prospective conditions seem to require; but it cannot be considered that the land originally appropriated should be arbitrarily held to limit railroads or the public in the application of statutory provisions. In every case, in determining what are station grounds and depot grounds, three conditions must concur: The grounds must be necessary, convenient, and actually used by the railroads in the transaction of their business. They therefore include sufficient land for safe and convenient approaches and exits for the public requiring passenger and freight transportation, for the location of depot buildings, warehouses, platforms, fixtures, and apparatus for taking water and fuel supplies, lighting, heating, transmission of messages and giving signals, sidings for passing trains, shifting and storing cars and other property, switches, and space where passengers may get on and off trains and goods be loaded and unloaded. An important factor in determining what land may be necessary and convenient for station purposes is the amount and character of the railroad business done at a particular station. *McGrath v. Detroit, Mack. & Marq. R. R. Co.*, 57 Mich. 555, 24 N. W. 854. Within narrow limits, where the facts are clear upon undisputed evidence, this question is properly one of law, but ordinarily it must be considered one of fact. *Grosse v. Chicago & Northwestern Railway Co.*, *supra*; *Plunkett v. Minn., St. Marie & At. Railway Co.*, 79 Wis. 222, 48 N. W. 519; *Rhines v. Chicago & Northwestern Railway Co.*, 75 Iowa, 597, 39 N. W. 912. It is apparent from the authorities cited that in this case it is one of fact and not of law. The appellate court has rendered a decision based upon the evidence. It is a familiar and well-settled rule that this court cannot

disturb the findings of the presiding justice upon what might apparently be a preponderance of the evidence. A careful review of the testimony contained in the report fails to show that the findings of the appellate court are erroneous, and the rulings based thereon are clearly correct.

Exceptions overruled.

MCCLAINE v. CARIBOU NAT. BANK.

(Supreme Judicial Court of Maine. Nov. 8, 1905.)

1. NEGLIGENCE — DANGEROUS PREMISES — DUTY OWED TO LICENSEE.

The defendant bank had partially constructed and built a certain walk, about 8 feet wide, on the south side of its bank building and on its own premises. Said walk fronted on and adjoined a certain public street south of said bank building. In this walk, about 17 feet from the east end of the same, was a rollway to the cellar of the bank building, about 12 feet long, 5 feet wide, and 5 or 6 feet deep. The rollway itself was uncovered, and without protection of any kind. But in the space on the walk, both east and west of the rollway, there were piled various obstructions, such as bricks, barrels, lumber, carpenters' horses, and other debris. These obstructions practically prevented entrance upon the walk from either end. The plaintiff in the nighttime, while going to a fire, fell into this rollway and was injured, and thereupon she brought suit to recover damages for the injuries sustained.

Held, that these various obstructions and unfinished condition of the walk were a plain indication to the plaintiff and the public generally that this walk was not opened for travel, and negatived any implied invitation on the part of the defendant bank for travelers to enter upon it, and that the plaintiff in going upon it was, at most, but a mere licensee, to whom the defendant bank owed no duty, except not to wantonly injure her.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 42, 54.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Also *held*, that the plaintiff was guilty of contributory negligence.

(Official.)

Action by Carrie McClain against the Caribou National Bank.

Action on the case to recover damages for personal injuries sustained by the plaintiff, and caused by the alleged negligence of the defendant. Plea, the general issue. Verdict for plaintiff for \$2,500. Defendant filed a general motion for a new trial, and also excepted to certain rulings made by the presiding justice. Sustained.

Argued before EMERY, STROUT, SAVAGE, and PEABODY, JJ.

Ira G. Horsey and Geo. H. Smith, for plaintiff. Louis C. Stearns and Wm. P. Allen, for defendant.

STROUT, J. In 1903 defendant erected a building in Caribou, on the corner of Washburn avenue and Vaughan avenue. October 24, 1903, the walls were up and roofed in, but the structure was not ready for occupa-

tion. It was the plan to have on three sides of the building a concrete walk about 8 feet wide. On the east side, on Vaughan avenue, the walk had been completed, and also on the north side; but on the south side, facing Washburn avenue, a curb had been put in upon defendant's land adjoining the avenue, and dirt filled in between that and the building, up to within about 4 inches of the top of the curbing—that space being left for the concrete, that was to be filled in later. About 17 feet from the southeast corner of the building, on Washburn avenue, in this walk, was a rollway to the cellar of the building, about 12 feet long, 5 feet wide, and 5 or 6 feet deep.

On the night of October 24th, or early morning of the 25th, plaintiff, while going to a fire, fell into this rollway, which was uncovered and without protection of any kind, and was injured, and this suit is to recover damages for that injury. Plaintiff had a verdict, and the case is here upon motion to set the verdict aside and on exceptions.

The walk on Washburn avenue was not only in the unfinished condition above stated, but at the southeast corner, next to Vaughan avenue, 300 or 400 bricks were piled upon it next to the building; on the curb was a pile of lumber about two feet high, in two tiers, and between them some barrels, which left only a space of about two feet to pass from Vaughan avenue onto the walk. The lumber was some 20 feet long, and extended to the rollway, but did not cover it. At the westerly end of the walk there were a large number of barrels and carpenters' horses and other debris, which nearly or quite prevented access to the walk at that end. These obstructions practically prevented entrance upon the walk from Vaughan avenue or at the other end. They were a plain indication to the public that the walk on Washburn avenue was not opened for travel, and negatived any implied invitation of defendant for travelers to enter upon it. In going upon it that night, the plaintiff, while perhaps not a trespasser, was at most a mere licensee, to whom the defendant owed no duty, except not to wantonly injure her. The principles announced by this court in *Dixon v. Swift*, 98 Me. 207, 56 Atl. 761; and *Parker v. Portland Publishing Co.*, 69 Me. 176, 81 Am. Rep. 262, apply to this case.

Upon the question of due care of plaintiff, it is difficult to perceive its exercise by her. She says it was dark, and she did not see the rollway, but diagonally across Washburn avenue, and within the distance of less than 300 feet, the Lyndon Hotel was on fire, the flames coming from the roof, and in the opposite direction, and 147 feet distant, a street electric light was burning, which it would seem must have given sufficient light to any attentive person to see the rollway. Several witnesses say they could see without difficulty. It is probable that the plaintiff was under excitement from the fire, and her eyes

and attention were upon the burning building, and no heed taken of her steps. Apparently she could not have entered upon the walk from Vaughan avenue, but from Washburn avenue, between the terminal of the walk, and not in the line of travel proposed when the walk was completed; perhaps to obtain a better view of the fire, or be away from passers upon the street and the operations of the fire department, rather than to travel upon the walk.

Upon the two grounds—that the defendant had not thrown open that walk to the public, and thereby impliedly invited the public to use it, and that the plaintiff was guilty of contributory negligence—this verdict ought not to stand.

Motion sustained.

Verdict set aside.

GREENLAW v. MILLIKEN.

(Supreme Judicial Court of Maine. Nov. 8, 1905.)

1. NEGLIGENCE — ICY SIDEWALK — SURFACE WATER—LIABILITY OF ABUTTING OWNER.

The plaintiff slipped upon the ice on the sidewalk in front of the defendant's house and sustained an injury. Thereupon the plaintiff brought suit against the defendant, alleging that the defendant wrongfully conducted water from the roof of a part of her house upon the sidewalk, which froze and rendered the sidewalk dangerous. *Held*, that to entitle the plaintiff to recover it was necessary for her to show that the icy condition of the sidewalk resulted from water artificially conducted upon the sidewalk, and not from surface water naturally flowing upon the sidewalk, or from melting snow which had fallen upon the sidewalk; and this the evidence fails to show.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1627, 1628.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Also, *held*, that the plaintiff was not in the exercise of due care.

(Official.)

Exceptions from Supreme Judicial Court, Cumberland County.

Action by Emma S. Greenlaw against Mary W. Milliken. Verdict for plaintiff, and defendant moves for a new trial and excepts. Motion for new trial sustained.

Action on the case to recover damages for personal injuries sustained by the plaintiff January 25, 1904, caused by the alleged carelessness of the defendant in having water improperly drawn off and conducted from the roof of her house or bay window on said house and discharged upon the sidewalk in front of said house, and which froze and rendered the sidewalk dangerous, and upon which the plaintiff slipped and was injured. Tried at the April term, 1905, Supreme Judicial Court, Cumberland county. Plea, the general issue. Verdict for plaintiff for \$1,250. Defendant filed a general motion for a new trial, and also excepted to certain rulings made by the presiding justice.

Memorandum. This cause was argued at the June term, 1905, of the law court at Portland. One of the justices sitting at said term did not sit during the hearing upon this cause, being disqualified by reason of having ruled therein at nisi prius. See Rev. St. 1903, c. 79, § 42.

Argued before **STROUT, SAVAGE, PEABODY, and SPEAR, JJ.**

William A. Connellan, for plaintiff. Symonds, Snow, Cook & Hutchinson, for defendant.

STROUT, J. On January 25, 1904, plaintiff slipped upon the ice on the sidewalk in front of the northeasterly corner of defendant's house on State street, in Portland, and fell and received injury. She claims that the defendant wrongfully conducted water upon the sidewalk, which froze and rendered the walk dangerous. Hence this suit. Plaintiff had a verdict, and the case is here on exceptions and motion to set aside the verdict.

Defendant's house is on the southerly side of the street, the front facing the northeast. The ground has a rise from the sidewalk to the rear line of the house of three feet and one-half inch, and the flow of surface water from defendant's premises is toward the sidewalk and street. The water from the roof of the main house is conducted into the sewer, and does not reach the sidewalk. The house has a bay window, $4\frac{4}{10}$ feet one way and $12\frac{6}{10}$ feet the other way. The roof of the bay window pitches each way; half the drainage going south and half north. At either end of the bay window roof is a conductor, with a one-inch opening. It is the only northerly half of the bay window roof that by any possibility could discharge water to reach the sidewalk at the place of injury.

From the front of the bay window to the granite curbing next to the sidewalk is 7 feet and 7 inches. On the north end of the house a driveway led from the street to the stable in the rear. From the stable to the street the ground descended. The water from the northerly end of the bay window was conducted through an elbow or offset from the bay window to a perpendicular conductor, which terminated in a wooden spout, having its outlet on the private walk from the sidewalk to the north end of the house to its rear. This elbow or set-off in the fall of 1903 had rusted out at the bottom, so that the water fell upon the grass plot at the side of the house, and would not flow into the conductor. This condition remained till October, 1904, and was in that condition at the time of the accident. The observer at the Weather Bureau testified that from January 15, 1904, to the 26th there were only two days, the 16th and the 24th, when the maximum temperature rose above 32 degrees. Those days were the 16th, when the maximum was 33 degrees, and the 24th, when it reached 36 degrees, and the day was cloudy. During all this time, in-

cluding the 25th, the total precipitation was $\frac{79}{100}$ of an inch. There was about one foot of snow on the ground. The sidewalk in front of the house was icy, as was also most of the sidewalks having a northerly exposure. Defendant's house was unoccupied at the time of the accident, and had been for the entire winter, and no fire had been in it. If the ice upon the walk was the result of surface water naturally flowing from the higher ground westerly, the defendant would not be liable. To entitle plaintiff to a verdict it was necessary for her to show that the icy condition resulted from water artificially conducted to the walk, and not from surface water naturally flowing there, or from melting snow which had fallen there. We think the evidence failed to show this. It seems incredible that the small surface of one-half of the roof of that bay window could hold and discharge sufficient water that fell through the opening in the rusted-out arm or set-off upon the snow to permeate through one foot of snow to the curbing, and then through, under, or over that to the sidewalk to produce the icy condition. It is much more probable that water flowed down the driveway, not conducted from the bay window, and thus produced the icy condition.

The jury apparently drew an inference not warranted by the evidence. It is also quite apparent that the plaintiff was not in ^{e care.}

Motion sustained.

Verdict set aside.

MOBILE COTTON MILLS v. SMYRNA SHIRT & HOSIERY CO.

(Superior Court of Delaware. Kent. Nov. 3, 1905.)

PLEADING—JUDGMENT ON PLEADINGS—AFFIDAVIT OF DEFENSE—SUFFICIENCY.

An affidavit of defense to an action by a foreign corporation, which alleges that it cannot recover because it has not complied with the laws of Delaware in regard to foreign corporations doing business therein, is insufficient, as against a motion for judgment, for failing to set forth in what respect the corporation has failed to comply with the statutes.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 19.]

Action by the Mobile Cotton Mills against the Smyrna Shirt & Hosiery Company. On motion for judgment notwithstanding the affidavit of defense. Granted.

The following affidavit of defense was filed, viz.:

"State of Delaware, Kent County—ss.: Be it remembered that on this twenty-sixth day of October, A. D. 1905, before me, Walter Pardoe, prothonotary of the Superior Court of the state of Delaware in and for Kent county, personally comes Charles B. Prettyman, treasurer of Smyrna Shirt & Hosiery Company, the defendant in the above-stated suit, who, having been by me

duly sworn according to law, doth depose and say that he is the treasurer of the defendant in the above-stated suit; that he verily believes that there is a legal defense to the whole of the cause of action in the above-stated suit, the nature and character whereof are as follows, viz.: That the defendant corporation has a just and true set-off to a part of the cause of action, and as to the whole of the said cause of action, that the plaintiff corporation has no legal right to recover thereon, because it has not complied with the provisions of the statutes of the state of Delaware in regard to foreign corporations doing business in said state of Delaware." The above affidavit was signed by Charles B. Prettyman, treasurer of the Smyrna Shirt & Hosiery Company, with the jurat of the said prothonotary and his seal of office attached.

Plaintiff asked for judgment notwithstanding the said affidavit of defense, for the following reasons: First. Because the affidavit contained no allegation that the plaintiff was a foreign corporation doing business in the state of Delaware. Second. That there was no allegation in said affidavit that the particular transaction referred to was a business transaction which took place in the state of Delaware. Third. Because the affidavit stated a conclusion of law; there being no allegation setting forth in what respect the plaintiff has failed to comply with the statutes of the state of Delaware.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Henry Ridge'v. Jr. for plaintiff. George M. Jones, for defendant.

LORE, C. J. We think, on the point that the affidavit fails to state in what respect the corporation plaintiff has not complied with the statutes of the state of Delaware, that judgment should be given notwithstanding the affidavit of defense.

STATE v. BELL.

(Court of Oyer and Terminer of Delaware.
New Castle. Dec. 9, 1904.)

1. HOMICIDE—MURDER—MALICE.

Malice is an essential ingredient of the crime of murder of both degrees.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 15-18.]

2. SAME—MALICE—PRESUMPTIONS—BURDEN OF PROOF.

Where, in a prosecution for murder, it appeared that the fatal act was done deliberately or without adequate cause, malice is presumed and the burden is on the accused to prove that it was done without malice.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 18, 265, 266, 271.]

3. SAME—FIRST-DEGREE MURDER—DEFINITION.

Murder in the first degree is where the killing is done with express malice aforethought,

or in perpetrating or in attempting to perpetrate a crime punishable with death.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 30-33.]

4. SAME—EXPRESS MALICE.

Express malice aforethought, as an element of murder, is where one kills another with a sedate, deliberate mind and formed design, manifested by lying in wait for deceased, or by antecedent menaces or threats, or any other circumstances disclosing a malevolent intention of the accused toward his victim at the time when the crime was committed.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 16, 17.]

5. SAME—SECOND-DEGREE MURDER.

Murder in the second degree is where the killing is done without a deliberate formed design to take life or perpetrate a crime punishable with death, but without justification, excuse, or provocation sufficient to reduce the offense to manslaughter.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 39, 40.]

6. SAME—MANSLAUGHTER.

Manslaughter is the unlawful killing of an individual without malice.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 52.]

7. ASSAULT AND BATTERY—JUSTIFICATION—LOOKS—GESTURES—WORDS.

No looks or gestures, however insulting, or words, however opprobrious or offensive, will constitute sufficient provocation to excuse a slight assault.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, § 95; vol. 26, Cent. Dig. Homicide, § 69.]

8. HOMICIDE—SELF-DEFENSE.

A slight assault is insufficient to excuse the killing of the assailant with a deadly weapon or to reduce the offense from murder to manslaughter.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 68.]

9. ELECTIONS—OFFICERS—BALLOT BOXES—DUTY TO GUARD.

It is the duty of election officers to safely keep the ballot boxes, and to repel any attempt to capture them with such force as may be necessary for the purpose.

10. HOMICIDE—INDICTMENT—VARIANCE.

Where, in a prosecution for homicide, the indictment alleged that the prisoner held the pistol in his right hand when he fired the fatal shot, proof that he held the pistol in his left hand did not constitute a material variance.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 256.]

11. SAME—KILLING THIRD PERSON.

Where defendant shot at an election officer with intent to kill him or do him great bodily harm, and the bullet hit and killed another whom defendant did not intend to injure, the crime was the same as if defendant had killed the officer shot at.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 23.]

12. SAME—PROMISCUOUS SHOOTING.

If, without aiming at any particular person, defendant unlawfully shot into a room where there were several persons, and one of them was killed, defendant was guilty of murder or manslaughter, according to the circumstances, regardless of his intention toward the person slain.

13. CRIMINAL LAW—REASONABLE DOUBT.

A reasonable doubt entitling an accused to an acquittal is not a mere fanciful, vague, or speculative doubt, but a reasonable, substantial

doubt, remaining in the minds of the jury after a careful consideration of all the evidence, and such a doubt as reasonable, fair-minded, and conscientious men would entertain under all the circumstances of the case.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1906-1922.]

John Bell was indicted for the murder of one Harvey Miller. Verdict of not guilty.

Argued before LORE, C. J., and SPRUANCE and GRUBB, JJ.

Herbert H. Ward, Atty. Gen., and Robert H. Richards, Deputy Atty. Gen., for the State. Daniel O. Hastings, for defendant.

SPRUANCE, J. (charging the jury). The indictment which you have been impaneled to try charges the prisoner John Bell with the murder of Harvey Miller on the 8th day of November last. During the present term you have heard much from the court as to the law of homicide, but it is necessary that we should now instruct you as to such parts of the law as appear to be applicable to this case.

Homicide is the killing of one human being by another. Felonious homicide is of three kinds: Murder of the first degree, murder of the second degree, and manslaughter. Malice is the essential ingredient of the crime of murder of both degrees. Without malice, there can be no murder either of the first or of the second degree. Malice is a condition of the mind or heart. As here used, this term is not restricted to spite or malevolence toward the particular person slain, but also includes that general malignity and reckless disregard of human life which proceed from a heart void of a just sense of social duty and fatally bent on mischief. Wherever the fatal act is done deliberately or without adequate cause, the law presumes that it was done with malice, and the burden is on the prisoner to show from the evidence, or by inference from the circumstances of the case, that the act was not done with malice.

Murder of the first degree is where the killing was done with express malice aforethought, or in perpetrating or attempting to perpetrate a crime punishable with death. Express malice aforethought is where one person kills another with a sedate, deliberate mind and formed design, which formed design may be manifested in many ways; as for instance, by lying in wait for the deceased, or by antecedent menaces or threats that disclose a purpose on the part of the prisoner to commit the act charged, or by former grudges, ill will, spite, hatred, or malevolence toward the deceased, or any other circumstances which disclose the purpose or intention of the accused toward his victim at the time when the crime was committed. The deliberate selection and use of a deadly weapon is a circumstance which, in the absence of satisfactory evidence to the contrary, indicates the existence in the mind of the person committing the act of a deliberate formed design to kill. All homi-

cides with a deadly weapon are presumed to be malicious until the contrary appears by the evidence, and the burden of proof to the contrary lies on the accused. Where the killing by a deadly weapon is admitted or proved, malice aforethought is presumed, in the absence of evidence to the contrary, and the burden of showing the contrary is on the accused, as the natural and probable consequences of the act are presumed by the law to have been intended by the person using a deadly weapon. If, when the slayer killed his victim, he deliberately intended so to do, the length of time that such intention existed is not material.

Murder in the second degree is where the killing was done with implied malice. Implied malice is an inference or conclusion of law from the facts found by the jury. Murder of the second degree is where there was no deliberate mind or formed design to take life or perpetrate a crime punishable with death, but where the killing was done without justification or excuse and without provocation, or without sufficient provocation to reduce the offense to manslaughter.

Manslaughter is where one person unlawfully kills another without malice. In order to reduce the crime to manslaughter, the provocation must be very great; so great as to produce such a transport of passion as to render the person for the time being deaf to the voice of reason. While murder proceeds from a wicked and depraved spirit and is characterized by malice, manslaughter results from no malignity, but from unpremeditated action and unreflecting passion. No looks or gestures, however insulting, no words, however opprobrious or offensive, can amount to a provocation sufficient to excuse or justify even a slight assault. Nor can a slight assault excuse the killing of an assailant with a deadly weapon, so as to reduce the offense from the grade of murder to that of manslaughter.

It appears from the undisputed evidence in this case, that shortly after the closing of the polls on the evening of the day of the general election, on the 8th day of November last, when the election officers were about to begin to count and tally the votes, a riotous mob, with force and violence, broke into a polling place in this city, known as 110 East Second street, for the avowed purpose of taking possession of the ballot box. The mob was composed of a large number of persons, some of whom were armed with pistols, and a number of shots were fired by them. It was the duty of the election officers to keep safely the ballot boxes, and to repel any attempt to capture them; and it was lawful for them to use such amount of force as was necessary for that purpose. The inspector did resist the assailants and finally repulsed them, and, in so doing, fired several shots. During the affray Harvey Miller, who was with or near the attacking party, was shot and killed, and the prisoner is now

charged with his murder. The prisoner admits that he took part in the attack, and that he fired one shot into the polling room, but he denies that he shot Miller. While all who participated in, or aided or abetted in, the said riotous attack upon the polling place, were guilty of a grave offense which merits and should receive severe punishment, the indictment against the prisoner is not for that offense.

There is but one count in the indictment, and that charges, in substance, that the prisoner fired the shot which killed Miller. This is a material allegation which must be proved to your satisfaction to warrant a conviction of the prisoner of any offense whatever. If upon mature consideration of the evidence, you shall not be able to determine who fired the shot which killed Miller; or if you shall determine that some other person than the prisoner fired said shot, even though such person was one of the prisoner's fellow riotors; or if you shall not be satisfied from the evidence, beyond a reasonable doubt, that said shot was fired by the prisoner—you should acquit him.

The allegation of the indictment that the prisoner held the pistol in his right hand when he fired the fatal shot is not material, and proof that he then held the pistol in his left hand would not be a material variance. If you shall be satisfied from the evidence that the prisoner unlawfully fired the shot which killed Miller, it will then be your duty to determine the degree of the offense, and for this purpose you should take into consideration the evidence and the admission of the prisoner that he took part in the riotous attack upon the polling place.

Where one unlawfully shoots a gun or pistol at one person and kills another, the crime is the same as if he had killed the person at whom he shot. If the prisoner shot at an election officer with intent to kill him or do him great bodily harm, and the ball hit and killed Miller, whom he did not intend to injure, the crime would be the same as if he had killed the officer. If, without aiming at any particular person, one unlawfully shoots into a room where there are several persons, and one or more of such persons is killed, the slayer is guilty of murder or manslaughter according to the circumstances, irrespective of his intention toward the particular person slain.

Where the testimony is conflicting, you should reconcile it if you can; but if you cannot do so, you should accept that part of it which you deem worthy of credit, and reject that which you deem unworthy of credit, having due regard to the intelligence or ignorance, and impartiality or bias, of the witnesses, and their opportunity to know the facts to which they have testified.

In every criminal case, the accused is presumed to be innocent, until his guilt is proved to the satisfaction of the jury be-

yond a reasonable doubt. If, after carefully and conscientiously considering and weighing all the evidence in the case, you should entertain a reasonable doubt of the guilt of the prisoner, that doubt should inure to his benefit, and you should acquit him. But such doubt must not be a mere fanciful, vague, or speculative doubt, but a reasonable substantial doubt, remaining in your minds after a careful consideration of all of the evidence, and such a doubt as reasonable, fair-minded, and conscientious men would entertain under all the facts and circumstances of the case.

Under this indictment, if the evidence shall so warrant you, you may find the prisoner guilty in the manner and form as he stands indicted; that is, guilty of murder in the first degree, or guilty of murder in the second degree, or guilty of manslaughter, or not guilty.

Verdict: Not guilty.

JONES et al. v. PURNELL.

(Superior Court of Delaware. Sussex. Oct. 9, 1905.)

1. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Under Rev. Code 1893, p. 798, c. 107, § 1, providing that in actions by or against administrators neither party shall be allowed to testify against the other as to any transaction with the deceased, a defendant, in an action by an administrator, is incompetent to testify to any transactions with decedent.

2. PARTNERSHIP—EXISTENCE—QUESTIONS FOR COURT AND JURY.

What is a partnership is a question for the court, but whether a partnership exists is a question of fact for the jury.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 185½.]

3. SAME—WHAT CONSTITUTES.

Where two or more persons engage in a business under an agreement, express or implied, to share its profits and losses, a partnership exists between them.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 15, 27.]

4. SAME—MANNER OF PROVING.

A partnership may be proved by direct evidence, or by evidence of the acts, conduct, and declarations of the alleged partners.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 64-81.]

5. SAME—PROOF AS BETWEEN PARTNERS.

A partnership, as between the alleged partners, must be shown by proof of the actual existence of the partnership.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 76.]

Suit by George F. Jones, administrator of Isaac N. Fooks, deceased, and another against Charles T. Purnell. Issues submitted to jury and answered.

The issues sent to the Superior Court by the chancellor in the above case are stated in the charge of the court.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Charles W. Whitley and Robert C. White, for plaintiffs. Charles F. Richards and Charles S. Richards, for defendant.

At the trial the defendant, in reply to a question asked him by his counsel, was proceeding to state certain conversations and transactions he had with Isaac N. Fooks in his lifetime relative to the alleged partnership. This was objected to by counsel for plaintiffs, on the ground that under the statute (Rev. Code 1893, p. 798, c. 107, § 1) the defendant could not testify to any conversations with or transactions by Fooks, he being now deceased and being a party to the suit through his administrator, and any judgment rendered against the plaintiffs in this case would affect the estate of the Fookses.

LORE, C. J. Under the statute, this defendant is not permitted to testify to any conversations or transactions with Mr. Fooks.

LORE, C. J. (charging the jury). The questions you are impaneled to try differ somewhat from ordinary suits that are brought before juries, where the parties originally come into this court and submit their differences to your adjudication, in this: that it is one where, in a case before the chancellor between the parties, the testimony as to certain questions of fact was so conflicting that he desires to have the information and the benefit of the verdict of a jury, and, in order to get that under the laws of this state, he sends what is termed an issue to be tried—in this case, by a jury of Sussex county. That issue contains two questions, which you are to answer by your verdict for his information and guidance.

The first of those questions is this: "Whether Isaac N. Fooks, Charles T. Purnell, and Alfred B. Robinson, under the name of Fooks, Purnell & Robinson, entered into a partnership for the purpose of buying and selling peaches and other fruit and produce at the railroad station at Georgetown, in Georgetown hundred, Sussex county, and state of Delaware, and any point or points at which they might conclude to operate for and during the fruit season of the year 1895." When you return your verdict, that question will be put to you, and you are bound to answer either "Yes" or "No"; that there was such a partnership formed as you are there asked to determine, or that there was not.

What constitutes a partnership—that is, the legal elements of a partnership—is a question of law for the court. Whether in fact a partnership existed between the parties is a question of fact for you. We will say to you, as a matter of law, that wherever two or more persons engage in a legal busi-

ness or occupation, under an agreement, either express or implied, to share the profits and the losses, that is what is ordinarily and broadly denominated a partnership. In *Plunkett v. Dillon*, 4 Houst. 396, we find it expressed in this language: "A partnership can be formed only, however, by a voluntary agreement, either express or implied, by two or more competent persons joining together their property, their labor, their skill and experience with one or more of them, in the transaction of business for their joint benefit and profit. It may be for a specific purpose, or confined even to a particular transaction. When the question of its existence arises between the alleged partners themselves, there must be a common interest and risk in it, and an agreement between them, either express or implied, reciprocally to participate in the losses as well as in the profits of the business." And it has been said in one of the judicial decisions of this state on this subject that it is this community of interest in sharing the profits and losses of the business which constitutes a complete partnership, as well between the parties themselves as in respect to strangers who deal with them as partners.

In order to answer this question in the affirmative, you must be satisfied from the preponderance of the evidence that these three persons did enter into a partnership, under the name of Fooks, Purnell & Robinson, to buy and sell peaches and other fruit and produce at the railroad station at Georgetown, in Georgetown hundred, Sussex county, and state of Delaware, and any point or points at which they might conclude to operate for and during the fruit season of the year 1895. A partnership may be proved between the parties, as well as with others, by evidence of the acts, dealings, conduct, admissions, and declarations of the parties themselves, as well as by direct proof in different lines. As between the parties, you must be satisfied by a preponderance of the proof of this fact, that a partnership actually did exist, and it differs where the parties contesting are partners, and where a third party is suing; for in the latter case, although the parties may not in fact be partners, yet they may so conduct themselves towards the third party as to make themselves liable. But between partners themselves, in order to establish a liability from one to the other, there must be an actual partnership proved, either directly or indirectly, by a preponderance of proof. So that, after considering all the evidence that you have had produced before you in this case, it is for you to say, in answer to that first question, either that there was or was not such a partnership.

The second question contained in the issue is "whether, if the said Isaac N. Fooks, Charles T. Purnell, and Alfred B. Robinson engaged together to buy and sell peaches

and other fruit and produce, as aforesaid, during the year 1895, such engagement was or was not limited to the purchase of two car loads." You must specifically answer this latter question, as well as the first one, according as the evidence may warrant you. In deciding this latter question, when you come to answer it as the evidence shall warrant, you will say either that it was limited, if there was an agreement to buy peaches, to two car loads, or that it was not so limited.

There are really no questions of contested law in this case. The law is clearly defined and laid down in our own decisions, and it is a question of fact for you to determine as to what your answer will be to the two questions propounded in this issue, which the court have already detailed to you. It is a question of fact for you to determine from the evidence. When you return with your verdict, these questions will be put to you in the form contained in the issue, and your answer to the first will be "Yes" or "No"—that they were or were not such partners; and to the second, that the agreement was confined to two car loads or was not so confined.

Verdict: As to the first query, "Yes." As to the second query, "No."

Appeal of MELONY.

(Supreme Court of Errors of Connecticut.
Nov. 7, 1905.)

1. DESCENT AND DISTRIBUTION — ADVANCEMENT—INTENTION.

Questions of advancements made by a decedent are always questions of intention.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, § 402.]

2. APPEAL—REVIEW OF FACTS—CONCLUSIVENESS OF FINDINGS.

Where there are no facts from which a conclusive legal presumption of an intention on the part of a decedent to make an advancement arises, and the question presented by the evidence is purely one of fact, the determination of the lower court is conclusive on the Supreme Court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3962.]

3. SAME—QUESTIONS REVIEWABLE—MATTERS NOT PRESENTED BELOW.

The question of the admissibility of evidence for a certain purpose is not before the Supreme Court for review, where the offer of the evidence in the trial court obviously indicated that it was made for another purpose.

4. DESCENT AND DISTRIBUTION — ADVANCEMENTS—CREATION FROM LOAN.

A loan made by a father to his son may not be converted by the father into an advancement without the consent and against the will of the son; but in order to effect such a change there must be a meeting of the minds between the father and the son such as to create a new contractual status.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, §§ 403, 410.]

Appeal from Superior Court, Windham County; William S. Case, Judge.

In the matter of the settlement of the estate of Norman Melony, deceased. From an order of the probate court allowing the amount purporting to be due on certain promissory notes of William H. Melony as advancements to him by deceased, said William H. Melony appealed to the superior court, where the order was reversed, and the administrator appeals to the Supreme Court of Errors. Affirmed.

Charles E. Searls, for appellant. Theodore M. Maltbie and Huber Clark, for appellee.

PRENTICE, J. From April, 1869, to November, 1877, the plaintiff's intestate, Norman Melony, let his son, William H. Melony, the present appellant from the action of the probate court, have sums of money aggregating \$2,550. Notes were taken therefor, which were twice consolidated and the accumulations of interest included. These notes were secured by mortgages of real estate. In May, 1878, the real estate thus mortgaged was conveyed by the son to the father to be managed and sold by the latter for the son's benefit. In August, 1882, a sale was made and \$3,000 over and above a first mortgage thereon realized. This amount the father indorsed upon the son's note, whose face amount purported to be \$4,020, leaving a balance unpaid. No accounting for the use, income, and profits of the property, for the period during which the father held it was ever made, although requested by the son. September, 1885, the son became indebted to the father in the sum of \$100, as the result of a business transaction, and borrowed the further sum of \$50. For this indebtedness, the son gave his 30-day bank note. This note was never presented for payment, and no request was ever made by the father for the payment of the same, or of any balance due upon the prior note, or of any interest upon either of said notes, nor was any attempt made to collect either of said notes, or anything due thereon, from the dates they were given down to the day of Norman Melony's death in 1896. The two notes last described, the first bearing the indorsement referred to, were found among the deceased's papers, and the attempt is now made to charge the amounts thereof against William's distributive share of his father's estate as advancements made to him. The court of probate passed an order favorable to this contention. The superior court reversed and set aside that order.

The superior court found that the original transactions were all loans. We understand the reasons of appeal as presenting the claim that in so doing and in not holding upon the evidence that they were advancements there was error in law. "Questions of advancements are always questions of intention." *Johnson v. Belden*, 20 Conn. 322; *Meeker v. Meeker*, 16 Conn. 383; *Hart v. Chase*, 46 Conn. 207. In this case, there are no facts from which a conclusive legal presumption of an intention to create an advancement arises.

The question presented was purely one of fact, which the court has conclusively determined.

Upon the trial the appellee offered evidence of declarations made by Norman Melony to a third person some years subsequent to the original transactions between the father and son "as tending to show an intention on the father's part to treat the loans referred to as advancements to be deducted from the son's share of his estate." This offer was accompanied by an admission "that no such intention was then or afterwards communicated to William, and that he was never a party to any such attempted change in the character of the original transactions." The evidence was thereupon, upon objection, excluded. The reasons of appeal impute error to this ruling. In the brief of counsel in support of this contention it is urged that the proffered evidence was admissible for the purpose of showing (1) Norman Melony's original intention to make advancements and not loans; and (2) a subsequent intention on his part to change what had been loans into advancements. The first of these claims evidently was not presented to the trial court. The appellee, while he did not in his answer to the reasons of appeal admit that the original transactions were loans, did set up a change subsequently effectuated by the father, whereby what had been indebtedness became converted into an advancement. The offer of the rejected evidence was plainly made in support of this allegation. The terms of the offer and accompanying admission, when read in the light of both what was said and what was not said, leave little room for doubt upon this point. The offer denominates the original transactions loans, and the admission unmistakably indicates that the appellee conceived himself engaged in an attempt to establish a change in a once existing status. This was the understanding, and we think the rightful understanding of the trial court. Had the appellee desired the benefit of the evidence for the purpose now indicated, he should have made that desire more plainly manifest. We have no occasion therefore to discuss the question of the admissibility of the evidence had it been offered for that purpose.

If the rejected evidence was theoretically admissible to establish a change of relation, either by virtue of section 705 of the General Statutes, or as admissions against interest, it was nevertheless immaterial and irrelevant, and therefore properly excluded. The offer made assumes the unsound proposition that a loan may by the creditor be converted into an advancement without the consent, past or present, and against the will of the debtor. The relation of debtor and creditor is a contractual one involving the meeting of two minds. That relation may not in the nature of things be changed at the will of one only. The minds of the contracting parties must again meet at some time in order to create a

new contractual status. The will of neither party can be overridden by the other. We are familiar with cases where loans are turned into gifts, and it has been held that advancements may be. *Sherwood v. Smith*, 28 Conn. 516; *Chapman v. Allen*, 56 Conn. 152, 14 Atl. 780. These cases, however, involve no exception to the general principle stated, that there must be a concurrence of minds. In all of them the new status is necessarily a better one for the donee, and his assent to the change of relation always appears at some point of time. His claim is the one which is always urged, never repudiated. By this very action, assent enters into the situation and dissent disappears from it. The unwilling donee has not yet been discovered. When he is, it will be time to inquire whether even he can be compelled to take what he does not want and has never agreed to accept. This case presents the bald attempt to force upon a man at the will of another a contractual relation with that other which is injurious to his interests, to which he has never given his consent, express or implied, and against which he rebels. The law sanctions no such proceeding.

There is no error.

DUESSEL et al. v. PROCH et al.

(Supreme Court of Errors of Connecticut.
Nov. 7, 1905.)

1. RELIGIOUS SOCIETIES — CHANGE — INCORPORATION — REAL ESTATE — CONVEYANCE — USE.

Where certain land was conveyed to trustees of a certain Lutheran church, following the Unaltered Augsburg Confession of Plymouth, and to their successors or assigns, trustees of such church, "to them and their own proper use and behoof," such church being congregational in government, having a mere optional affiliation with national associations or synods of such churches, the use of the property by a corporation subsequently organized from the old congregation, following the general Lutheran belief and the Unaltered Augsburg Confession of Plymouth, etc., was authorized.

2. SAME—CONSTITUTION—VOTING.

Where the constitution of a religious corporation, adopted by the unanimous consent of the members of the society, provided that controversies should be determined by a majority rule, the fact that it also provided that the management of its affairs should be vested in the "whole congregation" did not require the assent of every member to every vote; such provision being construed merely to refer to action at a meeting which all the members were entitled and had an opportunity to attend.

3. SAME—DEPOSED PASTOR—CHURCH BUILDING.

Where a church corporation had power to depose its pastor by a majority vote, and was subject to congregational government and under no compulsory affiliation with any superior body in the church, a pastor so deposed was not entitled to maintain a suit in equity to prevent the use of the church building by any other pastor than himself, and to secure its use for services held by him.

4. ACTION — EQUITIES ARISING AFTER COMMENCEMENT.

In a suit in equity, facts occurring subsequent to the filing of the bill and prior to final hearing may be pleaded and proved to establish the equities at the time of the hearing.

Appeal from Superior Court, Hartford County; Alberto T. Roraback, Judge.

Bill by Otto Duessel and others against Ludwig Proch and others for an injunction and a decree invalidating a certificate of incorporation of a certain Lutheran church. From a decree in favor of defendants, plaintiffs appeal. Affirmed.

An appeal was originally taken to this court at the May term, 1905. When reached for argument, the court suggested that, unless additional parties were joined, no judgment could be pronounced that would conclude all those legally interested in the controversy. That appeal was accordingly withdrawn, the judgment of the superior court opened by consent, new parties added in that court, and a new judgment rendered in June, 1905, similar in effect to the original one.

Noble E. Pierce, for appellants. Epaphroditus Peck and Frederick A. Scott, for appellees.

BALDWIN, J. Otto Duessel, alleging himself to be pastor of a Lutheran church in Plymouth, and sundry members of that church and of the congregation by which it is supported, have brought this action against the congregation, the other members of the church and congregation and the trustees who hold the title to the land occupied by the church building. The finding of the trial court establishes these facts: The congregation, which is named the "German Evangelical Lutheran St. Paul's Congregation, Unaltered Augsburg Confession," was organized in 1892. German Evangelical Lutheran churches are congregational in polity. There are several different national associations or synods of such churches, but their powers over any particular local church are advisory and similar to those of associations and conferences of Congregational churches. There is no church tribunal with jurisdiction to determine the questions in controversy in this action, or any matters of faith or church organization. St. Paul's church and congregation has never affiliated itself with any of the national associations or synods. In 1896 it had as pastor one Jentsch, who was affiliated with one of these associations known as the "General Council." While under his charge, the congregation adopted a constitution. This provided that it should be maintained as a branch of some neighboring congregation, calling the pastor of that to be its pastor, and that "the call extinguishes whenever the congregation dissolves itself, whenever the pastor leaves the German Lutheran church, whenever the pastor publicly stirs up strife and must be deposed,

or whenever the pastor voluntarily gives up his office to the congregation." In 1896 Mr. Jentsch resigned the pastorate, and the plaintiff Duessel, who was affiliated with the national association known as the "Missouri Synod," and pastor of a neighboring church in Bristol, began to serve in his place. No formal call to him was voted, nor was he ever installed; but by continued services, payment of salary, and the common understanding of all parties he became, and in 1904 was, pastor of the church, as well as of the Bristol church. German Evangelical Lutheran churches of the General Council and of the Missouri Synod alike hold to the canonical books of the Old and New Testament as the Word of God, the Unaltered Augsburg Confession as the standard of faith and theology, and the symbolical books, so called, including the Apology of the Augsburg Confession, the Smalcald Articles, the Catechisms of Luther, and the Formula of Concord, as true and orthodox expositions of that faith. Theologians and ministers of the General Council and of the Missouri Synod differ in some points of interpretation of the above-named standards; the theological teaching of the Missouri Synod as to the doctrines of conversion, predestination, and election differing from those of the General Council. These differences are deemed vital to orthodoxy by theologians of the Missouri Synod.

In 1901 a building lot in Plymouth was conveyed to three persons, described as trustees of the German Evangelical Lutheran St. Paul's Church, Unaltered Augsburg Confession of Plymouth, "and to their successors or assigns, trustees of said church," habendum "to them and their own proper use and behoof." Thereafter members of the congregation and others subscribed funds with which and with the proceeds of a mortgage a church building was erected on said lot. No purpose was expressed in the contributing or raising of the money nor any trust created in connection therewith devoting said church building to the uses of either the Missouri Synod or any other general organization of the Lutheran Church. In 1902, having voted to abandon its existing constitution, the congregation adopted one framed, at its request, by Mr. Duessel. This provided that the right to call a pastor should belong to the whole congregation, and that a call should never be given for a fixed period nor to a service to be terminated at the will of the congregation, so long as the minister teaches "the Word of God pure and lives a Christian life, till God Himself will call him to another field. But if the minister or teacher will teach false doctrines or leads an immoral conduct, and will stay therein in spite of all admonition of the congregation and Synod, then he shall be discharged." Another article declared that "the congregation, as a whole, has the sovereignty of the interior or exterior management of all af-

fairs," and a third that "to pass a resolution requires a majority of the members present." Early in 1904 the congregation voted to discharge the defendant Proch, who was then its collector, from that office, and Mr. Duessel in a sermon remarked in words understood to refer to Mr. Proch: "There is in this congregation a worse than Judas Iscariot. Judas carried the bag, and this man also has the money. Judas went out and hanged himself. What will this man do?" At about the same time Mr. Duessel excluded one of the congregation from partaking of the communion, because he refused to make a public declaration of repentance for having been married by a Baptist minister, who was the pastor of the bride; such a marriage being forbidden by the rules and practice of the Missouri Synod. Mr. Duessel also declined one Sunday to step into the house of one of the congregation, at the request of the latter, and baptize his infant child, who was lying at the point of death. The house stood next to the church. The child had received lay baptism, which Mr. Duessel thought sufficient. The Lutheran Church regards lay baptism as valid, but has provided a special ceremony for its confirmation by a pastor. Both the parents of the child were very anxious that it should receive clerical baptism, but it died without it. These incidents caused much bitterness of feeling towards Mr. Duessel on the part of many in the congregation.

Mr. Duessel frequently declared to the congregation, in the spring of 1904, that he desired to relinquish the pastorate, and advised the choice of one who would be pastor of that congregation only, but insisted that his successor should be affiliated with the Missouri Synod. On July 20, 1904, the congregation abolished the article regarding calling a pastor contained in the constitution adopted in 1896. It is a well-settled rule of the Lutheran denomination that a pastor cannot be dismissed except by his own consent or for persistent unchristian life, or upon the ground that he willingly teaches false doctrine. On August 8, 1904, a certificate was filed with the Secretary of State, stating that on August 2d the members of the church of the German Evangelical Lutheran St. Paul's Congregation of Plymouth had by a two-thirds vote, pursuant to Gen. St. 1902, c. 222, organized as a corporation under the name of the German Evangelical Lutheran St. Paul's Congregation of Terryville, Conn., to take the place of the society known as the "German Evangelical Lutheran St. Paul's Church, Unaltered Augsburg Confession." This was signed by the clerk and treasurer of the congregation and one of the trustees. Between 1902 and 1905 several votes were passed at what were claimed by the defendants to be legal meetings of the congregation, repealing the constitution of 1902, readopting the previous constitution, dismissing Mr. Duessel from the pastorate, declaring that

the church would not have a pastor belonging to the Missouri Synod, and resolving to call a pastor belonging to the General Council. The plaintiffs claimed that these meetings were not legally warned or conducted. In January, 1905, pending this action, at the suggestion of the trial judge, a meeting of the congregation was held under a proper call, and by a vote of 29 to 20 all those votes were formally ratified. The fact of such ratification was set up and admitted in supplemental pleadings. The defendants, prior to the commencement of the suit, had forbidden Mr. Duessel to enter the pulpit of the church again, and had caused the locks on the church edifice to be changed, so that a key which he possessed would no longer admit him.

Under these circumstances the superior court properly dismissed the complaint. It did not present a case of the use of a trust estate for purposes foreign to the trust. The only trust to which the church edifice was subject was a trust for the benefit of St. Paul's Church, described as a "German Evangelical Lutheran Church adhering to the Unaltered Augsburg Confession." The acts complained of have been sanctioned by the congregation which supports that church and is entitled to speak in its behalf. It is not disputed that the church still is and always has been a German Evangelical Lutheran church adhering to the unaltered Augsburg Confession. It was entitled to affiliate itself with any synod or council of the denomination, and to change its affiliation from time to time, should it so desire, by a vote of a majority of its members. *Lutheran Congregation v. St. Michael's Evangelical Church*, 48 Pa. 20. Being congregational in polity, this was one of its inherent rights. It did less than this in voting, pending the action, to call a pastor belonging to the General Council, and not to call one belonging to the Missouri Synod. Unanimous consent to such action, even if the congregation were an unincorporated association, was unnecessary for two reasons: First, because it worked no change in the purposes of the organization; and, secondly, because the constitution of 1902 expressly provided for majority rule. That constitution, so far as appears, was adopted by unanimous consent, and is alleged in the complaint to be a binding instrument which governs the rights of the parties to the cause. The claim that, as the management of its affairs was by this constitution vested in the "whole" congregation, the assent of every member to every vote was required is plainly untenable. This phrase referred to action at a meeting which all the members were entitled and had an opportunity to attend.

If Mr. Duessel be now the pastor of St. Paul's Church, he is not in this proceeding suing for his salary as such. So far as he is concerned, no question of property right is presented. He and his coplaintiffs have

appealed for judicial aid to prevent certain acts and to compel the performance of certain other acts in accordance with what they assert to be equitable duties. His exclusion from the pulpit, for reasons previously stated, violated no trust attaching to the church edifice. So far as concerns the claim in the complaint that the paper purporting to be a certificate of corporate organization be declared void, it was not disposed of by the judgment of the superior court, and the omission to pass upon it has not been made a cause of exception by either party. There is thus left to support the complaint nothing but the equity which it sets up to prevent the use of the church building under the ministry of any other pastor than Mr. Duessel, and to secure its use for services held under his charge. To grant such relief would be to use the compelling power of a court of equity to dispossess the majority of the church and turn the church building over to a minority. It would be to subject a church, which by the polity of the denomination to which it belongs is self-governing, to the overruling authority of that court, as to the mode of conducting its religious services. It would, since the plaintiffs could not prevail without showing the continued existence of the pastoral relation between Mr. Duessel and the congregation, be to preclude a court of law from subsequently determining that question with the aid of a jury, should he bring suit for salary during the time which has elapsed since his exclusion from the pulpit. *Cox v. McClure*, 73 Conn. 486, 47 Atl. 757.

Upon the evidence before it on the trial of this cause the superior court was justified in view of these considerations in declining to rule, as requested by the plaintiffs, that Mr. Duessel was still the lawful pastor of the church, and, in the exercise of its judicial discretion, in refusing the injunction claimed in the complaint. If he be its lawful pastor, it would be not in furtherance of equity, but against it, to interpose for his restoration to the pulpit of a Congregational church the majority of whose members have by repeated votes, under such circumstances as are set out in the finding, manifested their unwillingness to continue under his ministry, or that of any clergyman who is affiliated with the synod to which he belongs and the theological views of which he deems of such controlling importance. The plaintiffs objected by demurrer to the sufficiency of the supplemental pleadings which set up the doings of the meeting of 1905, and later, after pleading over, to the competency of the evidence offered in their support. These objections were all properly overruled. In equitable proceedings, any events occurring after their institution may be pleaded and proved which go to show where the equity of the case lies at the time of the final hearing. *Woodbridge v. Pratt & Whitney Co.*, 69 Conn. 304, 334, 37 Atl. 688.

There is no error.

GANS SALVAGE CO. v. BYRNES.

(Court of Appeals of Maryland. Nov. 23, 1905.)

1. APPEAL—REVIEW—LAW OF THE CASE.

The concession of a prayer for a ruling of law by the opposite party makes the legal proposition announced therein the law of the case, whether such proposition is right or wrong.

2. MASTER AND SERVANT—INJURY TO SERVANT—FALLING SHAFT—RES IPSA LOQUITUR.

Where, after the destruction of a building by fire, a brick vault shaft, extending from the cellar to the top story, some 35 feet high, was left standing, but appeared to be solid and not dangerous until it suddenly fell without warning, several days after the fire, and injured plaintiff, a member of a salvage crew working in the debris, the mere falling of the wall was not of itself evidence of negligence on the part of plaintiff's master in charge of the work of salvage.

3. SAME—SAFE PLACE TO WORK.

Where plaintiff, a member of a salvage gang engaged in working in the debris of a building destroyed by fire, was injured by the falling of a vault shaft, and there was no evidence that the shaft was dangerous, unsafe, or liable to fall prior to the time it did fall, defendant was not guilty of negligence in failing to provide plaintiff with a safe place in which to work because such shaft was not razed.

4. SAME—ASSUMED RISK.

The condition of the vault shaft being equally obvious to plaintiff and defendant, plaintiff by voluntarily working in the debris surrounding the same assumed the risk of injury therefrom.

Appeal from Court of Common Pleas; George M. Sharp, Judge.

Action by Robert Byrnes, to the use of James Higgins, against the Gans Salvage Company. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Carroll T. Bond and George Weems Williams, for appellant. James Fluegel, for appellee.

McSHERRY, C. J. The appellant is a body corporate engaged in the prosecution of a general salvage business. After the great fire, which caused a vast destruction of property in Baltimore City, on February 7 and 8, 1904, the appellant contracted to remove a quantity of canned goods from the cellar of a building which, before the fire had consumed it, had stood on South street. The plaintiff, who is the appellee on this record, was one of a number of men employed by the appellant to do the work of removal. Several walls or parts of walls of the building were standing after the fire was extinguished and at the time the salvage work was commenced. In the declaration it is alleged that "the building was dangerous and unsafe to work in," and that the "dangerous condition of said building was known to the defendant, but unknown to the plaintiff; that the plaintiff while using due care and caution in the said building was, by the negligence of the defendant in

thus having him work in the said dangerous and unsafe premises, * * * seriously and permanently injured * * * by the collapsing of a wall and other parts of the said building." The case went to trial before a jury upon the issue joined on the plea of not guilty, and resulted in a verdict against the defendant. From the judgment entered on that verdict, the pending appeal was taken. During the progress of the trial five exceptions were reserved. Four of them relate to rulings concerning the admissibility of evidence and the fifth brings up for review the action of the trial court on the prayers submitted for instructions to the jury.

As this is a suit by a servant against the master to recover damages for a personal injury sustained by the former in the course of his employment, negligence is the gravamen of the action. The negligence averred in the declaration consisted, if it existed at all, not merely in a failure of the appellant to exercise ordinary care to provide its servant, the appellee, with a reasonably safe place in which to perform the labor he had been employed to do, but in deliberately putting him to work in the ruins of a building known by the appellant, but unknown by the appellee, to be in a dangerous condition. The alleged negligence relied on to sustain a recovery was therefore not simply an omission to discharge some duty which the master owed to the servant, but involved an affirmative act of commission in the assignment of the servant to a situation which the master knew and the servant did not know to be perilous and insecure. Under the declaration it was incumbent on the appellee to prove by legally sufficient evidence, first, not only that some of the walls of the building in question, which were left standing after the fire, were in a dangerous condition and liable to fall, but that the identical wall, which by falling caused the injury complained of, was also in that same condition when the appellee was placed or retained at work in close proximity to it; secondly, that the appellant had knowledge of the dangerous condition of the wall which by collapsing injured the appellee, and that it, the appellant, possessed that knowledge prior to the occurrence of the accident; and, thirdly, that the appellee was ignorant of the danger, and by the exercise of proper prudence and care could not have discovered it before the wall fell upon him.

A brief outline of the facts appearing in the bills of exception must be given before turning to a consideration of the legal principles which underlie and will control the final decision of the several questions presented to this court by the record. The building, in the cellar of which the appellee and others were working when the accident happened, had been completely destroyed by the fire. Some partition walls and a brick vault, which extended from the cellar

to the top story, were left standing. All of the wood material had been consumed by the flames. The fragments of the walls still standing and the brick vault were not supported by any of the timbers which had formerly tied the outer and the inner walls together. The ruins showed merely a heap of debris, a few fragments of walls, and the remnant of the brick vault. This vault was built of brick, and was about four or five feet square, with openings into it on each floor. These openings in the face of the vault had iron doors attached. Thus the tenants of each floor were provided with a vault for the protection of their books and papers. After the fire this vault stood for a height of 30 or 35 feet, and presented the appearance of a square stack or chimney with iron doors opening into it at each floor. The cellar of the house was divided up into arched compartments, and in these the cases of canned goods were closely packed. In order to get them out after the fire, it was necessary to dig through the arched tops of the compartments, and this was done by the appellee and the other laborers engaged in the work of removing the goods. The work of removing the cases had progressed for several days under these conditions. There was a foreman who had charge of the hands, and both the foreman and the hands worked under a man named Ratinger, who had full charge of and supervision over the salvage work for the appellant company. Several days before the accident happened James W. McCuen, an inspector of furnaces, who was a subordinate of Building Inspector Preston, went to the premises where the appellee and the other employes of the salvage company were working, and told the foreman "to take care of the walls as they were coming down, as it was dangerous for the men to go further down without taking care of them, and he said he would." This message was delivered to the foreman, because Building Inspector Preston, who had not seen the condition of the walls and who had no personal knowledge concerning them, had been informed "that there were some men working in a cellar on South street, where it was dangerous." The building inspector directed McCuen "to go down there and notify them to take care of the walls if they continued working there," and McCuen without making any minute or even casual inspection of the walls, because, as he says, he did not have time to do so, merely communicated to the foreman the warning sent by Mr. Preston. The foreman thereafter repeated to Ratinger the message delivered to McCuen. After McCuen had left, and after Ratinger had learned from the foreman what the building inspector had directed to be done, one of the walls was thrown down under the supervision of Ratinger, but the vault stack was allowed to remain. There is not a particle of evidence in the record to show that the vault

walls, the four walls forming the four or five feet square vault stack, were unsafe or dangerous or even impaired. On the contrary, three witnesses examined on behalf of the appellee, they being the foreman and two of the 18 men employed by the appellant, distinctly and emphatically say they thought the vault walls perfectly safe because they were solid. McCuen did not tell the foreman that the vault walls were unsafe. He did not go into the cellar; he made no special inspection of the vault walls; he is not a builder, but a furnace inspector; and he testified that he thought in his judgment "if they would attempt to clear that débris out without protecting the walls, before they could get away from them, they would weaken and would fall down." He further testified: "The way it looked to me to clear the débris out that was there without first protecting the wall, it might possible fall after the débris was away. I wasn't making any particular inspection of that particular work. I was going around delivering messages to them who had charge of the gangs pulling down different walls." On March 7, 1904, it rained and no work was done by the men on the premises in question, though they had worked there several days the previous week. On the following day, March 8th, work was resumed, and whilst the appellee and other laborers were in the cellar, and whilst Ratinger was standing within a few feet of the vault, the vault walls fell and injured the appellee and another workman. There is nothing in the record to show what caused the vault walls to fall. To all appearances they were solid and safe, and, though McCuen, when testifying in the case a year after the accident had happened, stated that in his judgment, "when they got all this débris and stuff out of the cellar, it seemed to me it would so weaken the wall, there being nothing to support it, it would fall," he did not venture to say how much of the débris would have to be removed before the walls would give away, nor was any evidence whatever adduced to show that the removal of the débris actually caused the walls to fall. This vault stack, as has been remarked, extended up the height of the building, and the upper half toppled over and fell inwards, leaving about a story and a half of it undisturbed. It certainly could not have been foreseen by any one that the upper part of this quadrilateral brick structure would separate from the lower part about midway of its entire elevation, and that the top portion would fall in the way it did.

It is a general rule, not, however, without very important exceptions, at least one of which will be alluded to later on, that it is the duty of the master to exercise ordinary care to provide a reasonably safe place in which the servant may perform his services. *Eckhardt v. Lazaretto Co.*, 90

Md. 192, 44 Atl. 1017; *Armour v. Hahn*, 111 U. S. 818, 4 Sup. Ct. 433, 28 L. Ed. 440. A failure of the master to do this, in the instances where it is his duty to do it, is negligence, and, if an injury to the servant results therefrom and is the direct consequence thereof, an action will lie. A master is not an insurer of the servant's safety. *Wood v. Helges*, 83 Md. 269, 34 Atl. 872. His liability, if any liability attaches at all, depends altogether upon a breach by him of some imposed duty. Laying aside for the moment all the exceptions to the general rule requiring the master to exercise ordinary care to provide a reasonably safe place for the servant to work, what evidence is there in this case of a breach of the duty imposed by the rule? The concession by the appellee of the appellant's fifth prayer, which instructed the jury that the mere falling of the wall by itself was not sufficient evidence of negligence on the part of the appellant, excluded any inference of negligence from the naked act which caused the injury. *Serio v. Murphy*, 99 Md. 558, 58 Atl. 435. The concession of the prayer made the legal proposition which it announced the law of the case, whether that proposition was right or wrong. *Con. Ry. Co. v. O'Dea*, 91 Md. 510, 46 Atl. 1000. But the legal proposition contained in the conceded prayer was right. *South Balto. Car Works v. Schaefer*, 96 Md. 105, 53 Atl. 665, 94 Am. St. Rep. 560. The case at bar is distinguishable from *Treusch v. Kamke*, 63 Md. 278. That was an action to recover damages for an injury sustained by the fall of a house which had been so carelessly and negligently erected, and with such insufficient and improper materials, that in consequence it suddenly fell, and in falling injured the plaintiff. It was held that "the fact of the fall itself was at least prima facie evidence of improper construction, and entitled the plaintiff to call upon the defendant to explain it to the satisfaction of the jury." Here, however, we have no inquiry concerning a faulty or negligent construction. A house properly and carefully built, with sufficient and suitable material, would not suddenly fall, and the owner who built it, if it did so fall, would be bound to explain the cause of the collapse, if he wished to free himself from the consequences resulting from conditions for the existence of which he was himself responsible. The case in 63 Md. was not one between master and servant. In the case now before us no question as to improper or negligent construction is concerned, no suit is pending against the builder of the vault walls, and no inference as to the dangerous condition of the walls can be drawn from the mere fact that the walls fell, unless it be assumed that they could not have fallen had they not been in an unsafe and dangerous condition. But to assume that would be to assume as true the precise thing to be proved, and that assumption, when adopted, would

then be substituted for evidence tending to establish the fact to be proved. Such a process would permit negligence to be inferred from the simple happening of the accident. In a case like this that cannot be done.

Something else, then, in addition to the mere falling of the vault walls, must be found in the record before it can be held that there was evidence tending to prove that the place where the appellee was employed to work was dangerous. One wall of the building had been torn down by city employes, and after the warning message delivered by McCuen had been communicated to Ratinger by the foreman another wall was demolished by the appellant's workmen; but neither the city employes nor the appellant's workmen disturbed the vault walls. If the vault walls had presented any indications of being in a dangerous condition at the time the other walls were leveled, it is scarcely probable that they would have been allowed to remain standing. Indeed, it is reasonably certain they would also have been destroyed or strengthened. They appeared to be solid and secure, and the fact that they formed a square, compact column which had stood firmly for a month after the fire, seemingly unaffected by it, and without exhibiting any signs of weakness whatever, was calculated to induce a belief that it was not necessarily or even probably hazardous to remove the cases of canned goods from the cellar before either razing the walls or shoring them up. The evidence does not show what caused the vault walls to fall. The conjecture of McCuen that, if the débris were removed, the walls would fall is, at best, a mere speculation, because there is nothing in the record to show either that the débris had been removed, or, if removed, to what extent it had been taken away, or what causative relation existed, if any, between its removal and the collapse of the walls. Nor does the testimony of Emerich, the district chief of the fire department, tend to show that the walls were dangerous before the accident happened. He was summoned to the scene after the walls fell, and he knew nothing concerning them prior to that time. He aided in rescuing the men imprisoned by the débris. He found it necessary then to shore up the portions of the walls left standing before he would permit his subordinates to extricate the appellee. But the condition of the remnants of the walls after the upper half of them had toppled over gave no indication of their condition before their collapse. The physical appearance and the actual status had wholly and completely changed.

But, if it be assumed, or for the moment be conceded, that there was some legally sufficient evidence tending to prove that the walls which fell, and which by falling caused the injury complained of, were in

a dangerous and unsafe condition when the appellee was put to or retained at work in the cellar, then it is certain, in the absence of any proof as to what caused them to fall, that the means of knowing the danger and the peril incident to the removal of the canned goods were as open and obvious to the appellee as to the appellant. It will not do to say that the information imparted by McCuen to the foreman, and by the latter to Ratinger, apprised the appellant of a hazard and a risk of which the appellee was ignorant; because, in the last analysis, all that McCuen definitely said to the foreman was to repeat Mr. Preston's instructions "to all people cleaning out débris" that they should "take care of all dangerous walls before getting the débris out." The dangerous walls were not pointed out, and Ratinger, the foreman, and the 18 men at work under the latter each had precisely the same opportunity to see, and to judge as to, the peril involved in doing the work in which they were engaged, under the then existing surroundings. An employé who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from causes open or obvious, the dangerous character of which he had an opportunity to ascertain. *B. & O. R. R. Co. v. Stricker*, 51 Md. 47, 34 Am. Rep. 291. One who remains in a service which necessarily exposes him to hazardous risks from causes open and obvious, the dangerous character of which he knew or had an opportunity of knowing, must be considered as having assumed such risks, and, if injured in consequence thereof, has no claim against the employer. *Penn. R. R. Co. v. Wachter*, 60 Md. 395; *Yates v. McCullough Iron Co.*, 69 Md. 370, 16 Atl. 280. This doctrine, firmly grounded in the law of this state, in the law of England, and of probably every state in the federal Union, though usually stated as a general rule, constitutes, in reality, an exception to or qualification of the broad principle which requires the employer to use ordinary care to provide a reasonably safe place in which the servant may perform his work. It may be taken, then, as a postulate, that a servant, who, on entering into a contract of employment, knows of the dangers of the premises or place of work, or by the use of ordinary care could see and understand them, assumes the risks which arise therefrom. 20 Am. & Eng. Ency. L. 114. Knowledge by the servant of defects in appliances has been held in legal contemplation to carry with it knowledge of the risk and danger incident to the use of such appliances; and in such instances the law imputes and presumes knowledge of the risk and danger, and will not allow the injured workman to aver or prove that he had no actual knowledge thereof. *Yates v. McCullough Iron Co.*, supra.

Whatever danger or hazard there was in

performing the work which the appellee had been employed by the appellant to do was the danger or risk that unsupported and isolated walls, which had been subjected but recently before to the effects of the intense heat produced by a mighty conflagration, would, without warning and without the intervention of other forces than those set in motion by the laws of nature, suddenly collapse and fall, and in falling occasion the precise injury which actually befell the appellee. He saw the denuded walls rising up to a height of 35 feet above the place where he was working—they confronted him as he stepped upon the premises—and he had aided in throwing down one of the walls because it was more threatening than the others, and he must have known that a gale of wind or a vibration produced by the dynamiting of other walls in proximate sections of a burnt district, or a jar resulting from the fall of other walls in the vicinity, or the absorption of rain by the exposed mortar might cause the vault walls to totter and fall. He must have known all this, because we are bound to assume he was a man of average intelligence, as there is "no proof that he was stupid or dull of intellect, that any of his senses were impaired, or that he was not possessed of ordinary powers of observation." *Yates v. McCullough Iron Co.*, supra. If the place was really dangerous, the appellee must have known that it was, because the means of knowledge were as open and obvious to him as to the master, and by voluntarily working there he assumed the risks of being injured by causes which were open and obvious, and he cannot hold the employer responsible in damages, if those open and obvious causes produced the injury. If, on the other hand, the place where he worked was not a hazardous one, if the walls which in falling injured him were not in a dangerous condition, then there was no breach by the master of the duty owed to the servant to use ordinary care to provide a reasonably safe place in which the servant might perform his service; and, there being no breach of that duty, no action can be maintained, even though, in consequence of an accident resulting from some unexplained cause, an injury has been sustained. In either event, upon either hypothesis, there was no adequate cause of action. Such being the situation, the eighth prayer presented by the appellant withdrawing the case from the consideration of the jury ought to have been granted. That prayer sought to take the case from the jury because of a failure on the part of the appellee to adduce any legally sufficient evidence to show that the appellant had violated any of the duties it owed to the appellee. Holding as we do, for the reasons that have been given, that the prayer should have been granted, it becomes unnecessary to allude to or discuss the in-

structions which were given or the questions which are raised by the other bills of exception. As no recovery can be had, the judgment will be reversed without awarding a new trial.

Judgment reversed, with costs above and below, without awarding a new trial.

NEEDY v. MIDDLEKAUFF.

(Court of Appeals of Maryland. Nov. 16, 1905.)

1. LANDLORD AND TENANT — LEASE — CONSTRUCTION—QUESTION FOR COURT.

The question as to the meaning of the description of premises in a lease is for the court.

2. SAME—CONSTRUCTION.

A lease of the "north side" of a building, "consisting of a storeroom and five rooms on the second and third floors of the same, together with access to the same through the hallway and porch," did not give an exclusive right to a bathroom situate on the north side and accessible from a porch, and always used by all occupants of the building.

Appeal from Circuit Court, Washington County; M. L. Keedy, Judge.

Suit by Mary V. Middlekauff against William H. H. Needy for an injunction to restrain defendant from excluding complainant and others from the use of certain premises. From a decree for complainant, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Albert J. Long and Roger T. Edmunds, for appellant. J. Augustine Mason, for appellee.

PAGE, J. The appellee, being the owner of a house situate in the city of Hagerstown, leased the north side of the same in April, 1901, to the appellant for a term of 4½ years. The controversy in this case, depending upon the construction of the terms of the lease, is whether the appellant has an exclusive right to the possession and use of a bathroom in the said building, located on the north side thereof. The appellant, so claiming, has taken exclusive possession of the bathroom, and has locked the door, so that, as it is alleged, the appellee and her tenants have been and still are deprived of the use and enjoyment of the same. The appellee has filed her bill for an injunction to restrain the appellant from so excluding the appellee and her tenants from the proper use of the room. The court below granted the injunction, and refused, on motion of the appellant, to dissolve the same; and from this decree the appellant has appealed.

By her answer the appellant admits the following allegations to be true: First. That the building contains two large storerooms on the first floor—one on the north, the other on the south, side—the front door entrance being in the middle. In and by which the second and third floors on the north and

south sides are reached by stairways leading from floor to floor. Second. That for many years past the appellee has and does still occupy rooms in the building, and has rented out rooms on the second and third floors to other persons for housekeeping and lodging, and to be occupied as apartments usually are. Third. That for years past there has been a bathroom at the rear end of the north side of the building on the second floor, built upon and outside of the rear end or west wall of the north side of the building, but not a part thereof, accessible from the second and third floors over a porch running along the south side of the northern part of the building; and that it has been always used by the occupants of the buildings until shut off by the appellant. It was also proved that Judge Stake, who, for several years before his death in 1902, occupied the two rooms on the south side of the building on the second floor thereof, about the year 1896 erected a private bathroom in the rear of and adjoining his back room, and the entrance to this room could be had only through his rooms, and not through any hall or other room. This bathroom was never used by any one other than the tenants of these rooms. In April, 1901, the lease of the appellee to the appellant was executed. It demises to the appellant, for the term of 4½ years, "the north side of the building known as No. ——— South Potomac street, in Hagerstown, Md., consisting of a storeroom and five rooms on the second and third floors of the same, together with access to the same through the hall and porch; the storeroom to be used as a jewelry store and sewing machine store, and the second and third floors as a dwelling house to tenants satisfactory to the" appellee. There are no specific words showing that the lease was intended to include the bathroom on the north side of the house; and unless it be held that the general description of the north side of the building has that effect, and unless such intention can be gathered from the lease, there can exist no rights that the appellant is entitled to enforce in this proceeding. Whether it is so included is a matter for the determination of the court, construing the words employed in the light of all the circumstances existing and known to the parties at the time the instrument was executed. *Roberts v. Bonaparte*, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689.

The facts of the case show that the storeroom and the five rooms on the second and third floors were a part of a building in which were other apartments maintained by the appellee for her own use and that of her tenants. There are but two bathrooms in the building—the one, the subject of this controversy, on the north side of the house, which was reached from a hallway over the porch; the other, on the south side. The north bathroom, the proof shows, has always been used by all the occupants of the house up to the time when the appellant set up his

claim to the exclusive use of it in January, 1903. The bathroom on the south side, it seems, has been devoted, since its construction, to the occupant of the room on the second floor of the south side. At the time of the execution of the lease, these two rooms on the second floor of the south side were occupied by Judge Stake. Some years prior thereto he had constructed it, and had always had the exclusive control of it. It was located immediately adjoining his apartments, and could be reached only through his room, and was absolutely inaccessible from any other part of the house. It had never been used by other tenants, and could not be without passing through the room with which it communicated. Under these circumstances, which were well known to both parties, it would require plain and unmistakable words to justify the court in holding that it was intended to deprive the other occupants of the house of the reasonable and proper enjoyment of the only bathroom available for them.

It is insisted on the part of the appellant that the general description is broad enough to include the north side of the building, and that the entire north side of the building, and every right and privilege essential to the enjoyment of the property, passed with it. The words "the north side of the building" are undoubtedly sufficient, if they stood alone and unrestricted by other words, to include the entire north side. But the parties have seen fit, to further say, "consisting of a storeroom and five rooms on the second and third floors of the same, together with access to the same through the hallway and porch; the storeroom to be used as a jewelry store and sewing machine store, and the second and third floors as a dwelling house to tenants satisfactory to the party of the first part." If these words be regarded as restrictive of the general description, then the demise is limited to the six rooms particularly mentioned, with right of access thereto through the hallway and porch. The court below was of the opinion that the principles laid down in the case of *Mims v. Armstrong*, 31 Md. 87, 1 Am. Rep. 22, are applicable to the facts of this case, and with this we agree. The broad proposition was then laid down as follows: Where, in a deed, "general words are followed by special clause, the latter will restrain and limit their operation." In the case just cited the general description was, "all and singular his goods and chattels," etc., "and property of every kind and nature of and belonging to him" etc.; and the words were added, "which are particularly and fully enumerated in the schedule hereto annexed." The court said "in the grant before us the general descriptive words employed would certainly be sufficient, in the absence of any restrictive clause, to pass all the debtor's property; but we must suppose that the grantor has a purpose in the more particular description which he thought proper to give

in the schedule, and that purpose was what he declares to be a more particular and full description of the property conveyed. To withhold this meaning from the words of reference to the schedule, is to deny to them all import whatever and that is justified by no rule of construction whatever."

It is also contended that the exclusive use of the bathroom passed to the appellant as essential to the use and enjoyment of the rooms. It may be that it would be comfortable and even desirable to have an exclusive right, but a bathroom can be enjoyed by one without substantially interfering with the reasonable use of it by another or others.

Finding no error in the decree, it will be affirmed.

Decree affirmed.

ROBERTS v. ROBERTS et al.

LONDON et al. v. SHRIVER'S ESTATE.
(Court of Appeals of Maryland. Nov. 16, 1905.)

1. WILLS—CONSTRUCTION—VESTED OR CONTINGENT ESTATE.

Testator, after making certain bequests, devised and bequeathed all the rest and residue of his estate to his wife "for and during the term of her natural life, in trust for the use and benefit of herself and our children." He then authorized his wife to sell any part of the real estate which she thought proper, "the proceeds of such sale or sales to be invested upon the trusts of this will," and also to lease the real estate. He further gave her authority to use so much of the principal as might be required, "if it shall be necessary for the support of herself and her children, or for their education and advancement in life, all of which I confide to her discretion." Then followed this clause: "I devise and bequeath all my estate, real and personal, remaining at the death of my wife, to my children by my said wife, share and share alike, absolutely in fee simple. The child or children of a deceased child shall stand in its or their parent's place and stead, and receive and have the share and interest its and their parent would have been entitled to if living." *Held*, that the estates in remainder vested at the death of the testator.

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS—VALIDITY—DESCRIPTION OF PROPERTY.

Under Code Pub. Gen. Laws, art. 21, § 2, providing that all deeds conveying real estate shall contain a description of the real estate sufficient to identify the same with reasonable certainty, a deed of trust for the benefit of creditors is valid where it assigns "all and singular the real or personal estate, wheresoever situate, and all other property, of every nature, kind, and description, wheresoever situate, belonging to" the grantors.

3. SAME—ASSIGNMENT BY HUSBAND AND WIFE—PROPERTY INCLUDED.

A deed of trust for the benefit of creditors, executed by a husband and wife, recited that the grantors, being "indebted unto sundry persons and corporations in several sums of money and being unable to pay the same in full, have proposed and agreed to assign all our property . . . in trust for the benefit of our creditors, as hereinafter mentioned," and directed trustees to apply the residue in payment of the several debts due to the creditors aforesaid "of us . . . and without any preference or priority of payment," and, after the payment of debts, costs, etc., "then in trust to apply the surplus, if any, unto the said" grantors. *Held*,

that they conveyed, not only the property owned by them jointly, but also the individual property of the wife.

4. DEEDS—CONSTRUCTION—PROPERTY CONVEYED.

A deed conveying all the property owned by the grantor includes a vested remainder in property.

Appeals from Circuit Court, Carroll County, in Equity; Wm. H. Thomas, Judge.

Margaret L. Roberts and Margaret A. Landon and another presented exceptions to audits in a distribution of the estate of Augustus Shriver, deceased. From a judgment rejecting their respective claims, they appeal. Affirmed in part, and reversed in part.

Argued before McSHERRY, C. J., and BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

George Weems Williams and Frank Gosnell, for appellants Landon and Whyte. John Milton Reifsnider and Charles E. Fink, for appellant Roberts. Francis Neal Parke, for trustees.

BOYD, J. There are two appeals in this record—one of which was taken by Margaret L. Roberts from that portion of a decretal order of the court below which determined that her interest in her father's estate passed to Messrs. Roberts and Reindollar, trustees, under a deed of trust made by her and her husband; and the other by Margaret A. Landon and Clymer Whyte, administrators, which involves the construction of the will of Augustus Shriver. The property of the testator having been converted into cash, the questions arising were presented by exceptions to audits. We will first consider the appeal last mentioned.

1. Augustus Shriver was married twice, and died on the 28th of July, 1872, leaving surviving him a widow, two children by his first wife, and eleven by his second. After bequeathing \$100 to each of the two children by his first wife, and providing for payment of his debts and funeral expenses, he devised and bequeathed all the rest and residue of his estate to his wife "for and during the term of her natural life, in trust for the use and benefit of herself and our children," expressing his confidence that she would manage it as would be most advantageous to herself and children. He then authorized his wife to sell any part of the real estate which she thought proper, "the proceeds of such sale or sales to be invested upon the trusts of this will," and also to lease the real estate. He further gave her authority to use so much of the principal as may be required, "if it shall be necessary for the support of herself and our children, or for their education or advancement in life [all of which I confide to her discretion]," but recommended that she should not sell the farm on which he resided, unless absolutely necessary. Then follows this clause: "I devise and bequeath all my estate, real and personal, remaining at the death of my said wife, to my children

by my said wife, share and share alike, absolutely in fee simple; the child or children of a deceased child shall stand in its or their parent's place and stead, and receive and have the share and interest its and their parent would have been entitled to if living." He appointed his wife guardian of their children, until they were 21 years of age, and sole executrix of his will. Mrs. Shriver, the widow, died May 1, 1902, having disposed of a part of the corpus of the estate, in pursuance of the power conferred upon her. Two of the eleven children died after their father, and before their mother—Alice E., who married George R. Gehr and left four children, and Carrie, who married Edwin Reese, leaving her husband and twin boys surviving her. Those twins died a few days after their mother. Edwin Reese, the husband of Carrie, married Margaret A. Adams after the death of his two children, and died November 22, 1887, leaving all his property of every character and description to his wife, Margaret. She afterwards married Thomas D. Landon. Letters of administration were granted to Clymer Whyte on the estates of the two Reese children. The statement of these facts will suggest the claim of Mrs. Landon; that is to say, that the two Reese children took their mother's interest in the estate of Augustus Shriver, and, having died intestate, their interest went to Edwin Reese, their father, as heir at law and next of kin, who by his last will and testament left them to his widow, who is now Mrs. Landon, one of the appellants—the children of the testator, according to Mrs. Landon's contention, having taken vested remainders in his estate.

It will be observed that the testator left his entire estate (after payment of debts, funeral expenses, and legacies) to his wife "for and during the term of her natural life, in trust for the use and benefit of herself and our children." The legal title was therefore vested in her, and she and their children were the cestui que trustent. The widow and 11 children held the equitable estate, and were the beneficial owners during the widow's life. If the testator had simply left his estate to his widow and their 11 children during the life of the former, and at her death to the 11 children, there could be no doubt that the children would have taken vested, not contingent, remainders in the estate. It is thoroughly settled in this state that "it makes no difference, as to the vesting, whether the legal estate be devised to trustees who are required to convey according to the directions of the will, or whether the interest is provided to take effect without the intervention of trustees, nor that the trust provides for the accumulation of income until the period of payment or distribution arrives." *Taylor v. Mosher*, 29 Md. 451, *Ellicott v. Ellicott*, 90 Md. 829, 45 Atl. 183, 48 L. R. A. 58. The power given Mrs. Shriver to sell the real estate and invest the proceeds upon the trusts of the will was certainly not sufficient to

show an intention to create a contingent, instead of a vested, remainder, nor was the power to lease it. Nor can it be said that the power to use so much of the principal as was necessary for the support of herself and children, or for their education or advancement in life, necessarily made these contingent remainders. Although that power was expressly confided to her discretion, he did not give the estate to her to do what she chose with it, for her own benefit, but she could only use it for the purposes named; that is to say, for the support of herself and the remaindermen, or for the education or advancement in life of the latter. In *Benesch v. Clark*, 49 Md. 497, it was said that, where an estate is given to a person generally or indefinitely with the power of disposition, such gift carries the entire estate, and the devisee or legatee takes the property absolutely; but when the property is given to one expressly for life, and there be annexed to such gift a power of disposition of the remainder, the rule is different, and the first taker takes only an estate for life, with the power annexed. That has been approved in *Foss v. Scarf*, 55 Md. 310, *Russell v. Werntz*, 88 Md. 214, 44 Atl. 219, and other cases. It is clear from those decisions and authorities cited in them that there may be a valid devise to one for life with a power of disposition, which will not affect the remainder over, unless the power is exercised as authorized; and as to any part of the estate upon which the power is not exercised the remainder is unaffected. It is equally clear that the clause in the will last quoted does not of itself make these remainders contingent. The testator, having given his widow a power of disposition, naturally and properly spoke of his estate "remaining at the death of my said wife," but that would not convert what would otherwise have been a vested into a contingent remainder. The remainder may vest subject to the power, and the uncertainty as to whether the power will be exercised as to all or part of the estate does not make it a contingent remainder. As was well said in *Ducker v. Burnham*, 146 Ill. 10, 34 N. E. 560, 37 Am. St. Rep. 135: "If the remainder is contingent because it may consist of what remains after the exercise of the power of sale and use conferred upon the life tenant, then, in case the life tenant should fail to sell any of the estate, or to exhaust for her own use any of the principal thereof, the remainder would still be contingent, because it would consist of what remains after paying off the charges created upon the property by the directions to pay the debts and the bequests. To hold that a remainder is contingent, because it cannot be known how much will be left until the debts and funeral expenses and other charges are paid, would make every remainder given by will a contingent one. But it is well settled that a devise to a person after the payment of debts and legacies is not con-

tingent until such debts and legacies are paid, but confers an immediately vested estate. *Scofield v. Olcott* (Ill.) 11 N. E. 351. In such cases the remainder vests subject to the payment of debts and legacies, and subject to the exercise of the power to use and sell, but liable to be divested as to so much of the estate as may be disposed of for the payment of debts and legacies, and by the execution of the power. The remainder is not made contingent by uncertainty as to the amount of the estate remaining undisposed of at the expiration of the life estate, but by uncertainty as to the persons who are to take." See, also, *Heliman v. Heliman*, 129 Ind. 59, 28 N. E. 310, *Woodman v. Woodman*, 89 Me. 128, 35 Atl. 1037, *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23, and other cases cited in 24 Am. & Eng. Ency. of Law, 389.

It is not necessary to go beyond our own decisions to find authorities on the subject, but the above quotation from *Ducker v. Burnham* seems to be very apt. In *Taylor v. Mosher*, *supra*, the testator, after making certain devises, bequests, and dispositions in favor of his wife and servants, devised his estate not otherwise specifically disposed of to trustees. He directed them to pay certain annuities, and then to invest "the clear income of my estate, if anything remain after the application annually or otherwise of the several sums of money hereinbefore charged thereon," and provided: "Upon the death of my son William, I will and desire that a distribution of my estate be made among all my grandchildren, to wit, the children of my late son, James Mosher, and the children of my aforesaid son, William, provided any child he shall leave. All my said grandchildren to take per capita." The court said: "It is doing no violence to this language or to any rule of law to hold that the children of James, who were in esse at the date of the will and of the testator's death, took vested interests, liable to be divested pro tanto for the purpose of letting in for a share any child that William, who then had none, might, by possibility, have and leave surviving him. The fact that an estate is liable to be divested in whole or in part upon a contingent, does not make it a contingent estate." See, also, *Dulany v. Middleton*, 72 Md. 67, 19 Atl. 146, for a similar decision. It would seem, then, to be clear that the reference to the estate "remaining at the death of my said wife" did not make the remainder contingent.

But it is argued, and was so held by the learned judge below, that the rest of this clause shows that the interests left to the children were contingent—that their right to participate in the distribution of his estate was contingent upon their surviving the testator's wife. But we cannot see how that clause indicates an intention on the part of the testator to create contingent remainders. The wife might in her lifetime have given one child more than she gave another,

and that child might have survived her mother, while the other who received very little might have died, without issue, before her mother. It would seem to be more in accordance with the intention of the testator and more natural for him to vest the remainder in his children at his death. We have seen what confidence he had in his wife's judgment and sense of justice, and he was willing for her to decide what was necessary to be expended for the support of herself and children, and for their education or advancement in life. He did not direct that any charge should be made against them for sums thus advanced in excess of what was given others; and, even if the remainder be treated as contingent, those thus favored might survive their mother, and receive a share of the remaining property. The equality of distribution does not in any way depend upon whether the remainders were contingent or vested. It is a familiar but important rule that the law favors the early vesting of estates, and it is likewise a well-recognized rule of construction that, in doubtful cases, the interest should be deemed to be vested in the first instance, rather than contingent, unless the instrument under consideration does not admit of such construction. It cannot be doubted that Mr. Shriver did not intend to die intestate as to any part of his estate. He prefaced his will with the statement: "Subject to the payment of my debts and funeral expenses, I dispose of all my estate in manner and form following." Yet it was quite possible, although not probable, that all of the children by his second wife might have died without leaving issue before his wife died, and in that event there would have been an intestacy as to the remainder, if it must be regarded as contingent. The children provided for during the lifetime of his wife ("our children"; that is, those of his second wife and himself) were the same who were referred to in the clause under consideration ("my children by my said wife"). Mrs. Reese was one of those children, and left two children who would admittedly have been entitled to their mother's share if they had survived their grandmother. The testator did not leave the remainder to such of his children as survived his wife, or to such children and grandchildren (children of a deceased child) as survived her. He did make provision in that clause for the share and interest of a deceased child who had died leaving a child or children, but made none as to the share of a deceased child who died without leaving issue. The provision that "the child or children of a deceased child shall stand in its or their parent's place and stead, and receive and have the share and interest its and their parent would have been entitled to if living" is not of controlling effect on this question, by reason of the use of the words "receive and have." That was speaking of the period

of distribution, and whether vested or contingent, the remaindermen were not entitled to "receive and have" their shares until that time arrived. The trustee was to receive, have, and hold the estate until then, excepting such part as she previously disposed of under the other provisions of the will. Without further discussion of this clause, it is sufficient to say that we do not find anything in it which necessarily indicates an intention on the part of the testator to create contingent remainders, and it will be well to now see what this court has said about the effect of similar or analogous provisions in other wills.

In *Meyer v. Elsler*, 29 Md. 28, the testator after making certain bequests and legacies, gave all the rest of his estate to his wife and another in trust, to hold the same with surplus or unappropriated revenue or income arising from the same, etc. He then authorized them to receive all rents, issues, interest, and profits arising or growing out of the property, and from the amounts so received to pay insurance, taxes, and repairs, and out of the residue to pay his wife for her use and benefit one-third part, and directed the balance of the income to be invested in Baltimore City stock to be held in trust with the other property, until the end of 20 years after his death, or until his youngest child should arrive at the age of 20 years, and then the whole, including principal and interest, to be divided and paid over as follows: To his wife one-third part "and the other two-third parts to all my children, share and share alike, * * * and in the event of the death of either of my said children, leaving lawful issue, such issue to have and receive the share or portion that the deceased would have been entitled to if living." He then provided for a similar distribution of the third left to his wife, in case she "shall be dead at the time of such division." Elizabeth, one of the children, after the testator's death, married John Rose and subsequently died before the time had arrived for a division of the estate, intestate, and without issue. The widow also died before that time. This court held that the children took a vested interest in the property devised to them, and that John Rose, as husband of Elizabeth, was entitled under the statute then in force to a life estate in her share of the realty, and absolutely to her share of the personalty. That case is strikingly similar to the one under consideration, and has been fully approved in *Taylor v. Mosher*, supra, Small v. Small, 90 Md. 568, 45 Atl. 190, and *Daughters v. Lynch*, 93 Md. 305, 48 Atl. 1055, and other cases.

In *Cox v. Handy*, 78 Md. 108, 27 Atl. 227, 501, the testator left certain real and personal property to his wife for life, and his will contained this clause: "It is my will that after the death of my wife, Mary Ann Handy, all the property devised to her for life * * * shall be sold if necessary for equal

partition, or if the same can be accomplished without a sale, shall be divided amongst my children, share and share alike; the child or children of any deceased child to take the portion to which the parent, if living, would have been entitled." This court held "that a share of the property vested in each of the children of Wm. W. Handy, who survived him, but if any such child should leave children at his death, his share was divested in favor of his children; and that it was not divested by the death of the child in the lifetime of the tenant for life without leaving children," and in the opinion delivered after a motion for reargument, it was said: "A share of the property vested in each of the children who were living at the time of his death, and if any child died before the period of distribution, leaving children, they were substituted in his place; his share however was not divested if he left no children, but it went to his representatives." That case has been recently approved in *Hoover v. Smith*, 96 Md. 393, 54 Atl. 102, and in *Re Rogers' Trust Estate*, 97 Md. 674, 55 Atl. 679.

The cases we have cited would seem to conclusively show that these remainders were vested and not contingent. This opinion has already reached such length as to make it undesirable to attempt to discuss in detail the authorities relied on by the appellees, such as *Demill v. Reid*, 71 Md. 175, 17 Atl. 1014; *Larmour v. Rich*, Id. 369, 18 Atl. 702; *Small v. Small*, 90 Md. 550, 45 Atl. 190. In the latter, Judge Fowler referred to *Larmour v. Rich*, and said: "The distinction is clearly drawn between that class of cases where the estate or interest vests at the death of a testator, because of an absence of any expressed intention that it vest later, and those where the testator by his will fixes a more distant period for the vesting." It is sufficient to say that, in our opinion, the testator did not by his will express or indicate an intention that the remainder of his estate should not vest until after his wife's death. In the very recent case of *Ridgely v. Ridgely* (to be found in 59 Atl. 731, but not yet reported in the Maryland Reports), many of the cases affecting this question are cited. *Engel v. Geiger*, 65 Md. 539, 5 Atl. 249, *Small v. Small*, and *Larmour v. Rich*, are there included in the class of cases where gifts were made for life and then over to survivors, in which cases the period of survivorship is generally referred to the period of distribution, and not the death of the testator. There is no reference to survivorship in this will. In *Daughters v. Lynch*, supra, we repeated what had been said in *Taylor v. Mosher*, that "estates will be held to be vested wherever it can fairly be done without doing violence to the language of the will, and, to make them contingent, there must be plain expression to that effect, or such intent must be so plainly inferable from the terms used as to leave no room for con-

struction." We are therefore of the opinion that the court erred in rejecting the claims of Margaret A. Landon and Clymer Whyte, administrator, for the shares claimed by them respectively—the one being for this interest in the real property, and the other for that in the personalty distributed.

2. This brings us to the consideration of the appeal of Margaret L. Roberts. Having held that the children of Mr. and Mrs. Shriver took vested estates, it will not be necessary to determine whether a deed of trust such as that made by Mr. and Mrs. Roberts to Messrs. Reindollar and Roberts, trustees, would include a contingent remainder. The appellant contends that the deed of trust did not pass the interest of Mrs. Roberts for several reasons which we will briefly refer to.

(a) It is claimed for her that it does not contain a description of the real estate sufficient to identify it with reasonable certainty, as provided in section 9 of article 21 of Code Pub. Gen. Laws. The description in the deed of trust is "all and singular the real and personal estate, wheresoever situate, * * * and all other property of every nature, kind, and description and wheresoever situate [except so much thereof as is exempt from execution] of us the said" William and Margaret. It is difficult to understand how it would be possible to identify property intended to be conveyed more thoroughly than is done by that description. The intention manifested on the face of the deed was to convey and assign all of their property of every nature, kind, and description. If they had undertaken to specify it, some might have been omitted, and to show on the face of the deed that they intended to make an assignment of all property, it would have been necessary to have added some such clause as the one that was inserted. This court decided in *Maughlin v. Tyler*, 47 Md. 545, and other cases, that a deed of trust for the benefit of creditors, creating preferences and exacting releases, is void, unless it appears on its face to convey all the property of the debtor. It is true this deed does not create preferences or exact releases, but if the position of the appellant be correct as to the effect of this statute, it would be difficult to ever comply with the requirements of the law as announced in *Maughlin v. Tyler*. If a grantor intends to convey part of his property, of course he must describe it specifically, but if he intends to convey all of it and uses such language as is in this deed, who could be misled or in doubt as to what he conveyed? The object of section 9 is to require sufficient notice to the public and certainty as to what is conveyed. As well might it be required of a testator to specify his property in detail in a residuary clause in his will as to require a debtor making an assignment for the benefit of his creditors to do so. This statute has never been construed to require a schedule or list of the grantor's property to be set

out in such a deed, and so far as we are aware it is the universal custom throughout the state to use terms similar to those in this deed, when it is intended to make a general assignment of all the debtor's property. In *Carey's Forms of Precedents*, p. 371, a very similar description of property is given for such a deed of trust, and there have been many cases in this court where such descriptions were given, and never questioned. The case of *Farquharson v. Elchelberger*, 15 Md. 63, is conclusive of the question. It is said by the appellant that as it was decided prior to Acts 1856, p. 235, c. 154, § 24, which is now the section of the Code above mentioned, the effect of the statute was to change that decision. But that was "An act to simplify and abridge the rules and forms of conveyances," and if such a description was valid before the rules and forms were simplified, surely it is now. In our opinion, the statute does not in any wise invalidate this instrument.

(b) It is further contended on behalf of Mrs. Roberts that the deed of trust only conveyed the joint estates of her husband and herself—that she united in the deed simply to convey her potential right of dower. We find nothing in the deed that sustains that contention. It recites that they are "indebted unto sundry persons and corporations in several sums of money, and, being unable to pay the same in full, have proposed and agreed to assign all our property * * * in trust for the benefit of our creditors, as hereinafter mentioned." It then assigns the property as we have stated, and after giving the trustees authority to convert it into money, and providing for costs, etc., directs them to apply the residue of said moneys in payment of the several debts due to the creditors aforesaid of us, the said William Jesse Roberts and Margaret L. Roberts, his wife, *pari passu*, and without any preference or priority of payment," and after the payment of debts, costs, expenses, and commissions, "then in trust to apply the surplus (if any) unto the said William Jesse Roberts and Margaret L. Roberts," etc. It seems clear to us, therefore, that Mr. and Mrs. Roberts not only conveyed and assigned any property owned by them jointly, but all they owned individually. Whether or not she owed any individual debts which are entitled to be paid we have no means of knowing, and we do not intend to determine how the money realized from her father's estate is to be distributed by the trustees. That can be disposed of in the proceeding in which they make distribution.

(c) After having determined that the interests of the children of Mr. Shriver under his will were vested remainders, we do not deem it necessary to discuss at length the question as to whether Mrs. Roberts' interest passed by the deed of trust as we think it did. A vested remainder can be devised, mortgaged, or conveyed. It also is liable to ex-

ecution by a judgment creditor. *Armiger v. Reitz*, 91 Md. 334, 46 Atl. 990. We are of the opinion, therefore, that Mrs. Roberts' interest should be distributed to the trustees named in the deed of trust, and it can then be determined what creditors are entitled to it. As the court below so decided, although on a different ground, as to Mrs. Roberts' interest that part of the decretal order will be affirmed, but as we do not agree with the court as to the interest that would have gone to Carrie Reese, and is now claimed by Margaret A. Landon, and Clymer Whyte, administrator of Augustus Shriver Reese, and of William Reigart Reese, the portion of the order appealed from by them will be reversed. Of course we do not mean to disturb the portions of the decretal order not appealed from.

Decretal order affirmed in part, and reversed in part—the costs in No. 18 (office docket) to be paid by the appellant in that case, including one-half of the cost of transmitting and printing the record, and the costs in No. 19 (office docket) to be paid out of the estate of Augustus Shriver, including the other half of cost of transmitting and printing the record (one-half by the trustees, and the other by the receiver)—and cause remanded for further proceedings in accordance with this opinion.

BARKER et al. v. BARKER et al.
(Supreme Court of New Hampshire. Strafford.
Oct. 3, 1905.)

1. TRUSTS—REDUCING NUMBER OF TRUSTEES.

Under Pub. St. 1901, c. 205, § 1, giving the superior court full equitable powers in all cases of trust, such court has power to cause the number of trustees to be reduced, where it is shown to be necessary for the effectual performance of the trust that there should be a change in the number of trustees, because that fixed by the creator is excessive.

2. SAME—REMOVAL OF TRUSTEE.

Where it is necessary for the effectual performance of a trust that the number of trustees be reduced, it is no ground for objecting to the removal of a particular trustee that he will thereby be deprived of the opportunity of passing on the question whether he has complied with the condition imposed by the creator of the trust as to sobriety and good conduct, on which installments of the gift to him are predicated.

Exceptions from Superior Court; Wallace and Peaslee, Judges.

Petition by Hiram H. Barker and another for the appointment of trustees to fill vacancies. Charles B. Barker filed an answer, admitting the vacancies and alleging that the number of trustees should be reduced to one, and praying the appointment of one suitable person and the removal of the other trustees. From an order granting the prayer of the answer, petitioners bring exception. Exceptions overruled.

Petition praying for the appointment of trustees to fill vacancies caused by the resig-

nation of four of the seven members previously appointed upon the board of trustees created by the will of Hiram Barker, which is printed at length in *Edgerly v. Barker*, 66 N. H. 434, 31 Atl. 900, 28 L. R. A. 323. Charles B. Barker, one of the defendants and a member of the board of trustees, filed an answer admitting the existence of the vacancies in the board, but denying that there was any occasion for filling them. He offered to resign his trust, alleged that the number of trustees should be reduced to one in order to preserve the estate for the benefit of the parties interested therein, and prayed the appointment of one suitable person to execute the trust. It was ordered that the trustees then acting be removed, and that a single trustee be appointed in their stead, and the plaintiffs excepted.

Alfred S. Hayes and William S. Bangs, for plaintiffs. Streeter & Hollis, for Charles B. Barker. Elmer J. Smart, for Clara B. Berry. George E. Cochrane, guardian, pro se.

BINGHAM, J. We have here an estate which the testator understood, when he made his will, was worth \$800,000, and which in the early years of the trust produced a net income of \$20,000. In a period of 18 years it has shrunk, from one cause or another, including payments to trustees and appropriations to beneficiaries, to about \$200,000, and now yields an income of less than \$5,000, after deducting taxes and incidental expenses, but not including trustees' fees, miscellaneous expenses of management, and necessary repairs. The testator provided in his will for a board of six trustees, and that his son Hiram should be added to the number upon his complying with certain standards of sobriety and habits of living for a specified period. For the greater part of 10 or 11 years prior to January 20, 1904, the trust was managed by seven trustees, and the sum paid annually for their services was \$4,500 and expenses incurred in holding meetings of the board. The resignations of the four trustees who were not of the Barker family, having been previously tendered, were then accepted. Since that time the petitioners and the defendant Charles B. Barker have managed the trust. The petitioners ask for the appointment of four trustees to fill the vacancies. The defendant objects to the granting of the request, and asks that the present trustees be removed, and that a single trustee be appointed to execute the trust. The latter request was granted in the superior court, subject to the petitioners' exception. In addition to the estate having been greatly diminished during the existence of the trust, it is found that the only way to prevent its further dissipation is to provide for its administration by a single trustee; that the petitioners persist in attempting to make appropriations to beneficiaries that will in a comparatively

short time exhaust the property; that they are not able to agree with the defendant as to the management of the estate and the sums to be appropriated to beneficiaries; that their further continuance as trustees is opposed to the best interests of the estate and the other beneficiaries; that competent trustees cannot be procured to serve with the Barker trustees for \$500 a year, or any reasonable fee; that it is impossible to procure competent trustees to act for a less sum than \$500 a year; that if a board of seven is maintained and such payments are made the beneficiaries will be practically deprived of the net income of the property and the principal fund will ultimately be exhausted; and that in order to carry out the principal intention of the testator, namely, to provide for the support and maintenance of Hiram and his wife and Clara Barker Berry and to preserve the bulk of the estate for the grandchildren, it is necessary that the Barker family no longer continue as trustees.

As we understand the case, the order of removal includes a finding that the present trustees are unsuitable to continue in the management of the trust. Such a finding is not inconsistent with the special findings above enumerated. This being so, and it being found that the only way to prevent the further dissipation of the estate is to provide for administering it by a single trustee, the question presented is whether under these circumstances the superior court, in the exercise of its equity powers, could legally remove the present trustees and make the order reducing the number from seven to one. The petitioners concede that the superior court has full equity powers in all cases of trusts (Pub. St. 1901, c. 205, § 1; Walker v. Cheever, 35 N. H. 339; Wells v. Pierce, 27 N. H. 503), but contend that the order of the court in this instance is not within the limits of those powers, and is unauthorized and illegal from the fact that it was the intention of the testator that seven trustees, one of whom was to be his son, should manage the trust, and that to remove the present board, of which the son is a member, and reduce the number to one, is in contravention of this known and expressed intent. The defendant admits that, as a rule, in such matters the wish of the creator of the trust, when ascertained, is to be followed, but contends that the rule is subject to the qualification that when it is shown to be necessary for the effectual performance of the trust that there should be a change in the number, because that fixed by the creator of the trust is excessive or insufficient, a court of equity has power to cause the number to be reduced or increased to meet the necessities of the case, and that, if any or all of the trustees are unsuitable, it can order their removal, always being governed by a sound judicial discretion. The latter view meets our approval. It cannot be doubted but that the superior court, as a court of equity, has the power to remove trustees who become

unsuitable for the execution of a trust. Under such circumstances power of removal is also conferred by statute upon the probate court. Pub. St. 1901, c. 198, § 8. In this particular the jurisdiction of the two courts is concurrent. Bowditch v. Banuelos, 1 Gray, 220, 228, 229. It is the duty of a court of competent jurisdiction, upon the institution of proper proceedings before it and its being made to appear that trustees appointed to execute a trust are unsuitable, to remove them. Adams v. Adams, 64 N. H. 224, 9 Atl. 100. Trustees whose relations to their co-trustees or the beneficiaries are such as to interfere with the proper management of the estate may be regarded as unsuitable and removed. Wilson v. Wilson, 145 Mass. 490, 14 N. E. 521, 1 Am. St. Rep. 477; Disbrow v. Disbrow, 46 App. Div. 111, 61 N. Y. Supp. 614; Loring's Trustee's Handbook, 20. An instance of this is when trustees unreasonably disagree with their co-trustees in matters involving their joint discretion. Swale v. Swale, 22 Beav. 584; Stott v. Lord, 31 L. J. Ch. 391; Loring's Trustee's Handbook, 47. And, while a court of equity is reluctant to change the number of trustees from that designated by the creator of the trust, yet it seems to be in accordance with reason and authority that it may do so when, by reason of changed conditions in the estate, the number designated by the creator has become excessive or insufficient, and it is necessary to reduce or increase the number in order to effectuate the execution of the trust. Inhabitants of Anson, Pet'rs, 85 Me. 79, 88, 89, 26 Atl. 996; Force v. Force (N. J. Ch.) 57 Atl. 973; Austin v. Austin, 18 Neb. 306, 309, 22 N. W. 116; Birch v. Cropper, 2 De G. & Sm. 255; In re Dickinson's Trusts, 1 Jur. N. S. 724; Sitwell v. Heron, 14 Jur. 848; In re Chetwynd's Settlement [1902] 1 Ch. 692; Letterstedt v. Broers, 9 App. Cas. 371; In re New [1901] 2 Ch. 534; Lewin, Tr. (11th Ed.) 803; 2 Beach Tr. § 387; 2 Sto. Eq. Jur. § 1287; 3 Pom. Eq. Jur. (3d Ed.) §§ 1086, 1087; 28 Am. & Eng. Enc. Law (2d Ed.) 970. In Edgerly v. Barker, 66 N. H. 434, 452, 31 Atl. 900, 28 L. R. A. 328, the court, in construing the will, said: "A dominant idea of the residuary clause and of the whole will is that the testator's grandchildren shall have the bulk of his estate. Not less dominant or less manifest is his determination that C. and H. shall not have it. * * * In his mind the main point evidently was the extent to which he disinherited C. and H. and put their children in their places. * * * After years of observation and reflection his unchanged judgment was that the welfare of his issue required an absolute provision for the comfort of C. and H. during their lives, a conditional appropriation of \$30,000 for H., other special appropriations (including one for education), and a devise of the remainder to the grandchildren. In this manner, and to this extent, he was convinced it was his duty to modify the operation of the statutory rule of distribution. His exercise of testamentary power

to this end was his primary and leading purpose." The order of the superior court does not contravene this primary and leading purpose, for it is not probable the testator intended that, if any or all of the six trustees designated in his will should subsequently become unsuitable, they should be continued in the trust, or that, if Hiram was added to the board and became unsuitable for reasons other than those specified in the will, he should not be subject to removal the same as any other trustee would be for a like cause. And it is equally improbable that he intended the number of trustees should not be reduced, if, by reason of changed conditions in the estate, the number became excessive, so that it was impossible to effectuate his primary purpose without a reduction.

Another contention made by the petitioners is that the order of the court deprives Hiram of the opportunity of passing upon the question whether he has complied with the condition imposed as to sobriety and good conduct, upon which the second and third installments of the gift of \$30,000 are predicated, and is in violation of the intention of the testator that he should be permitted to pass upon this question with the other trustees. We do not think the will provides that he should have the right to pass upon his own qualifications with the other trustees; and, as we understand the law, he would not be entitled to pass upon questions in which he is directly interested as a beneficiary and involving an exercise of discretion, but that such questions should be passed upon by the other trustees alone. *Rogers v. Rogers*, 111 N. Y. 228, 234, 237, 18 N. E. 636; *Woodward v. James*, 115 N. Y. 346, 357, 22 N. E. 150.

Exception overruled. All concurred.

TISDALE et al. v. JOHN H. PRAY SONS CO. et al.

(Supreme Court of New Hampshire. Strafford. Oct. 3, 1905.)

CHattel Mortgages—Registration—Notice—Attachment.

Under Pub. St. 1901, c. 140, § 6, declaring that a mortgage of personal property is not entitled to registration unless the mortgagors and the mortgagee shall subscribe an oath that the mortgage is given in good faith, etc., registration of a mortgage of personalty containing such affidavit not signed and sworn to by the mortgagee is not constructive notice of the existence of the mortgage, and an attachment of the property while in the possession of the mortgagors and without knowledge, actual or constructive, of the existence of the mortgage, will prevail against the mortgagors and mortgagee.

Exceptions from Superior Court; Stone, Judge.

Bill in equity by Mary E. Tisdale and others against the John H. Pray Sons Company and others. Bill dismissed, and plaintiffs except. Exception overruled.

The Hobarts, who reside in Brookline, Mass., owned certain personal property situ-

ated in Rollinsford, and on March 20, 1903, executed the mortgage in question, which purported to secure a note for \$1,600. At the time of signing the note and mortgage nothing was due from the mortgagors to the mortgagee, but on March 24th a loan of \$1,600 was made. The mortgagors, but not the mortgagee, took and subscribed to the following oath: "We, John W. Hobart and Emma E. Hobart, hereby certify that the foregoing mortgage is given in good faith for a bona fide consideration, and is not intended or given to evade the claims of creditors." The mortgage was recorded in the town of Rollinsford on March 26, 1903. The defendants attached the mortgaged property on September 28, 1903, on writs brought against the Hobarts, without knowledge of the existence of the note or mortgage.

Charles S. Hill and Vere Goldthwaite, for plaintiffs. Arthur G. Whittemore and John S. H. Frink, for defendants.

BINGHAM, J. The affidavit contained in the mortgage, if otherwise sufficient, was not signed and sworn to by the mortgagee. The statute requires that the mortgagee as well as the mortgagor shall take and subscribe to the oath. Pub. St. 1901, c. 140, § 6. This must be done to entitle a mortgage of personal property to registration. The unauthorized registration of such an instrument is not constructive notice of its existence. *Lovell v. Osgood*, 60 N. H. 71. The defendants' attachment, having been made while the mortgaged property was in the possession of the mortgagors, and without knowledge, actual or constructive, of the existence of the mortgage, must prevail.

Exception overruled. All concurred.

CARR et al. v. CORNING (two cases).

(Supreme Court of New Hampshire. Merrimack. Oct. 3, 1905.)

1. TRUSTS — APPOINTMENT AND SUCCESSION OF NEW TRUSTEE — POWER OF PROBATE COURT.

As under Pub. St. 1901, c. 182, § 2, the probate court has jurisdiction of wills and of the estates of deceased persons, and as under Pub. St. 1901, c. 185, § 2, cl. 12, the probate court is authorized to appoint the trustees named in a will, and under Pub. St. 1901, c. 198, it is the duty of the probate court to administer trusts created by will, a provision, in a will creating a trust, that whenever a vacancy occurs in the board of trustees the remaining trustees or trustee shall nominate and appoint in writing a successor or substitute to fill such vacancy, said appointment to be approved by the judge of probate of a certain court for the time being, raises a presumption that the probate court was intended, which is not rebutted by the addition of the words "for the time being," and a contention that the power was vested in the judge in his individual and not his official capacity is untenable.

2. SAME.

The suitability of a trustee to be appointed by the probate court is a fact that must be proved in every case before the court is authorized to make the appointment, and where

testator by his will creating a trust made it the duty of the probate court to approve of an appointment to fill a vacancy in the board of trustees, evidence was admissible, on behalf of those empowered to appoint, to show the suitability of their proposed appointee.

3. SAME.

Since the law makes it the duty of the probate court to approve of trustees named in a will before appointing them, the mere fact that testator made it the duty of the probate court to approve trustees named in accordance with the provisions of his will did not make it illegal for the court to approve them, and a contention that, if it was the intention of the testator that the probate court should approve the appointment, the power of appointment fails as an attempt to confer on the court a jurisdiction not conferred by law, is untenable.

Transferred from Superior Court.

Bill in equity by Clarence E. Carr and another, trustees of the will of John H. Pearson, deceased, against Charles R. Corning, for construction of the will. Action for a writ of mandamus to compel defendant, as judge of probate of Merrimack county, to consider and pass on a petition filed by plaintiffs in the probate court of said county. Transferred, without ruling, from the superior court. Case discharged.

The will is the same as that before the court in *Haynes v. Carr*, 70 N. H. 463, 40 Atl. 638, and *Carr v. St. Paul's Parish*, 71 N. H. 231, 51 Atl. 920. The testator devised the residue of his estate in trust for various private and public purposes, named three persons as trustees, and provided that "whenever a vacancy occurs in the board of trustees from any cause whatsoever, the remaining trustees or trustee shall nominate and appoint in writing a successor or substitute to fill such vacancy, said appointment to be approved by the judge of probate for said county of Merrimack for the time being. After the decease of a trustee named in the will, the plaintiffs, who are the surviving trustees, duly nominated a suitable person as successor, and filed in the probate court for Merrimack county a petition requesting that the appointment be approved. The defendant, who is the judge of probate, declined to consider the petition in his judicial capacity, but as an individual expressed his disapproval of the appointment, and these actions were thereupon brought. The defendant excepted to the introduction of evidence tending to prove the suitability of the person named by the plaintiffs as successor to the deceased trustee.

Sargent, Remick & Niles and Oliver E. Branch, for plaintiffs. Streeter & Hollis, for defendant.

YOUNG, J. The defendant says: (1) The power of approval is vested in him in his individual and not in his official capacity. (2) If it was the intention of the testator that the probate court should approve the appointment, the power of appointment fails, because it is an attempt to confer upon the court a jurisdiction not conferred by law.

1. There is no force in the defendant's first position. In title 25 of the Public Statutes, entitled "Courts of Probate, and Estates of Deceased Persons," the words "judge" and "judge of probate" are constantly used when it is apparent the probate court is intended. For example, chapter 182, Pub. St. 1901, is entitled "Judges of Probate and Their Jurisdiction." It is a matter of common knowledge that, when a person attending to probate business or considering probate matters speaks of referring anything to the judge of probate, he usually intends the probate court, and not the person who exercises the function of that office. That is probably the sense in which Mr. Pearson used the words in his will, for the probate court has jurisdiction of wills and of the estates of deceased persons. Pub. St. 1901, c. 182, § 2. When he provided that the persons who were to administer the trust he was creating should be approved by the judge of probate, there is a presumption that the probate court was intended; and the fact that the law makes it the duty of that court to approve the appointment of trustees, as will hereafter appear, makes that presumption so strong that the mere addition of the words "for the time being" is not enough to rebut it.

2. The defendant's second position is also unsound, for clause 12, § 2, c. 185, Pub. St. 1901, authorizes the probate court to appoint the trustees named in a will; and a trustee who is named in the way the testator has provided to perpetuate the trust is "named in the will," within the meaning of that statute. *Shaw v. Paine*, 12 Allen, 293, 296. It is the duty of the probate court to administer trusts created by wills. Pub. St. 1901, c. 198. This duty necessarily carries with it that of appointing the trustees needed to execute such trusts (Pub. St. 1901, c. 185, § 2, cl. 12; *Id.* c. 198, § 6), and that of removing them if they become incapable or unfit to perform their duties. *Id.* c. 198, § 8. Since it is the duty of the court to remove trustees who are unfit to administer their trusts, it cannot be the duty of the court to appoint a person to that position unless it appears that he is fit for it, notwithstanding he is named as trustee in the will which creates the trust; for it would be a manifest absurdity to say that it is the duty of the court to appoint a person trustee when it would be its duty to remove him as soon as he was appointed. So it must always appear that the person named in the will is a fit person to execute the trust, for otherwise it would be the duty of the court to refuse to appoint him. In other words, it is the duty of the probate court to appoint trustees whenever they are needed to administer trusts created by wills; but its authority in that respect is limited to persons who are suitable to execute the trust, both when the trustees are named in the will which creates the trust, and when the will contains no provision for

the appointment of the trustees. Therefore the suitability of the trustee is a fact that must be proved in every case, before the court is authorized to make the appointment. In other words, the probate court must decide that the person named in the will is a suitable person to administer the trust before it can appoint him to that position. This is the statutory rule in respect to appointing the executors who are named in a will. Pub. St. 1901, c. 188, § 2, cl. 1; Id. c. 188, § 3. There is no more reason for requiring the court to examine into the suitability of executors to administer a deceased person's estate than there is for requiring it to inquire into the suitability of trustees to administer a trust the deceased person created. The fact that the statute makes it the duty of the probate court to inquire as to the suitability of the person named as executor before appointing him to that position tends to prove that the Legislature intended that the court should inquire as to the suitability of the person named as trustee before appointing him to that position. Since the law makes it the duty of the probate court to approve of trustees named in a will before appointing them, it is obvious that the mere fact that the testator made it the duty of the probate court to approve trustees named in accordance with the provisions of the will does not make it illegal for the court to approve them; for it cannot be illegal for the court to do its duty merely because some one requests it.

Case discharged. All concurred.

In re MOEBUS.

(Supreme Court of New Hampshire. Oct. 8, 1905.)

1. HABEAS CORPUS — RETURN OF ESCAPED CONVICT TO PRISON—RIGHT TO PROCESS—ISSUE OF IDENTITY.

A person confined in state prison, on the ground that he is an escaped convict sentenced to a term of imprisonment, is entitled to process which will enable him to try the issue of whether he is the convict or not, unless the question of identity has been determined against him by a court having jurisdiction in a proceeding to which he and the state were parties.

2. SAME—ISSUES.

Where the petitioner, in a petition for a writ of habeas corpus for his discharge from the state prison, where he is confined on the ground that he is an escaped convict under sentence of imprisonment, expressly states that he does not wish to try the issue whether he is the convict or not, and the state asserts that he is, the court will assume that he is the convict.

3. APPEAL—FAILURE TO EXCEPT TO RULING OF LOWER COURT—EFFECT.

The rule that the failure to except to the ruling of the superior court prevents the appellant from raising the same question in the Supreme Court may be waived when justice requires it.

4. HABEAS CORPUS — RETURN OF ESCAPED CONVICT TO PRISON—ISSUES.

Where the person brought into the state and confined in the state prison on the ground

that he is an escaped convict under sentence is the convict, there is no occasion for the trial of any question between him and the state, unless the state desires to inflict further punishment for the escape, as authorized by Pub. St. c. 285, § 13; Id., c. 253, § 14.

5. SAME—FAILURE TO PROSECUTE FOR ESCAPE.

The failure of the state to prosecute an escaped convict, brought into the state and confined in the state prison under the sentence, for the escape, punishable by Pub. St. c. 285, § 13, and Id. c. 253, § 14, gives him no ground for complaint.

6. ARREST—AUTHORITY TO ARREST ESCAPED CONVICT.

One under sentence for felony and unlawfully at large may be arrested and returned to imprisonment, even by a private person, without a warrant.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arrest, § 144.]

7. CRIMINAL LAW—IMPRISONMENT.

A person sentenced to imprisonment in the state prison for a term of years escaped after a few months' imprisonment. He was recaptured and returned to prison. Held, that he could be lawfully kept in prison until the expiration of the term.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3814.]

Petition for writ of habeas corpus by Henry E. Moebus, praying for his discharge from the state prison. Denied.

Petition for a writ of habeas corpus, filed September 21, 1905. The petitioner alleges, in substance, that he was brought into this jurisdiction from the state of New York, of which he is a resident, upon a requisition issued by the Governor of this state, and was committed to the state prison, where he has been held as a convict since November 8, 1900; that he was committed without due formality of law and is illegally detained; and that he has not been informed "by a competent court" why he is thus deprived of his liberty. The prayer is that the warden of the state prison may be ordered to bring the petitioner before the court, for the purpose of examining the question whether he was lawfully entitled to a hearing before a competent court within this state prior to his commitment to prison, and that the petitioner may be liberated if the court should find that he was so entitled. The state claimed that the petitioner is Mark Shinborn, who was committed to the state prison in 1895 for a term of 10 years and escaped after serving a few months of the sentence. The petitioner denied that he is Shinborn, but expressly declined to try the question of his identity, and based his right to a discharge upon grounds considered in the opinion.

Henry E. Moebus, pro se. Edwin G. Eastman, Atty. Gen., for the State.

PARSONS, C. J. The petitioner is now confined in the state prison under a decree of the court sentencing one Mark Shinborn to 10 years' imprisonment. If the petitioner is Moebus and not Shinborn, he is illegally confined and is entitled to be discharged. Unless the question of identity has been determined against him by some court with

jurisdiction of the question, in a proceeding to which he and the state were parties, so that he is estopped by legal adjudication to now contend that he is not Shinborn, the petitioner is entitled to process which will enable him to try that question, and to a discharge, if the fact be found in his favor. But the petitioner expressly states that he does not desire to try this question, and asserts his purpose to withdraw his petition if the court permits such trial. In this situation, the state asserting that the petitioner is Shinborn and the petitioner refusing to join issue on that assertion, it must be taken for the purposes of the case that the petitioner is Shinborn. Whether this court has original jurisdiction to entertain a petition for a writ of habeas corpus (Pub. St. c. 239, §§ 3, 18; Laws 1901, p. 563, c. 78, §§ 2, 5, 7) is a question of grave doubt, and one which we are not inclined to pass upon except when necessarily raised and fully argued. If the application were made to the superior court, the two legal questions which the petitioner presents might be readily raised and transferred.

It also appears by the petitioner's brief that application has at some time been made to the superior court, and a ruling had upon one, at least, of the questions now sought to be presented. Failure to except to such ruling would under the rules prevent the petitioner from raising the question here, but the rule may be waived when justice requires; and to send the petitioner to the superior court merely for the purpose of presenting the questions in a formal manner is not usually considered necessary, when the questions are so presented that they can be fairly considered. *Hutchinson v. Railway*, 73 N. H. 271, 277, 60 Atl. 1011. This court has jurisdiction to determine the legal questions raised. The manner of their presentation is one of form merely. If these questions are determined favorably to the petitioner, the question of jurisdiction to issue the writ will be presented. But the answer to these questions renders it unnecessary to consider whether this court should itself issue the writ or send the petitioner to the superior court.

The petitioner claims that his present detention is illegal because, after he was brought into this state upon the claim that he was an escaped convict under sentence to the state prison, he was not tried upon the issue whether he was the convict the state alleged him to be. If the petitioner was Shinborn, an escaped convict, when brought within this state, there was no occasion for the trial of any question between him and the state, and no question to try, unless the state desired to, and could, inflict further punishment for the escape. Pub. St. c. 285, § 13; Id. c. 258, § 14. The failure of the state to prosecute a person for a crime admittedly committed by him gives him no ground of complaint.

Being under sentence for felony and unlawfully at large, Shinborn could lawfully be arrested and returned to imprisonment, even by a private person, without warrant. *State v. Holmes*, 48 N. H. 377. The foundation of the petitioner's claim to a trial before his committal to prison rests upon the contention that he was not Shinborn. If he was Shinborn, no wrong has been done him. If he is not Shinborn, he was illegally committed and is illegally confined. He may be entitled now to a trial of that question, if none has been had. As he declines to ask for such trial, and refuses to contest the issue if raised by the state, no ground of error appears. As heretofore said, his refusal to litigate the question of his identity is an admission that he is Shinborn, and it follows that he is legally confined in the state prison, unless his term of imprisonment has expired. This is the second point made by the petitioner.

In 1865, Shinborn was sentenced to imprisonment for 10 years in state prison. After a few months he escaped, but was recaptured in 1900, and has since been confined in prison. He has therefore been imprisoned about 5 years, whereas the term of imprisonment which the sentence of the court imposed upon him was twice that which he has served. "The sentence of the law is to be satisfied only by the actual suffering of the imprisonment imposed, unless remitted by death or some legal authority. The punishment is imprisonment, the period of which is expressed only by the designated length of time. Neither the date of its commencement, nor of its expiration, is fixed by the terms of the sentence." *Dolan's Case*, 101 Mass. 219, 222; *In re Edwards*, 43 N. J. Law, 555, 39 Am. Rep. 610; *Sartain v. State*, 10 Tex. App. 651, 38 Am. Rep. 649, and note 653; 11 Am. & Eng. Enc. Law (2d Ed.) 313. The judgment of the court was that Shinborn should be confined in the state prison for the term of 10 years. It does not appear that the time when the imprisonment should commence or the date when it should end were stated in the order under which the execution of the sentence began. If either was, the order was no part of the sentence. *Ex parte Howard*, 17 N. H. 545. The warden of the prison can lawfully keep Shinborn until the judgment of the court that he be there imprisoned 10 years has been performed.

Upon neither of the grounds urged by the petitioner can his discharge be justified. It appears by the petition and papers filed therewith that the petitioner has not been deprived of an opportunity to litigate the question of identity, upon which the rightfulness of his imprisonment depends, but that he refused to proceed to such a trial when opportunity therefor was afforded him by the superior court. No occasion appears for the exercise of any supervisory power of this court. It also appears that the petitioner's

application to the federal court had the same result. If for reasons satisfactory to himself the petitioner, while contending that he is not Shinborn but Moebus, persists in refusing to submit the question to some tribunal with jurisdiction to decide it, he must submit to confinement as Shinborn.

Petition denied. All concurred.

HADS v. TIERNAN.

(Supreme Court of Pennsylvania. Oct. 9, 1905.)

DEED—DESCRIPTION—RESERVATION.

The premises were described in a deed as a lot 38 feet by 33 feet "with a two-story frame dwelling thereon, being one-half of double house thereon, to have and to hold said described lot and one-half of double house now thereon." The lines of the lot which the grantee understood she was to have included the whole of the double house. *Held*, that all that was reserved to the grantor was one-half of the building.

Appeal from Superior Court.

Action by Bridget Hads against Thomas J. Tiernan. From a judgment of the superior court (25 Pa. Super. Ct. 14), affirming a judgment for plaintiff, defendant appeals. Affirmed.

Argued before DEAN, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Thomas H. Greevy and D. Clare Good, for appellant. S. B. Hare and Thomas C. Hare, for appellee.

PER CURIAM. The deed from the appellant to the appellee, under which she claims title and right of possession, is for a lot of ground situated in the city of Altoona, on the northeast side of Tenth street, containing in front 38 feet and running back 33 feet. A verdict was directed in her favor by the common pleas, and the judgment on it was affirmed by the superior court. Hads v. Tiernan, 25 Pa. Super. Ct. 14. The defense of the appellant is that a recovery ought to have been allowed for but one half of the lot, because he had excepted the other half under the following clause in the deed: "To have and to hold said described lot or piece of ground and one-half the double house now thereon." The conveyance is of a lot of ground 38 by 33 feet, with no reservation or exception of any interest in it by the grantor. The grantee testified that she understood she was getting just what the deed calls for, and her brother, the grantor, admits that, in compliance with her demand that she should have 38 feet of ground, he executed the deed to her for a lot of the dimensions called for in it, thinking that, because he had reserved one-half of the double house, the deed would not amount to anything for the one-half of the lot on which the same was erected. On this state of facts, whether the rights of the parties are to be determined from the words of the conveyance, or from the admission of the appellant that his sister understood he was conveying to her the lot she is now

claiming, with one-half of the building on it reserved, the only conclusion to be arrived at is that of the common pleas and the superior court. The brother thought he was deceiving his sister; but he was not, in law or in fact. The deed on its face gives her just what she thought she was getting, and by his admission he is estopped from saying he conveyed anything less. If he reserved anything, it was but one-half of the building which his sister has agreed he may remove. As to his claim to title by adverse possession, the testimony discloses nothing more than his retention of possession of the land sold to his vendee, for whom he held it in trust, and against whom he could not start the statute of limitations until he manifested his intention to change the character of his possession by some act of hostility to her title plainly indicating to her his intention to deny her right and to hold adversely to it. *Buckholder v. Sigler*, 7 Watts & S. 154; *Olwine v. Holman*, 23 Pa. 279; *Ingles v. Ingles*, 150 Pa. 397, 24 Atl. 677; *Connor v. Bell*, 152 Pa. 444, 25 Atl. 802.

Judgment affirmed.

CHASE v. CLEARFIELD LUMBER CO., Limited.

(Supreme Court of Pennsylvania. Oct. 9, 1905.)

DEED—DELIVERY—EVIDENCE.

An assignment of an interest in land was found in the assignor's safe after his death. The safe had been used by members of the family as a repository for their papers. There was evidence from which the jury could have inferred an actual delivery to the assignee, who was a member of the family of the assignor. *Held*, that the question of delivery was for the jury.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 127, 633.]

Appeal from Court of Common Pleas, Clearfield County.

Action by Jane Chase against the Clearfield Lumber Company, Limited. Judgment for plaintiff, defendant appeals. Affirmed. See 58 Atl. 813.

Argued before DEAN, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

David L. Krebs and A. M. Liveright, for appellant. J. B. McEnally and W. Clark Miller, for appellee.

PER CURIAM. As evidence of her title to the land from which the appellant cut the timber, the plaintiff produced and offered at the trial the assignment to her by John M. Chase, her father-in-law, dated February 28, 1879. To repel the presumption that it had been delivered to her, appellant called B. F. Chase, a son of John M. Chase and one of his executors, who testified that after his father's death he found the assignment in a box or the safe that had belonged to him. He was not certain whether he found it in the box or

safe, but thought that most of the papers were in the safe, and the contention of the appellant is that it was there found. The witness, however, testified still further that various kinds of paper, such as contracts and insurance policies, belonging to other members of the family, were found in the safe, and added, "Father's safe was everybody's safe." There were facts and circumstances from which the jury could fairly have inferred that the deceased had actually passed the title to his daughter-in-law; and the finding of the assignment in his safe after his death is entirely consistent with his delivery of it to her, in view of the explanation of the son, called by the defendant, that the safe was "everybody's safe," for she may have deposited it there, as other members of the family had deposited their papers in it. The question of delivery was purely one of fact for the jury, and was submitted to them under proper and careful instructions. The offer, which is the subject of the third assignment of error, was properly disallowed; for it was not to show that the appellee, by anything she had said or done, had estopped herself from asserting her title.

Judgment affirmed.

In re SCRANTON SEWER.

Appeal of LACKAWANNA IRON & STEEL CO.

(Supreme Court of Pennsylvania. Oct. 9, 1905.)

1. MUNICIPAL CORPORATIONS — IMPROVEMENTS — APPEAL FROM VIEWERS.

Provisions of Act May 16, 1891 (P. L. 75), providing for an appeal from confirmation of the report of viewers in the matter of municipal improvements within 30 days, are repeated in an amendment of the act, passed April 2, 1903 (P. L. 124). *Held*, that this permission to appeal does not take away the right given by act May 19, 1897 (P. L. 67), to appeal within 6 months.

2. SAME — ORDINANCE — ALTERATION OF PLAN — LIABILITY OF ABUTTING OWNERS.

A city by ordinance authorized the construction of sewers in certain city streets and alleys, and viewers were appointed to assess the cost. The chief engineer of the city, on the suggestion of the director of public works, erased from the map showing the location of the sewers certain portions of streets and alleys, because in his judgment the improvement thereof was not justified, and the improvements were made in accordance with the map so altered. *Held*, that a property owner could not be compelled to pay an assessment for benefits to his property arising from the construction of the sewer under the altered plan.

Appeal from Court of Common Pleas, Lackawanna County.

In the matter of the cost and expenses of sewer section G, Seventeenth sewer district, of the city of Scranton. From an order dismissing the exceptions, the Lackawanna Iron & Steel Company appeals. Reversed.

Among the exceptions was the following: "Fourth The plans prepared for the said

work and filed in the bureau of engineering, and which are distinctly referred to and made part of said ordinance, included as a portion of the territory to be sewered by said sewer certain lots and blocks situate south of Gallagher court, which said lots and blocks were eliminated by the city engineer after the passage of said ordinance and after approval of the said plans and specifications, and were not taken into consideration by the viewers, so that the viewers' report is based upon a different territory from that which is involved in the ordinance and in the plans and specifications prepared for said work. This change of territory invalidates the ordinance completely." The facts are stated in the opinion of the Supreme Court.

Argued before MITCHELL, C. J., and DEAN, BROWN, POTTER, and ELKIN, JJ.

Everett Warren, John F. Murphy, and Harold A. Watres, for appellant. David J. Davis, City Sol., and H. R. Van Deusen, Asst. City Sol., for appellee.

BROWN, J. There was a motion to quash this appeal, because it was not taken within 30 days from the confirmation of the report of the viewers. It is based upon the act of May 16, 1891 (P. L. 75), which provides that an appeal may be taken within 30 days. This provision reappears in an amendment to the act passed April 2, 1903, P. L. 124. The permission to appeal within 30 days does not take away the right given by the act of May 19, 1897 (P. L. 67), to appeal within 6 months, and the motion is therefore denied.

An ordinance of the city of Scranton, approved September 5, 1902, authorizes the construction of a sewer in certain streets and courts between designated points, to be known as "section G" in the Seventeenth sewer district of that city. On September 8, 1902, the city presented its petition to the court below, reciting the passage of the said ordinance, and asking for the appointment of viewers to assess the costs and expense of the sewer and the benefits resulting from it, in accordance with the act of May 16, 1891 (P. L. 75). Viewers were appointed, who made report, assessing the sum of \$16,808.42 to be paid by the appellant for the benefits to its properties. Though the viewers were appointed to assess the cost, expense, and benefits of a sewer to be built on lines clearly designated in the ordinance, they assessed the cost and expense of the construction and the benefits of a different one. No other action than the ordinance of September 5, 1902, was ever taken by the city councils in reference to the sewer; but the chief engineer of the city, upon the suggestion of his superior, the director of public works, blotted out from the map showing the location of the sewer certain portions of streets and courts on which it is to be constructed, because, in his judgment,

the improvements in the blotted-out portions do not justify the extension of the sewer through them. Just when he assumed this wholly unwarranted authority does not appear; but, when the viewers met, they confined their investigation to what must be regarded as the sewer system of the chief engineer, and not the one adopted by the city authorities. That official blotted out Irving avenue from Front street to Moosic street, though the ordinance directs the sewer to be constructed from Front street to Moosic street, and thence to River street. He blotted out Front street from South Webster street to Irving avenue, and portions of Gallagher and other courts in the same locality. Though the ordinance called for the sewer in these blotted-out portions of the streets and courts, the viewers passed upon the question of the cost and expense and the resultant benefits, as if it were to be constructed only on the lines indicated on the tampered-with map. They followed the map of an engineer; but they were directed to act in pursuance of the provisions of an ordinance of the city of Scranton, and to ascertain and assess the cost and expense and assess liability for the sewer therein specifically designated. Sewer systems can be adopted only by ordinance, but the one upon which the appellant has been assessed for benefits is nothing but that of a city's employé.

In dismissing appellant's second exception to the report of viewers, the court below said: "There remains to be considered the effect of a variance between the first section of the ordinance and the map or plan attached as part thereof in respect to the extent of the proposed sewer. This section of the ordinance specifies certain blocks of streets and courts in which the sewer is to be built, which were originally included in the map, but afterwards, before the appointment of viewers and without amendment, the department of public works decided to omit, and thereupon they were obliterated on the map, and the view was had according to the map as so altered, and therefore not strictly according to the ordinance. The question so presented is really one of first impressions and by no means free from difficulty. On the one hand, the alteration of the map was entirely unauthorized and in a sense unlawful. At first blush it would seem to go so materially to the integrity of the proceeding as to make it invalid. But, on the other hand, we are unable to discover, and counsel have not indicated to us, how the exceptants have been or may be injuriously affected by that means. There were no damages involved in the case. Neither the cost of the sewer nor the benefits assessed will be increased as a result of the alteration. * * *

As a result of the change in the map, the view

and the report do not go outside of the streets mentioned in the ordinance, but certain blocks or parts of streets or alleys are omitted." Whether the appellant had been injuriously affected by the change in the map and the substitution of the sewer system of the chief engineer for the one adopted by the city itself is not the test of its right to complain. The system is not its system, and it may or may not have been in favor of it. Without regard to its wishes, a sewer can be constructed by the municipality after appropriate municipal action; but only after such action and the provisions of a valid ordinance have been followed can it be called upon as the owner of private property to pay for the benefits arising from the public improvement. This is not an arbitrary rule, but a just and wise one, not to be broken in on by any exception. A municipality can impose a valid municipal lien for street improvements only when the improvements are made in pursuance of law and the mode pointed out by the city ordinance is strictly followed. Such liens do not rest on any agreement or specific assent of the owner of the land charged with the burden, and the improvement is often against his wish. A clear right must therefore be shown by the municipality to justify such an act of sovereign power. Municipal charges legally laid on lands are sufficiently large, without subjecting them to any imposed contrary to law. *Western Pennsylvania Railway Co. v. City of Allegheny*, 92 Pa. 100; *Hershberger v. City of Pittsburgh*, 115 Pa. 78, 8 Atl. 381; *Morewood Avenue*, *Ferguson's Appeal*, 159 Pa. 39, 28 Atl. 130. This is equally true of benefits assessed under the act of 1891.

The appellant can be compelled to help pay for what the ordinance provides. It cannot be assessed for anything else; but the viewers have assessed it for something else, and its complaint is, therefore, a substantial one. In asking that it pay nearly \$17,000 for benefits, the city must show a sewer system to be constructed according to the directions of an ordinance; but, instead, its claim is for one mapped out by a city engineer on a map which he was not authorized to make. If his map cuts out a portion of the system as adopted by the city councils, the system is no longer the city's for the purpose of compelling property owners to contribute to the cost of its construction. To help pay for the construction of a sewer adopted by the municipal authorities is a liability to which the appellant may be subjected, but the liability imposed upon him by the report of the viewers is not such. As it must be set aside for the reason stated, the other questions raised need not now be considered.

The decree of the court below is reversed, and the report of the viewers is set aside, at the cost of the city of Scranton.

In re SIGEL'S ESTATE.

Appeal of SCHUDT.

(Supreme Court of Pennsylvania. Oct. 9, 1905.)

1. WILLS—CODICIL—EFFECT.

A will and a codicil must be regarded as parts of one and the same instrument, and the codicil will not be allowed to vary or modify the will, unless such was the plain intent of the testator.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 997.]

2. SAME.

Testator, after making several legacies, gave the residue of his estate to his heirs, and on the same day executed a codicil giving a certain sum to three persons, who were his heirs, "and no more." Held, that the three heirs were not excluded by the words "no more" from sharing in the balance of the estate; but such words applied only to the amounts mentioned in the codicil.

Appeal from Orphans' Court, Warren County.

In the matter of the estate of Charles Sigel, deceased. From a decree distributing the estate, William Schudt appeals. Affirmed.

Argued before MITCHELL, C. J., and DEAN, BROWN, MESTREZAT, and POTTER, JJ.

John G. Johnson, Perry D. Clark, and Jacob Stern, for appellant. Frank Gunnison and T. A. Lamb, for appellees.

POTTER, J. Charles Sigel died February 21, 1904, unmarried and without issue, and leaving a large estate. On the day of his death he executed a will, by which he revoked all previous wills, gave certain legacies, and, in his own language, "the balance of my estate to the heirs of Charles Sigel"; that is, to his own heirs. On the same day he executed a codicil, which reads as follows: "I give to my sister, Matilda Sigel, of Kirchheim, Germany, Mary Schmidt, of East Orange, N. J., and Mary Schudt, of West Seneca, N. Y., each one thousand (\$1,000) dollars, and to Gus Schudt, my nephew, two thousand (\$2,000) dollars, and no more." It is agreed that Mary Schmidt and Mary Schudt were one and the same person, the daughter of a deceased sister of testator. Schudt was her maiden name, and Schmidt her married name. Gus Schudt was the son of testator's sister. All three legatees were heirs at law of the testator, and in the absence of the codicil would have been entitled to share in the distribution of his estate under the residuary clause of his will. Upon distribution of the balance shown by the executor's first account, the court below held that the legatees named in the codicil were entitled to receive the legacies there given them and also to share in the residuary estate under the will.

Appellant claims that this construction of the will is erroneous, and that by the use of the words "and no more" in the codicil, the testator expressed his intention that the amounts there given should be all that the

legatees named should receive, and that the residue of his estate should be divided among his remaining heirs, to the exclusion of the three named in the codicil. In such a case as this, where a will and codicil are to be construed, the rule is well settled that they must be regarded as parts of one and the same instrument, and that the codicil is not to be allowed to vary or modify the will, unless such was the plain and manifest intention of the testator. In *Spang v. Hill*, 2 Woodw. Dec. 45, after a consideration of the authorities, the court said: "The general result of the authorities on the subject is that, notwithstanding a codicil, the provisions of a will are to stand, unless in order to effect the purposes of the codicil it is absolutely necessary that the provisions of the will shall give way." Chief Justice Mercur said, in *Lewis' Appeal*, 108 Pa. 133: "It is not necessary to refer to the numerous English and American authorities which hold as a canon of construction that a clear gift cannot be cut down by any subsequent words, unless they show an equally clear intention. In applying this rule, it is sufficient that the subsequent words indicate the testator's intention to cut it down with reasonable certainty, and it is not necessary to institute a comparison between the two classes as to lucidity. 1 Williams on Executors, 185. It cannot be cut down by any doubtful expressions in the codicil. The language of the latter must be such as to clearly establish the modification claimed before such effect can be given to it." And in *Sheetz's Appeal*, 82 Pa. 213, this court said (page 217): "The clearly expressed purpose of a testator is not to be overborne by modifying directions that are ambiguous and equivocal, and may justify either of two opposite interpretations. Such directions are to be so construed as to support the testator's clearly announced main intention." The fundamental distinction between the nature of a codicil and a later will should be borne in mind. The later will works essentially a revocation, while the codicil is a confirmation, except as to the express alterations which it may contain; and therefore, while in the case of a later will a revocation may be presumed, this is not true of a codicil. It means rather an addition than a revocation.

While no case has been found which furnishes an exact precedent for the one now before us, yet we think in principle it is to be governed by the authorities which hold that a gift once made by will is not to be cut down by a subsequent codicil, unless the intention of the testator to that effect appears clearly or by necessary implication. Where it is possible to construe the codicil so as to give effect to all the provisions of the will, it certainly should be done. We do not think that it can be said in this case that the intention of the testator to revoke the gifts of proportionate shares in the residue, made to the heirs named in the codicil, is

clear from the use of the words "and no more"; for these may be construed to apply equally well as limiting the amount of the additional gifts to the sums named in the codicil. In *Brisben's Appeal*, reported in 1 *Lanc. Bar*, October 9, 1869, this court, speaking through Read, J., said: "It would appear to be perfectly reasonable that where a legacy is given by will to a particular individual, and by a codicil another legacy is given to the same person, the second should be considered as additional to the first, and therefore where a paper is codicillary, and two legacies are given to the same person, they are cumulative. The more recent decisions treat this as conclusive, unless a contrary purpose is distinctly manifested by the instruments themselves." In the present case this general principle would unquestionably make the gifts to the individuals named in the codicil cumulative, were it not for the words "and no more." The doubt raised by them is as to whether they limit the words of the will and defeat the right to share in the residue. Or do they limit only additional gifts? We are inclined to the latter construction, under the accepted principle that, where a devise is made of an estate, a revocation will not be implied, unless no other construction can be placed upon the language. In this case we think the construction adopted by the court below, which saves the right to share in the residue, is reasonable and fair. If the codicil be read into the will, it would then read, "and the balance of my estate to the heirs of Charles Sigel, and, in addition, to the persons named in the codicil the amounts therein named, and no more"; that is, in addition to their proportionate share of the residue as heirs, under the language of the will, they get, respectively, the amounts named, "and no more."

We cannot accept the view that the words "and no more" in the codicil clearly and necessarily apply to the provisions of the will and cut down the gift there made. To apply them only in limitation of the amounts named in the codicil as additional gifts seems to us quite as much in line with the probable intention of the testator as the other suggestion. In *Bender v. Dietrick*, 7 *Watts & S.* 284, which was cited by the court below and

by counsel for both sides, the decision was placed upon the ground that "an heir at law can only be disinherited by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed." Justice Rogers said (page 287), in language peculiarly applicable here: "It seems to me that the expression that they shall have \$50, and no more, of his real and personal estate, does not raise such a strong probability, as has been shown, as that a contrary intention may not be supposed. Indeed, the difficulty arising from the imperfection of the will is to ascertain what the testator did intend. His intention is at best but matter of conjecture, and certainly on such grounds no person heretofore has been deprived of his inheritance."

We think the conclusions reached by the court below in this case are justified by reason and the authorities. The assignments of error are overruled, and the decree of the orphans' court is affirmed, and this appeal is dismissed, at the cost of the appellant.

In re SIGEL'S ESTATE.
(Supreme Court of Pennsylvania. Oct. 9, 1905.)
Appeal from Orphans' Court, Warren County.

In the matter of the estate of Charles Sigel, deceased. From the decree of distribution, Albert Sigel and others appeal. Affirmed.

Argued before MITCHELL, C. J., and DEAN, BROWN, MESTREZAT, and POTTER, JJ.

W. E. Rice, W. D. Hinckley, and J. H. Alexander, for appellant. T. A. Lamb and Frank Gunnison, for appellee.

POTTER, J. We have just filed an opinion at No. 68, January term, 1905, in the appeal by William Schudt (62 *Atl.* 175) from the same decree, which disposes of the controlling questions raised by these appellants. Their further discussion is unnecessary. The assignments of error are overruled, and this appeal is dismissed, at the cost of the appellants.

BRENNAN v. PENNSYLVANIA R. CO.
(Supreme Court of New Jersey. Nov. 28, 1905.)
RAILROADS — ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE.

It appearing in the evidence that the driver of a team of horses attached to a wagon loaded with two logs stopped his team in the dusk of the evening upon a public highway at a point distant not less than 35 feet from the nearest rail of a railroad crossing; that he saw the flagman at the crossing come out of his shanty with a lantern and set it down, and concluded from that fact that a train was approaching; that from a point where he stopped to a point 12½ feet from the crossing his view of the railroad was unobstructed; that the headlight of the locomotive was lighted; that while passing over that distance he could see a train approaching for a quarter of a mile, but did not use his powers of observation during any of that time, but drove upon the track and the horses were injured—*held*, that the driver was guilty of contributory negligence, and that the owner of the horses could not recover for the damage done to them, because of the contributory negligence of the driver.

(Syllabus by the Court.)

Action by John Brennan, Jr., against the Pennsylvania Railroad Company. Verdict for plaintiff. Rule to show cause made absolute.

Argued June term, 1905, before DIXON, SWAYZE, and GARRETSON, JJ.

Allan H. Strong, for the rule. Leslie Lupton, opposed.

GARRETSON, J. The plaintiff sued to recover damages to his team of horses, wagon, and harness, caused by their being struck by an engine of the defendant company at a highway crossing known as the "Six Roads Crossing," a short distance west of Rahway. The jury gave verdict against the defendant, which it by this rule seeks to set aside.

The accident occurred January 17, 1903, at about 5:30 p. m. It was dark or twilight. The plaintiff's team was in charge of Harry Hunt, his colored driver, who was using it to haul 60-foot poles from a place called "Hoxie's" across the tracks to Woodbridge. There were two teams, both belonging to the plaintiff, one in charge of Hunt and the other in charge of James Tierney. Each team was drawing a wagon on which were two logs 60 feet in length; the front and hind wheels being about 45 feet apart. Hunt's team was in front and Tierney's was following closely. Both men were familiar with the crossing and had been carting logs over it for a considerable time. They approached the railroad on Leesville avenue, and the train from which the injury was received was west-bound on the first track to be crossed. About 70 feet from the railroad Leesville avenue runs into St. George's avenue, which crosses the railroad at right angles. The plaintiff's drivers went from Leesville avenue into St. George's avenue, and then intended to go directly across the railroad. Hunt, the driver of the injured team, stopped at the junction of

Leesville avenue and St. George's avenue, then started on, and continued until his horses were struck on the first railroad track. From the place where Hunt stopped to the crossing, a distance of 70 feet, there was an unobstructed view of at least a quarter of a mile along the railroad towards Rahway (the direction from which the train in question came), except so far as the flagman's shanty interfered. The headlight of the engine was lighted. The shanty adjoins the easterly side of the highway, was 6 feet from the nearest rail of the track, and was 6½ feet in width along the road, so that it would begin to be an obstruction 12½ feet from the railroad track, while from a point 70 feet from the track to a point 12½ feet from the track, or for a distance of 57½ feet, there was an unobstructed view for a quarter of a mile.

It appears from the testimony of Hunt that, from the time he started from the place where he had stopped until his team was struck, he did not look to see whether any train was approaching. Upon his direct examination Hunt says: "The first we saw was the crossing, and I stopped right at the curve [this is at the junction of Leesville avenue and St. George's avenue], and when I stopped the flagman came out and set his light down and went back, and the fellow was behind me. He says: 'Go ahead, there is no train; for the flagman has set his light down and gone back.' I says: 'I don't know about that. We cannot always depend upon the flagman.' He says: 'Well, if there was a train coming, he would have to be out there.' So I started on, and as I got on the track he came out, and he says, 'There is a train coming,' and to come on across. Well, I went on, and the next thing I knew the light was on me of the engine, and it was zip, and it was all over." On cross-examination he testified as follows: "Q. Where were you when you stopped your horses first? Was it at the junction of the roads? A. Just; well, you cannot say about the junction of the roads. The hind part of my wagon was about at the junction; yes, the hind part; yes, right at the curve. Q. The point where you stopped as you said to look was where, just as you come from Leesville avenue into St. George's avenue? A. Yes, sir. Q. Just about the junction of the two roads? A. Yes, sir. Q. While you were standing at that point I understood you saw the flagman come out and set down his lamp? A. Yes, sir. Q. And then Jim, who was behind you on the other load, he called out to you to go ahead, that there was no train coming. Then you said you did not know about that? A. Yes, sir. Q. Then you went on, did you? A. I did. I went on." He then describes the position of himself with reference to the flagman's shanty, saying: "As you come on here, when you got to the shanty on the wagon, you were right by the shanty, and there is the track.

Q. That is, when you were sitting on the wagon opposite the shanty, the horses are on the track? A. Yes, sir; and the driver is by the shanty. When I reached the shanty, he came out and said, 'Go ahead, a train is coming,' or he said, 'Come on,' or something of that kind, or 'Go ahead, a train is coming.' Q. That is, just when you were sitting on your wagon, just opposite the watchman's shanty? A. Yes, sir. Q. Then he came out and said to you, 'Go ahead, there is a train coming?' A. Yes, sir; and the horse's head was then about on the first track. A. When he said that to you, was your wagon standing or was it moving? A. We were going along. Q. From the time that you stopped up here at the junction of the two roads you went right on, did you? A. Yes, sir. Q. Where was the train when you first saw it coming? A. Well, I could not tell you; all I seen was the light and the light was on me then." When the plaintiff rested, counsel for the defendant moved for a nonsuit on the ground of the contributory negligence of the plaintiff's driver in passing over the distance from where he stopped to the track, where there was an uninterrupted view from the stopping place until interrupted by the flagman's shanty. The trial Justice then requested Hunt, the driver, to say how far away from the track the place was where he first stopped, and Hunt then testified it was about 30 or 35 feet from the nearest track.

Upon these facts we think the contributory negligence of the plaintiff's servant is clear. *Van Riper v. N. Y. S. & W. R. R. Co.* (N. J. Sup.) 59 Atl. 26; *Beeg v. N. Y. S. & W. R. R.*, 70 N. J. Law, 56, 56 Atl. 169; *Conkling v. Erie R. R.*, 63 N. J. Law, 338, 43 Atl. 686; *Hoopes v. W. Jersey & Seashore R. R. Co.*, 65 N. J. Law, 89, 47 Atl. 27; *Dotty v. Atlantic City R. R. Co.*, 64 N. J. Law, 710, 46 Atl. 772; *Winter v. N. Y. & L. B. R. R. Co.*, 66 N. J. Law, 677, 50 Atl. 339; *Pennsylvania R. R. Co. v. Leary*, 56 N. J. Law, 705, 29 Atl. 678; *D. L. & W. R. R. Co. v. Hefferman*, 57 N. J. Law, 149, 30 Atl. 578; *Pennsylvania R. R. Co. v. Richter*, 42 N. J. Law, 180. Nor are we able to perceive how the plaintiff is relieved from the effects of the contributory negligence of his driver by the action of the flagman. The first act of the flagman was to come out of the shanty, put his light outside, and go into the shanty again. This could only indicate that the flagman was preparing to give a signal to an approaching train. It was not a signal for travelers on the highway, else he would have remained outside with his light at all times for the benefit of those likely to come along at any time; while, if it were for the trains, it would only be used at times when a train was due or was seen approaching by the flagman, and the testimony is that the driver understood a white light means there is a train coming. It was testified that the flagman made use of certain words and that these words were

an invitation to the driver to cross. These words are variously testified to as "Get across, there is a train coming," or "There is a train coming and to come across," or "Go ahead, a train is coming," or "Come on." These words were used when the driver of the injured team was opposite the shanty and the horses were on the track, as appears by the testimony already referred to, and Tierney, the other driver, testifies that the flagman came out with a light and put it outside, but did not say anything, and he did not come out until Harry struck the crossing with the team, and then said, "Get across, there is a train coming." These words, used under these circumstances, cannot be regarded as an invitation to the driver to cross with an assurance that it was safe. It was rather a notice to the driver that he was in danger and to escape the danger he must get across. But the conduct of the flagman, although amounting to an invitation, can never relieve the traveler from the obligation to look out for his own safety. *Swanson v. Central R. R. Co.*, 63 N. J. Law, 605, 44 Atl. 852; *Pennsylvania R. R. Co. v. Pfuell*, 60 N. J. Law, 278, 37 Atl. 1100.

The rule to show cause is made absolute.

MILLER et al. v. WILLETT et al.

(Court of Chancery of New Jersey. Oct. 20, 1905.)

1. EQUITY—BILL—DEMURRER.

A bill of complaint, which states that the complainants jointly have rights of action against several defendants, no one of whom is liable in whole or in part for the others' debt, which asks neither accounting nor discovery, but demands simply the payment by each defendant separately of a definitely ascertained sum of money, which shows no joint or related liability between the defendants, and which alleges neither the breach of a trust, the perpetration of a fraud, nor any other ground for equitable relief, is demurrable for want of equity.

2. SAME—MULTIFARIOUSNESS.

Such a bill is multifarious, in that it subjects unrelated defendant, who the bill shows is entitled to defend separately, to the embarrassment of defending a suit in which others are joined as defendants with whom he has no apparent common interest.

3. SAME—WANT OF EQUITY.

A bill which seeks to enforce a statutory obligation in the nature of a guaranty of a debt, by compelling the payment of sums largely in excess of the amount necessary to satisfy that debt, is demurrable for want of equity.

(Syllabus by the Court.)

Bill by Alfred L. Miller and others against John A. Willett and others. Demurrer to bill sustained.

The bill of complaint in this cause is filed by Alfred L. Miller and more than 450 other persons, who allege themselves to be residents in the state of Colorado and to be all of the depositors in and creditors of the State Bank of Monte Vista, in the county of Rio Grande, in that state. The defendants are John A. Willett and 19 others,

who are in the bill alleged to be the only shareholders in said bank and persons liable for the debts within the jurisdiction of this court. The bill of complaint alleges: That the State Bank of Monte Vista, since the 11th day of August, 1890, has been, and still is, a corporation organized under the laws of the state of Colorado, having a capital stock which as increased is \$80,000, divided into 800 shares, of the par value of \$100 each. That the said bank conducted, in three different places in Colorado, a general banking business, until June 15, 1899, when it became insolvent, and on that day made an assignment under the laws of the state of Colorado and appointed one Norman H. Chapman as assignee. That the assignee qualified and took possession of the property and choses in action of the bank, converted them into money, and paid them out to the creditors of said bank, and that nothing remains for distribution, all the property and choses in action having been disposed of, resulting in the payment by said assignee upon the indebtedness of the bank as of December 15, 1899, of 15 per cent., and of December 1, 1901, of 4½ per cent., and that, if any further moneys are recovered for said bank creditors, it must be from the stockholders upon their stock liability. That the complainants deposited in that bank at times while the defendants were shareholders therein, and that the balances of complainants' deposits remaining in the bank at the date of its failure were the sums stated in the list set forth in the bill of complaint, amounting in the aggregate to \$66,115.93. That the present total indebtedness of the said bank (after crediting the payments made thereon by the assignee, amounting to \$11,646.90) amounts to \$56,469.03, upon which the complainants claim interest at the rate of 8 per cent. per annum from June 15, 1899, being the rate of interest allowed by law in the state of Colorado. The complainants further allege: That the laws of the state of Colorado at the time of the organization of the bank provided as follows (Laws Colo. 1885, p. 264, No. 243, § 1): "Shareholders in banks, savings banks, trust deposit and security associations, shall be individually responsible for debts, contracts and engagements of the said association in double the amount of the par value of the stock owned by them respectively." That said law has been at all times since the organization of the bank, and now is, in full force and effect. The bill of complaint further alleges: That when the complainants became creditors of said bank the defendants in this bill were shareholders therein, and continued to be shareholders at the date of said bank's assignment, and that the number of shares held by each defendant is as follows: John A. Willett, 5 shares; Robert D. Kent, 5 shares; Frederick Lowe, 5 shares; William P. Aldrich, 30 shares; Edo Kipp, 5 shares;

Anna Basch, 40 shares; Moses E. Worthen, 30 shares; Estate of C. Aldrich, 30 shares. The bill of complaint further alleges that said Edo Kipp, died February 16, 1899, seised of certain lands, etc., leaving a last will whereof Arrianna Van Houten and Ella K. Goodlatte were appointed executrices; that they probated said will on March 1, 1899, before the surrogate of Passaic county, and undertook the administration of the estate of said decedent; that said Kipp left him surviving as his heirs at law and devisees of his lands, etc., Arrianna Van Houten, Ella K. Goodlatte, Peter E. Kipp, John M. Kipp, and Mary Kipp; that said Peter E. Kipp has since died; and the complainants charge that said Arrianna Van Houten, Ella K. Goodlatte, John M. Kipp, and John E. Kipp, and Mary Kipp, heirs, and devisees of said Edo Kipp, are severally and individually liable for the obligation of said Edo Kipp under the will as above stated. The bill of complaint further alleges that Anna Basch departed this life on November 24, 1903, seised of certain lands, etc., testate, as by her last will appointed Henry L. Basch, Isaac Basch, and Marion Feeder, executors of her will, who on December 5, 1903, proved the same before the surrogate of Passaic county and took upon themselves the burden of the execution thereof. That said Anna Basch left her surviving as her heirs at law and devisees of her lands, etc., Isaac Basch, Marion Feeder, James S. Basch, Carrie Basch, Matilda Basch, and Anna J. Basch, who, the complainants charge, are severally and individually liable for the obligation of said Annie Basch, under the will aforesaid. The bill further alleges that said Moses E. Worthen departed this life December 26, 1897, testate, seised of certain lands, etc., and by his last will appointed the Passaic Trust & Safe Deposit Company executor and trustee, which company on January 7, 1898, probated said will before the surrogate of Passaic county and undertook to execute the same, and that said Moses E. Worthen left him surviving, as his heirs at law and devisees of his lands, etc., Irene C. Worthen, now Irene C. Mansur, Harry Worthen, Frank Popple, Jr., Bessie Popple; and the Passaic Trust & Safe Deposit Company, trustee, and the complainants charge that the said heirs and devisees are severally and individually liable for the obligation of said Moses P. Worthen, as above stated. The bill of complaint further alleges that William P. Aldrich upon his individual responsibility, but in the name of the "Estate of C. Aldrich," subscribed for 30 shares of the stock of said bank, and was a shareholder therein when the complainants became creditors and at the time of the assignment made by said bank, to the extent of 30 shares, and the complainants charge that said William P. Aldrich, upon subscribing to said stock, became and was individually liable for the obligation entered into as above named, and agreed to

assume, and did assume, the liability for the debts of said bank (in case of insufficiency of the corporate assets to liquidate such indebtedness), in double the amount of the par value of the stock subscribed for in the name of "Estate of C. Aldrich"; and the complainants charge that said William P. Aldrich is indebted to complainants in double the amount of the par value of said stock. The bill further alleges that by virtue of the statute of the state of Colorado, pursuant to which said State Bank of Monte Vista was incorporated, each and every stockholder of said bank agreed to assume, and did assume, liability for the indebtedness of said bank (in case of deficiency of its assets to liquidate its indebtedness) in double the amount of the par value of his stock; and the complainants charge that the defendants, by virtue of the provisions of said statute, are severally and individually indebted to the complainants in double the amount of the par value of the stock in the bill of complaint set forth as being held by them respectively. The bill prays that the defendants John A. Willett, Robert E. Kent, and Frederick Lowe, may be decreed to pay to the complainants the sum of \$1,000 each; the defendant William P. Aldrich the sum of \$12,000; the defendants Arrianna Van Houten, Ella K. Goodlatte, John M. Kipp, John E. Kipp, and Mary Kipp, as heirs at law of Edo Kipp, deceased, the sum of \$1,000; the defendants Isaac Basch, Marion Feeder, James S. Basch, Carrie Basch, Matilda Basch, and Emma J. Basch, as heirs at law and devisees of Anna Basch, the sum of \$8,000; the defendants Irene C. Mansur, Marry Worthen, Frank Popple, Jr., Bessie Popple, and the Passaic Trust & Safe Deposit Company, trustee, as heirs at law and devisees of Moses P. Worthen, deceased, the sum of \$6,000; and for further relief, etc.

Seven separate demurrers have been filed to the bill of complaint; one by John A. Willett, another by Robert B. Kent, another by William P. Aldrich, another by Fred Lowe, another by the Passaic Trust & Safe Deposit Company, trustee, another by Isaac Basch, Marion Feeder, James S. Basch, Carrie Basch, and Emma J. Basch, and another by Arrianna Van Houten, Ella K. Goodlatte, John M. Kipp, John E. Kipp, and Mary Kipp. Thirteen grounds of demurrer are stated by the different demurrants, which are substantially the same. They are as follows: "(1) That the complainants have not in their bill stated such a case as entitled them in a court of equity to any relief against the defendants or any of them, as to the matters contained in said bill. (2) That it appears by the bill of complaint that the names of the natural persons and of the corporations, complainants, are not accurately or correctly set forth in said bill; and their residences are not definitely given. (3) That it appears by the bill that there are divers other persons

who are necessary parties to said bill and who are not made parties thereto; and in particular it appears by the bill that the State Bank of Monte Vista named in said bill is a necessary party thereto, and that Norman H. Chapman as assignee for the benefit of creditors named in said bill is a necessary party thereto, but that neither of said necessary parties is made a party to said bill. (4) That it appears by the said bill that complete justice can be done only by the courts of the jurisdiction where the corporation, the said State Bank of Monte Vista, was created, and that, only a part of the stockholders being parties defendant to this proceeding, it is not within the province or power of this court to make the ascertainment and afford the equitable relief contemplated by the Colorado statute, and, therefore, the bill should be dismissed. (5) That it does not appear by the bill of complaint that the complainants have recovered judgments upon their claims against the State Bank of Monte Vista in the state of Colorado or elsewhere, or have had in any way the validity of their claims judicially determined against said bank. (6) That it does not appear by said bill that the validity of the claims of the complainants has been established against the stockholders of said bank by the assignee of said bank or by any court. (7) That it does not appear by said bill that the assets of said bank were legally and properly administered and the proceeds justly and equitably applied to the reduction of the debts of the creditors. (8) That it does not appear by said bill that the assets of the said bank were ascertained and administered in any suit or proceeding to which the stockholders of said bank were parties or wherein the rights and equities of the stockholders of said bank were duly regarded. (9) That the complainants' rights depend upon the statute of the state of Colorado, which cannot be equitably enforced by this court in view of the circumstances set forth in the bill of complaint. (10) The statute of Colorado, upon which the complainants rely, contemplates a proceeding in equity in the domiciliary jurisdiction by the creditors of the corporation against all the stockholders thereof, for the purpose of establishing a pro rata liability. This court will not enforce the liability created by the statute of Colorado in a suit by creditors against a few of the stockholders. (11) That the liability imposed upon stockholders by the provisions of the statute of the state of Colorado quoted in the bill of complaint is not enforceable in the courts of this state. (12) That the said bill of complaint does not set forth any facts showing a liability on the part of this defendant for the debts of Moses E. Worthen, mentioned in said bill. (13) That it appears by the bill that the same is exhibited against this defendant and several other defendants for distinct matters and causes, in several

whereof, as appears by the bill, this defendant is not in any manner concerned, and that the bill is multifarious."

The cause was argued on these grounds of demurrer.

Thomas M. Moore and H. C. Whitehead, for demurrants. Horton & Tilt, Eugene Emley, and Philo P. Tolles, opposed.

GREY, V. C. (after stating the facts). The Colorado statute, which is the basis of this suit, declares that the shareholders of banks in that state shall be individually responsible for the debts of the bank in double the amount of the par value of the stock owned by them respectively. The bill of complaint is filed against 11 defendants in different groups, alleging that each group is severally and respectively indebted to the complainants in a certain named sum of money. The complainants pray that each group of defendants may be decreed to pay to the complainants the definite amount of money named in the bill of complaint. This cause has been argued upon the widest possible basis, presenting variant constructions of the Colorado statute above quoted, and citing numerous decisions in different states touching the meaning of that act, the proper mode of procedure to enforce it, and also discussing the constitutionality, operation, and effect of the New Jersey act of March 30, 1897 (P. L. 1897, p. 124), prohibiting suits of this character in the courts of this state, unless the corporation and all of its stockholders shall be made parties.

I have not found it to be necessary to consider each of the grounds of demurrer to the complainants' bill of complaint, inasmuch as several of the objections presented, affect the whole case, as the complainants have stated it in their bill of complaint, and when determined must dispose of these demurrers. The first cause of demurrer challenges the bill of complaint upon the ground that the complainants have not set forth such a case as entitles them to any relief in equity, etc. As the complainants state their cause of complaint, they have a right to the payment of seven definitely ascertained sums of money. They seek separate money decrees, that certain named defendants shall respectively pay these several sums, and they ask no other relief. The following summary of the prayer for relief exhibits this feature of the bill of complaint. The complainants pray that John A. Willett may be decreed to pay \$1,000; that Robert D. Kent may be decreed to pay \$1,000; that Frederick Lowe may be decreed to pay \$1,000; that William P. Aldrich may be decreed to pay \$12,000; that Arrianna Van Houten, Ella K. Goodlatte, John E. Kipp, and Mary Kipp, as heirs and devisees, may be decreed to pay \$1,000; that Isaac Basch, Marion Feeder, James S. Basch, Carrie Basch, Matilda Basch, and Emma J. Basch, as heirs and devisees, may be decreed to pay \$8,000; that Irene C. Mansur, Harry Worthen, Frank

Popple, Jr., Bessie Popple, and the Passaic Trust, etc., heirs and devisees, etc., may be decreed to pay \$6,000. It is not asserted that any group of defendants which is alleged to owe one of these definite sums is in any way liable in whole or in part for any other of them. Nothing in the expressions of the bill suggests that there is any need of an accounting as between the complainants and any or all of the defendants. No discovery is sought by the bill of complaint. No facts are stated which indicate the existence of any trust which is sought to be enforced, nor is any fraud alleged against which relief is asked. Nor is any other element of equity jurisdiction presented by the complainants' bill of complaint. All that is alleged is that certain named defendants are indebted in certain definitely ascertained sums of money to the complainants, which they seek to recover severally in full, from the respective defendants, by this suit. As the complainants state their case, there is no ground of equitable jurisdiction exhibited. The facts set forth in the bill of complaint, if taken to be true, as asserted by the complainants, do show that they have a direct, certain, and adequate remedy by suit at law to recover each sum of money which they claim against the several defendants, respectively. There is therefore no occasion for an appeal to equity jurisdiction. In such cases a demurrer to the bill of complaint will be sustained. Story, Eq. Pl. § 473.

The bill of complaint is also challenged by the demurrants upon the ground that it is multifarious. The face of the bill alleges that the defendants in seven different groups owe seven distinct sums of money, constituting seven separate causes of action, which, as between the separate groups of the defendants (so far as the bill of complaint states the situation), are wholly unrelated. The Colorado statute, which is alleged to have created liabilities sought to be enforced in this suit, is recited on the face of the bill of complaint, to make the shareholders individually responsible in double the amount of the par value of the stock owned by them, respectively. This is obviously a several liability of each shareholder to the creditors of the bank. It was so held in *Auer v. Lombard*, 72 Fed. 209, 19 O. C. A. 72. The complainants themselves insist that it is several. It has been declared by the Colorado courts interpreting this statute, in the case of *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145, that a suit in equity for the common benefit of all the creditors affords the most effectual and convenient proceeding to enforce the provision under examination. This very general statement of the occasion for a suit in equity may define correct equity practice in a state in which the distinction between law and equity tribunals is not maintained, but the course of the procedure there suggested cannot be recognized as authority here without bringing our practice

into inextricable confusion. Suits in equity in this state are maintained, not because they are effectual or convenient remedies to complainants, but because the relations of the complainants to the defendants are such that they have, as against them, equitable grounds for relief. In the Colorado case cited it does not appear whether all the shareholders or only some of them were made defendants, nor whether the amount of the bank's unpaid debt exceeded the whole sum for which the shareholders were liable, or only a part thereof requiring an accounting and decree for proportionate payments. In the case presently before me, the bill of complaint contains no allegations of facts which justify joining in one suit these several and respective claims against many different persons. No concert of action by the defendants is alleged; no obligation common to all defendants is set forth; nor is there any tie suggested by which the claims of the complainants against all these defendants should be joined, except that it will prevent a multiplicity of suits. But that would be true if the complainants should join in one suit all the unrelated claims they might have against any number of defendants. The complainants say each defendant separately owes the whole sum which he is asked to pay, but they state no reason for joining in one suit these seven several and distinct and apparently (so far as the bill shows) unrelated claims. This feature of the bill of complaint justifies the defendants' contention that it is multifarious. It subjects the defendants, who the complainants show are entitled to defend separately, to the embarrassments of a suit in which others are joined who apparently have no common interest.

It also appears on the face of this bill of complaint that no equitable decree can be made in this suit against the defendants. It must be noted that the complainants do not ask, nor does their bill contemplate, a collection in this suit from each defendant of that proportion of the bank's debt (not exceeding his whole liability) which he ought to pay. Such a procedure would require, not only an accounting, but also the presence as parties in the suit of all the shareholders who are liable for proportionate shares of the bank's debt. What the complainants here demand is that each defendant shall pay the uttermost sum for which he may be liable, although the total of the payments which may thus be demanded from all the shareholders will far exceed the bank's debt. This seeks to force upon each defendant an obligation beyond what any equitable construction of his statutory liability requires. The Colorado statute declares that the shareholder shall be individually responsible for the debts of the bank, in double the amount of the par value of the stock which he owns. The obvious meaning is that, whatever of the bank's debts its assets, when applied, shall fail to pay, the shareholders shall make good to the creditors; each shareholder being re-

sponsible individually, and not jointly, for his proportionate share of the bank's unpaid debts to an extent not exceeding double the amount of the par value of the stock which he may own. It is an obligation severally owned by each shareholder to all of the creditors. In the present suit the complainants allege that the total of the bank's unpaid debts is \$56,469.03; that the par value of each share issued by the bank, \$100, with an issue amounting in the total to \$80,000; that of the 800 shares issued the defendants in this suit hold 150, which are of the total par value of \$15,000. The present suit seeks several and respective decrees against the defendants (who held only $\frac{2}{16}$ of the shares) to the amount in all of \$30,000. Like suits against the other shareholders will make them pay \$130,000. By such a construction of the statutory liability and procedure to enforce it, the creditors will collect \$160,000, to pay the bank's indebtedness, which it is admitted on the face of the bill, is little more than one-third of that amount.

There has been some discussion, in the cases cited, of the question whether this statutory liability is the imposition of a penalty or the creation of a statutory contractual obligation, imposed by the state in granting the franchise, which the shareholder has accepted by taking his shares. The tendency of the courts is to adopt the latter view. It is a familiar principle that courts of equity will not enforce penalties. The complainants in this suit do not present their case as one seeking to enforce penalties, yet their bill of complaint as framed, by insisting upon the several liability of each defendant to pay as an absolute sum double the par value of his shares, the total of which is far in excess of the bank's unpaid debts, and omitting to bring in as defendants all the shareholders, and to invite an accounting and the ascertainment of the proportionate sums which each should respectively pay to satisfy the bank's unpaid debts, in effect seeks to enforce against each defendant the payment of a fixed sum, wholly unrelated and out of all proportion to the amount needed to pay the bank's debts—in short, to enforce a penalty. This defect of the bill of complaint is apparent upon its face, and affects this court's ability to make any decree in this cause which will be just and equitable.

For the reasons above stated, the demurrers to the bill of complaint must be sustained, with costs.

STATE v. NEALON et al.

(Supreme Court of New Jersey. Nov. 13. 1905.)

STATUTES — SPECIAL ACT — REGULATION OF CITIES.

The supplement, approved March 30, 1905, to the act entitled "An act to remove the fire and police departments in the cities of this state from political control," approved May 2, 1885,

is a special act to regulate the internal affairs of cities, and therefore is unconstitutional.

(Syllabus by the Court.)

Quo warranto by the state against John I. Nealon and others. Judgment for the state.

Argued June term, 1905, before GARRISON, GARRETSON, SWAYZE, and DIXON, JJ.

Gilbert Collins, for the State. Thomas F. Noonan, for defendants.

DIXON, J. At the last February term of this court the Attorney General, *ex officio*, filed an information against the defendants, charging that they unlawfully exercised the franchises of a board of police commissioners in the city of Bayonne, under color of a supplement, approved March 30, 1905, to an act entitled "an act to remove the fire and police departments in the cities of this state from political control," approved May 2, 1885, which supplement the information alleges to be unconstitutional and void, as being a special law regulating the internal affairs of cities. To the plea of the defendants, insisting upon the validity of the supplement, the Attorney General demurred, setting forth with his demurrer various reasons for holding the supplement to be unconstitutional, among them that stated in the information.

We think that reason is sufficient. The act of 1885 (Gen. St. 1551) applies to all cities in the state which, by vote of the citizens, accept the act, and directs that in each of those cities a board of police commissioners, consisting of four residents in the city, shall be appointed by the mayor and council, that two of the commissioners shall be selected from each of the two political parties which polled the greatest number of votes at the last preceding municipal election, and that every successor of any of these commissioners shall be selected from the same political party as his predecessor. The supplement of 1905 (P. L. p. 155) applies only to cities having a population numbering between 12,000 and 100,000, in which police commissioners have not been appointed in pursuance of any law of this state. It authorizes the mayor alone, in his discretion, to appoint a board of police commissioners, consisting of four residents in the city, not more than two of whom shall be the same political party, but directs that the successors of the commissioners shall be appointed in the manner directed in the act of 1885. The effect of the original act is to vest the perpetual control of the police department in members of the two political parties which at the municipal election last preceding the acceptance of the act polled the greatest number of votes, and the effect of the supplement is to vest such control in members of those political parties out of which the mayor selects his first appointees.

I find it somewhat difficult to perceive

how such legislation has for its object the removal of the department from political control, as the title of the act declares. But, waiving that matter, the supplement must be adjudged unconstitutional on the ground that it is a special act to regulate the internal affairs of cities. It attempts a classification of cities on the basis of population, but it excludes from its operation those cities which, although their population is within the prescribed number, have police commissioners appointed in pursuance to other statutes. Hoboken is such a city, and there police commissioners are to be appointed without regard to their party affiliations. It is impossible to suggest a substantial reason for discriminating between Hoboken and other cities of the designated size, with respect to the mode of selecting the police commissioners. The decision of this court in *Tetrault v. Orange*, 55 N. J. Law, 99, 25 Atl. 268, is directly in point. The classification attempted is unreal.

The Attorney General is entitled to judgment.

TUSTING v. CITY OF ASBURY PARK.

(Supreme Court of New Jersey. Nov. 13, 1905.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—OBJECTION TO ASSESSMENTS.

When a landowner has notice of the proceedings for making a street improvement in front of his property, for which the law authorizes an assessment thereon to be levied, and refrains from applying for a writ of certiorari to review the proceedings until the improvement is completed and an assessment levied, he will be allowed to question on certiorari only the legality of the assessment.

2. SAME—AUTHORITY OF COUNCIL.

Under clause 3 of section 48 of the city act of March 24, 1897 (P. L. 1897, p. 70), the common council of the city may make the assessment there authorized.

3. SAME—CERTIORARI TO REVIEW.

A certiorari to review such an assessment, allowed after 60 days from the confirmation of the assessment had elapsed, should be dismissed under section 65 of said act (P. L. 1897, p. 79.)

(Syllabus by the Court.)

Certiorari by Robert Tusting against the city of Asbury Park to review an assessment for grading a street. Dismissed.

Argued June term, 1905, before SWAYZE and DIXON, JJ.

Wm. F. Midlige, for prosecutor. Samuel A. Patterson, for defendant.

DIXON, J. The certiorari in this case brings up an assessment against the prosecutor's land fronting on Bond street in Asbury Park for the grading and graveling of the street. As the prosecutor had ample notice of the proceedings for the improvement at their inception, but delayed to apply for the writ until the improvement was completed and the assessment levied, he cannot be heard with regard to any errors in procedure prior to the assessment. Youngster

v. Paterson, 40 N. J. Law, 244; *Jelliff v. Newark*, 48 N. J. Law, 101, 2 Atl. 627; *Id.*, 49 N. J. Law, 239, 12 Atl. 770. The chief legal ground of objection to the assessment is that it was levied by the common council, not by the board of city assessors.

An examination of the city act of March 24, 1897 (P. L. 1897, p. 46), under which these proceedings were taken, leaves us in some doubt on this point, but the better view appears to be that, with regard to the grading, graveling, paving, flagging, and otherwise improving and regulating of streets, under clause 3 of section 48, the common council itself has authority to assess the costs and expenses of the improvement upon the owners of property benefited to the extent of the special and peculiar benefit received. Of this tenor are the words used, and the doubt arising from considering other parts of the act is not strong enough to overthrow their plain import. This being determined, we think the last clause of section 65 becomes applicable, which forbids the allowance of any certiorari to review an assessment, unless the same be applied for within 60 days after confirmation of the assessment by the common council.

The present assessment was confirmed by the council on September 2, 1902, but the writ of certiorari was not applied for until July, 1903. It should therefore be dismissed, with costs.

HAUENSTEIN v. RUH.

(Supreme Court of New Jersey. Nov. 13, 1905.)

PRINCIPAL AND AGENT—LIABILITY OF AGENT.

The defendant, as a collection agent, after informing the plaintiff that he was acting as such, received from the plaintiff the amount of a claim against the plaintiff's brother, which was in his hands for collection, and at once paid it over to his principal. *Held* that, in the absence of any personal fraud or guaranty of the validity of the claim, the defendant was not answerable to the plaintiff for the amount so received, on proof that the claim was invalid.

(Syllabus by the Court.)

Appeal from District Court of Jersey City.

Action by Louis O. Hauenstein against Charles F. Ruh. Judgment for plaintiff, and defendant appeals. Reversed.

Argued June Term, 1905, before SWAYZE and DIXON, JJ.

J. Emil Walscheid, for plaintiff. James A. Gordon, for defendant.

DIXON, J. The facts on which the judgment of the district court in favor of the plaintiff was based are that the defendant, who was in the collection business, had received from his son, who was in similar business on his own account, a memorandum of the amount of a claim against the plaintiff's brother, which the defendant's son said had been sent to him from a New York law office for collection; that, the brother's property being about to be sold under the Martin act,

the plaintiff was present for the purpose of buying it in; that the defendant was also present, and, being asked by the plaintiff, if he was going to bid at the sale, answered that he was, to protect a client, that he had a claim against the brother which came from a New York law office, and, if that was paid, it was all he was after; that the plaintiff then said he would pay it if it was just, and the defendant said if he would pay it it would be all right; that thereupon the plaintiff gave his check for the amount to the defendant's order, and the defendant at once indorsed it over to his son who collected the amount; and that the claim was in truth unfounded. On these facts judgment for the amount of the check was given in favor of the plaintiff, and the defendant appeals.

We think the judgment was erroneous. There was no evidence that the defendant in any way guaranteed the validity of the claim or made any fraudulent statement regarding it. To the plaintiff's knowledge he received the check in order to pay it over to the person whom he represented, and he actually did just what the plaintiff thus, by implication, authorized him to do. Although he did not at the time give to the plaintiff the name of his principal or of the ultimate claimant, yet he was not asked for it, and he distinctly informed the plaintiff that he was but an agent. Under these circumstances the plaintiff's remedy, if any exists, must be pursued against the principal who has wrongfully received his money.

The judgment of the district court should be reversed, and, unless the plaintiff applies to this court before the next term thereof for a different disposition of the cause, final judgment in favor of the defendant may be entered, with costs, pursuant to the act of April 3, 1902 (P. L. 1902, p. 565), regulating such appeals.

PHILADELPHIA & C. FERRY CO. v. INTERCITY LINK R. CO.

(Supreme Court of New Jersey. Nov. 13, 1905.)

1. CORPORATIONS—DEFECTS IN ORGANIZATION—WHO MAY QUESTION.

The fact that an amended certificate of incorporation was not acknowledged or proved before a proper officer is unimportant in proceedings taken by the corporation to condemn land.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 77, 78.]

2. EMINENT DOMAIN — CONDEMNATION OF FRANCHISE.

The present location of a footpath leading to the prosecutor's ferry, and which can be changed without detriment to its usefulness, cannot be deemed necessary for the purposes of the prosecutor's franchise.

3. SAME—PETITION—PROOFS.

Condemnation proceedings are not rendered irregular by the omission to state, in the petition and proofs presented to the justice, matters which the eminent domain act does not require to be set forth.

4. CORPORATIONS—ACTIONS—SERVICE OF NOTICE.

Service of notice of such proceedings on the registered agent of a domestic corporation is sufficient, although not made at the registered office because the corporation had removed therefrom.

5. EMINENT DOMAIN—PROCEEDINGS—AMENDMENTS.

Under the seventeenth section of the eminent domain act (P. L. 1900, p. 86) the justice to whom a petition for condemnation is presented has power to permit amendments of the proceedings and to adjourn the hearing on the petition.

6. SAME—PARTIES.

In a proceeding to condemn the rights of an abutting owner in a public highway, the municipality in which the highway lies is not a necessary party.

(Syllabus by the Court.)

Certiorari by the Philadelphia & Camden Ferry Company against the Intercity Link Railroad Company to review an order of a justice of the Supreme Court. Affirmed.

Argued June term, 1905, before SWAYZE and DIXON, JJ.

Gaskill & Gaskill, for prosecutor. Martin V. Bergen, Jr., for defendant.

DIXON, J. This certiorari brings up an order made by one of the justices of this court on April 24, 1905, appointing commissioners to appraise lands owned by the Philadelphia & Camden Ferry Company, in order that the Intercity Link Railroad Company might acquire the same for the construction and operation of a railroad running from Camden beneath the bottom of Delaware river to the Pennsylvania boundary, and there connecting with a railroad from Philadelphia. The petitioner for the order is the Intercity Link Railroad Company, claiming to be incorporated under the general railroad act of this state (P. L. 1903, p. 645), and the prosecutor of the certiorari is the Philadelphia & Camden Ferry Company.

The first objection urged by counsel for the prosecutor against the legality of the order is that the petitioner was not lawfully incorporated, because the original certificate of incorporation and an amended certificate were not acknowledged or proved before a proper officer. As to the original certificate the allegation of fact is untrue, and as to the amended certificate the fact is in this controversy unimportant. The state only can complain of so formal a defect. *National Docks R. R. Co. v. Central R. R. Co.*, 32 N. J. Eq. 755.

The second objection is that the petitioner is not a railroad corporation within the meaning of the act above cited, because the whole of the proposed railroad is to be under the surface of the ground. This reason we find to be untrue in fact.

The third objection is that the land of the prosecutor, it being a corporation of this state chartered to facilitate transportation, is not rendered by the above-cited act subject to condemnation. The thirteenth section of

the act provides that land of such a corporation, not necessary for the purposes of its franchise, may be condemned, but that only a right to cross its other lands can be so taken. The evidence in this case shows that the land which the petitioner seeks to condemn is not necessary for the purposes of the prosecutor's franchise. It comprises part of a triangle lying west of the center of Delaware avenue, between the lines of Market and Federal streets, in Camden, which part is wholly unused, save for ornament, except that the southeasterly corner is occupied by a few feet of a cement path leading from the foot of Arch street towards the prosecutor's ferry, which path would be equally useful if moved 20 feet further south, so as to be off the tract condemned. It would be absurd to regard the present location of that footpath as necessary for the prosecutor's franchise.

The fourth, fifth, and sixth objections relate to alleged defects in the petition and proofs presented to the justice who made the order. The necessary contents of such a petition and the requisite verification are prescribed by the second section of our eminent domain act—P. L. 1900, p. 80—(*McEwan v. Penna. N. J. & N. Y. R. R. Co.* [N. J. Sup.] 60 Atl. 1130), and they do not embrace those matters, the lack of which forms the grounds of these objections.

The seventh objection is that notice of the application to the justice was not legally served on the Camden & Suburban Railway Company, one of the occupants of the land to be condemned. That company is a domestic corporation, and the defect in the service consisted in the fact that the notice, though served on the registered agent of the company, was not served at its registered office, from which the company had removed. Our corporation act (P. L. 1896, p. 291, § 43) does not require service of process to be made at the company's registered office, but only on the registered agent. The service made was, we think, sufficient. On the day first set for the hearing on the petition the petitioner moved to amend the same, and the justice after granting the motion adjourned the hearing for 13 days, in order that the opposing parties might have an opportunity to consider the petition as amended. Then, on the adjourned hearing he appointed the commissioners. This amendment and adjournment form the basis of the eighth and ninth objections. The seventeenth section of the eminent domain act (P. L. 1900, p. 86) authorizes the justice, upon any hearing before an appeal is filed, to make such orders and permit such amendments as may appear reasonable or as may promote the public purposes for which the power to condemn was conferred. This authority is clearly ample for the amendment allowed, and we think warrants also the adjournment; for, although the fifth section of the act directs the justice to appoint the commissioners on the day

fixed for the hearing, that does not necessarily mean the day first fixed, but includes any day so fixed in accordance with such orders as the justice may make under the seventeenth section.

The tenth, and last, reason urged is that the city of Camden was not made a party to the proceedings, although a portion of the land to be condemned lay within the limits of Delaware avenue. The explanation of this omission is obvious. The petitioner had no power to condemn the public rights in the highway, but under section 34 of the general railroad act might contract with the city for the exercise of certain privileges in the street, provided it had first acquired the rights of the abutting owner therein by agreement or condemnation. The present proceeding seems to have been framed to comply with this proviso, and clearly the city was not a necessary party thereto.

None of the objections presented is valid, and therefore the proceedings under review should be affirmed, with costs.

COLLOTY v. SCHUMAN.

(Supreme Court of New Jersey. Nov. 13, 1905.)

1. WITNESS—CROSS-EXAMINATION.

Any questions directly tending to show that the real import of a witness' testimony in chief is materially different from its original aspect are within the range of legitimate cross-examination.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 931-945.]

2. PRINCIPAL AND AGENT—CONTRACT WITH AGENT.

A contract made with the authorized agent of a known principal binds the principal, but not the agent.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 476-478.]

(Syllabus by the Court.)

Appeal from District Court of Atlantic City.

Action by Eugene M. Colloty against Edward F. Schuman. Judgment for plaintiff, and defendant appeals. Reversed.

Argued June term, 1905, before SWAYZE and DIXON, JJ.

Thompson & Cole, for appellant. Eli H. Chandler, for appellee.

DIXON, J. In the district court of Atlantic City the plaintiff sued the defendant for a commission claimed by the plaintiff for renting a hotel at the instance of the defendant. The defendant contended that in employing the plaintiff he acted as the agent of his mother who owned the hotel and that the plaintiff knew he was so acting. The plaintiff, having at the trial testified to his employment by the defendant and that \$42.50 of his commission had been paid by check, further testified on cross-examination that the check was drawn by Mrs. Schuman, and then was asked the following questions:

"Aside from receiving this check, did you ever meet her with regard to this transaction? Did you have any conversation with her relating to the renting of this property? Did you know at the time you had this conversation with Mr. Schuman that Mrs. Schuman was the owner of this property? Did you ever have any conversation with Mrs. Schuman regarding your pay for your services in securing this tenant for this property?" These questions were overruled, on the ground that they were not proper cross-examination. Such rulings are now assigned as reasons for reversal.

On the surface, the plaintiff's testimony in chief was to the effect that his bargain was made with the defendant as principal. Any questions directly tending to show that its real import was materially different would fall within the range of legitimate cross-examination. The questions propounded were manifestly designed to elicit the fact that the plaintiff knew he was dealing with the defendant as his mother's agent, for such knowledge might be inferable from the plaintiff's being aware that Mrs. Schuman owned the hotel, and that she had talked with him about renting it and about his pay for securing the tenant. If that inference should be drawn, the effect of the plaintiff's testimony would be essentially changed from its original purport. Although the defendant had signed the lease to the tenant as if he himself were the landlord, that would not render him a principal in the contract with the plaintiff. The overruling of this cross-examination was error.

On the defense the defendant testified that the plaintiff knew at the time that he (the defendant) was acting as agent for his mother, but the court refused to instruct the jury that such knowledge would defeat the action. This also was erroneous; the legal rule being that a contract made with the authorized agent of a known principal binds the principal, not the agent.

The judgment must be reversed, and the cause remitted to the district court for a new trial.

HAINES v. BOARD OF CHOSEN FREE-HOLDERS OF BURLINGTON COUNTY.

(Supreme Court of New Jersey. Nov. 13, 1905.)

HIGHWAYS—IMPROVEMENT—ASSESSMENT OF COST.

Where a proceeding for the improvement of a public road was initiated by a petition under the eighth section of the road improvement act of March 22, 1895 (Gen. St. p. 2902), before the passage of the road improvement act of April 1, 1903 (P. L. 1903, p. 145), the right to assess land bordering on the road for 10 per cent. of the cost, which the act of 1895 conferred, was not revoked by the act of 1903.

(Syllabus by the Court.)

Certiorari by I. Snowden Haines against the board of chosen freeholders of Burling-

ton county to review a road assessment. Assessment affirmed.

Argued June term, 1905, before SWAYZE and DIXON, JJ.

John G. Horner, for prosecutor. Chas. Ewan Merritt, for defendant.

DIXON, J. Prior to April 1, 1903, a petition, duly signed, had been presented to the board of chosen freeholders of Burlington county under the eighth section of the road improvement act of March 22, 1895 (Gen. St. p. 2902), praying for the improvement of the road leading from Burlington to Columbus, and the work of improvement was in progress on said day. According to that act, the land bordering upon the road was subject to an assessment for benefits to the extent of $\frac{1}{10}$ of the cost of the work, and after the improvement was completed, in the year 1904, such an assessment was levied; part of the expense being thus imposed on the land of the prosecutor of the present writ. He now insists that, by force of the road improvement act of April 1, 1903 (P. L. p. 145), the power to assess was revoked.

It may be conceded that, with regard to all proceedings for road improvement begun after the passage of the act of 1903, that act supersedes the act of 1895; but, reserving for further consideration the eighteenth section, it is clear that all the other clauses of the later act are prospective only, and would have no effect whatever on proceedings previously instituted.

The eighteenth section is as follows: "Sec. 18. All acts and parts of acts inconsistent with the provisions of this Act are hereby repealed: Provided, that this repealer shall not revive any act heretofore repealed, nor shall any proceeding for the improvement of any public road, entered into before the passage of this act, abate, but such proceeding shall continue, as near as may be, as if the same had been commenced hereunder." Leaving out of view the proviso of this section, the repealing sentence would not impair the force of the act of 1895 upon improvements previously undertaken, because, as the act of 1903 would then be wholly prospective, its terms could not be inconsistent with the application of any law to prior transactions. The prosecutor's contention must therefore rest on the proviso alone.

The proviso declares that no proceeding entered into before the passage of the act shall abate. The proceeding now under review was entered into by the petition presented before April 1, 1903. That petition contemplated and expressly provided for the assessment now before us as a substantial part of the proceeding by which the improvement should be made and paid for. The proviso, by declaring that such a proceeding shall not abate, requires that it should not fail in any substantial provision. The further declaration that it shall continue, as

near as may be, as if the same had been commenced under the act of 1903, simply means that, if that act provided a different method for accomplishing the same results, the new method should be pursued. It does not imply that any public right should be abandoned or any private obligation released. As the act of 1903 makes no provision for the conduct of a proceeding under which part of the expense of improving a road is to be charged on the abutting land, such a proceeding must go on, without abatement, as if the act of 1903 did not exist.

The assessment must be affirmed, with costs.

BERNSTEIN et al. v. DEMMERT.

(Supreme Court of New Jersey. Nov. 13, 1905.)

LANDLORD AND TENANT — TERMINATION OF TESTIMONY — NOTICE — TENANCY FROM MONTH TO MONTH.

The prosecutor entered into possession of certain premises under a written lease for the term of five years from May 1, 1903, at a yearly rental, payable in equal monthly payments in advance. The lessor had a life estate only, and by his death, which occurred during the term of the lease, the title to the demised premises vested in remaindermen, until it was by them conveyed to the defendants in certiorari, by whom landlord and tenant proceedings to dispossess the prosecutor were instituted by a one month's notice, dated and served on December 30, 1904, requiring possession to be delivered to them on February 1, 1905. Held: (1) That such notice was insufficient to terminate the tenancy; (2) that the mere fact that the prosecutor after the death of the life tenant continued the monthly payments first to the remaindermen, and afterwards to the defendants in certiorari, did not make him a tenant from month to month; no question as to the character of such payments having arisen and no new agreement having in point of fact been made.

(Syllabus by the Court.)

Certiorari to District Court of Jersey City.

Action by Joseph E. Bernstein and others against Ferdinand Demmert. Judgment for plaintiffs, and defendant brings certiorari. Reversed.

Argued June term, 1905, before GARRISON and GARRETSON, JJ.

Walter L. McDermott, for the prosecutor. John L. Keller and Peter H. James, for defendants.

GARRISON, J. This writ of certiorari brings up a landlord and tenant proceeding brought to recover possession of leased premises upon the ground that the tenancy had been terminated by a legal notice. The notice that had been given was a one month's notice, and the only question is whether such notice was sufficient. The facts to be dealt with are stated in the landlord's affidavit as follows: The prosecutor took possession of the premises under an agreement made with Augustus H. Vanderpoel, acting as committee of the estate of one Henry Long. This agreement, which was a lease for the

term of five years from May 1, 1903, at a yearly rental of \$1,800, payable in equal monthly payments of \$150 in advance, was immediately recorded. The said Henry Long had a life estate only, and on November 16, 1903, died, whereby the title to the leased property vested in certain remaindermen, who, on the 28th day of November, 1904, conveyed the premises to the defendants in certiorari, by whom landlord and tenant proceedings to dispossess the prosecutor were instituted by a notice dated and served on December 30, 1904, requiring possession to be delivered to them on the 1st day of February, 1905. The affidavit further states that after the death of the life tenant the prosecutor continued the payments of \$150 per month without having made any new agreement touching the letting of the premises, and that after the defendants in certiorari purchased the property the prosecutor continued to make the same monthly payments to them without any new agreement.

Upon proof of these facts, without material modification, the district court adjudged that the defendants in certiorari were entitled to possession, thereby deciding that a month's notice was sufficient to terminate the tenancy, and hence necessarily adjudging that the prosecutor was a tenant from month to month. I am unable to concur in this result or to find any support for it either in the affidavit of the landlord or in the facts certified by the district court. If the prosecutor was a monthly tenant, he was so by force of some agreement. The only agreement made by him was the one under which he entered into possession, and that was a lease for a term of years. The affidavit states and the district court found that no new agreement had been made. The rental reserved by the only agreement ever made was a yearly rental, payable in instalments of \$150 per month in advance. This the tenant paid continuously and without any question touching its character from the day he took possession, in 1902, until it was refused by the present owners, in 1904.

This course of dealing, standing alone and nothing more appearing, will not justify the inference that the prosecutor by continuing such monthly payments evinced by implication a purpose to enter into a new agreement of letting, viz., from month to month. All of the facts found by the court below touching the conduct of the parties rebut such an inference, chief among which is that both the remaindermen and the defendants in certiorari had actual knowledge of the terms of the prosecutor's lease and accepted the monthly payments which he continued to make without any new agreement, or, so far as the case shows, without ever raising any question as to the character of such payments.

Beyond the mere fact, therefore, that these monthly payments were thus made, there is

nothing upon which an implied tenancy from month to month can rest, and obviously this circumstance itself is not sufficient to raise such an implied letting. Where the original letting is for one month, or where monthly payments, begun and continued without any express agreement, are clearly referable to current terms of that duration, it is the natural, and hence the legitimate, inference that the minds of the parties had met upon a monthly tenancy. Hence such relationship will be implied; but, where the circumstances under which monthly payments are made repel such a relationship as a matter of fact, the court will not imply it as a matter of law.

Whether immediately upon the death of the life tenant the prosecutor became a trespasser or a tenant at sufferance or a holding over tenant for years need not now be decided. The question on which the jurisdiction of the court below depended was whether he then was or has since become a tenant from month to month. That he did not become so by force of any agreement made by him has been expressly found by the trial court and that he did not become so by force of any agreement the law will make for him is the result I have reached upon the admitted facts of the case and the other circumstances certified to this court in response to its rule. The judgment of the First District court of Jersey City should be reversed.

LAZARUS v. MARTLING.

(Supreme Court of New Jersey. Nov. 13, 1905.)

1. JUSTICES OF THE PEACE—APPEAL—TRANSCRIPT.

The mere fact that the transcript sent up to the court of common pleas on an appeal from the small cause court fails to show that a written notice of appeal, signed by or on behalf of the appellant, had been filed with the justice, and that the appeal bond had been so filed, does not afford legal ground for dismissing the appeal.

2. SAME—CORRECTION OF TRANSCRIPT.

In granting an appeal the justice acts judicially, and, if the legality of his adjudication on that point is challenged in the common pleas, he should be ruled to certify the facts, so as to correct any imperfections or irregularities apparent in the transcript, before such adjudication is reversed.

(Syllabus by the Court.)

Certiorari to Court of Common Pleas, Bergen County.

Action by Jacob G. Lazarus against Anna M. Martling. Judgment for plaintiff, and on dismissal of defendant's appeal she brings certiorari. Reversed.

Argued June term, 1905, before SWAYZE and DIXON, JJ.

Alexander Simpson, for prosecutor. Jacob W. De Yoe, for defendant.

DIXON, J. A judgment having been rendered against the defendant in a small cause court, she appealed to the Bergen common

pleas, and there her appeal was dismissed, because the transcript sent up by the justice failed to show that a written notice of appeal, signed by or on behalf of the appellant, had been filed with the justice, and that an appeal bond had been so filed. Under a rule from this court the reasons for dismissal are expressly stated by the common pleas to be the alleged defects in the transcript and to test the legal sufficiency of those reasons is the object of the present writ of certiorari. The small-cause court act (P. L. 1903, p. 251) provides (section 81) that the justice who grants an appeal shall send to the clerk of the common pleas a transcript of the proceedings and judgment in the cause, together with the appeal bond, within 10 days after he shall receive notice of the appeal. In this enactment, unless the notice of appeal is included in the phrase "transcript of the proceedings," the statute does not require it to be sent to the common pleas. I think it is not so included, because the entire phrase, "transcript of the proceedings and judgment," suggests that the proceedings intended are those prior to the judgment, a suggestion corroborated by the fact that the bond alone of the steps taken after judgment is mentioned. According to the usual practice the transcript consists of a copy of the docket which the statute (section 112) requires the justice to keep, and such papers as are necessary for the trial of the cause on appeal (*English v. Bonham*, 17 N. J. Law, 350; *Henry v. Campbell*, 24 N. J. Law, 141); but no entry upon the docket respecting the appeal is prescribed, except "when and by whom it was demanded, and the date of receiving notice thereof"; and the notice of appeal is certainly not a paper necessary for the trial of the case. No transcript as to the bond is required, the bond itself being produced.

Moreover, in determining whether an appeal should be granted, the justice acts judicially (*Tichenor v. Hewson*, 14 N. J. Law, 26), and when the sufficiency of the steps taken for perfecting the right of appeal has been adjudged by him, the cause is transmitted to the common pleas, not for a review of alleged errors in the court below, but for a new trial on the merits. *Vannoy v. Givens*, 23 N. J. Law, 201. No doubt the common pleas has power to ascertain whether an appeal has been legally taken, and to dismiss the cause, if it has not been, but this power should be exercised on an ascertainment of the real facts, not on a mere discovery of defects in the transcript. For as to those parts of the docket which are not essential to a record of the judgment (and the proceedings for appeal are certainly not) the statute is directory only (*English v. Bonham*, 17 N. J. Law, 350; *Houghton v. Potter*, 23 N. J. Law, 338, 24 N. J. Law, 735), and it has long been the practice for the common pleas to rule the justice to certify matters which he ought to have entered on his docket, but which he has omitted (*Bennet v. Kite*, 9 N. J. Law, 106). Indeed the stat-

ute which directs what shall be so entered expressly declares that no imperfections or irregularities in the docket shall invalidate any proceedings or judgment, but the same may be corrected to conform to the fact at any time, under rule by the court to certify or otherwise. We conclude that the order of dismissal was made without legal evidence to support it, and should be set aside.

Let the cause be remitted to the common pleas for further proceedings according to law.

SHELDON CO. v. HARLEIGH CEMETERY ASS'N.

(Supreme Court of New Jersey. Nov. 13, 1905.)

CONTRACT—ACTION—DEFENSES—FRAUD.

In an action on a written contract it is error to overrule an offer to prove that the execution of the contract by the defendant was obtained solely by the false statement of a non-existent fact.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2012.]

(Syllabus by the Court.)

Certiorari to District Court of Camden.

Action by the Sheldon Company against the Harleigh Cemetery Association. Judgment for plaintiff, and defendant brings certiorari. Reversed.

Argued at June term, 1905, before GARRISON and GARRETSON, JJ.

William C. Jones, for prosecutor. John F. Harned, for defendant.

GARRISON, J. This was an action brought to recover the contract price of certain advertising, the contract concerning which was in writing. When the agent for the defendant who had signed this contract was on the witness stand he was asked what statement had been made to him by the person who obtained his signature. This question was overruled, upon the ground that what took place before the execution of the paper could not be shown.

This question and the ruling upon it were too broad to indicate any error in law. Before the matter was finally disposed of, however, the counsel for defendant at the request of the trial court stated specifically what he expected to prove by the witness, to wit: "I want to show, and I think I have the right to show, that the signature to this paper was obtained under a misrepresentation, and the misrepresentation was that I had sent word to Mr. Rhedemeyer to sign it, and I never sent any such word, as I have so testified. Mr. Rhedemeyer would not have signed it—he says he wouldn't have signed it if he had not received that message from me, which he supposed to be a legitimate message. (Exception noted for defendant.)"

The overruling of this offer was clearly erroneous. The effect of the excluded proof was not to vary or contradict the terms of the

written contract, but on the contrary to show that but for the false statement of a non-existent fact such contract would not have been signed; and hence that in legal contemplation no contract had been made.

Counsel for the plaintiff argues in his brief that the defendant after knowledge of this fraud ratified the contract, but of this there is no mention in the judge's certificate which constitutes the case with which we have to deal. This certificate, it may be remarked, is faulty in form, but as both counsel have based their arguments upon it without objection, nothing but delay would result from sending it back for a more strict compliance with the rule.

The judgment of the district court of the city of Camden is reversed.

MAYOR & COUNCIL OF BOROUGH OF PARK RIDGE v. REYNOLDS et al.

(Supreme Court of New Jersey. Nov. 13, 1905.)

MUNICIPAL CORPORATIONS—REVIEW OF EXPENDITURES—PROCEDURE.

Under the provisions of "An act to provide for the summary investigation of county and municipal expenditures" (P. L. 1898, p. 155), the justice of the Supreme Court who has made an order appointing experts to prosecute such an investigation is not required to institute an inquiry into the truth of the facts sworn to in the jurisdictional affidavit in the manner prescribed by the act.

(Syllabus by the Court.)

Certiorari by the mayor and council of the borough of Park Ridge against N. A. Reynolds and others. Order affirmed.

Argued June term, 1905, before GARRISON and GARRETSON, JJ.

R. M. Hart, for the prosecutor. E. W. Wakelee and W. J. Wright, for defendants.

GARRISON, J. The return to this writ of certiorari shows that an affidavit signed by more than 25 persons who swear that they are freeholders of the borough of Park Ridge, in the county of Bergen and state of New Jersey, setting forth that they have paid taxes on real estate in said borough within one year last past, to wit, taxes for the year 1904, and that they have cause to believe that the moneys of said borough have been, and are being unlawfully expended, was presented to one of the justices of the Supreme Court, and that thereupon he made an order for a summary investigation into the affairs of said borough pursuant to an act entitled "An act to provide for the summary investigation of county and municipal expenditures," approved March 23, 1898 (P. L. 1898, p. 155); that after said order was entered, the mayor and council of the borough of Park Ridge and certain officials of said borough and two freeholders presented to the said justice of the Supreme Court a petition averring that the affidavit was not signed by 25 freeholders, that some of the signers of said affidavit were not free-

holders or residents of the borough, and that some of them were married women; that upon the hearing on the said petition the justice ordered that its prayer be denied, which order is the one the prosecutors seek to have reviewed.

The question raised by this writ is whether under the act referred to, the justice of the Supreme Court to whom the jurisdictional affidavit was presented was obliged to try and determine the issues of fact raised by the denial of the facts stated in such affidavit, and, if such statement was found to be false, revoke the order originally made.

It is not pretended that any such procedure is expressly provided by the statute in question. The most that is claimed is that it is inferentially implied or that it inheres in the nature of the proceeding created by the statute. Neither of these contentions appear to me to be well founded. The Legislature in the creation of a remedial procedure may prescribe that jurisdiction shall depend upon the existence of certain facts or it may declare that jurisdiction shall arise whenever proof of certain facts is made in a prescribed manner. In this latter case, the preliminary inquiry touching jurisdiction is not whether the facts sworn to are true, but whether they are the ones required by statute, and are sworn to as therein prescribed.

The present proceeding is of this latter class, and hence neither expressly nor inferentially was the justice who had correctly passed upon the preliminary question before making his order required to institute an inquiry into the truth of the facts contained in the jurisdictional affidavit.

The order removed by this writ is affirmed.

OSTERHOUT v. JERSEY CITY, H. & P. ST. RY. CO.

(Supreme Court of New Jersey. Nov. 13, 1905.)

MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.

A conductor was thrown from the platform of a trolley car and injured. It appeared that he knew that the track was rough and uneven, but it did not conclusively appear that he knew or should have known of other defects on the track, which probably caused the derailment. In an action against his employer, the court rightfully refused to nonsuit or direct verdict for the defendant, asked for on the ground that plaintiff assumed the risk of derailment of the car.

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.

Action by Wallace Osterhout against the Jersey City, Hoboken & Paterson Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued June term, 1905, before GUMMERE, C. J., and GARRETSON, GARRISON, and REED, JJ.

Bedle, Edwards & Thompson and William H. Speer, for plaintiff in error. Weller & Lichtenstein, for defendant in error.

REED, J. The plaintiff below was a conductor on a car of the defendant, the rear trucks of which were derailed. The swerving of the rear of the car threw the conductor from the rear platform and injured him. On the trial below there was a verdict for the plaintiff. The schedule time from North Paterson to Passaic, a distance of $4\frac{1}{2}$ miles, was one hour. The rails of the defendant's road between these termini were not uniform. The ends of the road were laid with heavy, solid rails, while for a space of about a mile between there were laid lighter rails of a different pattern, apparently older and much worn, with uneven joints. There is testimony that a piece of the flange at or near the point where the car was derailed was broken from the rail, and that this flange looked as if it had been broken for some time.

The only question which requires consideration on this writ of error is whether the conductor assumed the risk of this accident. The risk of injury from a defect in the track, negligently permitted to remain unrepaired, was not one of the ordinary risks which the conductor assumed in entering upon his employment. He cannot be said to have assumed the risk, in the absence of notification of the danger, unless the danger was so apparent that by a person in his position, using reasonable prudence, it would have been observed. The conductor had been on the run over this road for two or three weeks at the time of the accident. He says that he discovered after a few days that these rails were old by the way the car ran over them, when the car came to the joints it bumped and jumped, and that the car also wobbled. He says that the car ran smoothly over this portion of the track when they had plenty of time. From the testimony of a previously employed motorman it appeared that the car jerked when it came to the end of the rail; that the end of one rail would be higher than the end of the next rail; that the flange of the car wheel ran on the flange of the rail in many places, the rail itself being worn down; that with his eyes in front he would see the mud slop up on one side; when the car struck the rail, it threw the water and sand to one side. He says that in some places there was hardly any dirt between the tracks, and that he could see the iron brace running from one rail to another where the dirt had been washed out. It also appeared that after the car left Passaic, and was within a mile and a quarter of the bad rails, the conductor told the motorman they were five minutes behind time. From what the conductor admits he knew it cannot be said that he took upon himself the risk of derailment of his car. The fact that the track was rough and uneven, and by reason thereof the joints may have been uneven, did not prove that the risk of derailment was apparent. Nor from what he should have known does it seem clear that he assumed the risk of the happening of such an occur-

rence. From the fact, if true, that a previous motorman had observed conditions which warned him of the danger it does not follow that this conductor should have observed the same conditions. A motorman's attention is directed to the line of the track over which he is passing, but a conductor has other duties which demand his attention elsewhere. It is not so clear that the conductor appreciated the risk, and so assumed if that the court should have granted a nonsuit or directed a verdict. Nor can the warning given by the conductor to the motorman that they were five minutes late be regarded as a direction to run over this portion of the track at a reckless speed. It was the ordinary indication given by a conductor to a motorman to enable him to run his car on schedule time. Nor does the testimony show with any degree of certainty that the car was running at a dangerous speed at the time of the occurrence.

There should be judgment for the defendant in error.

McCANN v. MAYOR, ETC., OF CITY OF NEW BRUNSWICK.

(Supreme Court of New Jersey. Nov. 13, 1905.)

MUNICIPAL CORPORATIONS — POLICEMAN — REMOVAL FROM EMPLOYMENT.

The relator was appointed a police officer of New Brunswick in 1897, and in 1902, under an ordinance which authorized the appointment of a roundsman, who was to be a member of and taken from the regular police force, he was made roundsman. In 1905 the office of roundsman was abolished, and thereafter the relator was not permitted to perform duties either as roundsman or policeman. *Held*:

1. That under the facts of the case the ordinance of 1905, abolishing the office of roundsman, was adopted in good faith for what the council deemed the interest of the city, and was valid.

2. That the relator did not cease to be a policeman by accepting the additional duties and pay of roundsman, and could only be removed from his employment of policeman for cause, after conviction on charges preferred, pursuant to the statute.

(Syllabus by the Court.)

Application by Randall McCann for writ of mandamus to the mayor and common council of New Brunswick. Mandamus granted.

Argued June term, 1905, before DIXON and SWAYZE, JJ.

George S. Silzer, for relator. Theo. B. Booraem, for defendant.

SWAYZE, J. The relator was appointed a police officer of New Brunswick in 1897. In 1902 the common council was authorized to appoint an officer to be known as "roundsman of police," and the relator was appointed. In the same year, the Revised Ordinances provided that the police department should consist of a chief, two sergeants, a roundsman, and policemen. The duties of roundsman were not specifically defined. In fact the relator acted as an ordinary police

officer, and, in addition to his duties as such, checked up the reports of the other officers, for which he received additional compensation. On February 6, 1905, an ordinance was passed abolishing the office of roundsman of police. After March 7, 1905, the relator was not permitted to perform his duties as roundsman or policeman. He now asks a mandamus to compel the municipal authorities to place him on duty as roundsman or policeman, claiming the protection of the tenure of office act of 1885. P. L. p. 163; Gen. St. p. 1534, pl. 328.

The ordinance abolishing the office of roundsman was within the power of the council. It seems to have been adopted in good faith for what the council deemed the interest of the city. The place has not been filled, and no other officer has been appointed to do the same work. The case in this respect is within the rule adopted by the Court of Errors and Appeals in *Newark v. Lyon*, 53 N. J. Law, 632, 23 Atl. 274, and applied in this court in *McManus v. Newark*, 49 N. J. Law, 175, 6 Atl. 882; *Boylan v. Newark*, 58 N. J. Law, 133, 32 Atl. 78. The relator is not entitled to be reinstated as roundsman.

His claim to be reinstated as a policeman rests on a different basis. By accepting the additional duties and pay of a roundsman, he did not cease to be a policeman. The ordinance of May 6, 1902, which authorized the appointment of roundsman, provided that he should be a member of, and taken from, the regular police force. The roundsman was a policeman with additional duties, and from the office or employment of policeman the relator could only be removed for cause, after charges had been preferred and he had been tried and convicted, pursuant to the statute. He is entitled to be reinstated as a policeman, and a mandamus should issue for that purpose.

LUDLAM v. SWAIN et al.

(Supreme Court of New Jersey. Nov. 13, 1905.)

1. HIGHWAYS — APPLICATION — SURVEY — VARIANCE.

An application for a public road gave its course as southeastwardly from the beginning point. The returns of the surveyors gave the first course as south, 54 degrees west. This course was along an ancient highway and within its bounds. *Held*, that the variance was fatal.

2. SAME—CONSENT OF STATE.

Where a road crosses land of the state, the consent of the Legislature must be obtained before the road is laid out.

3. SAME—VALIDITY OF PROCEEDINGS.

A taxpayer may question the validity of the proceedings to lay out a road across land of the state without the consent of the Legislature.

(Syllabus by the Court.)

Certiorari to Court of Common Pleas, Cape May County.

Action by Frank S. Ludlam against Lin-

naeus T. Swain and others. Judgment for defendants, and plaintiff brings certiorari. Proceedings set aside.

Argued June term, 1905, before DIXON and SWAYZE, JJ.

Morgan Hand, for prosecutor. Douglass & Douglass, for defendants.

SWAYZE, J. The writ brings up proceedings to lay out a public road. Two objections only need be considered.

1. There is a variance between the road as described in the notice and application and the road as laid by the surveyors. The beginning point is apparently the same in the application and in the return, but the identity is apparent only. In the application the road is described as running a southeastwardly course. In the return the first course is south, 54 degrees west, 662.6 feet, along the Shore Road. The Shore Road is an existing ancient highway, and this course is within its bounds. The result is to shift the real beginning point of the new road 662.6 feet to the southwest, and to change the road for nearly a mile of its length from the course indicated in the notice and application. This is fatal to the proceedings. *Whittingham v. Hopkins*, 70 N. J. Law, 322, 57 Atl. 402.

2. The road crosses land of the state. No consent has been given by the Legislature. Section 85 of the road act (Gen. St. p. 2822) enacts that no law for laying out or opening public roads shall be so construed as to permit any person to lay out or open any public or private road through or upon any lands belonging to this state, unless the consent of the Legislature be first obtained for that purpose. It is argued that this objection is premature, because the consent of the Legislature may be obtained before the road is built; but the prohibition of the statute is not merely against the opening of the road, but against laying it out. It is of no importance that the exact location may not be known until the surveyors have acted. The consent of the Legislature is a prerequisite, and may be given, so as to leave the precise location to be subsequently determined.

It is also argued that the prosecutor cannot raise the question, because a taxpayer or one of the public cannot merely, as such, complain of encroachment on the public domain. That, however, is not the basis of the prosecutor's right. The necessity of the road depends upon its public importance as a single whole. A road, which may be necessary, if it form a public highway between the termini named in the application, may be of no value, if it fails to afford such communication. The taxpayer can only be burdened in case the road is necessary, and rightfully complains of action which may burden him otherwise.

The proceedings should be set aside, with costs.

**STATE BOARD OF REGISTRATION
AND EXAMINATION IN DEN-
TISTRY v. TERRY.**

(Supreme Court of New Jersey. Nov. 13, 1905.)

**PHYSICIANS AND SURGEONS—PRACTICE OF
DENTISTRY—LICENSE.**

Section 8 of the act to regulate the practice of dentistry (P. L. 1898, 123) provides that the act shall not be construed to prohibit the registered student of a licensed dentist from assisting his preceptor in dental operations while in his presence and under his direct and immediate personal supervision. *Held*, that to exempt the defendant from the penalties of the act for practicing dentistry without a license it was not sufficient that he was a student of a regularly licensed dentist. His practice must have consisted in assisting his preceptor under the direct and immediate personal supervision of the latter.

(Syllabus by the Court.)

Appeal from District Court of Trenton.

Action by the State Board of Registration and Examination in Dentistry against George Lee Terry to recover a penalty. Judgment for defendant, and plaintiff appeals. Reversed.

Argued June term, 1905, before DIXON and SWAYZE, JJ.

Edward D. Duffield, Asst. Atty. Gen., for appellant. J. Lefferts Conard, for appellee.

SWAYZE, J. This is an action to recover a penalty for practicing dentistry without a license. The statute (P. L. 1898, 119) subjects to the penalty any person practicing dentistry not being at the time legally licensed to practice as such in this state (section 12), and gives a right of action to recover the penalty to the State Board of Registration (section 16). The act is not to be construed to prohibit the registered student of a licensed dentist from assisting his preceptor in dental operations while in his presence and under his direct and immediate personal supervision. Section 8. The only provision for registration is that there shall be an annual registration of every person practicing dentistry within the state, together with an annual registration of each and every assistant in the employ of every such person. Section 10.

In the present case the judge left two questions to the jury: (1) Whether the defendant was practicing dentistry; (2) whether he was a student of a regularly licensed dentist. He charged that, if the jury found that the defendant while practicing was doing so as a student of a regularly licensed dentist, the verdict should be for the defendant. To this part of the charge exception was duly taken. We think the charge was erroneous. The exception in section 8 is not an exception of all students in all circumstances. It is narrowed to a registered student while assisting his preceptor in the preceptor's presence, and under his direct and immediate personal supervision. It is difficult to determine what the act means by a registered student, since no provision is made for the registration of students as such, but only for the registra-

tion of assistants. In the present case that question need not be decided. There was evidence indicating that the defendant was not an assistant, but rather the principal, and that the dental operations he performed were performed independently and on his own responsibility, and not under the direct and immediate personal supervision of the alleged preceptors. The defendant did not bring himself within the exception of section 8 merely by proving that he was a student without proving the other qualifications in that section.

For this error, the judgment must be reversed, and there must be a new trial.

DAVIS v. SCHER.

(Supreme Court of New Jersey. Nov. 13, 1905.)

**VENDOR AND VENDEE—RESCISSION OF CON-
TRACT—MISDESCRIPTION OF PROPERTY.**

A statement of the number of rooms in a building in Newark contained in a written contract for sale of real estate is so material that its falsity will justify the vendee in rescinding the contract, although the vendor may be able to make the building answer the description before the day for performance.

(Syllabus by the Court.)

Appeal from District Court of Newark.

Action by Ignatz Davis against Louis Scher. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued June term, 1905, before DIXON and SWAYZE, JJ.

Philip J. Schotland, for appellant. Michael J. Tansey, for appellee.

SWAYZE, J. This is an action by a vendee of real estate against the vendor to recover \$100 paid on account of the purchase price upon the execution of the agreement for sale. By the agreement, dated July 18, 1904, the defendant agreed to convey to the plaintiff, on or before the ensuing 1st of September, premises described as 317 Springfield avenue, in the city of Newark, consisting of a three-story frame building, with a store and two rooms on the first floor, six rooms on the second, and four rooms on the third floor. The plaintiff was unable to examine the interior of the building until about August 10th, and then discovered that there were but five rooms on the second floor and three rooms on the third floor. He then rescinded the contract and sought to recover his deposit. The only question is whether the misrepresentation was so material as to justify a rescission of the contract. The trial judge found in favor of the plaintiff. We think he was right. The mere fact that the parties inserted in the contract this particular statement of the number of rooms on each floor indicates that they thought it was material at the time; and clearly the number of rooms on each floor of a building of that character in a city like Newark may materially affect the income to be derived from the property. The right of

the plaintiff to rescind does not depend on a fraudulent misrepresentation. It arises from the fact that he is not getting what he bargained for. The principle is the same that was stated by Justice Depue in *Wolcott v. Mount*, 36 N. J. Law, 262, 264, 13 Am. Rep. 438.

It is argued in the present case that on September 1st, the day for performance of the contract, the number of rooms might have been as stated in the contract. In the absence of proof, the conditions existing on August 10th would be presumed to continue; but, aside from that consideration, the plaintiff had the right to rescind at once upon discovering that the building differed materially from the description.

The judgment should be affirmed, with costs.

LEHIGH VALLEY R. CO. OF NEW JERSEY v. INHABITANTS OF TOWN OF PHILLIPSBURG.

(Supreme Court of New Jersey. Nov. 22, 1905.)

1. EMINENT DOMAIN — OPENING STREETS — COMPENSATION.

The proceeding to condemn lands for laying out, opening, and establishing new streets, authorized by article 5, § 1, of an act entitled "An act to revise and amend the charter of the town of Phillipsburg" (P. L. 1872, p. 497), are superseded by the provisions of "An act to regulate the ascertainment and payment of compensation for property condemned or taken for public use." Revision of 1900 (P. L. 1900, p. 79).

2. SAME—ASSESSMENT OF DAMAGES.

The provision of section 17 in the act of 1900, *supra* (P. L. 1900, p. 86), excepting from the operation of the act cases of the "taking of land for a public improvement, where payments of the award for land taken and damages is authorized by the statute to be set off against or made wholly or partially in benefits to be assessed for the same improvement," does not include the charter of Phillipsburg, which contains no provision for any assessment for the cost of the land taken, and which provides only that, in estimating and assessing the damages to the landowner by taking his property, "the commissioners shall have due regard both to the value of the land and real estate and to the injury or benefit to the owner or owners thereof by making such improvements aforesaid."

(Syllabus by the Court.)

Proceedings by the inhabitants of the town of Phillipsburg against the Lehigh Valley Railroad Company of New Jersey to review such proceedings and a resolution of the common council of Phillipsburg. The railroad company brings certiorari. Proceedings set aside.

Argued June term, 1905, before GARRISON and GARRETSON, JJ.

Smith & Brady, for prosecutor. J. I. Blair Reilly, for defendant.

GARRETSON, J. The writ in this case brings up the proceedings and resolution of the common council of the town of Phillipsburg touching the taking and appropriating of certain lands of the Lehigh Valley Rail-

road Company for the extending and opening of Sitgreaves street between Abbett street and Center street, and the appointment of commissioners to make an estimate and assessment of damages. The resolution attacked was passed March 20, 1905, and the writ allowed April 15, 1905. The resolution recites that the town is desirous of extending Sitgreaves street, from Abbett street to Center street, in accordance with an ordinance passed; that certain lands of the prosecutor are necessary; that it has been unable to agree with the prosecutor for the land necessary, and resolves: "That the common council proceed to take and appropriate sufficient land and real estate of the said the Lehigh Valley Railroad Company of New Jersey for the extending and opening of said Sitgreaves street from Abbett street to Center street. * * * That the said common council proceed to appoint three disinterested freeholders, one of whom shall be a resident of the town of Phillipsburg and two of whom shall be residents of the township of Greenwich, of the county of Warren and state of New Jersey, commissioners to make an estimate and assessment of the damages that the said the Lehigh Valley Railroad Company of New Jersey may sustain by taking and appropriating in the manner provided by law such land and real estate. That the following persons, to wit: James Smith, a freeholder and resident of the town of Phillipsburg, and Owen Oberly and Lewis A. Fisher, freeholders and residents of the township of Greenwich, in the said county of Warren and state of New Jersey—be, and they are hereby, appointed commissioners for the purpose aforesaid. That these proceedings in the premises be entered on the journal, and that the town clerk within nine days from the date hereof furnish the said the Lehigh Valley Railroad Company of New Jersey with a full copy of the said record."

These proceedings were taken under "An act to revise and amend the charter of the town of Phillipsburg," approved March 8, 1872 (P. L. p. 478). By article 3, § 4, subd. 5, the common council is authorized to pass and enforce by-laws and ordinances "to ascertain and establish the boundaries of all streets, highways and public alleys of said town to lay out, open and establish new streets or alleys within said town and to order and cause any street, road, highway or alley already laid out and to be located, straightened, altered or widened and to take and appropriate for such purposes any land and real estate upon making compensation to the owner or owners thereof." P. L. 1872, p. 485. By article 5, § 1 (P. L. 1872, p. 497), it is provided "that whenever the common council shall determine by ordinance to straighten the lines of streets, lanes or alleys or lay out or open any new street, lane or alley within said town or make any sewer or drain in any part of the said town and to take and appropriate for such purpose any

lands and real estate, they are hereby authorized to treat and agree with the owner or owners thereof for the same and for this purpose they may purchase said lands and real estate of the owner or owners thereof as they shall judge reasonable and shall receive from such owner or owners a conveyance of said lands to said town: Provided, however, that such agreement shall be in writing signed by the said owner or owners and reported to the common council who shall enter the same upon the journal and shall agree or disagree to the same and shall furnish the owner or owners of the said land and real estate with a full copy of the said record within three days thereafter and until such copy is furnished said agreement shall not take effect." Section 2: "That in case no agreement can be made for such purpose it shall be lawful for the common council to appoint three disinterested freeholders, one of whom shall be a resident of said town and two of whom shall be residents of the township of Greenwich in the county of Warren, commissioners to make an estimate and assessment of the damages that any such owner or owners may sustain by taking and appropriating in the manner aforesaid such lands and real estate; and in estimating and assessing such damages, the said commissioners shall have due regard both to the value of the lands and real estate and to the injury or benefit to the owner or owners thereof by making such improvements as aforesaid."

There is no provision in the charter for the assessment of the cost of lands so taken upon the property benefited. The damages so assessed are to be paid by the town treasurer under the direction of the common council. The prosecutor assigns as reasons for setting aside the resolution appointing commissioners: "First. Because the common council of the town of Phillipsburg had no authority to pass said resolution or to appoint commissioners to make an estimate and assessment of the damages that may be sustained by the prosecutor by reason of the taking and appropriating of its lands for public purposes. Second. Because the practice that heretofore existed in condemnation cases authorized by the charter of the town of Phillipsburg was superseded by the provisions of an act of the Legislature of the state of New Jersey entitled 'An act to regulate the ascertainment and payment of compensation for property condemned or taken for public use.' Revision 1900, approved March 20, 1900."

The seventeenth section of the act last referred to (P. L. 1900, p. 86) provides: "The practice prescribed by this act shall supersede the existing practice in all condemnation cases for the ascertainment of compensation except in cases of the taking of land for a public improvement where payment of the award for lands taken and damages is authorized by statute to be set off against or made wholly or partially in benefits to be assessed for the same improvement in which

cases the procedure prescribed by this act shall not be exclusive of the procedure authorized by such statutes and the municipal corporation or other public body taking lands for a public improvement may elect to proceed under such statute and on such election the procedure prescribed by this act shall not apply to such taking." The benefits referred to in the general act are evidently the special benefits which are assessed upon the property specially benefited by the improvement contemplated, and are fixed after the value of the land taken is ascertained. They are an ascertained sum which becomes a debt of the property owner and when he comes to receive the full compensation for his property taken, to which he is entitled by law, he receives that full compensation in whole or in part by the cancellation of a debt he owes the municipality. The benefits to be considered under the Phillipsburg charter are not such special benefits, because none are assessed under that charter, but must be a part of the general benefits shared in by the whole property of the town, as the taxable property of the whole town pays for the cost of the improvement out of the taxes raised. It may be doubtful whether the ascertained value of the landowner's property can thus be reduced, and he be paid such reduced sum as the compensation for his property taken for public use. This general benefit cannot be regarded as a debt due from the property owner to the municipality, it is an increment of value to his property which he is entitled to have added to his property if it has accrued when the commissioners act, in common with all other property owners.

We think the proceedings should have been under the general act for condemnation of property taken for public use and the resolution of the common council appointing commissioners to condemn the land of the prosecutor is set aside. This makes it unnecessary to consider the other reasons alleged against the resolution.

RADLEY v. RADLEY et al.

(Court of Chancery of New Jersey. Nov. 13, 1905.)

1. DOWER—EQUITABLE ESTATES.

2 Gen. St. p. 1275, § 1, extending the right of dower to lands whereof any other person was seised to the husband's use during his lifetime, conferred on the wife an estate in dower in all cases in which during the coverture a third person was seised to the use of the husband, under such circumstances as in equity entitled the husband or his heirs to a conveyance of the legal estate and actual seisin and possession of the land.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dower, § 45.]

2. SAME—RELEASE—DEEDS—EFFECT.

Where a married woman and her husband executed a deed to certain of his property to a trustee, the deed reciting that it was for the purpose of placing the title in the trustee and his heirs, free from the wife's dower or right of dower which she thereby released, the

trustee to hold the property for the sole benefit of the husband and his heirs, to whom he should convey on written demand, the deed of itself raised an equitable estate in fee in the husband, as to which the deed was not effective as a release of the wife's dower, conferred by 2 Gen. St. p. 1275, § 1.

Bill by Pauline K. Radley against William M. Radley and others for dower. Decree for complainant.

Francis V. Dobbins, for complainant. George S. Silzer, for defendant heirs at law. E. S. Savage, for defendant Heald. Fred C. Hyer, for defendant Acken.

EMERY, V. C. To a bill for dower, the heirs at law set up by their answer the defense that complainant released her right of dower by a conveyance of the property made by herself and her husband in his lifetime to the defendant Acken. They also deny that complainant was the wife of Alfred N. Radley, the intestate, but this defense was not urged after the proof of marriage made at the hearing. As to the conveyance, the proofs disclosed the following facts bearing on the issues now involved. On November 18, 1901, Alfred N. Radley and the complainant, Pauline K., his wife, as parties of the first part, executed and acknowledged a deed to the defendant Moses H. Acken, reciting as its consideration the payment of \$1,000 to Pauline K. Radley, and conveying to Acken in fee the premises in question, and further stating: "The object of this conveyance being to place the legal title of the premises above described in Moses H. Acken, as trustee for Alfred N. Radley, his heirs or assigns, free and clear of the dower and right of dower of the said Pauline K. Radley, she having by these presents, for the consideration above expressed of \$1,000, the receipt whereof is hereby acknowledged, sold, assigned, transferred and released all her dower and right of dower in and to the land above described." All estate, right, and demand of the parties of the first part, as well in law as in equity, was also conveyed to Acken, his heirs, and assigns forever, "in trust nevertheless and for the benefit of Alfred N. Radley, his heirs, executors, administrators and assigns." This deed was dated November 14, 1901, and before its execution seems to have been submitted to the counsel of complainant. On its execution and acknowledgment on the 18th, Mr. Harris, the commissioner of deeds who took the acknowledgment, received from the husband \$1,000 and paid it over to the wife, as the consideration for the deed. Subsequently, and on November 20, 1901, Acken executed and acknowledged a declaration of trust, reciting the conveyance to him and declaring that he held and would continue to hold the premises "in trust only, for the use and benefit of the said Alfred N. Radley, his heirs and assigns, free and clear of the right of dower of the said Pauline K. Radley," to whom the consideration named in the deed

was paid by Alfred N. Radley for the release of her dower in said premises, and, for himself and his heirs, he further covenanted to "convey said premises or any part thereof by good and sufficient deed to the said Alfred N. Radley, or to his heirs and assigns whenever and as soon as I or they shall be thereunto requested in writing, free of dower and clear and discharged of and from all and every incumbrance thereon by me or my heirs."

The validity of the transaction as a post-nuptial settlement on the wife, in lieu of dower, which a court of equity would enforce as properly executed and reasonable, is not expressly involved on the pleadings in this case. The wife has not attacked the conveyance as unreasonable or improvidently made; nor, on the other hand, have the heirs alleged or proved that it was a reasonable settlement; at the hearing each party urges that the burden of attacking or supporting the release as a settlement is upon the other, and for the purposes of the present suit each party stands on the deed alone. The only direct issue here between the parties is therefore the effect of the wife's conveyance as a conveyance which is a bar to her dower, both at law and in equity, so long as it stands unimpeached. The dower act (2 Gen. St. p. 1275, § 1) provides: "That the widow, whether alien or not, of any person dying intestate or otherwise, shall be endowed for the term of her natural life of the one equal third part of all the lands, tenements and other real estate whereof her husband, or any other to his use, was seized of an estate of inheritance, at any time during the coverture, to which she shall not have relinquished or released her right of dower by deed executed and acknowledged in the manner prescribed at law for that purpose."

The wife has in this case released her right of dower by deed duly executed, but the question arises whether this deed to Acken operated to release her right of dower in the equitable estate of her husband, which was created by the deed itself. As to dower in equitable estates, under our statute, it was held by the Supreme Court, in *Yeo v. Mercereau* (1842) 18 N. J. Law, 387, that the effect of the statute in extending dower to lands, whereof any other person was seized to the husband's use, was to give the wife an estate in dower, in all cases in which, during the coverture, a third person was seized to the use of the husband, under such circumstances as in equity entitled the husband, or his heirs, to a conveyance of the legal estate and actual seisin and possession of the lands. It was not thought or decided by the majority of the court (Hornblower, C. J., White & Elmer, JJ. concurring) that dower in all trust estates was created (pages 391, etc.) although Nevius J. (page 402) thought it applied to estates held in trust, and this general scope seems to have been given to the statute by Mr. Justice Depue in *Cushing v. Blake* (Err.

& App. 1879) 30 N. J. Eq. 689, 695. In *Yeo v. Mercereau* the widow was held entitled to dower in lands conveyed to a third person "in trust, to and for the use of the husband and his heirs," and as to which the grantee six months subsequently executed a declaration of trust to the husband, covenanting "to convey the premises to him, his heirs, and assigns at any time thereafter." Under this decision, the effect of the deed to Acken, in trust for the husband and his heirs, was to create at once, and by the deed itself as soon as it took effect at all, an equitable estate in fee in the husband, and the question for decision therefore is whether the release of dower given in the deed creating this trust estate operated on this equitable estate of Radley which was the result of the deed. Had the deed simply conveyed the legal estate in fee to Acken, without declaring or raising a trust, and had the equitable estate in Radley arisen by a subsequent conveyance to him, or by a declaration of trust creating a merely passive trust, then clearly the release of dower in the lands made by the previous deed would not reach to or affect the right to dower in the equitable estate arising in the husband subsequently to the deed. In such case the wife, notwithstanding the release to Acken, would be entitled to dower, because of the subsequent seisin of an estate to the use of her husband, just as she would have been entitled to dower under a deed subsequently conveying the legal title of the premises to her husband. But as the wife might, under the statute, by a subsequent deed duly executed, have released her right of dower in this subsequently acquired equitable or legal estate, the question is whether this deed is in fact operative as releasing the wife's dower, not only in the legal estate, which the deed expressly conveys, but also the dower in the equitable estate, which is created in the husband by the deed itself, which dower in the equitable estate arose by operation of law, on the deed taking effect. That the parties intended the deed so to operate appears from the express declaration of the object of the conveyance, taken in connection with the express conveyance "in trust." Taking the whole conveyance, the object was to convey to Acken the legal title to be held in trust for Radley, free and clear of dower and right of dower of Mrs. Radley, in the lands; the trust, so far as it was created by the deed itself, being a merely passive trust to hold the lands. But the case cannot be settled merely as a question of intention of the parties. It is a question as to the operation and legal effect of the deed, and whether this intention was carried into effect by the deed, or whether the deed so far as the dower in the equitable estate of the husband created thereby is concerned, is not ineffective as a release of an estate, and is not merely an equitable agreement in reference to it, which may or may not be carried into effect as a postnuptial settlement. In other

words, the question is: Did the release of dower in the equitable estate created by the deed have the operation of an executed conveyance of the estate in dower, or has it, as to this, only the effect of an executory contract?

Treating the case as one merely of the construction of the operation and effect of this deed on the equitable estate thereby created, I think the deed must be held not to operate as a conveyance or release, of the dower in the equitable estate. The reason is that this right of dower in the equitable estate arose in the wife by operation of law, as soon as the trust deed was executed and an equitable estate in the husband was created, and as an incident created by law in such equitable estate, and the parties could not by their deeds or declarations prevent the operation of the rules of law relating to the creation or vesting of estate, or the incidents of such estates. The wife might agree that the deed should bar her against any future claim to dower in the equitable estate, and such agreement might be enforced, and the conveyance may be treated in equity as sufficient evidence of such an agreement; but her mere release of dower to the grantee in trust did not of itself release or pass the right of dower in the trust estate which arose by the deed. The wife was not a party to the subsequent declaration of trust, and her rights to dower depend therefore on the construction of the deed to Acken, the trustee. This deed created a purely passive trust in the grantee "for the benefit of Radley, his heirs, executors, administrators and assigns." By the subsequent declaration of trust, to which only the trustee and Radley were parties, the trustee covenanted to convey the premises to Radley, or to his heirs and assigns, upon request in writing, free of dower of the wife, and it may be that by this covenant an active trust was created in favor of the heirs of Radley. If an active trust in favor of the husband or his heirs had been created by the deed itself, a different situation might perhaps have resulted, for the decisions do not seem to go to the extent of giving the wife dower in equitable estates, where the trusts are active, as distinguished from merely passive trusts, where the grantee's sole trust is to hold the legal title for the benefit of the husband. But the trust estate, so far as created by this deed of the wife, was only such purely passive trust to hold the title for the husband and his heirs. And as the trust to convey on request in writing was one subsequently created by a declaration of trust, to which the wife was not a party, she cannot be affected by it, and the question whether this declaration did create an active trust is not material in the present case, and I do not decide it. Under the pleadings and proofs as they now stand, the deed cannot be considered as in itself a bar to dower, nor can it be considered as being

a postnuptial settlement which should be enforced to bar the dower, for the reason that, such agreement being executory in its operation, defendants must show that it is a reasonable and proper settlement. The burden is upon them to allege and prove this defense, and it has neither been set up nor proved. *Ireland v. Ireland* (1887) 43 N. J. Eq. 311, 12 Atl. 184.

As the case now stands, complainant is entitled to a decree.

COMMONWEALTH v. FISHER.

(Supreme Court of Pennsylvania. Oct. 9, 1905.)

1. STATUTES—TITLE OF ACT—CONSTITUTIONAL LAW.

Act April 23, 1903 (P. L. 274), entitled "An act defining the powers of the several courts of quarter sessions of the peace, with reference to the care and control of dependent, neglected, incorrigible and delinquent children under the age of 16 years," and providing for the means in which such power may be exercised, contains only one subject, sufficiently expressed in its title.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 133, 184.]

2. COURTS—CONSTITUTIONAL LAW—CREATION OF NEW COURT.

Act April 23, 1903 (P. L. 274), defining the powers of the several courts of quarter sessions in respect to incorrigible children, is not unconstitutional as creating a new court; such court being already an ancient existing court, and not simply a criminal court recognized by the Constitution, which does not define its jurisdiction.

3. JURY—RIGHT TO JURY TRIAL.

Act April 23, 1903 (P. L. 274), relating to the care and control of dependent and incorrigible children, is not unconstitutional, as denying the right to a child of trial by jury, as such child is not tried by the court for any offense, and the act is operative only when there is to be no trial; the purpose of the act being to prevent a trial.

4. CONSTITUTIONAL LAW—CLASS LEGISLATION.

Act April 23, 1903 (P. L. 274), providing for the control and treatment of dependent and delinquent children, is not unconstitutional as class legislation.

Appeal from Superior Court.

Frank Fisher was committed to the House of Refuge, and appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and ELKIN, JJ.

John H. Fow, for appellant. John C. Bell, Dist. Atty., and Owen J. Roberts, Asst. Dist. Atty., for the Commonwealth.

BROWN, J. In a proceeding conducted in the court of quarter sessions of the county of Philadelphia under the provisions of the act of April 23, 1903 (P. L. 274), Frank Fisher, the appellant, was committed by that court to the House of Refuge. From the order so committing him an appeal was taken to the superior court, which affirmed it. *Commonwealth v. Fisher*, 27 Pa. Super. Ct.

175. The constitutionality of the act of 1903 was the sole question before the court in that case, and is renewed here. The objections of the appellant to the constitutionality of the act, as presented by counsel, are: (a) Under its provisions the defendant was not taken into court by due process of law. (b) He was denied his right of trial before a jury on the charge of the felony for which he had been arrested. (c) The tribunal before which he appeared, and which heard the case and committed him to the House of Refuge, was an unconstitutional body, and without jurisdiction. (d) The act provides different punishments for the same offense by a classification of individuals according to age. (e) The act contains more subjects than one, some of which are not expressed in the title. In considering these objections, the order in which they are made will not be followed.

The act is entitled "An act defining the powers of the several courts of quarter sessions of the peace, within this commonwealth, with reference to the care, treatment and control of dependent, neglected, incorrigible and delinquent children, under the age of 16 years, and providing for the means in which such power may be exercised." By this title notice of the purpose of the act is distinctly given. It is a single one. It is to define what powers the state, as the general guardian of all of its children, commits to the several courts of quarter sessions in exercising special guardianship over children under the age of 16 years needing the substitution of its guardianship for that of parents or others. This purpose is expressed in the title in as few words as are consistent with clearness. No one, from reading the title, can possibly misunderstand the purpose of the act that follows, and article 3, § 3, of the Constitution is not offended, if, in passing to the body of the act, nothing is there found but this one single purpose. The preamble to it is a recital that, as the welfare of the state requires that children should be guarded from association and contact with crime and criminals, and as those who, from want of proper parental care or guardianship, may become liable to penalties which ought not to be imposed upon them, it is important that the powers of the court, in respect to the care, treatment, and control of dependent, neglected, delinquent, and incorrigible children, should be clearly distinguished from those exercised by it in the administration of the criminal law. After defining the powers of the court the act proceeds to direct how they are to be exercised in giving effect to its purpose. Nothing in the first nine sections can be read as relating or germane to any other purpose than the one named; and there can be no surer test than this of compliance with the constitutional requirement of the singleness of purpose of an act of assembly.

The objection that "the act offends against a constitutional provision in creating, by its terms, different punishments for the same offense by a classification of individuals," overlooks the fact, hereafter to be noticed, that it is not for the punishment of offenders but for the salvation of children, and points out the way by which the state undertakes to save, not particular children of a special class, but all children under a certain age, whose salvation may become the duty of the state, in the absence of proper parental care or disregard of it by wayward children. No child under the age of 16 years is excluded from its beneficent provisions. Its protecting arm is for all who have not attained that age and who may need its protection. It is for all children of the same class. That minors may be classified for their best interests and the public welfare has never been questioned in the legislation relating to them. Under the act of 1887, the classification of females under 16 years of age means felonious rape, with its severe penalties for what may be done one day, though on the next it remains simple fornication, to be expiated by a mere fine. Other acts forbid the employment of minors under 12 years of age in mills; of any boy under 14, or any female, in anthracite coal mines; of minors under 14 in and about elevators; of a boy under 12, or any female, in bituminous coal mines. Others make it a misdemeanor to furnish intoxicating drinks, by sale, gift, or otherwise, to one under 21, and forbid the admission of any minor into certain places of amusement. Such classification is not prohibited by the Constitution, and what has not been therein prohibited the Legislature may enact. Shortly after the adoption of our present Constitution, we said, in the leading case *Wheeler v. The City of Philadelphia*, 77 Pa. 338: "In like manner other subjects, trades, occupations, and professions may be classified; and not only things, but persons, may be so divided. The genus homo is a subject within the meaning of the Constitution. Will it be contended that as to this there can be no classification? No laws affecting the personal and property rights of minors as distinguished from adults? Or of males as distinguished from females? Or, in the case of the latter, no distinction between a feme covert and a single woman? What becomes of all our legislation in regard to the rights of married women, if there can be no classification? And where is the power to provide any future safeguards for their separate estate? These illustrations might be multiplied indefinitely, were it necessary."

No new court is created by the act under consideration. In its title it is called an act to define the powers of an already existing and ancient court. In caring for the neglected or unfortunate children of the Commonwealth, and in defining the powers

to be exercised by that court in connection with these children, recognized by the state as its wards requiring its care and protection, jurisdiction is conferred upon that court as the appropriate one, and not upon a new one created by the act. The court of quarter sessions is not simply a criminal court. The Constitution recognizes it, but says nothing as to its jurisdiction. Its existence antedates our colonial times, and by the common law and statutes, both here and in England, it has for generations been a court of broad general police powers in no way connected with its criminal jurisdiction. Innumerable statutes upon our own books during the last two centuries attest this. With its jurisdiction unrestricted by the Constitution, it is for the Legislature to declare what shall be exercised by it as a general police court; and, instead of creating a distinctively new court, the act of 1903 does nothing more than confer additional powers upon the old court and clearly define them. On this point nothing can be profitably added to the following from the opinion of the superior court: "No new court is created, and the ancient court of quarter sessions, which is older than all the Constitutions of Pennsylvania, is given thereby not greater, but different, powers from those previously exercised. The court of quarter sessions has for many years exercised jurisdiction over the settlement of paupers, over the relation of a man to his wife and children in desertion cases, in surety of the peace cases, in the granting of liquor licenses, and in very many of the ways in which the public welfare is involved, where there is neither indictment nor trial by jury. It might as well be said that the court of quarter sessions is not a court of quarter sessions, 'because it keeps a separate road docket, or, for convenience, a separate docket for desertion cases, or appoints days in which it will hear a certain class of cases, or, as it is said in popular parlance, will hold a 'license court.' In the latter class of cases, where there is more than one court of common pleas within a county, it is usual for the courts themselves to designate the judges who shall hold what is known as the 'license court.' It has never been claimed, so far as we know—certainly not successfully claimed—that such designation was in any sense unconstitutional, or that, because of the designation, a separate court was created. It is no more so in the case under consideration than in any of the cases spoken of above." It is a mere convenient designation of the court of quarter sessions to call it, when caring for children, a 'juvenile court'; but no such court, as an independent tribunal, is created. It is still the court of quarter sessions before which the proceedings are conducted, and though that court, in so conducting them, is to be known as the 'juvenile court,' the records are still those of the court of quarter sessions.

In pressing the objection that the appellant was not taken into custody by due process of law, the assumption, running through the entire argument of the appellant, is continued that the proceedings of the act of 1903 are of a criminal nature for the punishment of offenders for crimes committed, and that the appellant was so punished. But he was not, and he could not have been without due process of law; for the constitutional guaranty is that no one charged with a criminal offense shall be deprived of life, liberty, or property without due process of law. To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer years in public punishment and disgrace, the Legislature surely may provide for the salvation of such a child, if its parents or guardian be unable or unwilling to do so, by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection. The natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home, to save it and to shield it from the consequences of persistence in a career of waywardness; nor is the state, when compelled, as *parens patriæ*, to take the place of the father for the same purpose, required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts. When the child gets there, and the court, with the power to save it, determines on its salvation, and not its punishment, it is immaterial how it got there. The act simply provides how children who ought to be saved may reach the court to be saved. If experience should show that there ought to be other ways for it to get there, the Legislature can, and undoubtedly will, adopt them, and they will never be regarded as undue processes for depriving a child of its liberty or property as a penalty for crime committed.

The last reason to be noticed why the act should be declared unconstitutional is that it denies the appellant a trial by jury. Here again is the fallacy that he was tried by the court for any offense. "The right of trial by jury shall remain inviolate," are the words of the Bill of Rights, and no act of the Legislature can deny this right to any citizen, young or old, minor or adult, if he is to be tried for a crime against the commonwealth. But there was no trial for any crime here, and the act is operative only when there is to be no trial. The very purpose of the act is to prevent a trial, though, if the welfare of the public require that the minor should be tried, power to try it is not taken away from the court of quarter sessions; for the eleventh section expressly provides that nothing in the preceding sections "shall be in derogation of the powers of the courts of quarter sessions and oyer and terminer to try, upon an indictment, any delinquent child, who, in due course, may be brought to trial." This sec-

tion was entirely unnecessary, for without it a delinquent child can be tried only by a jury for a crime charged; but, as already stated, the act is not for the trial of a child charged with a crime, but is, mercifully to save it from such an ordeal, with the prison or penitentiary in its wake, if the child's own good and the best interests of the state justify such salvation. Whether the child deserves to be saved by the state is no more a question for a jury than whether the father, if able to save it, ought to save it. If the latter ought to save, but is powerless to do so, the former, by the act of 1903, undertakes the duty; and the Legislature, in directing how that duty is to be performed in a proper case, denies the child no right of a trial by a jury, for the simple reason that by the act it is not to be tried for anything. The court passes upon nothing but the propriety of an effort to save it, and, if a worthy subject for an effort of salvation, that effort is made in the way directed by the act. The act is but an exercise by the state of its supreme power over the welfare of its children, a power under which it can take a child from its father and let it go where it will, without committing it to any guardianship or any institution, if the welfare of the child, taking its age into consideration, can be thus best promoted. "The true rule is 'that the court are to judge upon the circumstances of the particular case, and to give their directions accordingly.'" This was said in habeas corpus proceedings in *Rex v. Sir Francis Blake Delaval et al.*, 3 Burr. 1434, by Lord Mansfield, in discharging Anne Catley, a minor. And he further said: "In the present case there is no reason for the court to deliver her to her father. She has sworn 'to have received ill usage from him before she was at all put out apprentice'; and, whilst she was with Bates, her master, it appears that her father seldom or never came near her, or ever gave her either advice or reprimand. It is even suspicious 'whether the father and mother were not parties to the conspiracy,' and whether the father does not carry on this prosecution in hopes of extorting money from the defendants. Let the girl, therefore, be discharged from all restraint, and be at liberty to go where she will."

By the act of April 10, 1835 (P. L. 133), which is a supplement to the act establishing the House of Refuge, authority was given to an alderman or justice of the peace, on complaint of a parent or guardian, to commit to that institution an incorrigible or vicious female under the age of 18 years. Mary Ann Crouse was committed to the institution by Morton McMichael, a justice of the peace of the county of Philadelphia, and in remanding her to the institution, in proceedings on a writ of habeas corpus for her discharge, on the ground that the act authorizing her commitment was unconstitutional, as she had not had a trial by a jury, this court, with Gibson as its Chief Justice, said in a *per curiam*: "The object of the charity is reformation, by

training its inmates to industry, by imbuing their minds with principles of morality and religion, by furnishing them with means to earn a living, and, above all, by separating them from the corrupting influence of improper associates. To this end may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriæ*, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that, of strict right, the business of education belongs to it. That parents are ordinarily intrusted with it is because it can seldom be put into better hands; but, where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance? The right of parental control is a natural, but not an unalienable, one. It is not excepted by the Declaration of Rights out of the subjects of ordinary legislation; and it consequently remains subject to the ordinary legislative power, which, if wantonly or inconveniently used, would soon be constitutionally restricted, but the competency of which, as the government is constituted, cannot be doubted. As to abridgment of indefeasible rights by confinement of the person, it is no more than what is born, to a greater or less extent, in every school; and we know of no natural right to exemption from restraints which conduce to an infant's welfare. Nor is there a doubt of the propriety of their application in the particular instance. The infant has been snatched from a course which must have ended in confirmed depravity; and not only is the restraint of her person lawful, but it would be an act of extreme cruelty to release her from it." *Ex parte Crouse*, 4 Whart. 9.

Appellate courts of other states have expressed this same view. Among the cases which might be cited is *Wisconsin Industrial School for Girls v. Clark County*, 103 Wis. 651, 79 N. W. 422, where it is said: "The power to place children under proper guardianship has been exercised by chancellors and judges exercising chancery powers from time immemorial. Said Lord Redesdale, in 1828, in *Wellesley v. Wellesley*, 2 Bligh (N. S.) 124, the right of a chancellor to exercise such power has not been questioned for 150 years. Such a proceeding is not a trial for an offense requiring a common law, or any jury. It was never so regarded in England, nor has it been in this country in but few instances, notably cases in New Hampshire and in *People ex rel. O'Connell v. Turner*, 55 Ill. 280, 8 Am. Rep. 645. That case was in effect overruled by later cases, and is not now considered as authority. *Petition of Ferrier*, 103 Ill. 367, 43 Am. Rep. 10; *McLean County v. Humphreys*, 104 Ill. 378. As said, in substance, in the *Ferrier Case*, the proceeding is not one according to the course of the common law, in which the right of trial by

jury is guaranteed, but a mere statutory proceeding for the accomplishment of the protection of the helpless, which object was accomplished before the Constitution without the enjoyment of a jury trial. There is no restraint upon the natural liberty of children contemplated by such a law, none whatever, but rather the placing of them under the natural restraint, so far as practicable, that should be, but is not, exercised by parental authority. It is the mere conferring upon them that protection to which, under the circumstances, they are entitled as a matter of right. It is for their welfare and that of the community at large. The design is not punishment, nor the restraint imprisonment, any more than is the wholesome restraint which a parent exercises over his child. The severity in either case must necessarily be tempered to meet the necessities of the particular situation. There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded. Every statute which is designed to give protection, care, and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated, but one of the most important duties which organized society owes to its helpless members is performed, just in the measure that the law is framed with wisdom and is carefully administered. The conclusions above expressed are in accordance with adjudications elsewhere, with but very few exceptions. *Roth v. House of Refuge*, 31 Md. 329; *Ex parte Crouse*, 4 Whart. 9; *Tiedeman, Lim.* § 50; *Prescott v. State*, 19 Ohio St. 184, 2 Am. Rep. 388; *People ex rel. Van Heck v. New York Catholic Protectory*, 101 N. Y. 195, 4 N. E. 177; *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197; *St. Mary's Industrial School v. Brown*, 45 Md. 310; *Farnham v. Pierce*, 141 Mass. 203, 6 N. E. 830, 55 Am. Rep. 452."

None of the objections urged against the constitutionality of the act can prevail. The assignments of error are therefore all overruled, and the order of the superior court, affirming the commitment below, is affirmed.

SAMPLE et al. v. CITY OF PITTSBURG et al.

(Supreme Court of Pennsylvania. June 22, 1905.)

1. STATUTES—LOCAL OR SPECIAL LAWS.

Act April 20, 1905 (P. L. 221), providing that, where two cities are contiguous and in the same county, the smaller may be annexed to the larger, and describing the method of procedure, is in violation of Const. Art. 3, § 7, subd. 2, providing that the General Assembly shall not pass any local law regulating the affairs of cities, where the only two cities in the commonwealth that are "contiguous and in the same county" are the cities of Pittsburgh and Alle-

gheny, and it is evident that the act was intended to legislate locally for them.

[Ed. Note.—For cases in point, see vol. 44, Statutes, §§ 79, 81, 101-105.]

2. INJUNCTION—BILL BY CITIZENS—ANNEXATION OF CITIES.

A bill in equity, at the suit of citizens of Allegheny City, will lie to restrain the city of Pittsburg and its municipal officers from taking any steps to annex the city of Allegheny to the city of Pittsburg under the unconstitutional act of April 20, 1905 (P. L. 221).

3. STATUTES—LOCAL LAW—REGULATION OF CITIES.

Act April 20, 1905 (P. L. 221), providing for the annexation of one city by another, is a law "regulating the affairs" of cities, within Const. art. 3, § 7, subd. 2, prohibiting the passage of a local act for that purpose.

Potter, J., dissenting.

Bill by Thomas G. Sample and others against the city of Pittsburg and others. Decree for plaintiffs.

Argued before MITCHELL, O. J., and DEAN, FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

William A. Stone, Harvey Henderson, and W. C. Gill, for plaintiffs. Wm. B. Rodgers and T. D. Carnahan, for defendants. A. Leo Well, for interveners.

MESTREZAT, J. This is a bill filed in this court by the plaintiffs, who are citizens and taxpayers of Allegheny City, to restrain the defendants, the city of Pittsburg and William B. Hays, mayor, James S. Wightman, president of select council, and R. B. Ward, president of common council, from taking any proceedings to annex the city of Allegheny to the city of Pittsburg under the provisions of an act of assembly commonly known as the "Cook Law," entitled "An act providing that, where two cities are contiguous and in the same county, the smaller may be annexed to the larger, prescribing the method of proceeding and the effect of annexation, providing for the division of such enlarged cities into wards, for the apportionment of common council, and for the indebtedness of such cities," approved April 20, 1905 (P. L. 221). It appears from the averments of the bill that the city of Pittsburg, through its mayor and councils, has instituted proceedings in the court of quarter sessions of Allegheny county to have the city of Allegheny annexed to the city of Pittsburg under this act of assembly. The bill avers, *inter alia*, that the two cities are cities of the second class, located in Allegheny county, and are separated from each other by the Allegheny river and the Ohio river, both navigable streams; "that the said two cities of Pittsburg and Allegheny are the only two contiguous cities in the state of Pennsylvania, and are the only two cities in any county in the state that are contiguous; that there is no other locality in the state of Pennsylvania where there are two cities as classified under the laws of Pennsylvania, nor is there any other

locality in the state where any borough or township is contiguous to a city that can be annexed thereto under the present laws of the state of Pennsylvania, except by a majority vote of the electors of said borough or town, as provided by the Constitution of Pennsylvania;" and that "the Cook law, under which the defendants are proceeding, is unconstitutional, because prohibited by article 3, § 7, subd. 2, of the Constitution, which provides that the General Assembly shall not pass any local or special law regulating the affairs of counties, cities, townships, wards, boroughs, or school districts." It is further averred that "the Cook law is a local law, because its provisions can only apply to one locality, namely, the mouth of the Allegheny river, where it empties into the Ohio river, and for some distance above and below its mouth; that there is no other locality in the state of Pennsylvania to which the Cook law can apply, and it was the intention of the Legislature that it should only apply to this locality; that the law is special and class legislation, and is unconstitutional." The defendants filed an answer, in which they denied that the act in question is unconstitutional, and aver, *inter alia*, as follows: "It may be that the cities of Pittsburg and Allegheny are the only two contiguous cities of the state situate in the same county; but it is submitted that the time is not far distant when contiguity will exist as to the boundaries of other cities of the state, within the meaning of the act of the General Assembly approved April 20, A. D. 1905, * * * and that in the very near future the city of Pittsburg and the city of McKeesport, both of which are in Allegheny county, will be in all probability contiguous."

The first section of the act of 1905 provides, *inter alia*, that where two cities, situate in the same county, are or may be contiguous to each other, the city having the smaller population, as shown by the last preceding United States census, may be annexed to the city having the larger population, as shown by the said census. It is further provided in this section that, "for purposes of this act, cities separated by a stream, river or highway shall be included under the term 'contiguous.'" The act, then, in several sections provides in detail the proceedings which shall be taken to carry it into effect. The subject of this statute is the annexation of one city to another, and it requires no argument to show, and we understand it is conceded, that it must be regulated by general legislation. A careful consideration of the act, however, convinces us that it was not intended to be general in its operation throughout the state, and that it clearly offends against section 7 of article 3 of the Constitution of 1874, which provides that "the General Assembly shall not pass any local or special law * * * regulating the affairs of counties.

cities, townships, wards, boroughs or school districts." We do not deem it necessary to enter into a discussion of the power of the General Assembly to classify cities for the purposes of legislation, or the multitude of cases decided by this court on the subject. We are concerned here, not with the subject of classification of cities and whether the Legislature, in enacting the statute in question, has transgressed the Constitution in that respect, but simply whether the act is local or special legislation in contemplation of the constitutional provision prohibiting such legislation.

This section of the Constitution has frequently been the subject of interpretation by this court. *Commonwealth v. Patton*, 88 Pa. 258, involved the constitutionality of an act of assembly entitled "An act to provide for the holding of courts in certain cities of this commonwealth." The act required that in all counties containing a certain population, and having a city with a certain population, situate at a certain distance from the county seat, the judge of the courts of the county should hold a session of court in such city after every regular term of court for the county. This court held the act to be special legislation, and in conflict with article 3, § 7, of the Constitution. The trial judge in that case found that Crawford county was the only county to which the act could apply at that time. Mr. Justice Paxson, delivering the opinion, says (page 280): "This is classification run mad. Why not say all counties named Crawford, with a population exceeding 60,000, that contain a city called Titusville, with a population of over 8,000, and situated 27 miles from the county seat? Or all counties with a population of over 60,000, watered by a certain river or bounded by a certain mountain? There can be no proper classification of cities or counties, except by population. The moment we resort to geographical distinctions we enter the domain of special legislation, for the reason that such classification operates on certain cities or counties to the perpetual exclusion of all others. * * * That is not classification which merely designates one county in the commonwealth, and contains no provision by which any other county may, by reason of its increase of population in the future, come within the class." A subsequent and similar act intended to accomplish the same result, applying to counties and cities of the future, as well as of the present, was also declared unconstitutional in *Scowden's Appeal*, 96 Pa. 422. Justice Paxson, again delivering the opinion, says (page 425): "It is no part of our business to discuss the wisdom of this legislation. However vicious in principle we might regard it, our plain duty is to enforce it, provided it is not in conflict with the fundamental law. It requires but a glance at the act to see that it is an attempt to evade the Constitution. It is special legislation under the attempted disguise of a general law. Of all forms of special legislation

this is the most vicious. * * * The act of June 12, 1879 (P. L. 174)," the act then under consideration, "makes no attempt at the classification of cities. It is merely an effort to legislate for certain cities of the fifth class to the exclusion of all other cities of the same class. That is to say, it refers only to cities of the fifth class which are situated in a county having a population of 60,000. * * * Classification which is grounded in no necessity, and has for its sole object an evasion of the Constitution, will not be encouraged."

McCarthy v. Commonwealth, 110 Pa. 243, 2 Atl. 423, involved the consideration of an act providing for payment of salaries, instead of fees, to county officers, and requiring the officers to pay the fees to the treasurer in counties containing a certain population. The act was held to be special legislation and void. In delivering the opinion, Mr. Justice Gordon says (page 246 of 110 Pa., page 424 of 2 Atl.): "But by what process of reasoning is this legislation, which has selected for its operation three or four counties from all those composing the commonwealth, to be justified? Is the justification to be found in the well-recognized legislative power of classification? We think not. It is admitted that classification, even where not specially recognized by nature, custom, the laws of trade, or the Constitution, must in certain cases be adopted ex necessitate, as in the case of cities, under the act of May 23, 1874 (P. L. 280). * * * There is here, however, a new and complete classification, and not a mere cutting out of one or more cities, designated by population, from the general class, and in this the act of 1874 is distinguishable from that of 1883 [the one then under consideration], in which no general classification is attempted, but a special legislation adopted for certain counties selected from all others, and to be ascertained by their populations rather than by their names. * * * If, indeed, such legislation were to be recognized as legitimate, vain would be the constitutional prohibition of local or special laws. But little ingenuity in the way of so-called classification would be necessary in order to isolate every single county, borough, ward, township, and school district in the state, and provide for each its own local code." In *Morrison v. Bachert*, 112 Pa. 322, 5 Atl. 739, we held an act to be local legislation which regulated the fees of county officers, "except in counties containing more than 150,000 or less than 10,000." Mr. Justice Paxson, delivering the opinion, says (page 328 of 112 Pa., page 740 of 5 Atl.): "That the act in question is in direct conflict with the Constitution is too plain for argument. It is only necessary to read the title to this act to see this. It excludes perpetually from its operation all counties having a population of over 150,000 inhabitants. This makes it a local law. If it can exclude Philadelphia and Pittsburgh, it may exclude every other county in the state but the one county seeking such

special or local legislation. * * * Nor can this legislation be sustained upon any rational theory of classification. In point of fact, there is no attempt at classification. It was a mere exclusion of certain counties." In Scranton School District, 113 Pa. 176, 6 Atl. 158, an act was declared local legislation which provided for the levying of taxes, etc., but having a proviso excluding all cities of the third class which, by an ordinance, would not accept the provisions of the act. Green, J., delivering the opinion, says (page 190 of 113 Pa., page 159 of 6 Atl.): "The circumstance that the power to determine the question is delegated to another body does not at all affect the question. The practical result is the same, the law of 1875 will be limited to the one or more cities that do accept, and that makes it local. All our recent decisions are to the effect that, if local results either are or may be produced by a piece of legislation, it offends against this provision of the Constitution and is void."

In *Davis v. Clark*, 106 Pa. 377, an act giving the right to file a mechanic's lien, with a provision that it should not apply to counties having over a certain population, was held to be local, and therefore void. Mercur, C. J., in the opinion of the court says (page 384): "The main contention is whether the act of 1879 is in conflict with this clause of the Constitution. It shows on its face that it was not intended to apply, and does not apply, to the whole state. It assumes, what was a well-known fact, that some of the counties had each a population greater than 200,000. In the counties of Philadelphia and Allegheny, that greater population had been legally found by the census of 1870. * * * It was not, then, a general act applicable to every part of the commonwealth. It did apply to a great number of counties; but there is no dividing line between a local and a general statute. It must be either the one or the other. If it apply to the whole state, it is general; if to a part only, it is local. As a legal principle, it is as effectually local when it applies to 65 counties out of the 67, as if it applied to the one county only. The exclusion of a single county from the operation of the act makes it local." *Perkins v. Philadelphia*, 156 Pa. 554, 27 Atl. 356, involved the consideration of "an act to abolish commissioners of public buildings, and to place all public buildings heretofore under the control of such commissioners, under the control of the department of public works in cities of the first class." The act was held to be local and unconstitutional. Mr. Justice Dean, delivering the opinion, says (page 562 of 156 Pa., page 359 of 27 Atl.): "This act purports to be a general law applicable to cities of the first class. We have held, and now adhere to it, that the Legislature may lawfully classify cities for corporate purposes, and that an act to promote such purposes is not local or special merely because at the date of its passage there was

but one city to which it applied. But it has been decided in case after case, since the Constitution of 1874 went into effect, in positive, unmistakable language, that if the act was intended to apply to but one particular city, county or township, and was not intended to and could never apply to any other, it was local, and therefore unconstitutional. This act is nominally general, applies in terms to cities in the first class, abolishes commissioners of public buildings for the use of courts and municipal purposes in such cities, created by special acts of assembly, and places all buildings heretofore under their control in the control of the department of public works. At the date of its passage there was just one city, one set of commissioners, one special act of assembly, one public building, to which it could apply. From the very nature of the case, there never could be another city in the first class to which the act could apply, for it transfers to the department of public works buildings heretofore under the control of such commissioners. No matter how many cities come into this class, nor how soon they reach it, this act cannot apply to them; for their affairs have not heretofore been regulated by any such act as that of 1870."

From these and other decisions of the court, it is settled that the test whether a statute is local and special legislation within the prohibition of the Constitution is whether it operates upon all counties or cities alike, and, when they are properly classified, it acts upon all counties or cities of the same class alike, or whether it operates upon certain counties or certain cities, or upon a part of a class of counties or cities, and excludes all others. If the latter is the result or effect of the act, and it was so intended to be, it is local or special, notwithstanding it is in terms general. The court will look at the substance and not the form of legislation in determining the question, and a local or special act, repugnant to the fundamental law, will be declared void, though it may be disguised as a general act. Classification of cities may be used as a basis for legislation which relates to municipal affairs; but if the legislation concern subjects of general, as distinguished from a municipal, character, it passes into the realm of local or special legislation forbidden by the Constitution. However disguised, classification can never be successfully invoked for the purpose of evading the constitutional inhibition against local or special legislation.

The answer of the defendants raises the question of the right of the plaintiffs, citizens and taxpayers of Allegheny City, to maintain this bill and test the constitutionality of the act of 1905. We think this question too well settled to require extended discussion. *Wells v. Bain*, 75 Pa. 39, 15 Am. Rep. 563; *Wheeler v. Philadelphia*, 77 Pa. 338; *Pittsburg's Appeal*, 79 Pa. 317. This last case was a bill to restrain the city of Pittsburg

and its officers from exercising authority over an adjacent municipality admitted to the city by an ordinance passed in pursuance of an act of assembly, the provisions of which the plaintiffs, citizens, and taxpayers of the municipality claimed had not been complied with by councils in admitting the municipality as part of the city. The defendants denied the right of the plaintiffs to maintain the bill. In sustaining the bill, Mr. Justice Gordon, speaking for the court, said (page 324): "The right of a private citizen to maintain a bill, such as that upon which this case is founded, is hardly open for argument. So many are the cases in which such bills have been sustained that one might suppose this matter to be no longer open for debate." It was also said in the opinion that "the plaintiff, who is threatened by most burdensome impositions, should have the power to inquire into the right by which the councils of Pittsburg proposed to act in subjecting his person and property to their jurisdiction for the purposes of municipal government and taxation."

There can be no doubt that the act of 1905 regulates the "affairs of cities" in contemplation of the Constitution. In *Morrison v. Bachert*, 112 Pa. 322, 5 Atl. 739, the trial court defined "affairs of counties" to be such "as concern counties in their governmental and corporate capacity." This court, however, thought the definition too narrow a construction of these words, and held that, "when it [the Constitution] speaks of the affairs of a county, it means such affairs as affect the people of that county." In that case it was held that an act to ascertain and appoint the fees to be received by certain county officers was an act regulating the affairs of counties. This construction of the clause in question was followed and approved in *Frost v. Cherry*, 122 Pa. 417, 15 Atl. 782, where it was held that this clause of the Constitution avoided an act of assembly repealing a section of the fence law of 1700. And in *Commonwealth v. Patton*, 88 Pa. 258, and in *Scowden's Appeal*, 96 Pa. 422, this court held that an act of assembly authorizing the holding of special sessions of the courts of certain counties away from the county seat was a law regulating the affairs of counties, and was special legislation and void. In *Perkins v. Philadelphia*, 156 Pa. 554, 27 Atl. 356, it was held that an act of assembly "regulates the affairs of the city" which abolished the commissioners of public buildings and placed all public buildings theretofore under their control in the control of one of the departments of the city government. The act under consideration here not only affects the people of the two cities, but concerns the two cities in their governmental and corporate capacities. It enlarges the territory and population of one, and deprives the other of its charter and government as a city. It is apparent, we

think, that the act is a "law regulating the affairs of" cities within its operation.

Is the legislation in question of local or special operation, and therefore within the prohibition of article 3, § 7, of the Constitution? This is the vital and controlling question in the case, and under the well-established rules of constitutional interpretation and our own construction of the clause in question it must be answered in the affirmative. The title of the act clearly indicates the subject of the enacting part, and discloses the local and special features of the statute. It shows that the act was not intended to apply to any two cities of the state, so as to make it general in its operation; but conditions are imposed which restrict its application to certain cities, thereby depriving the other cities of the state of the benefit of its provisions. The statute is operative "where two cities are contiguous and in the same county." Its provisions can be invoked to annex only two cities and when they are thus situated. Two cities of this description may be annexed to each other, and all others are excluded from the operation of the statute. As we take judicial cognizance of the municipal divisions of the state, as well as of their location, we know, as averred in the bill and not denied in the answer, that the cities of Allegheny and Pittsburg, in Allegheny county, are the only two contiguous cities in the state, and that there are no two contiguous cities in any other county in the state. The act, therefore, is limited in its operation to these two cities, and the effect or result of the legislation is the same, and the act as clearly special, as if the names of the two cities had been written in the statute, instead of the periphrase used in the description of the cities subject to its operation.

The identification to the two cities intended to be affected by the act is also aided by the provision of the statute that, "for purposes of this act, cities separated by a stream, river or highway shall be included under the term contiguous." Aside from the contention that the act applies only to cities separated by a stream, river, or highway, this clause of the act clearly suggests the two Allegheny county cities as the cities subject to its operation. We judicially know that Pittsburg and Allegheny are the only two cities in the commonwealth separated by a stream or highway, and the fear that that fact would render those cities not contiguous, within the meaning of the statute, moved the promoters of this legislation to further identify them by inserting this clause in the act. This feature should not and cannot be ignored when the court is called upon to test the constitutionality of the statute, as it clearly earmarks the legislation as local and special.

There is no merit in the contention that at some time in the future there may be two

other cities which may become contiguous, and in that event can be consolidated under the provisions of the act. With a knowledge of the facts, known to the Legislature as well as to the court, this is not within the range of probability, but a possibility so remote that it must be excluded from consideration in determining the constitutionality of the statute. It could only occur if a community adjacent to any of the cities of the state should become sufficiently populous to enable it to become a city, and should take the necessary legal steps to make itself a city and subject to the operation of the act, or if the boroughs lying between and connecting certain cities of the state should, by the requisite legal proceedings, be annexed to those cities or form themselves into a city, and thereby connect two existing cities, so as to make the act operative. These are simply contingencies within the realm of speculation, and entirely too remote to support legislation otherwise repugnant to the constitutional mandate.

The statute requires any two cities desirous of availing themselves of its provisions to be located in the same county. This confines the act in its operation to cities within certain territorial limits, and brings it within the domain of special legislation prohibited by the Constitution. The act does not attempt to classify cities on any basis whatever. It provides simply that it shall operate upon two cities situated in the same county. It therefore excludes from its provisions and denies its privileges to all cities separated by a county line, or which are not wholly within the same county, although occupying contiguous territory. All cities whose boundaries are coterminous with the county line are perpetually excluded from the operation of the statute, although other cities may adjoin them at different parts of their boundaries. This distinction made in the act between the cities of the commonwealth is not based upon necessity, nor upon any grounds which the law recognizes as justifying classification. Its effect is to restrict the operation of the statute to two cities located in the same territorial division of the state; and, when considered in the light of the conceded facts, it fixes with unmistakable certainty the two cities to be consolidated under its provisions. A clearer or more palpable attempt to evade the constitutional prohibition against special and local legislation is not disclosed in any of the numerous bills introduced in the General Assembly since the adoption of the present Constitution, not excepting the statute which Mr. Justice Paxson, in *Commonwealth v. Patton*, 88 Pa. 258, very properly characterized as "classification run mad."

The present Constitution went into effect almost a third of a century ago. Prior to its adoption, there was practically no constitutional restraint on the power of the General Assembly to enact local or special legislation. As has been pointed out in the opinions of

this court, one of the manifest objects of the adoption of the last Constitution by the people of the state was to eradicate the evils of local and special legislation which had grown to such an extent as to make its abuse almost unendurable. Such was the purpose of section 7 of article 3, which specifies more than 50 subjects on which the General Assembly is prohibited from passing any local or special law. Notwithstanding this emphatic and comprehensive declaration in the Constitution against this species of legislation, there has not been a session of the General Assembly since its adoption that the framers of legislation have not attempted to evade this provision of the instrument by all the ingenuity at their command. They have done this in the face of repeated warnings of this court that the constitutional mandate would be rigidly enforced. Nearly 20 years ago, in speaking of this provision of the Constitution and the intention of the court to compel a strict observance of it, in *Morrison v. Bachert*, 112 Pa. 322, 5 Atl. 739, Mr. Justice Paxson said (page 328 of 112 Pa., page 739 of 5 Atl.): "It was a wise provision and will be sternly enforced. It is our purpose to adhere rigidly to that instrument, that the people may not be deprived of its benefits. It ought to be unnecessary for this court to make this judicial declaration; but it is proper to do so, in view of the amount of legislation which is periodically placed upon the statute book in entire disregard of the fundamental law. As we view it, this note of warning at this time is needed." We desire to reiterate and emphasize this admonition. It is within our power, and it is our duty, to strike down legislation repugnant to any provision of the Constitution. It is not the province of either department of the government to criticize or question the wisdom of the people in the adoption of any part of their fundamental law; nor can either department be permitted to ignore or evade its provisions under any pretext or by any device whatever.

We are of opinion that the act of April 20, 1905, providing for the annexation of two contiguous cities in the same county, is local and special legislation, within the prohibition of article 3, § 7, of the Constitution, and is therefore void. It follows that the defendants are without authority to institute or maintain the proceedings taken by them for the purpose of annexing the city of Allegheny to the city of Pittsburg, and that the plaintiffs are entitled to the relief prayed for in the bill.

Decree.

This cause came on to be heard on bill and answer, and was argued by counsel, and now, June 22, 1905, after consideration it is ordered and decreed that an injunction be issued perpetually restraining the city of Pittsburg, and William B. Hays, mayor, James S. Wightman, president of select council, and R. B. Ward, president of common council of the

city of Pittsburg, and each of them, from taking or maintaining any proceedings under the act of assembly approved April 20, 1905, for the purpose of annexing the city of Allegheny to the city of Pittsburg. It is further ordered that the costs of this proceeding be paid by the city of Pittsburg.

POTTER, J. (dissenting). I am not able to agree with the reasoning of the opinion which has been adopted by the majority of the court in this case, nor to accept the conclusion therein set forth. Even if it be true that the act in question was intended to facilitate the union of Pittsburg and Allegheny, yet that fact cannot in itself affect the constitutionality of the act. The fact that legislation meets the needs of some particular locality does not render it obnoxious to the Constitution. Perhaps most legislation owes its origin to special or particular needs, which are no less meritorious because they must be included in and satisfied by laws expressed in general terms. In his work, "Restrictions upon Local and Special Legislation," Mr. Binney has defined general laws to be such as "operate uniformly upon all members of any class of persons, places, or things requiring legislation peculiar to themselves in the matters covered by the laws." A law is to be regarded as general when it is framed in general terms, is restricted to no locality, and operates equally upon all of a group of objects whose condition or needs render such legislation appropriate. The act of April 20, 1905 (P. L. 221), provides for the consolidation of any two contiguous cities situate in the same county in the state. It must be admitted that any "two contiguous cities" is a general expression. It matters not at how many or how few places in the state there may be two cities which are contiguous. Wherever and whenever there are such, the act would apply. As Mr. Binney says, if the classification be valid, the number of members in a class is wholly immaterial; so that it makes no difference whether there be 1 or 100 places in the state which will at the present time fit the conditions of the act, so long as the way is open for other places to come in as occasion may arise.

But it is suggested that the further limitation of the operation of the act to cases where two contiguous cities are "situate in the same county" makes it local. But why so? In so far as the language of the act is concerned, no county in the state is excluded from its operation. There are sound reasons why no city should be allowed to extend beyond the boundaries of a single county, and the limitation in that respect, if general, is legitimate. Under the act of February 2, 1854 (P. L. 21), a local act applying to Philadelphia, it is provided that the boundaries of Philadelphia shall be extended so as to embrace the whole of the territory of the county of Philadelphia; and it is sug-

gested that, because there cannot therefore be two contiguous cities in Philadelphia county, that county is excluded from the operation of this act, with the result that the legislation thereby becomes local. But this court decided squarely in *Evans v. Philippi*, 117 Pa. 226, 11 Atl. 630, 2 Am. St. Rep. 655, that a statute general in form is not to be treated as a local one simply because of the intervention of some local statute, unrepealed, which prevents it from taking general effect. Aside from that, it is difficult to see why the fact that one county in the state is already so filled with a city as to leave room for no other contiguous city within its boundaries should be any more of an obstacle to the efficiency of a general law than the fact that in many counties of the state no cities at all exist at the present time. The local act governing Philadelphia may be repealed, and that county may be enlarged, in which case this act would apply to every county in the state. And contiguous cities may grow up in any county, which, under the terms of this act, may in due time be annexed to each other and consolidated into one municipality.

I would uphold the constitutionality of the act of April 20, 1905, and dismiss this bill.

HARTFORD WHEEL CLUB v. TRAVELERS' INS. CO.

(Supreme Court of Errors of Connecticut.
Nov. 7, 1905.)

1. LANDLORD AND TENANT — SUMMARY PROCEEDINGS—THEORY OF CASE.

Where complainant, in summary proceedings to recover real property, alleged that defendant was complainant's lessee by virtue of a monthly hiring as alleged, such complaint was inconsistent with a right in complainant to enforce a forfeiture of a lease executed by its grantor to defendant.

2. SAME—LEASE FOR YEARS—TERMINATION.

Where a lease for a definite term provided that it should become void on nonpayment of rent, such provision did not create a limitation of the term, but a mere condition subsequent, for the breach of which the lessor at his option might terminate the lease.

3. SAME—BREACH OF CONDITION—WAIVER—ACTIONS—INSTRUCTIONS.

Where, in a summary proceedings to recover possession of real property, the landlord, after electing to declare a forfeiture under the lease for nonpayment of rent, accepted and received from the tenant rent subsequently accruing, the tenant was entitled to an instruction that the forfeiture of the lease might be waived by the subsequent payment and acceptance of such rent.

4. SAME—LEASE—CONSTRUCTION.

Where a lease provided that the tenant should surrender the premises at the expiration of the term or on the sooner termination of the lease, and waived all demand for rent, re-entry, notice to quit as required by law, and every other formality whatever, such waiver only authorized the lessor to commence an action to recover possession without demand and re-entry, and did not preclude the tenant from relying on a waiver of a forfeiture by the landlord, consisting of the acceptance of rent subsequently accruing.

Error to Court of Common Pleas, Hartford County; John Coats, Judge.

Summary process for the recovery of real property by the Traveler's Insurance Company against the Hartford Wheel Club. A justice's judgment in favor of plaintiff was affirmed by the court of common pleas, and defendant brings error. Reversed.

On September 10, 1904, one John P. Harbison leased to the Hartford Wheel Club a tenement in his building on the corner of Main and Grove streets in Hartford for the term of two years and nine months from August 1, 1904, at the annual rent of \$900. The lessee covenanted to pay the rent in equal monthly payments on the 1st day of every month, beginning with September, 1904. Immediately following the lessee's covenant to quit and surrender said premises at the expiration of the term or sooner termination of the lease, the lessee agreed that "all demand for rent or re-entry, notice to quit possession as required by law, and every other formality whatever are hereby expressly waived." There was a subsequent provision, by which the lessee arranged for securing payment of rent by creating a lien on his goods, etc., in favor of the lessor; provided said rent shall remain unpaid 20 days after the same becomes due, then this lease shall become void at the option of the lessor, without notice. The Hartford Wheel Club entered under this lease, and has since remained in possession of the premises. On January 3, 1905, Harbison conveyed the land and building, which included the leased premises, to the Travelers' Insurance Company, with the usual covenants of warranty, excepting existing leases. On April 3, 1905, the Travelers' Insurance Company commenced a proceeding in summary process against the Hartford Wheel Club before John F. Forward, a justice of the peace, to recover possession of said leased premises. The case was tried to a jury. Upon the trial the question whether by force of a letter of December 15, 1904, written by Harbison and claimed to have been received by the defendant, there had been a termination of the written lease between Harbison and the defendant in consequence of a forfeiture for nonpayment of rent, was in issue as a controlling question. A bill of exceptions was settled and filed, disclosing in connection with the pleadings the claims of the parties, the state of evidence and conceded facts appearing at the close of the testimony, and stating that the defendant asked the justice to charge the jury that, if the jury found that there had been a forfeiture of said lease for the nonpayment of rent, the subsequent acceptance of rent by the plaintiff and its grantor operated as a waiver of said forfeiture, and that the justice refused this request. After verdict and judgment for the complainant, the defendant obtained this writ of error, assigning error in the refusal of the justice to charge as requested, and other errors in law claimed to be in-

involved in the justice's judgment. Upon the return of the writ of error to the court of common pleas, the defendant in error pleaded "Nothing erroneous," and the court of common pleas found this issue for the defendant in error, and rendered judgment affirming the judgment of the justice court. This appeal from the judgment of the court of common pleas is in the nature of a motion in error, and presents the question whether the justice of the peace manifestly erred in not charging the jury as requested by the (defendant) plaintiff in error.

Andrew J. Broughel, Jr., for appellant.
Robert C. Dickenson and William Bro. Smith, for appellee.

HAMERSLEY, J. (after stating the facts). The complainant, in the proceeding of summary process, claimed that the defendant was its lessee by virtue of a monthly hiring as alleged in its complaint. The allegations of its complaint are inconsistent with any right in the complainant to enforce in this proceeding a forfeiture of the Harbison lease in pursuance of the terms thereof. Its complaint is based solely on the allegations that, when the premises were conveyed to it on January 3, 1905, the defendant was lawfully in possession under a lease from its grantor for the month of January; that on February 1st this lease expired from lapse of time; that on February 15th the complainant gave the defendant the statutory notice to quit possession, and, notwithstanding this notice, the defendant still holds over. The proceeding is not one by a lessor to obtain possession after the termination of his lease by reason of any express stipulation thereof, but is one to obtain possession after his lease has terminated by lapse of time. The Harbison lease and its termination, as alleged by the complainant, were essential evidential facts. Unless the termination were proved, the complainant could not establish the lease for one month and its expiration by lapse of time, on which its complaint is based. The complainant claimed that the defendant's failure to pay Harbison the rent for the month of October within 20 days after the same became due was a cause for forfeiture; that the letter of December 15th, received by the defendant before another failure to pay rent within the time limited, completed the forfeiture, and operated as an absolute and final termination of the lease. The defendant claimed that the letter did not complete the forfeiture and that, if it must be treated as completing the forfeiture, the acceptance of subsequently accruing rent by the lessor operated as a waiver of the forfeiture claimed to be thus proved.

The law of this state applicable to these claims upon the state of facts appearing in the record is settled. When a lease for years provides that the term shall only extend to the happening of a certain event, the term ends upon the happening of that event absolutely and irrespective of the

wishes or the action of either party. But, when a lease for a definite number of years contains a provision that the lease shall become void upon the nonpayment of rent, that provision does not create a limitation of the term, but merely a condition subsequent, for the breach of which the lessor may at his option end and terminate the lease. By the breach the lessee forfeits his right to the continuance of the lease, and the lessor gains the right to terminate the lease in the manner prescribed by law; but, until so terminated, the lease remains in force, and the lessee is bound by its obligations. In order to take advantage of the forfeiture, the lessor must make demand of performance on the day the rent becomes due, if the forfeiture occurs upon a failure to pay on that day, or, if the forfeiture occurs upon failure to pay within a certain number of days after the rent becomes due, then upon the last day of the time so limited. The lessor, having made demand, must enter upon the leased premises for the purpose of asserting his right to possession thereof, by which act he declares his will to avoid the lease, and treats the lessee as no longer a tenant, but a mere trespasser, upon his land; or he must do some other act which is equivalent to such entry, and as unequivocally and certainly as a formal entry treats the lessee as a mere trespasser. Upon such demand and entry the lessor acquires the right, after legal notice, to bring ejectment or summary process for possession of the premises, and to enforce the termination of the lease as of the day of entry; and the lessee acquires the right to insist upon the termination of the lease and his consequent release from its obligations. *Chalker v. Chalker*, 1 Conn. 79, 91, 6 Am. Dec. 206; *Bowman v. Foot*, 29 Conn. 331, 341; *Camp v. Scott*, 47 Conn. 366; *Read v. Tuttle*, 35 Conn. 25, 95 Am. Dec. 215; *Duppa v. Mayo*, 1 Saunders, p. 287, note 16; *Clark v. Jones*, 1 Denio (N. Y.) 517, 518, 43 Am. Dec. 706; *Mackubin v. Whetcroft*, 4 Har. & McH. 135, 154.

By failing to make the requisite demand, the lessor loses his right to enforce the forfeiture. Having made demand, the lessor may waive his right to enforce the forfeiture at any time before entry by acceptance of after-accruing rent. And even an unqualified demand for such rent is a waiver of the forfeiture. By this act the lessor unequivocally treats the lessee as still his tenant, notwithstanding the forfeiture, and as lawfully in possession under the lease, and enforces the obligations imposed upon him as tenant by the terms of the lease. This power of waiver before entry belongs absolutely to the lessor, and may be exercised by him independently of any action by the tenant. After the lessor's election to enforce the forfeiture is declared by entry, and before the consequent termination of the lease is finally settled by the lessee's surrender of possession or his ejectment by the

lessor, the power of waiver remains, but cannot, before entry, be exercised by the lessor alone, independently of the lessee. By the entry the lessee has acquired a right to regard this treatment of him as a mere trespasser as binding upon the lessor, and to insist upon the consequent termination of the lease and his release from its obligations. This right he may waive; and so the power of waiving a forfeiture after entry does not belong to the lessor alone, but depends also upon the action of the lessee. When the forfeiture has been determined by entry, and the lessee, still in possession, waives his rights accruing from that determination by the payment of after-accruing rent, and the lessor by the acceptance of that rent treats the lessee as still his tenant, and not as a continuing trespasser, there is a waiver of the forfeiture, binding alike upon the lessor and lessee. This law in respect to waiver rests upon plain principles of justice controlling the rights and duties of the parties in relation to the peculiar forfeiture arising upon the breach of a covenant in a lease for years to pay rent upon a day certain. *Bowman v. Foot*, 29 Conn. 331, 337; *Camp v. Scott*, 47 Conn. 366, 370, et seq.; *Fifty Associates v. Howland*, 11 Metc. 99, 102; *Coon v. Brickett*, 2 N. H. 163, 165; *Jackson v. Sheldon*, 5 Cow. 448; *Goodright v. Cordwint*, 6 Term. Rep. 219.

In the present case the only default from which a termination of the lease on December 15th is claimed occurred on November 21st, when the lessee failed to pay the rent for the month of October within 20 days after it became due. There appears to have been no demand on the lessee for performance on November 21st, or at any time, unless, indeed, the letter of December 15th should be treated as a demand. And there was no re-entry, unless the mailing and receipt of the letter of December 15th is the equivalent of re-entry and as certainly as a formal entry asserts the lessor's right to immediate possession and treats the lessee as a mere trespasser on the premises. But, waiving the matter of demand and the question of the legal sufficiency of the letter of December 15th to take the place of a formal entry, it appears in the bill of exceptions that the rent for the month of October was paid, and a receipt given therefor under date of December 31, 1904, and that the rent for the month of November, which accrued after the lessee's act of forfeiture on November 21st, namely, December 1st or within 20 days thereafter, was paid by the lessee to the authorized agent of the lessor, and said rent was accepted by said agent, who gave to the lessee a receipt therefor under date of January 3, 1905. Under these circumstances the defendant was entitled to have the jury instructed that the forfeiture of the lease, which the complainant claimed the lessor had elected to enforce on December 15th by his letter of that date, might

be waived by the subsequent payment of after-accruing rent by the lessee and its acceptance by the lessor.

The right of the defendant to instruction as to the waiver of the forfeiture is not affected by the clause in the lease immediately following the promise of the lessee to make punctual payment of the rent, and to "quit and surrender the premises at the expiration of said term or sooner termination of this lease," in which clause the lessee agrees that "all demand for rent or re-entry, notice to quit possession, as required by law, and every other formality whatever are hereby expressly waived." The waiver, if regarded as unlimited, cannot change the provision of the lease from a condition subsequent into an absolute limitation of the term, so that upon the occurrence of the lessee's default the term shall absolutely cease, irrespective of the wishes of the parties. The utmost effect that can be given the unlimited waiver is to enable the lessor to commence his action for obtaining possession, whether it be ejectment or summary process, without demand and re-entry. In that case the commencement of the action operates as the equivalent of demand and re-entry, and the power of waiving the forfeiture before action commenced exists, whether or not an unnecessary entry or its equivalent may be in fact made. Under any permissible view of the provisions of the lease, the forfeiture arising upon the lessee's default might have been waived after the letter of December 15th and before action brought; and the fact of such waiver was material in determining the issue in the justice trial.

The defendant's request to charge must be read and understood in reference to the issues presented by the pleadings, to the claims and state of facts appearing in the bill of exceptions, and to the law applicable thereto. So read and understood, we think the trial justice plainly erred in the unqualified refusal of the request; and this error is apparent upon the record of the proceedings before the justice.

Additional requests to charge, made to the justice, were correctly refused. Other errors, assigned in the writ as involved in the judgment of the justice court, do not properly appear in the record.

There is error in the judgment of the court of common pleas. The judgment is reversed, and the cause remanded, with instructions to render judgment for the plaintiff in error.

ENGEL v. CONTI.

(Supreme Court of Errors of Connecticut.
Nov. 7, 1905.)

WITNESSES—REDIRECT EXAMINATION.

Where, in an action for alienating the affections of plaintiff's wife, he testified that he had not lived with her or had any connection with her during the preceding eight months, but on cross-examination admitted that within

two weeks he had gone with her one evening to a neighboring city, where they had occupied the same room in a hotel, she sleeping in the bed and he on the floor, he was properly permitted to testify on redirect examination that while they were so alone together she proposed that he discontinue his suit against defendant in consideration of defendant's dismissing a suit against plaintiff, as she did not desire court proceedings, and that she did not come to him for the purpose of resuming marital relations.

Torrance, C. J., and Hall, J., dissenting.

Appeal from Superior Court, Hartford County; Edwin B. Gager, Judge.

Action by Herman Engel against Angelo Conti. From a judgment in favor of plaintiff, defendant appeals. **Affirmed.**

Joseph P. Tuttle, for appellant. Benedict M. Holden, for appellee.

BALDWIN, J. The complaint alleged that the affection of the plaintiff's wife for him had been wholly destroyed, and that he had wholly lost her society. In proof of this, he testified at the trial that he had not lived with her or had any connection with her during the preceding eight months. On cross-examination he stated that within two weeks he had gone with her one evening from Hartford (where each then resided) to the neighboring city of New Britain, where they spent the night at a hotel in the same bedroom; she sleeping in the bed, and he on the floor, and not with her. Having stated on redirect examination that they talked together while in the hotel, he was asked what was said by each. This question was objected to, but admitted; and in reply he testified that she said that she had come to him for the last time, that the defendant in the present action wanted to settle it, that she wanted him to drop it, that if he did the defendant would drop one which he had brought against the plaintiff, that she did not want to go to court, and that there was no use in proving things that happened a year ago, and also asked who his witnesses were, to all of which he replied that he had supposed she wanted to ask him to live with her again, and not to talk about this case, and that he should insist upon its trial. Upon recross-examination he testified, among other things, that he went to New Britain at her solicitation and expense, that she told him that she wanted to talk to him in the cars while going there, that she induced him to go to the room at the hotel by pretending to be ill, and that neither undressed during the night.

The question admitted on the redirect examination was a proper one. In cross-examination the plaintiff had admitted being in his wife's society at a time when in his complaint he had asserted that he was totally deprived of it. He had testified that, on this occasion, they had spent the night in a bedroom containing only one bed, and his accompanying assertion that she occupied it alone, if left without further support or explanation, would not have been likely to

weigh much with the jury. This explanation his counsel sought to elicit by showing what on this occasion was said by him to his wife, and by her to him. The character of this conversation would naturally tend to make the truth of his testimony that he had slept upon the floor either more or less probable. An appropriate way to characterize it was to put before the jury the language used. His wife and he had been on the night in question, in an equivocal situation. Was their conversation the expression of mutual affection, or did it show her bent on opposing his interests and endeavoring to promote those of the defendant? The subject of the investigation in the cause on trial was the relations of this man and woman. Had they been such as commonly attended the marriage state? Were they of such a nature during the night spent in this hotel bedroom? This could only be determined from their acts on that occasion; and of these acts what each then said to the other formed a part. It was immaterial, in this aspect, whether any statement of fact made by either was true or false. The only important thing in regard to it would be that it was made there and then. It was admissible as one of the circumstances attending and characterizing a meeting of two persons, the purpose and consequences of which it was material for the jury to determine in order to answer the issue presented. Whether she had in fact come to her husband for the last time was not the important thing, but whether she said that she had. Whether the defendant was, in fact, ready to drop his suit if the plaintiff would drop his was immaterial, but if she said that he was, that would tend directly to show that she put herself in the attitude of an emissary of the adverse party in a litigation involving the existence of criminal relations between him and herself. Words accompanying conduct can always be put in evidence, where the nature and significance of such conduct is in controversy, and it is of an equivocal character which these words tend to explain. *Avery v. Clemons*, 18 Conn. 306, 309, 46 Am. Dec. 323; *Wigmore on Evidence*, § 1772. They then become strictly relevant to the issue, since the fact that they were uttered bears on the probability that the conduct under consideration was in fact of one description or of another. *Plumb v. Curtis*, 66 Conn. 154, 166, 33 Atl. 998. In a case like the present where it was important to show the feelings of those whose conversation was admitted in evidence, proof of this kind may be of special weight. *Vivian's Appeal*, 74 Conn. 257, 261, 50 Atl. 797.

It is undoubtedly true that a jury, unless properly cautioned, may be in danger of crediting the truth of words so spoken and drawing conclusions from them other than those for which alone they can legitimately serve as a foundation. If the defendant requested such a caution, it was no doubt given, as no exception is taken to the charge. It is im-

material that the only witness offered to prove the nature of the conversation was one of the participants, and he the plaintiff in the action. The testimony, so far as its admissibility is concerned, stands on the same footing as if it came from a disinterested stranger, who had overheard all that was said, while occupying an adjoining room. The rule against the admission of hearsay evidence is peculiar to Anglo-American jurisprudence, and did not obtain an established foothold in it until the close of the seventeenth century. It is not one that can be safely strained beyond its established limits, and these are observed when no declarations are excluded which are offered to characterize conduct of an ambiguous nature, which they accompany and serve to explain, and for the purpose simply of showing that they were made, and not that what was declared was true. *Wigmore, Ev. §§ 1364, 1768.*

There is no error. In this opinion *HAMERSLEY* and *PRENTICE, JJ.*, concurred. *TORRANCE, C. J.*, and *HALL, J.*, dissented.

GARBERG v. SAMUELS et al.

(Supreme Court of Rhode Island. Oct. 30, 1905.)

EVIDENCE—OPINION EVIDENCE.

In an action for injuries from slipping on a sloping pavement, it was proper to permit one who had been for many years engaged in laying pavements of such character to testify as to whether the pavement in question was laid at such a pitch as to be dangerous; a pavement of the material employed not being in common use.

Action by Mina Garberg against Joseph Samuels and others. Defendants' petition for a new trial denied.

Argued before *DOUGLAS, C. J.*, and *DUBOIS, BLODGETT, and JOHNSON, JJ.*

Herbert A. Blake, for plaintiff. Vincent, Boss & Barnefeld, for defendants.

DOUGLAS, C. J. 1. This case presents plain questions of fact for the jury. They have found, upon what seems to us competent evidence, that the defendant was guilty of negligence in maintaining a slippery pavement directly below and sloping downward from a doorstep 5½ inches in height, at such an angle as to be dangerous to persons who were invited to use it in patronizing the store. And they have also found by implication that the plaintiff was in the exercise of due care when she met with the accident of which she complained. We see no reason to disturb their conclusions. The damage, in the circumstances shown, cannot be considered excessive.

2. Exception was taken to the allowance of the question put to one who had been for many years engaged in the business of laying floors of the character under consideration, whether a pavement of such construction and laid at such a pitch was danger-

ous. A sloping floor of the material here employed is not in common use, and ordinary persons may be presumed not to be familiar with its peculiarities. We think the jury were entitled to have the benefit of expert testimony upon this subject, and that the question was properly admitted. The exception must therefore be overruled.

The petition for a new trial is denied, and the case is remitted to the superior court for judgment upon the verdict.

MARSHALL v. McCORMICK.

(Supreme Court of Rhode Island. Oct. 23, 1905.)

1. GARNISHMENT—DISCLOSURES BY GARNISHEE—FAILURE TO MAKE—LIABILITY—RELIEF.

The liability of a garnishee, failing through mistake to disclose to the court that he has no property of defendant in his hands to satisfy the judgment that plaintiff obtains, imposed by Gen. Laws 1896, c. 254, § 20, is a liability to an action only, and arises on the default, and he may make the affidavit and refund double the garnishee fee paid him in discharge of his liability, as expressly provided by chapter 256, § 21.

2. SAME.

The word "mistake" in Gen. Laws 1896, c. 256, § 21, giving relief to a garnishee failing through mistake to disclose to the court that he has no property of defendant in his hands, should receive a broad construction, and an affidavit by a garnishee that through accident and mistake he neglected to file his personal affidavit of no funds is within the provision.

Exceptions from District Court, Providence County.

Trespass on the case, under Gen. Laws 1896, c. 254, § 20, by Antonio Marshall against Joseph McCormick. Heard on exceptions to the rulings of the court that the action was barred. Exceptions overruled.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Charles H. McKenna, for plaintiff. Charles A. Walsh, for defendant.

BLODGETT, J. After the rendering of the opinion in *Marshall v. Gray*, 26 R. I. 517, 59 Atl. 744, the defendant in this action, who was garnishee of the above-mentioned defendant, Gray, filed an affidavit of no funds with the clerk of the Seventh district court, accompanied by an affidavit that through accident and mistake he had previously neglected to file his personal affidavit thereof, and at the same time paid to such clerk double the fee paid him as garnishee of Gray; all these steps being taken before execution issued against Gray. The plaintiff refused to accept the double garnishee fee, and, although the district court refused to charge McCormick as the garnishee of Gray, took out execution from that court against Gray, and after demand upon Gray and upon McCormick, and a return of the

execution unsatisfied by either of them, has brought this action against McCormick, in which he seeks to hold him liable as the garnishee of Gray, because of his failure to file his account as provided by section 20, c. 254, Gen. Laws 1896, and the case is now before us upon plaintiff's exceptions to the ruling of the Seventh district court that this action was barred by the provisions of section 21, c. 256, Gen. Laws 1896. Where there is an appearance by a garnishee and a disclosure of funds by him, his liability is fixed and determined by the court, and he is charged by the court in such amount as the court finds is then justly due and payable, and from this action of the court relief may be had by way of appeal or by exception to another tribunal, as from any other judgment. But where through accident or mistake the garnishee, who in fact has no funds or property of the defendant in his hands, has failed to so disclose that fact to the court, he is held liable, in the words of the statute (section 20, c. 254), "to satisfy the judgment or decree that the plaintiff shall obtain against the defendant in such writ, to be recovered by action on the case, excepting as is hereafter provided, in chapter two hundred fifty-six, in case of accident or mistake." This defendant, though not charged by the court as a judicial act, is, within the meaning of the clause in section 21, c. 256, "charged as trustee by reason of his default," as interpreted by the court in *Eddy v. Prov. Machine Co.*, 15 R. I. 11, 22 Atl. 1116, having made default and hence being liable to the action provided in section 20 of chapter 254. But this is a liability to an action only, and arises upon the default, ipso facto, and is not created by any judgment of the court; and hence such a defendant garnishee may make the affidavit and refund double the garnishee fee paid him, as provided in section 21 of chapter 256, Gen. Laws 1896, in discharge of his liability, and without appeal or exception.

2. The plaintiff argues, further, that the affidavit of the garnishee does not disclose a case of mistake within the intent of the statute; his error being one of law, and not of fact. We feel constrained, however, to give to the word "mistake," as here used, a broad construction. The process of garnishment by which a person is held to pay his debt to the judgment creditor of his creditor imposes upon him an inconvenience for the benefit of other parties with whom he has no privity, and should be limited so as not to do him actual injustice. The proviso in question is for the protection of the garnishee, and ought to be liberally interpreted. Our opinion is, therefore, that the district court did not err in sustaining the defense offered.

The plaintiff's exceptions are overruled, and the cause will be remanded to the district court for judgment for the defendant.

GREENOUGH, Atty. Gen., ex rel. KELLEY v. WHITELEY et al., Board of Canvassers and Registration.

(Supreme Court of Rhode Island. Oct. 9, 1905.)

ELECTIONS—CAUCUS—MISCONDUCT—SUPPLEMENTARY CAUCUS.

Pub. Laws 1902, p. 85, c. 1078, imposes certain duties on the board of canvassers of the city of Providence, and section 14 (page 41) contemplates the holding of a second or supplementary caucus for certain reasons, but does not apply to a case where the caucus is declared void by reason of fraud in the conduct or proceedings of the caucus, and by sections 18, 19 (pages 44, 45), penalties are imposed upon officials or other persons guilty of violations of the law in the conduct of a caucus. *Held* that, where the board of canvassers found that no persons were elected or nominated at a caucus because of misconduct in the conduct of the caucus, the statute did not authorize the holding of any second or supplementary caucus.

Petition by William B. Greenough, as Attorney General, on the relation of Charles M. Kelley, against Samuel Whiteley and others, as the board of canvassers and registration of the city of Providence, for a mandamus to compel such board to designate a place for holding a caucus. Writ denied.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Comstock & Canning, P. Henry Quinn, and James H. Thurston, for petitioner. Francis Colwell, Albert A. Baker, and James M. Thurston, for respondents.

PER CURIAM. This is a petition for a writ of mandamus to compel the board of canvassers and registration in the city of Providence to designate a place for the holding of a caucus of the Democratic Party in the First Ward of the city of Providence, and to do the various other things which are provided by Pub. Laws, p. 35, c. 1078, passed December 12, 1902, to be done for the purpose of holding caucuses in the city of Providence. It appears from the papers in the case that a caucus of the Democratic Party was held in said First Ward according to law on the 27th day of September, 1905, and that the board of canvassers had performed the duties required by said chapter 1078 preliminary to the holding of that caucus. Subsequent to the holding of said caucus, upon the petition of James H. Thurston et al. to the said board of canvassers, said board of canvassers found "that no persons were lawfully elected or nominated at said caucus, and that said caucus was illegal and void." The legal effect of this finding of the board is to invalidate the result of the caucus, which was in its calling and inception entirely lawful, but failed by misconduct in performance of its function to exercise the privilege given to the party by law.

The broad question presented to the court is whether, under chapter 1078, the board

of canvassers can now be required by writ of mandamus to provide for the holding of another caucus of the Democratic Party in said First Ward; said board having been requested to do so by the Democratic city committee through its chairman. Upon a careful examination of the statute above quoted, we are of the opinion that the duties imposed on the board of canvassers of the city of Providence by said chapter have been fully complied with by the said board of canvassers in the acts done by them preliminary to the holding of said caucus on the 27th day of September, 1905; that the statute does not contemplate the holding of any second or supplementary caucus for any reason other than as set forth in the act in section 14; and that section does not apply to a case where the caucus is declared to be void by reason of fraud in the conduct or proceedings of such caucus. In our opinion, if the court should grant the relief prayed, it would be substantially adding to the statute provisions which the Legislature did not make; and upon reading the whole statute it appears to the court it was not the intention of the Legislature to provide for the holding of any second or supplementary caucus, in such case as is presented to us. The only provisions which we find in the statute relating to the perpetration of fraud in the conduct of a caucus are those in sections 18 and 19, which impose penalties upon officials or other persons who are guilty of violations of the law.

The court is therefore constrained to deny the application for the writ.

HUNT v. FRANKLIN COUNTY COM'RS.
(Supreme Judicial Court of Maine. Nov. 15, 1905.)

ACCORD AND SATISFACTION—CLAIM AGAINST COUNTY.

When county commissioners have allowed a smaller gross sum in full for an itemized bill against their county, and that sum is then drawn by the claimant from the county treasury, his claim for the remainder of his bill is thereby barred; at least so long as he retains the sum drawn.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Counties, § 327.]

(Official.)

Petition by John J. Hunt for writ of certiorari against the county commissioners of Franklin county. Petition dismissed.

Heard by the presiding justice without intervention of a jury, with the right of exception by each party to rulings of law. Under this stipulation the plaintiff petitioner excepted to certain rulings made by the presiding justice. Overruled.

Argued before EMERY, STROUT, SAVAGE, POWERS, and SPEAR, JJ.

George C. Webber, for plaintiff. H. S. Wing, for defendants.

EMERY, J. The petitioner was an official agent for the prevention of cruelty to animals. In May, 1902, he presented to the county commissioners of Franklin county, for allowance and payment from the county treasury, an itemized bill of \$152.48 for services and expenses for investigating cases in that county. The commissioners considered the bill, and in the presence of the petitioner allowed a lump sum of \$100 in full for the whole bill. The petitioner thereupon drew that amount from the county treasury upon that order for payment.

In April, 1904, the petitioner, without returning the \$100 so drawn by him, again presented the bill to the then county commissioners of Franklin county. The commissioners refused to allow any part of it, or to make any adjudication upon any separate items, and thereupon this petition was filed for a writ of certiorari to bring up the commissioners' doing in the matter.

The petitioner urges that the allowance of a lump sum for his itemized bill less than the full amount was illegal; that the commissioners should have allowed or disallowed each item, and should be compelled to do so now, in order that he might bring the disallowed item before the court. On the other hand, the respondents claim that certiorari is not the proper remedy for the petitioner.

We have no occasion to consider either of the above contentions, since a complete answer to the petition is made by the fact that, with knowledge that \$100 was allowed him in full for his whole bill, he drew that amount from the treasury upon such allowance, and has not returned it. He cannot now reopen the matter. *Perry v. Oheboygan*, 55 Mich. 250, 21 N. W. 333; *Brick v. Plymouth County* (Iowa) 19 N. W. 304; *Murphy v. United States*, 104 U. S. 464, 26 L. Ed. 838. As well might a plaintiff who had recovered and collected judgment in a common-law action for less than his claim, stated afterwards, maintain an action on the same claim.

Exceptions overruled.

Petition dismissed.

PISCATAQUIS SAV. BANK v. HERRICK et al.

(Supreme Judicial Court of Maine. Nov. 20, 1905.)

1. REFERENCE—POWER OF REFEREE—REPORT—WHEN OBJECTIONS TO SHOULD BE MADE.

A referee has full power to decide all questions arising, both of law and of fact. And, in the absence of fraud, prejudice, or mistake on his part, objections for which should be made when the report is offered for acceptance, his decision is final.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reference, §§ 150–155, 159.]

2. APPEAL—DECREE—REPORT OF REFEREE.

Where a bill in equity was referred by a rule of court without conditions or limitations, and the referee, having heard the parties, re-

ported the facts found by him and his conclusions thereon to the court, and his report was accepted, an appeal from a final decree, made in accordance with the terms of the report, cannot be sustained.

(Official.)

Appeal from Supreme Judicial Court, Piscataquis County, in Equity.

Bill by the Piscataquis Savings Bank against E. L. Herrick and others. Decree for plaintiff, and defendants appeal. Dismissed.

Argued before WISWELL, C. J., and EMERY, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Frank E. Guernsey, for appellants. Joseph B. Peaks, for appellee.

SAVAGE, J. The plaintiff claimed to be the equitable owner of certain notes and a mortgage securing them, which it took as collateral security for loans made by it to the owner of the notes and mortgage, and brought this bill in equity to obtain an equitable foreclosure of the right to redeem the same. The bill and answer disclose that the parties were at issue upon questions of fact and also upon questions of law. After the pleadings were completed the cause was referred, by agreement of parties, by a rule of court, which contained the stipulation that judgment on the report of the referee should be final. The rule contained no other stipulation material to the present consideration of the case. The referee heard the parties and reported the facts found by him and his conclusions thereon to the court. His report was accepted. Subsequently a justice of the court made a final decree in accordance with the terms of the report, and from that decree one of the defendants seasonably appealed. The cause is now before us upon that appeal.

Of the many questions argued, we need to consider but one. The cause was referred without any conditions or limitations as to the powers of the referee. And in such case it is well settled that the referee has full power to decide all questions arising, both of law and of fact; and, in the absence of fraud, prejudice, or mistake on the part of the referee, objections for which should be made when the report is offered for acceptance, his decision is final. *Sweetsir v. Kenney*, 32 Me. 464; *Hall v. Decker*, 51 Me. 81; *Long v. Rhodes*, 36 Me. 108; *Hatch v. Hatch*, 57 Me. 283. By agreement the parties submitted the cause to a tribunal of their own choosing. To that tribunal was transferred all the powers of the court. Having chosen to go to that tribunal, the parties cannot now be heard upon the merits by the court. As was said in *Sweetsir v. Kenney*, supra: "Whatever we might think of the law, * * * it is not in our power to control the decision of that tribunal, to which the parties submitted both the law and the facts."

The result is that the appeal from a decree made in accordance with the report of the referee is not sustainable.

Appeal dismissed. Decree below affirmed, with additional costs.

CHAPMAN v. HAMBLET.

(Supreme Judicial Court of Maine. Nov. 16, 1905.)

1. DEEDS — CONSTRUCTION — DESCRIPTION OF LAND.

The description of land conveyed is to be interpreted by reference to all the calls in the deed of conveyance, and every call is to be answered if it can consistently be done.

2. SAME.

In cases of ambiguity the interpretation is to be sought from the attendant circumstances and the intent of the parties, and the deed must receive a construction most favorable to the grantee.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 231, 235, 239.]

3. BOUNDARIES—MONUMENTS.

A boundary line is a monument, and would by the general rule of construction govern the course in a deed, unless the intention of the parties would be defeated by its adoption.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 23.]

4. SAME—"PROLONGATION."

Where uncertainty is introduced in the language of a deed by the word "prolongation," it is held to mean a continued or extended line, though consisting of several angles, where such meaning would be consistent with the other words of description, rather than a direct line, which would render the next course in the deed inconsistent with the direction and monuments by which it is described.

(Official.)

Report from Supreme Judicial Court, Cumberland County.

Action by Moses M. Chapman against Melvin Hamblet. Case reported. Judgment for defendant.

Trespass quare clausum fregit, wherein the plaintiff sought to recover damages of the defendant for cutting and removing certain wood and timber from a portion of the plaintiff's premises in Scarborough. The defendant admitted the taking, but justified under claim that the premises upon which the alleged trespass was committed was a part of a tract of land on which the trees and wood growth had been conveyed to him by the plaintiff. Plea, the general issue. After the evidence had been closed, it was agreed to report the case to the law court, and that, upon so much of the evidence "as is competent and legally admissible, the law court is to render such judgment as the legal rights of the parties may require."

The deed mentioned in the opinion and given by the plaintiff to the defendant, is as follows:

"Know all men by these presents, that I, Moses M. Chapman, of Westbrook, in the county of Cumberland and state of Maine, in consideration of one dollar and other good and valuable considerations paid by Melville

Hamblet, of Portland, in said county, the receipt whereof I do hereby acknowledge, do hereby remise, release, bargain, sell, and convey, and forever quitclaim unto the said Melville Hamblet, his heirs and assigns, forever, the trees and wood growth on the following described parcel of land, situated in Scarborough, in said county of Cumberland, bounded and described as follows:

"Commencing at a point on the county road running from Portland to Buxton, at the corner of Allen T. Reed's land and land of said Chapman; thence following the division line between said Allen T. Reed's and said Chapman's and the prolongation of said Chapman's line until it intersects with the wire fence between said Chapman's land and the land now or formerly of Champaign and Larochele; thence in an easterly direction by said wire fence between said Champaign land and the land of said Chapman, and by the prolongation of said Chapman's said line, to land now or formerly of McKenney; thence by land of said McKenney and Knight to a logging road; thence by the logging road to a wire fence on said Chapman's land; thence by the wire fence to said Buxton road; reserving and excepting therefrom a small lot of birches near the Buxton road. Provided the said trees and wood growth shall be removed within three years from the date thereof.

"Said grantee has the right to pile said wood and timber in the pasture of said Chapman, together with all reasonable rights of way in and to the same, and to said above-described premises, for the purpose of removing said trees and wood, as herein provided.

"To have and to hold the same, together with all the privileges and appurtenances thereunto belonging to the said Melville Hamblet, his heirs and assigns, forever.

"And I do covenant with the said grantee, his heirs and assigns, that I will warrant and forever defend the premises to him, the said grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons claiming by, through, or under me.

"In witness whereof, I, the said Moses M. Chapman, have hereunto set my hand and seal this 11th day of November in the year of our Lord one thousand nine hundred and three.

"Moses M. Chapman. [Seal.]

"Signed, sealed, and delivered in presence of Isaac W. Dyer.

"State of Maine—ss.:

"Portland, November 11th, 1903.

"Personally appeared the above-named Moses M. Chapman and acknowledged the above instrument to be his free act and deed.

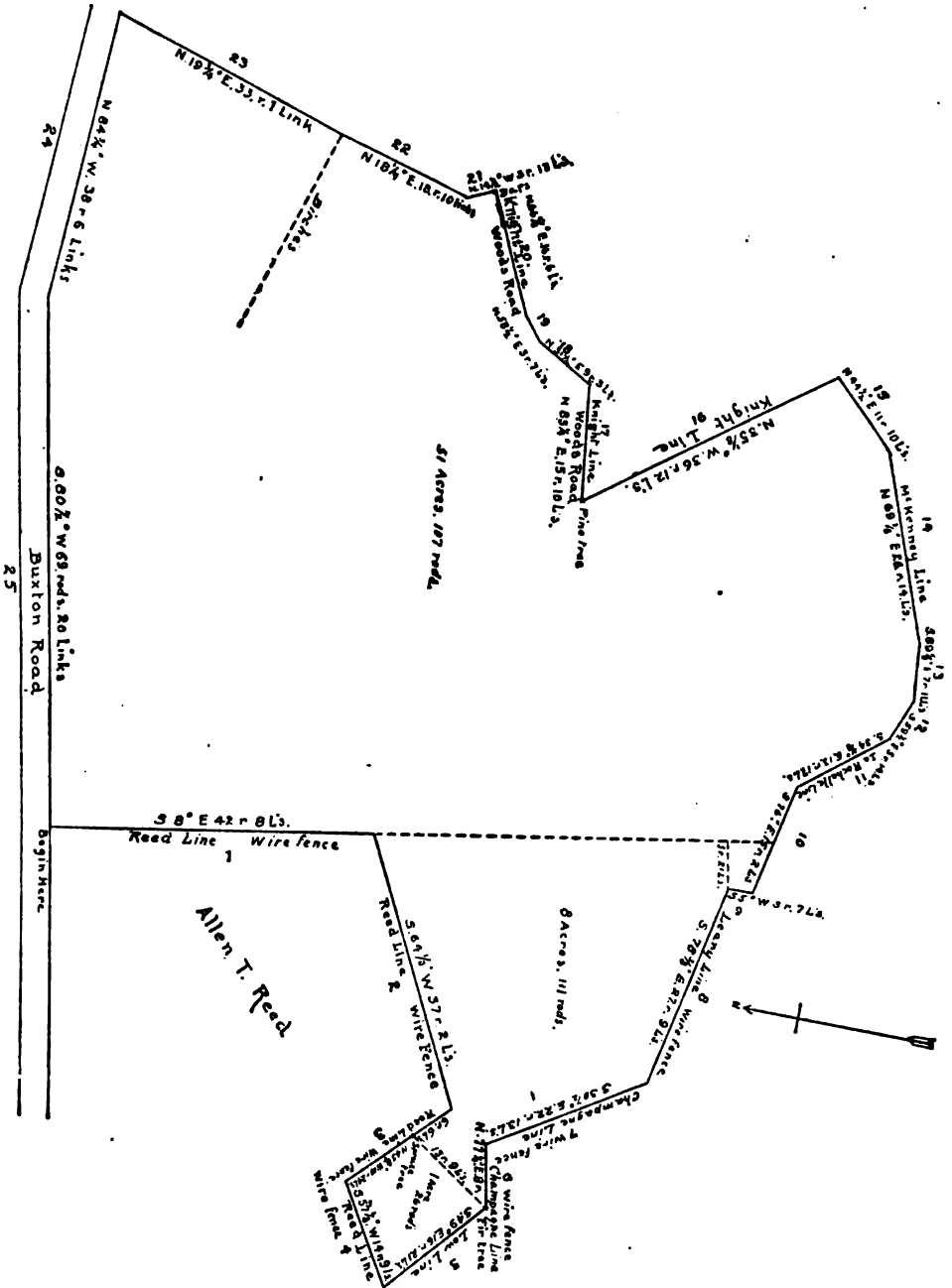
"Before me,

"Isaac W. Dyer, Justice of the Peace."

Argued before EMERY, STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

A. F. Moulton and William Lyons, for plaintiff. M. P. Frank, for defendant.

SKILLIN PLAN.



PEABODY, J. This was an action of trespass *quare clausum*. The case comes before the law court on report. The act complained of was the cutting of certain wood and timber from a portion of the plaintiff's farm.

The defendant claims that under the deed of the plaintiff dated November 11, A. D. 1903, he had license to cut all the wood and timber upon the farm, except a small lot of birches on another part of the premises not affected by the acts complained of.

The dispute is upon the construction of this deed, and especially of the following words in the description of the boundary of the disputed territory: "Commencing at a point on the County Road running from Portland to Buxton, at the corner of Allen T. Reed's land, and land of said Chapman; thence following the division line between said Allen T. Reed's and said Chapman's and the prolongation of said Chapman line, until it intersects with the wire fence between said Chapman's land and the land now or formerly of Champaign and Larochelle."

The survey and plan made by Augustus E. Skillin, subsequent to the date of the deed show that the language describing the lines in dispute is ambiguous. The uncertainty which exists is introduced by the word prolongation in connection with the first course of the Reed boundary line. In common language this word may mean a line produced, as claimed by the plaintiff; but it is not infrequently used of a continued or extended line, as claimed by the defendant.

The plaintiff's contention is that by the language, "prolongation of said Chapman's line," is meant a line produced in the first course of the Chapman-Reed boundary, and that of the defendant is that the word "prolongation" is used in the sense of extension or continuation, and is a term merely descriptive of the boundary line beyond the land of Reed and to the Champaign-Larochelle wire fence. Therefore it is necessary to choose between a line departing from the Chapman-Reed boundary line and one following it, but in a new course.

The description of the land is to be interpreted by reference to all the calls in the deed, and every call is to be answered if it can be done. *Herrick v. Hopkins*, 23 Me. 217. The interpretation is to be further sought from the attendant circumstances and the intent of the parties, and the deed must receive a construction most favorable to the grantee. *Erskine v. Moulton*, 66 Me. 276; *Field v. Huston*, 21 Me. 69; *Pike v. Munroe*, 36 Me. 309, 58 Am. Dec. 751; *Ames v. Hilton*, 70 Me. 36; *Knowles v. Bean*, 87 Me. 331, 32 Atl. 1017; *Stoops v. Smith*, 100 Mass. 63, 1 Am. Rep. 85, 97 Am. Dec. 76; *Hastings v. Hastings*, 110 Mass. 280.

The Chapman-Reed boundary consists of a broken line of four courses, and the Chapman line is continued on still another course. As this boundary line is a monument, it would by the general rule of construction govern

the course, unless the intention of the parties would be defeated by its adoption. *Haynes v. Young*, 36 Me. 557; *Sanborn v. Rice*, 129 Mass. 387; *Woodward v. Nims*, 130 Mass. 70; *Davis v. Rainsford*, 17 Mass. 210; *Percival v. Chase*, 182 Mass. 371, 85 N. E. 800. By following this boundary line until the end of the Reed land is reached without reference to the several angles in the line, and then following the Chapman line understanding it to be still used as a monument until the Champaign wire fence is reached, there is no confusion in the language of the deed. It will be seen by reference to the Skillin plan that the line which the plaintiff insists answers the second call in the deed introduces into the description two material inaccuracies: It does not intersect "with the wire fence between Chapman's land and the land now or formerly of Champaign and Larochelle," and the next course is inconsistent with the direction and monuments by which it is described.

The force of the argument that the word prolongation in the description implies a direct line is lessened by the use of the word a second time in the deed, namely, "thence in an easterly direction by said wire fence between said Champaign land, and land of said Chapman, and by the prolongation of said Chapman's said line to land now or formerly of McKenney," where it could not in the nature of the case be a direct line; and the course and the names of the adjacent owners in this call of the deed best accord with the boundaries of the land claimed by the defendant.

The defendant's testimony shows that he had in view the purchase of the wood and timber upon the whole of the plaintiff's farm, except a small lot of birches which the plaintiff desired to reserve for fencing, that the price which he offered was for this, and that no reduction was ever made in the price. This is in conflict with the plaintiff's statement that the intended reservation was the wood and timber on the lot in dispute, made definite by a line, which he pointed out to the defendant, extending south across his land, being that designated in the second call in the deed. It appears that the plaintiff during the negotiation requested Lewis P. Knight, who was familiar with the value of wood and timber, to estimate the amount of growth on the premises, and that he, in making his estimate, examined the whole tract understanding that the plaintiff was to sell all the wood and timber, except some small growth of birches. The greater weight of evidence proves that the plaintiff did not, as he testifies, point out this line to the defendant, but an assumed division line between his land and that of John O. Knight, which he marked upon the face of the earth by spotting trees between a spruce tree near the Reed line and a fir tree near the corner of the adjoining lands of Champaign and Lowe.

Under these circumstances and rules governing the construction of deeds, it must be held that the deed between the parties included the disputed premises.

Judgment for defendant.

WENTWORTH v. TOWN OF PITTSFIELD.
(Supreme Court of New Hampshire. Merrimack. Oct. 3, 1905.)

MUNICIPAL CORPORATIONS — TORTS — INJURY FROM DEFECTIVE HIGHWAYS.

The word "railings," in Laws 1893, p. 47, c. 59, authorizing actions against towns for injuries by defects in "a bridge, culvert, or sluiceway, or dangerous embankments and defective railings," means railings necessary to guard travelers from going over dangerous embankments, and not railings merely useful as hand rails; and a pedestrian injured while using steps leading from a sidewalk to a cross-walk over a street, by reason of slipping on the ice on steps, cannot recover because of the absence of a hand rail.

Transferred from Superior Court.

Case for injuries from a defective highway by Mabel M. Wentworth against the town of Pittsfield. There was a nonsuit at the close of plaintiff's evidence, subject to exception, and the cause transferred from the superior court. Exception overruled.

The evidence tended to prove the following facts: There are two highways in the village of Pittsfield, one known as "Main Street," running nearly in an easterly and westerly direction, and the other, known as "Chestnut Street," running from Main street in a northerly direction, forming a right angle with it at the starting point. A portion of these highways, adjoining the lot in the easterly corner, is a sidewalk for the use of pedestrians. The surface of the sidewalk at the corner of the streets is 23 inches higher than the surface of the walk across Chestnut street. There are two stone steps leading from the surface of the sidewalk to that of the cross-walk; the upper one being 5 feet 11 inches long and 25 inches wide, and the lower one 6 feet 8 inches long and 14½ inches wide. There is an iron rail running from a point in the southerly line of the sidewalk on Main street, about six feet easterly of the steps, to a post set in the southerly end of the lower step. There is no rail at the other end of the steps. In the evening of January 6, 1903, the steps were covered with snow, and there was a hard, trodden path of snow and ice near their center line. The surface of the path on each step sloped upward from its front edge to the step above, and was slippery. About a quarter past 7 o'clock that evening, when it was quite dark, the plaintiff walked on the sidewalk in Chestnut street in a southerly direction to the corner of Main street, and turned westerly into the path down the steps. As she stepped on the lower step, she slipped upon its hard, slanting, and slippery surface, fell, slid down the steps to the cross-

walk, and was injured. She did not go off the northerly end of the steps. She did not take hold of the rail at the south end. There were persons standing against it, near the top of the steps.

Martin & Howe, for plaintiff. Edward A. Lane and Streeter & Hollis, for defendant.

CHASE, J. The question before the court is whether the steps where the plaintiff was injured were a "dangerous embankment and defective railing," within the meaning of section 1, c. 59, p. 47, Laws 1893, as interpreted in *Wilder v. Concord*, 72 N. H. 259, 56 Atl. 193, and subsequent cases; that is to say, a dangerous embankment defectively railed. The defect which the plaintiff relies upon is the absence of a rail at the northerly end of the steps. It is not necessary to consider whether the absence of a rail would render the town liable, if a traveler went off or fell off the end of the steps because of such absence, for the plaintiff's injury was not caused in that way. Her position is that the statute referred to required the town to maintain a rail to serve as a support for travelers and prevent them from falling while using the steps, if a rail was reasonably necessary for such purpose to render the highway suitable for the travel over it. She complains of the absence of a hand rail—not of the absence of a barrier to guard a traveler from the danger of falling from an embankment located contiguous to or near the traveled path in the highway. The office of the rail, required by the law as it stood prior to the passage of the act of 1893, seems to have been to guard the traveler from going or falling over an embankment or precipice, or into a hole, or from going against an obstruction located upon the side of the traveled path or very near to it. A town then might be, and still may be, fined for neglect to cause a dangerous embankment or causeway in a highway to be securely railed. Pub. St. 1901, c. 75, § 1. Under the former statute rendering towns liable to travelers for injuries caused by defects in highways, it was held that the absence of a railing would be a defect, if the railing was reasonably necessary to prevent travelers from going into a hole (*Willey v. Portsmouth*, 35 N. H. 303), or a cellar (*Stack v. Portsmouth*, 52 N. H. 221), or a stairway leading to a cellar (*Sweeney v. Newport*, 65 N. H. 86, 18 Atl. 86), or against rocks, etc. (*Davis v. Hill*, 41 N. H. 329), located dangerously near the traveled path. See, also, *Knowlton v. Pittsfield*, 62 N. H. 535, and authorities cited.

No case was cited by counsel, and none has been found in this state or elsewhere, in which it was held that the absence of a mere hand rail was a defect for which the town would be liable to a traveler injured in consequence of it. A hand rail, from the nature of things, can be serviceable only to travelers on foot; and it is useful to them, not simply be-

cause the way is upon an embankment or leads over a hill or an uneven surface. In the cold seasons, when there is ice upon the ground, sidewalks upon level ground, as well as upon hilly ground, can be made safer to travelers by providing hand rails for them to lay hold of and guard themselves against slipping and falling. A law that would require hand rails upon sidewalks, when reasonably necessary to prevent travelers from falling, would place a severe burden upon towns—one that legislators would naturally hesitate to impose. It is doubtful whether, under the former law of the state, the defendants would be liable to the plaintiff because of the absence of the rail, though they might be liable because of the slippery condition of the steps. Under the present law (Laws 1893, p. 47, c. 59), they are not liable for the latter cause; and it is equally clear that they are not liable because of the absence of the hand rail. It was intended by this law to materially abridge the liability of towns to civil actions for injuries resulting from defects in highways. *Wilder v. Concord*, 72 N. H. 259, 260, 56 Atl. 193. Unless notice is given, as provided in section 2 of the act, such actions can be maintained only in case the defect exists in certain specified parts of a highway, namely, "a bridge, culvert, or sluiceway, or dangerous embankments and defective railings." "Embankments" and "railings" are here associated together as they are in section 1, c. 75, Pub. St. 1901. The natural inference is that the railings referred to are such as are necessary to guard the traveler from going over the dangerous embankment—such as will be barriers against such disaster. If the idea of support or aid to the traveler in his act of traveling had been in mind, it is highly improbable that the association of railings with dangerous embankments would have been made, for, as has already been said, railings for that purpose are needed in many places where there is no dangerous embankment. If the sidewalk in Chestnut street, over which the plaintiff passed before reaching the steps, had been icy—especially if the surface of the ice had been sloping or uneven—she might have needed a hand rail there to avoid a fall, as much as she did while descending the steps.

The defect of which she complains was not a "defect, insufficiency, or want of repair" of a "dangerous embankment and defective railing," within the meaning of the statute, and consequently she has no right of action against the defendants, even if it wholly or partly caused her injury. If it was a defect in the highway, it, like that caused by the slippery condition of the steps, was excluded from those for which towns are liable by the passage of the act of 1893 and the repeal of the prior statutes on the subject. The nonsuit was rightly ordered.

Exception overruled. All concurred.

ATTORNEY GENERAL *ex rel.* PUTNAM v. FOGARTY.

(Supreme Court of New Hampshire. Hillsborough. Oct. 8, 1905.)

APPEAL—AGREED CASE—MOOT QUESTIONS.

Moot questions, in an agreed case which contains no provision for judgment, will not be considered, in the absence of some special reason therefor.

Information, in the nature of quo warranto, filed by the Attorney General, on the relation of Everett S. Putnam against John W. Fogarty, and prosecuted by the relator. Facts agreed. Case discharged.

Hamblett & Spring and Charles W. Hoitt, for plaintiff. Doyle & Lucier, for defendant.

PER CURIAM. The agreed case contains no provision for judgment and presents merely a moot question. Such questions are not considered, in the absence of special reason therefor. *Conn. Valley Lumber Co. v. Monroe*, 71 N. H. 473, 52 Atl. 940. No reason for an exception to the general rule is perceived in this case.

Case discharged.

BROOKHOUSE v. UNION PUB. CO.

(Supreme Court of New Hampshire. Hillsborough. Oct. 8, 1905.)

1. TRUSTS—ENFORCEMENT—EVIDENCE.

Plaintiff's guardian was treasurer of defendant company, which had a deposit in the M. bank. The guardian withdrew from other sources funds belonging to plaintiff, receiving certificates of deposit and a draft, all payable to him as guardian, which he gave to defendant's assistant treasurer, who gave him credit therefor on the company's books and deposited the papers in the M. bank. The guardian, as treasurer, afterwards drew checks on said bank to the amount of said deposits, and used the checks for his own benefit. *Held*, in an action by plaintiff to have defendant company declared a trustee of said deposit, evidence that the treasurer habitually availed himself of the bank account of the company for his own use by depositing and checking out his own funds was admissible on the question of his intent in withdrawing plaintiff's funds from the places where they were originally deposited.

2. SAME—CONSTRUCTIVE TRUST.

Defendant never having had any use of the fund, save the possible use incident to its brief deposit in its name, was not liable on the ground that it had received the fund with notice of the trust and applied it to any debt owing to it by its treasurer.

3. SAME.

Defendant having no direct information of fraudulent intention, and the certificates of deposit and the draft being negotiable instruments, it was not chargeable with notice of the trust.

4. APPEAL AND ERROR—FINDINGS BY COURT.

Where there is some evidence tending to support a finding by the court, an exception thereto will be overruled.

5. TRUSTS—CONSTRUCTIVE TRUST.

Where the treasurer of defendant company was accustomed to use the bank account of the company for his own purposes by depositing therewith and checking out his own moneys for his own use, the duty of the defendant was like

that of a bank in regard to the deposits, and it was not bound to see that checks, etc., payable to the treasurer as plaintiff's guardian, and deposited with defendant's account, were not misapplied, but it would be presumed that checks drawn by the guardian were drawn in good faith.

6. CORPORATIONS—NOTICE TO OFFICER—EFFECT.

The rule that notice to the treasurer was notice to the corporation did not apply as to the misapplication by the treasurer of such guardianship funds, as the facts to be imputed related to an independent fraudulent act of the treasurer.

Transferred from Superior Court; Pike, Judge.

Bill by Nina D. Brookhouse against the Union Publishing Company to recover sums of money with which it is alleged the defendants are chargeable as trustees for the plaintiff. The facts were partly agreed to and partly found by the court. Transferred on plaintiff's exceptions from the May term, 1904, of the superior court. Exceptions overruled.

From a date prior to May, 1895, to October, 1895, Joseph C. Moore was the defendant's treasurer and manager, and had the practical control of their affairs. From February, 1894, to October, 1895, they also had an assistant treasurer, whose powers and duties were the same as those of the treasurer in case of the latter's absence or disability, excepting authority to sign certificates of stock. The defendants had a deposit account with the Manchester National Bank. Moore used this account as a conduit for his private enterprises, keeping a record thereof upon the defendants' books. Moore was also guardian of the plaintiff, then a minor, and had deposited in a savings bank, in his name as guardian, sums of money belonging to the plaintiff. May 23, 1895, he withdrew from this bank \$2,250, receiving a certificate of deposit and a draft upon a Boston bank, both payable to himself as guardian, or order. He indorsed these papers as guardian and passed them to the defendants' assistant treasurer, to be deposited in the Manchester National Bank to the defendants' credit. The assistant treasurer indorsed the defendants' name upon the papers and deposited them the same day, in accordance with Moore's instructions. An entry was made by Moore's direction upon the defendants' cash book, by which cash was charged with \$2,250, as if received from him. May 24th Moore drew two checks, in the defendants' name, in favor of the Halifax Mills, upon the Manchester National Bank, amounting to \$2,250, neither of which was for the defendants' benefit. The checks were paid by the bank and charged to the defendants on May 29th. Upon each of the days intervening between May 24th and May 29th, sums of money amounting to \$3,000 or \$4,000 were deposited in the national bank in the defendants' name, and sums amounting substantially to the same totals were withdrawn, leaving the balance at the close of

business each day less than \$30. Nearly all the sums deposited were Moore's, and the sums withdrawn were used in part to pay his bills and in part to pay the defendants' bills. August 21, 1895, a further sum of \$1,250 was withdrawn from the plaintiff's savings bank account in the form of a certificate of deposit, put in the defendants' account at the national bank, and entered upon the defendants' cash book, the same in all respects as the first sum. When the deposit in the national bank was made, the defendants' balance there was only \$20. Other sums belonging to Moore were deposited with the \$1,250, making the total deposit \$8,065. The defendants' cash account of August 21st shows the receipt of these sums of Moore and the payment of sums on his account amounting to \$6,579. The account of the next day's transactions shows the receipt of \$6,300 from Moore and the payment of \$6,788 on his account. August 21st he drew a check for \$820 to pay the defendants' help, and also drew other checks. The defendants' check book showed that there would be a balance of \$2,313.26 in the bank to the defendants' credit, after satisfying these checks. When Moore withdrew the money from the savings bank, it was his intention to deposit it in the defendants' account with the national bank for the purpose of checking it out for the benefit of others than the defendants, and he carried the intention into effect. The finding as to intention is made from the manner in which the transactions themselves took place and from Moore's habit for years of using the defendants' account with the national bank for his private business. The plaintiff excepted to this finding. From May to October, 1895, Moore was indebted to the defendants in a sum exceeding \$3,500. The question whether the plaintiff, now 21 years old, is entitled to recover the sums withdrawn from the savings bank, or either of them, was reserved.

Taggart, Tuttle, Burroughs & Wyman, for plaintiff. Burnham, Brown, Jones & Warren, for defendants.

CHASE, J. The fact that Moore made use of the money in question for his own purposes very soon after he withdrew it from the savings bank, and that in using it he pursued the course of his habit in the use of private funds—depositing the money in the national bank in the defendants' name and immediately checking it out for his private purposes—was competent evidence upon the question of his intention at the time of the withdrawals. As this evidence has a tendency to support the court's finding, the plaintiff's exception to the finding must be overruled; and the finding must be accepted as true in considering the questions of law raised by the case. The plaintiff is entitled to the relief sought (1) if the defendants now have possession of the money in question; or (2) if they received it from Moore

with notice of the trust and applied it to the payment of Moore's individual indebtedness to them; or (3) if they so received it and aided Moore in wrongfully diverting it from the plaintiff. *Hill v. McIntyre*, 39 N. H. 410, 75 Am. Dec. 229; *Sherburne v. Goodwin*, 44 N. H. 271; *French v. Currier*, 47 N. H. 88; *Hardy v. Bank*, 61 N. H. 34.

1. The first ground of relief certainly does not exist. The fund has been traced, not merely into the defendants' possession, but through their possession into the possession of other parties. *Bank Commissioners v. Trust Co.*, 70 N. H. 536, 544 et seq., 49 Atl. 113, 85 Am. St. Rep. 646.

2. Nor is the second ground of relief established. The money was not paid and received on account of Moore's indebtedness to the defendants, but in the use by Moore of the defendants' deposit account with the Manchester National Bank as a "conduit" for, or means of, transmitting money in his private enterprises. If the defendants had any use whatever of the money, which is doubtful, it was only as an incident of the deposit during the brief time while the money was passing through their deposit account with the national bank, and with no intention on the part of Moore, nor on their part so far as appears, to permanently convert the money to their uses. There was no such conversion of the money as will justify a court of equity in holding the defendants responsible for it as trustees for the plaintiff.

3. The question remains whether the defendants received the money with notice of the trust and aided Moore in wrongfully diverting it from the plaintiff. In considering this question, the matter of notice is of vital importance. The defendants took no part whatever in withdrawing the money from the savings bank. That was solely Moore's act, and, being accompanied with the intention of using the money for his own purposes, constituted a complete conversion of it. He had already converted the money to his own uses when he handed the certificates of deposit and the Boston draft, duly indorsed by him as guardian, to the defendants' assistant treasurer, with directions to deposit the same in the defendants' bank account. To consummate his fraudulent scheme, he deemed it convenient or advisable to use that account as a conduit through which to pass the money from himself to the parties to whom he would pay it. The only persons who took part in operating, so to speak, the conduit were Moore himself and the defendants' assistant treasurer. No other officer or servant of the defendants did anything whatever in respect to the deposit or withdrawal of the money. The entries upon the defendants' books relating to the money were in Moore's name. An officer or agent of the defendants, however attentive to his duties, would not learn from an examination of the books that the plaintiff's money was passing through their bank ac-

count, or would discover facts that would put him upon inquiry in that direction. The defendants' assistant treasurer received no direct information as to Moore's fraudulent intention. His only knowledge relating to the transactions was that the certificates of deposit and draft were payable to Moore as guardian or order, were indorsed by him in that capacity, and were deposited with the defendants as if they were his private funds. In considering these facts it must be borne in mind that the certificates and draft, unlike certificates of stock in corporations or promissory notes, were mere temporary representatives of value or credits. They did not bear interest. They were negotiable paper according to the commercial law. 2 Dan. Neg. Inst. §§ 1052, 1703, 1705. In the ordinary course of business such paper is used like currency to pass money presently from one person to another in business transactions, not to represent money more or less permanently invested with a view of producing income. Decisions relating to the transfer by trustees of stock certificates, promissory notes, and similar papers afford little aid in a case of this kind. Circumstances that would conclusively show that a transfer of certificates of stock, etc., was in violation of the trust might be entirely consistent with a lawful transfer of certificates of deposit and drafts. To a person not informed of the circumstances by which Moore obtained these papers and of his intention in respect to their use, it would appear that he had a right to negotiate them as he did in this case. Indeed, if they did not lawfully belong to him individually in consequence of his past transactions in executing the trust, it would be his duty to make use of them in paying outstanding claims against the trust estate, if any, or in making investments, or in some other way for the benefit of his ward. To hold them an unreasonable length of time would be a breach of trust, and would subject him to liability for any loss arising therefrom. By reason of his position as guardian and the form of the papers he had absolute control of the manner in which they should be used. No license from the probate court or other source was necessary. He could transfer them directly to the persons to whom he intended ultimately to pay the money represented by them, or he could convert them into currency and use that, or he could deposit them in a bank in his own name as guardian, or in his own name without further description, and draw checks against the deposit. If he transferred them directly to a person in payment of his private indebtedness, or for some other consideration known to be for his private benefit, the form of the paper alone would be sufficient to put the person upon inquiry as to his right to so use the paper, and to charge him with knowledge of the facts he would thus learn. Such use is generally wholly in-

consistent with the guardian's rights, and is not made in the ordinary course of business. But the indorsee of such papers who receives them in the course of changing them into currency, or in the course of distributing the credits they represent by means of a temporary deposit and checks or orders drawn against the deposit, is not put upon inquiry by the mere form of the paper; for such use is consistent with the guardian's rights and duty. To charge such indorsee with responsibility for a misapplication of the funds, it must appear that he had knowledge of the contemplated misapplication, or of facts that would put him upon inquiry. Even a mingling of guardianship funds with private funds in a deposit account with a bank kept in the guardian's individual name is not, in itself, unlawful, though it be unwise. In such case the form of the paper will not impose upon the bank the duty of seeing to it that the guardianship portion of the account is properly used. The ordinary presumption applies—that the guardian is acting in good faith, and will make a proper use of the money in drawing checks against the deposit. See *Sherburne v. Goodwin*, 44 N. H. 271, 279.

The only obligation of the bank is to honor the checks that are duly drawn against the account in the form it is kept. To charge banks with the duty of supervising the administration of trusts, when in the due course of business they receive checks and drafts payable to and properly indorsed by trustees in their trust capacity, would place an unreasonable burden upon the banks and seriously interfere with commercial transactions. The law imposes no such duty upon banks. *Bank Commissioners v. Trust Co.*, 70 N. H. 536, 550, 551, 49 Atl. 113, 85 Am. St. Rep. 646; *Goodwin v. Bank*, 48 Conn. 550; *Board of Freeholders v. Bank*, 48 N. J. Eq. 51, 21 Atl. 185; *State Nat. Bank v. Reilly*, 124 Ill. 464, 14 N. E. 657; *Coleman v. Bank*, 94 Tex. 605, 63 S. W. 867, 86 Am. St. Rep. 871; *Interstate Nat. Bank v. Claxton*, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885; *Central Nat. Bank v. Insurance Co.*, 104 U. S. 63, 26 L. Ed. 693; *Gray v. Johnson*, L. R. 3 Eng. & Ir. App. Cas. 1; 2 Dan. Neg. Inst. § 1612. It is true that the defendants are not bankers, but their obligation to Moore in respect to funds which he placed in their bank account or in their possession, to be there deposited, was like that of a bank to its depositor. It is not questioned that he had the defendants' license to use the account. If the authority was not expressly given, it must have arisen from the practice which had existed for years, presumably with the defendants' knowledge and acquiescence. This authority, together with Moore's official relation to the defendants, enabled him to make use of the account for his private purposes as fully and conveniently as he could have done if the account in the bank had been in his own name. He could make deposits and

check them out at will by his own act. He could use the account for a lawful transmission of guardianship funds, the same as he could if the deposit had been made in the bank in his own name. When the defendants' assistant treasurer received, indorsed, and deposited the certificates and draft, he might properly presume that Moore would withdraw the funds so deposited for lawful purposes. It does not appear that the assistant treasurer had knowledge of any facts that had a tendency to overcome this presumption. If he was acting within his authority as assistant treasurer, which—Moore being present and acting—is doubtful, the defendants are not chargeable through him with knowledge of Moore's contemplated misappropriation of the funds, or of facts that would put them upon inquiry in regard to the matter.

The plaintiff further says that the defendants had notice of the fraud through Moore himself, their treasurer and general manager. It is true that a principal is ordinarily chargeable with the knowledge acquired by his agent in executing the agency, and is subject to the liabilities which such knowledge imposes. But there is a well-established exception to this rule, by which the principal is not charged with the knowledge of his agent when the latter is engaged in "committing an independent, fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act." *Allen v. Railroad*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185; *Indian Head Nat. Bank v. Clark*, 166 Mass. 27, 43 N. E. 912; *Produce, etc., Co. v. Bleberbach*, 176 Mass. 577, 588, 58 N. E. 162; *Camden, etc., Co. v. Lord*, 67 N. J. Eq. 489, 58 Atl. 607; *Gunster v. Company*, 181 Pa. 827, 37 Atl. 550, 59 Am. St. Rep. 650; *Frenkel v. Hudson*, 82 Ala. 158, 2 South. 758, 60 Am. Rep. 736; *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; 2 Pom. Eq. Jur. (3d Ed.) § 675, and authorities cited in notes; 1 Am. & Eng. Enc. Law (2d Ed.) 1145, and authorities cited in notes. This exception was recognized in this state in *Clark v. Marshall*, 62 N. H. 498, 500. Mr. Pomeroy suggests a doubt whether it applies to the managing officers of a corporation "through whom alone the corporation can act." Section 675, note 1. He gives no reason for the doubt, and the cases which seem to have raised it (*Holden v. Bank*, 72 N. Y. 286, and *First Nat. Bank v. Milford*, 36 Conn. 98) were decided upon an application of the general rule to the facts, without any allusion to the exception, and, of course, without any allusion to a distinction in the application of the exception when the principal is a corporation instead of a natural person. In both cases the principals were seeking to hold an advantage acquired through the fraudulent acts of their agents, and were chargeable with the fraud by virtue of the familiar principle that a person cannot ratify acts and disaffirm the fraud that is a con-

stituent part of them. In the case at bar, the defendants do not set up any claim to the funds in dispute. The funds have passed beyond their reach without being of any advantage to them. In many of the cases cited the principals were corporations which acted solely through the officers who committed the fraud. Whatever be the true reason for the exception—whether it be the presumption that the agent would not communicate knowledge of the fraud to his principal, or the consideration that the fraudulent acts are not within the scope of the agent's employment and are wholly for his benefit—it is not perceived how the fact that the principal is a corporation instead of a natural person affects the application and force of the reason. The knowledge of a corporation, whether actual or imputed, must necessarily be that of its officers; but this circumstance does not transform the officers into principals. The stockholders of a corporation like that of the defendants furnish the capital and presumably carry on the business. The principalship of the corporation is embodied in them. The officers and agents of the corporation exercise only delegated authority—delegated by virtue of a by-law or rule of the corporation, or by virtue of its habitual manner of doing business. If, as the plaintiff argues, the assistant treasurer represented the defendants in the receipt of the deposits, Moore was not the only officer of the corporation through whom the corporation could act relating to the matter. The facts would not admit of the application of the rule to which Mr. Pomeroy's doubt relates.

The application of the rule embodied in the exception to the peculiar circumstances of this case produces a just result, one that commands the approval of a court of equity. The defendants were not really the principals of Moore in respect to the deposits and withdrawals of the plaintiff's money in and from their bank account; they were his agents. The transactions were solely on his account and for his benefit. The defendants received no substantial benefit from them. The only authority conferred upon Moore by them which he used was the authority to use their bank account for his private purposes. In drawing checks, he fulfilled their obligation to himself. He was really acting for himself. If he had drawn the checks in the course of a legal use of the funds, the plaintiff would have had no cause for complaint. As has been seen, the defendants did not owe the plaintiff the duty of looking after the appropriation of the money, even if they knew it was temporarily in their possession. The presumption was that he would lawfully appropriate it. There is no evidence outside of that relating to Moore's acts and intention in these particular transactions which tends to show that they had reason to anticipate he would attempt to use the authority they conferred upon him in misappropriating trust funds. They were, at most, only unwitting agents of Moore in the

transactions. The mere fact that he acted for the defendants in fulfilling their obligation to him does not in justice and equity afford a sufficient reason for charging them with knowledge and making them responsible equally with himself for a fraud that he was committing outside the scope of the authority he exercised in their behalf.

Still another position taken by the plaintiff is that she might maintain an action against the Manchester National Bank, on the ground that the form of the certificates of deposit and draft was notice to the bank that the papers represented guardianship funds, to which the defendants could not give a valid title; that, if the plaintiff pursued that course, the bank would have a right of action against the defendants upon their indorsements of the paper; and that equity will enable the plaintiff to proceed directly against the defendants in the interest of the bank as well as herself, thereby avoiding the necessity of two actions. It follows from what has already been said that this position is not tenable, even if equity would have jurisdiction of the subject-matter in case the bank acquired no valid title to the paper—a point that has not been considered.

The plaintiff is not entitled to the relief sought, and the bill should be dismissed.

Exceptions overruled. Case discharged. All concurred.

SCOTT FERTILIZER CO. v. MALONEY.

(Superior Court of Delaware. Kent. Nov. 3, 1905.)

PLEADINGS—JUDGMENT ON PLEADINGS—AFFIDAVIT OF DEFENSE—SUFFICIENCY.

An affidavit of defense, in an action of book account, which avers that the account has been paid, plaintiff accepting a note of a third person for the sum claimed to be due, and that defendant is indebted to plaintiff in no sum whatever, his demand having been paid, is sufficient to deprive plaintiff of the right to judgment on motion.

Action by the Scott Fertilizer Company against Lydia C. Maloney. On motion for judgment notwithstanding the affidavit of defense. Denied.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Henry Ridgely, Jr., for plaintiff. Richard R. Kenney and Arlie B. Magee, for defendant.

The defendant filed the following affidavit of defense, viz.: "State of Delaware, Kent County—ss.: Be it remembered that on this twenty-sixth day of October, A. D. 1905, before me, Edwin F. Wood, a notary public for the state of Delaware, personally came Lydia C. Maloney, the defendant in the above-stated suit, who, having been by me duly sworn according to law, doth depose and say that she is the defendant in the above-stated suit; that she verily believes that there is a

legal defense to the whole of the cause of action in the above-stated suit, the nature and character whereof is as follows, namely: That the book entries charged in the plaintiff's affidavit of demand against her, the said defendant, have been fully settled and paid for, the said plaintiffs in the said suit on December 15, 1903, taking and accepting the note of Frank E. Maloney due at six months from date for the said sum claimed by these plaintiffs against this defendant, namely, two hundred and thirty-one dollars and twenty-two cents (\$231.22), and that she, the said defendant, is therefore indebted to the said plaintiffs in no sum whatever; the demand of the said plaintiffs having been fully satisfied and paid." The above affidavit was duly signed and sworn to before the said justice of the peace.

Mr. Ridgely, for plaintiff, asked for judgment notwithstanding the affidavit of defense, on the ground that there was no allegation in the affidavit that the note referred to therein was accepted as payment of the claim of the plaintiff, which averment was necessary under the uniform decisions of the court.

Mr. Kenney, for defendant: The word "payment" has been held by this court to be sufficient in an affidavit of defense.

GRUBB, J. It has always been the policy of this court not to grant snap judgments, if there is a sufficient indication that there is a bona fide defense.

LORE, C. J. We think, under our rulings, that the affidavit of defense is sufficient as it stands. We refuse judgment.

Judgment refused.

STATE v. COLLINS.

(Court of Oyer and Terminer of Delaware. Sussex. March 25, 1903.)

1. HOMICIDE—FIRST-DEGREE MURDER—DEFINITION.

Murder in the first degree is the taking of human life with express malice aforethought, or in perpetrating or attempting to perpetrate a crime punishable with death.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 36-38.]

2. SAME—SECOND-DEGREE MURDER—DEFINITION.

Murder in the second degree is the killing of a human being without a deliberately formed design to take life, or to perpetrate or attempt to perpetrate a crime punishable with death, but without justification, excuse, or sufficient provocation to reduce the homicide to manslaughter.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 39, 40.]

3. SAME—MANSLAUGHTER—DEFINITION.

Manslaughter is the unlawful killing of a human being without malice aforethought.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 52.]

4. SAME—MALICE.

In murder in the first degree express malice must be shown, while in murder in the second degree malice may be shown by such acts and conduct as indicate a reckless disregard of

human life, though unaccompanied with a deliberate design to take life.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 36-40.]

5. SAME—PRESUMPTION.

Where the life of a person is proved to have been taken by another, it is presumed in law to have been taken with malice aforethought, unless the contrary appears.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 268.]

6. CRIMINAL LAW — CIRCUMSTANTIAL EVIDENCE—WEIGHT.

Circumstantial evidence, to warrant a conviction, must be of such significance, consistency, and force as to produce conviction in the minds of the jury of the guilt of accused beyond a reasonable doubt, and the facts must be such as to be inconsistent with any other reasonable conclusion than that the prisoner was the guilty party.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1261.]

7. SAME—REASONABLE DOUBT.

A reasonable doubt, entitling an accused to an acquittal, must not only be reasonable under the facts disclosed in the case, but must grow out of the evidence and be of such a character as to prevent the minds of the jury from reaching an honest conclusion of accused's guilt, after a most careful and conscientious consideration of the facts and circumstances surrounding the case.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1267, 1268, 1906-1922.]

8. SAME—EXPERT TESTIMONY—WEIGHT.

In considering the testimony of an expert in a criminal case, the jury should consider his means of knowledge, the reasons he assigns for his opinions, and give credence to his testimony as they may find his qualifications sufficient and his reasons satisfactory.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1081.]

9. SAME—CHARACTER.

Proof of good or bad character, whether it relates to witnesses or to the accused, should be considered as other evidence tending to show credibility, innocence, or guilt, and is entitled to such weight as the jury may deem just in connection with all the other evidence in the case.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 846.]

Elmer Collins was indicted for murder. Verdict, not guilty.

At a court of oyer and terminer, in and for Sussex county, beginning March 16, 1903, the defendant, Elmer Collins, was placed upon trial upon the charge of murder in the first degree, for the felonious killing of his wife, Alda Collins, on the 12th day of April, 1902.

At the trial the state proved the following facts: That on the 12th day of April, 1902, Alda Collins, the deceased, was found dead in the stable connected with the carriage house of the property where she had lived with her husband, near the town of Laurel in Sussex county; that she was seen by none of her neighbors moving around the premises that morning; that about 8 o'clock in the morning of the day of the killing the defendant Elmer Collins came over from his house to the house of one George Henry, who lived a short distance away and in plain sight

of Collins' house, and there informed the members of the Henry family of the fact that Mrs. Collins had been killed, and that the members of the Henry family went over immediately to the Collins house, and from time to time other persons gathered; that they went into said carriage house and found Mrs. Collins lying in the stable part of the same, partly upon her stomach, dead; that her face was in the horse manure and corn stalks with which the earth floor of the stable was covered; that when found she had upon her head three wounds, and on her forehead a severe contusion, and her throat cut with a deep gash running nearly back to the vertebrae in her neck; that the wounds upon the head, involving a fracture of the skull, probably would have caused death and that the wound in the neck unquestionably would have caused death, which indicated that she had been killed for a considerable period, for hours at least; that upon her face, as she lay in the manure, were blood stains, and that those blood stains were dry; that the blood in the wound in the neck had coagulated and had practically dried there—all of which indicated that the deceased had been killed for a considerable time before her body was found. It was further proved by the state that the carriage house or stable in which the body was found had four compartments or rooms in it; that a door just large enough for a carriage to be taken in opened into the carriage house, which was just about large enough to hold a carriage, with a space sufficient to walk along by the carriage back into some stalls; that on the right-hand side of the wide door opening into the carriage house was a smaller door for the purpose of going in and out; that on entering the carriage house, on the right-hand side, you first came to a corner, about six or eight feet square, which was used for the storing of corn; that next you came to a door opening into what was called the stable, which was practically a stall about twice the size of the ordinary stall in a stable; that a door opened from the carriage house into this stall, and by passing right through you could go through a door into a pound into which the horses were sometimes turned; the stall of the stable, being the second apartment on the right-hand side of the building, was where Alda Collins, the deceased, was found; that right behind that was a stall or two of about the same size, and back of that was another room or space used for cows; and that in the back part of the carriage house there was a ladder which led to the loft.

The theory of the state, from the circumstantial evidence offered, was that the deceased was not killed in the stable, but that she was killed in the corner, being the compartment in the carriage house next to the stall in which the body was found; that during the day on which she was found and also the preceding day the corner was fast-

ened, and that only upon the third day did any person get into the corner to see what was in there, and that when they got in they found that on the partition between the corner and the stable where the woman's body was found, at a short distance above the floor, was a wide, thick blood stain, and that directly underneath the blood stain on the floor of the corner was another blood stain wider and longer, and that scattered over the floor on the corn and other places near and upon the adjacent boards were other splatters of blood; that, upon a scientific examination and testing by an expert of said blood spots found in the corner, the same were pronounced beyond all reasonable scientific doubt to be human blood; and that the person who killed Alda Collins killed her in a place where he could have concealed it by closing the door only, as it was closed for two days, and that her slayer took her from a place of concealment, after delivering the fatal wounds, out into an open stable where she could be easily discovered.

The state further proved that the defendant made various statements in regard to the occurrences at his house that morning, that these statements varied in material particulars, and that said statements also varied from the facts in the case, so as to indicate that they were false. The state further proved that upon the top part or apron of the overalls worn by the defendant when he called George Henry's family over to his place that morning there were blood stains; that these blood stains were put upon the garment when the blood was fresh; that the defendant accounted for the blood stains by saying that he lifted up his wife out of the manure of the stable and pressed her to his breast and kissed her, further stating that when he laid her down he put her face back in the manure; also that he took his two small children in his dearborn, with some farming implements that morning, and went to a back field to do some cultivating, leaving his wife to do some chores at home, when she was to join him and the children in the field, and that he returned to the house from the field in something like an hour, when he found his wife dead in the stable. The state proved that, if such had been true, the blood which had oozed from the wound would have been in such condition that it would not have produced the stain which was produced upon the flap or apron of the said overalls of the defendant, said stain having been proved by the state to be infiltrated blood passing through the meshes of the garment, which could only be the case with fresh warm blood, and not with coagulated blood; that upon the right leg of the overalls which the defendant wore that morning, according to his own statement, was a splatter of blood, which the state proved could only have been made there as the blood spurted from a human body, said splatter of blood having the

formation and the gloss, not of a smear, but of a spurt, of blood.

The state also produced and offered in evidence the instrument with which it claimed the killing was done, being a large iron bar found in the carriage house after the murder was committed, which instrument the state claimed was amply sufficient to have produced the fatal wounds. The state further contended that, from the facts proved, it was evident that the defendant came upon his wife as she was stooping down in the corner crib and struck her from behind with the iron bar referred to, that then she was pushed or forced or leaned against the door sill in the corner crib, producing the stain found thereon, and falling down upon the floor produced the stain there found, and that after she had bled sufficiently for all of said blood stains to be made the defendant concluded it was better to draw her out of a place of concealment into a place of openness, and that he took her out of a closed room into an open room, viz., to an open compartment or stable; that after delivering the fatal blow the defendant dragged his wife from the door of the corner crib, with his arms under her arms and her head resting upon the apron or flap of his overalls, to the stable, where her dead body was subsequently found, and threw her upon the manure; and that it was while so dragging her that the warm blood from the wounds in her head infiltrated through the meshes of his overalls producing the identical stain afterwards found upon said garment.

As regards a motive for the slaying of the deceased, the state proved that prior to the time of the killing the defendant had an intimacy with a young woman, that he was a short time prior thereto trying to induce her to go away with him, that he had told her that he would clear the way for their plans; and the theory of the state upon that matter was that the other love of the defendant, and the fact that his wife stood in the way of the consummation of his plans, caused a dispute to arise over this person, in which the wife may have exhibited some jealousy, and which may have been followed by quarrels which led finally to the killing of the woman by her husband, the defendant.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Herbert H. Ward, Atty. Gen., and Robert H. Richards, Deputy Atty. Gen., for the State. Robert C. White and Charles F. Richards, for defendant.

LORE, C. J. (charging the jury). It is not disputed that on the 12th day of April, 1902, the dead body of Alda Collins was found in the stable part of a building on the farm near Laurel, in this county, on which she with her husband, Elmer Collins, the prisoner, and their two small children had theretofore been living. The body was covered with

blood, the face was bruised, the nose was broken, the back and side of the skull were crushed in, and the throat was cut. The indictment charges that she was killed by Elmer Collins, her husband, and that she is guilty of murder of the first degree.

Inasmuch as under this indictment you may find the prisoner guilty of murder of the first degree, or of the second degree, or of manslaughter, if in your judgment the evidence shall so warrant, it is necessary for the court to define these three grades of felonious homicide. (1) Murder of the first degree consists in taking a human life with express malice aforethought, or in perpetrating or in attempting to perpetrate a crime punishable with death; that is to say, when such life is so taken with a sedate, deliberate mind and formed design to take the life of, or to do some great bodily injury to, the person whose life is so taken. (2) Murder of the second degree is where there is no such deliberately formed design to take life, or to perpetrate or attempt to perpetrate a crime punishable with death, but where, nevertheless, the killing is without justification or excuse, without any, or without sufficient, provocation to reduce the homicide to manslaughter. (3) Manslaughter is the unlawful killing of a human being without malice aforethought.

Malice is the essence of murder. In murder of the first degree such malice must be express, and may be indicated by all such facts and circumstances as show a deliberately formed design to take life. In murder of the second degree malice may be shown by such cruel acts and conduct as indicate a reckless disregard of human life, although unaccompanied with a deliberate design to take life. In manslaughter there is no malice.

Bearing in mind these distinctions, it is your duty to inquire into the guilt or innocence of the prisoner. Whenever the life of one person is proved to have been taken by another, it is presumed in law to have been taken with malice aforethought, unless the contrary appears.

Crime may be proved either by direct or by circumstantial evidence, or by both. Direct evidence is such as the confessions of the accused or the testimony of persons who saw the crime committed. Circumstantial evidence consists of the suspicious facts and circumstances which surround a case, but which lack the direct or positive character.

The universal experience of those engaged in the administration of justice shows the absolute necessity of admitting and relying upon circumstantial evidence, in forming our conclusions in regard to the guilt or innocence of accused persons, and, when clearly convincing and conclusive, is of equal weight with direct evidence. Indeed it is often the only means of uncovering and proving crimes which are committed in secret and which are concealed by the cunning artifices of the perpetrator. But, while this is so, we say

to you most emphatically that circumstantial evidence, to warrant a conviction, must be entirely satisfactory, and of such significance, consistency, and force as to produce conviction in the minds of the jury of the guilt of the accused beyond a reasonable doubt. The great rule on this subject is this: That when the evidence is circumstantial the jury must be fully satisfied, not only that the circumstances are consistent with the guilt of the prisoner, but they must also be satisfied that the facts are such as to be inconsistent with any other reasonable conclusion than that the prisoner was the guilty party. They must be such as to exclude any other hypothesis or conclusion. This is the rule relating to circumstantial evidence, as distinguished from direct evidence. The state claims to have produced in this case both direct and circumstantial evidence.

But whether the evidence be direct, or circumstantial, or both, it must in every case be of such a character as to satisfy the minds of the jury of the guilt of the prisoner beyond a reasonable doubt. Such a doubt, gentlemen, must not only be reasonable under the facts disclosed in the case, but must grow out of the evidence as you have heard it here, and must be of such a character as to prevent your minds from reaching an honest conclusion of the guilt of the accused, after a most careful and conscientious consideration of all the facts, circumstances, and conditions surrounding the case. If, after such consideration, there remains in your mind such a reasonable doubt of the guilt of the prisoner, you should acquit him.

The burden of proof is upon the state. All the presumptions of law, independent of evidence, are in favor of innocence, and every person accused of crime is presumed to be innocent until proved guilty.

Expert testimony is the evidence of persons who are skilled in some art, science, profession, or business, which skill or knowledge is not common to their fellow men and which has come to such experts by reason of special study and experience in such art, science, profession, or business. The value of such testimony depends upon the learning and skill of the expert, and varies with the circumstances of each case. The jury should take into consideration the expert's means of knowledge, and the reasons he assigns for the opinions he has given, and give credence to his testimony as they may find his qualifications sufficient and his reasons satisfactory. The jury may accept or reject the conclusions of experts, as in their judgment they may or not be found consistent with reason and experience or otherwise satisfactory. The testimony of experts is to be considered like any other testimony, and is to be tried by the same tests, and receive just so much weight and credit as the jury may deem it entitled to, viewed in connection with all the evidence in the case. The testimony of detectives, of police officers, and of

relatives of accused persons is to be taken and considered in like manner.

Proof of good or bad character, whether it relates to witnesses, or to the accused, is to be considered by you as any other evidence tending to show credibility or innocence or guilt, as the case may be, and is entitled to just so much weight as the jury may deem just, in connection with all the other evidence in the case. Like consideration is to be given to proof of marital relations subsisting between the prisoner and his deceased wife at and before the time of her death.

From the nature of the evidence, and the mystery attending this homicide, the testimony in this case has necessarily occupied many days. Both your patience and endurance have been largely taxed. That testimony is now all before you. It has been presented and argued with great care by counsel, both on the part of the state and of the prisoner. From that evidence, and from that alone, you are to reach your verdict, after the most thoughtful and conscientious consideration of it, under the solemn obligation of the oath you took when you entered that jury box.

If, after such consideration, you are not satisfied beyond a reasonable doubt that the prisoner did kill his wife in the manner laid in the indictment, your verdict should be not guilty. Should you believe, however, that he did kill her in such manner, unlawfully, but without malice, your verdict should be guilty of manslaughter. Again, if you believe that he killed her in such manner, cruelly and wantonly, but without express malice aforethought, you should find him guilty of murder in the second degree. But if you believe that he killed her in such manner, with sedate, deliberate mind and formed design to take life, then your verdict should be guilty in manner and form as he stands indicted.

Verdict, not guilty.

STATE v. WILSON.

(Court of General Sessions of Delaware. Kent. April 30, 1904.)

1. MARRIAGE—EVIDENCE.

Where a witness, having lived with accused as his wife without being married to him, introduced him as her husband to her family, and, in order to deceive them, signed a bail bond in defendant's name as though she was his wife, such facts were insufficient to prove a marriage, so as to render her incompetent to testify.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Marriage, § 16.]

2. INDICTMENT—CONVICTION OF LESSER DEGREE OF OFFENSE CHARGED—ASSAULT WITH INTENT TO KILL

Under an indictment for assault with intent to murder, defendant may be convicted of that offense or of simple assault.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 586.]

3. HOMICIDE—ASSAULT WITH INTENT TO KILL—ELEMENTS OF OFFENSE.

In a prosecution of assault with intent to murder, the state is bound, not only to prove the assault, but to show beyond a reasonable doubt that it was made with intent to murder the prosecutor.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 112, 478, 544.]

4. ASSAULT AND BATTERY—DEFINITION OF ASSAULT.

An assault is an unlawful attempt, by violence, to do injury to the person of another; the person making the attempt having the present ability to commit the injury.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, §§ 68-74.]

5. HOMICIDE—MURDER—DEFINITION.

Murder is the unlawful killing of a human being with malice aforethought, either express or implied, committed by a person of sound memory and discretion.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 12.]

6. SAME—FIRST-DEGREE MURDER—EXPRESS MALICE.

Express malice, constituting murder in the first degree, is proved by attending circumstances satisfactorily evidencing a sedate, deliberate purpose and formed design to kill another, such as the deliberate selection and use of a deadly weapon, or lying in wait, etc.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 17.]

7. SAME—SECOND-DEGREE MURDER.

Murder in the second degree is proved where it is satisfactorily shown that the killing was done with a sedate, deliberate purpose and formed design to take life, or in perpetrating or attempting to perpetrate any crime punishable with death, but is usually shown to have been done suddenly, without justification or excuse, and without provocation sufficient to reduce the homicide to manslaughter or in the committing or attempting to commit a noncapital felony or an act of violence from which malice is presumed.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 39, 40.]

8. SAME—SELF-DEFENSE.

Where defendant shot prosecutor, not for his own protection, but to gratify a feeling of revenge or malice, he was not entitled to avail himself of the plea of self-defense.

9. SAME—REPELLING ASSAULT.

Where a person is assaulted, he is not obliged to wait until he is struck by an impending blow before returning the assault, in order to entitle him to the defense of self-defense; but he is not justified in using more force than is reasonably necessary under the circumstances to repel the assault or avert the peril.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 124-127.]

10. SAME.

Where accused was suddenly assaulted, and the assault was so fierce and urgent as not to allow him to retreat or avail himself of other means of escape, he was then entitled to use a deadly weapon in his defense.

11. CRIMINAL LAW—REASONABLE DOUBT.

A reasonable doubt is not a mere imaginary, whimsical, or possible doubt of the guilt of accused, but is such a real and substantial doubt as intelligent and impartial men would reasonably entertain on a careful consideration of the relevant facts proven in the case.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1906-1922.]

Samuel E. Wilson, was indicted for assault with intent to murder. The jury disagreed.

The defendant, Samuel E. Wilson, was indicted at this term for assault upon one Edward Damph with intent to murder the said Damph. The state proved the following facts: That both Damph and the defendant, Wilson, lived in Philadelphia; that while living in Philadelphia the defendant had formed the acquaintance of one Mina Jarrell, after which the two lived together there as man and wife, though not married; that the defendant's business took him away from Philadelphia frequently, and that while so away from the city, some months before the assault occurred, Mina Jarrell and Damph met by chance at a boarding house in Philadelphia, where they became acquainted after which, at another place, they lived together as man and wife, though not married; that Damph, although he had lived with Mina Jarrell for some time, had never met Wilson until the day of the assault, though she had mentioned Wilson to him and had shown him Wilson's picture; that a short time before the day of the assault Mina Jarrell was called to Felton, Del., where her parents lived, on account of the mortal sickness of her father; that while there she corresponded with Damph, and upon the death of her father invited Damph to come to Felton to attend the funeral, and to assist her in regard to settling up her father's affairs; that Damph came down from Philadelphia and Wilson also came down on the same train, but, the one not knowing the other, they were not attracted to each other and did not meet; that Wilson formed a part of the funeral party that day and drove with Mina Jarrell in a carriage to the place of interment, a cemetery near Harrington; that Damph, after arriving at Felton, hired a horse and carriage and drove alone to the cemetery, passing Wilson and Mina Jarrell on the way; that both Wilson and Damph attended the funeral; that after the funeral Wilson started back toward Felton with Mina Jarrell in the carriage with him; that Damph preceded them to Harrington; that Wilson and Mina Jarrell passed through Harrington, and Damph followed after them in his carriage, and, when they had gotten nearly to Felton, Damph drove by them a short distance, then turned around and drove back, turning his horse's head diagonally across the road, so that Wilson could not pass, and got out of his carriage and suggested to Mina Jarrell to get in the carriage with him, announcing to Wilson then that Mina Jarrell had called herself his wife; that thereupon Miss Jarrell arose upon her seat in Wilson's carriage and Damph lifted her out of Wilson's carriage and carried her a few paces and set her down upon the side path; that Wilson remained in his carriage; that meanwhile, when Damph had gotten out of his carriage, his horse had gone on down the road, and after he placed Miss Jarrell on the side path and they had walked a little distance he said they could hardly get to Felton that way, and

he would go on and catch his horse; that he went on about 100 yards or so, caught his horse, and turned back, leaving his horse walking in the road; that meanwhile Miss Jarrell walked on the side path in the same direction that Damph had taken, and Wilson drove along beside her with his horse in a walk; that after a short space of time Damph, having caught his horse and turned it back, met the two as they were coming down the road; that, when he met them, he turned his horse around, or started to turn it around, in the road and that brought him upon the same side of the road and on the same side of his horse as Miss Jarrell was on; that about that time Wilson had gotten out of his carriage—having his revolver free in his overcoat and with his hand upon his pistol—and as Damph was starting to help Miss Jarrell into his carriage, Wilson, without warning, pulled his pistol and shot at Damph, and after the first shot immediately fired again; that the first shot did not take effect, but that the second shot did, the wound that Damph then received being upon the left side of his head, and the course that the bullet took when it entered the head, according to the testimony, indicated that it was fired from the rear, when Wilson was not exactly behind Damph, but at a little angle to the rear of him; that the shot fired was from a 44-caliber revolver, and struck Damph over the ear and fractured the skull a portion of the bullet lodging in the skull and driving splinters thereof into the brain (some splinters of the skull opening the brain and letting out small portions of brain matter), and then giving a ragged wound as it left the head a little distance further over towards the forehead; that that wound staggered Damph and he fell to the ground, when he reached towards his rear pocket for the purpose of drawing his revolver, having been shot twice; that as soon as Damph reached for his revolver, and was trying to get it out of its leather case, Wilson stooped over him and fired the third time, before Damph could get his revolver out of its case, the bullet hitting Damph on the side of his nose; that it could not be determined in what portion of his head the bullet finally lodged, as it was never recovered; that a portion of the bullet that had lodged in the skull was taken from his skull by the operating surgeon at the Delaware Hospital in Wilmington, where Damph was subsequently carried; that Damph was for a short space of time unconscious, but, reviving, he got into his carriage and in a confused sort of way asked some one who happened along in what direction Felton was, and, being told, he drove a few paces in the opposite direction, and then turned his horse towards Felton, and drove off. It was further proved that the nature of the wounds received by Damph was exceedingly dangerous, and the chances of his recovery were very slight; but, owing to his good constitution, native strength of body,

and as a result of skillful treatment in the hospital, he finally recovered.

The evidence on the part of the defense was to the effect: That when Damph first came up to Wilson's carriage he said, "Is that Mr. Wilson?" That Wilson replied, "That is my name." That he then said, "Who is that you have in there with you?" That Wilson replied, "This is Miss Jarrell." That Damph then said, "Miss Jarrell calls herself my wife, and she must get out of there and get in with me." That as he said these words he had his hand upon his hip pocket, and Miss Jarrell said to Wilson, "Oh, Sam! he is going to shoot you; let me get out." That Miss Jarrell thereupon jumped out of the carriage, assisted by Damph, and walked with the latter along the side path of the road, until Damph went ahead to recover his horse. That, when Damph returned to Miss Jarrell after catching his horse, he had some words with Wilson, who was walking beside Miss Jarrell, and immediately drew his revolver as if to shoot Wilson, and that Wilson drew his revolver and shot back in self-defense.

Argued before SPRUANCE, GRUBB, and BOYCE, JJ.

Herbert H. Ward, Atty. Gen., and Robert Richards, Deputy Atty. Gen., for the State. Richard R. Kenney and Arley B. Magee, for defendant.

Mina Jarrell, being produced as a witness on behalf of the defendants, the Attorney General asked that she be first sworn on her voir dire, which was accordingly done, and the witness was questioned by the Deputy Attorney General as follows: "Q. Will you look at the paper which I now hand you, and state whose signature it bears? A. That is my signature. Q. What is the name signed there by you? A. Mrs. Mina Wilson. Q. Where did you sign that? A. In Felton, at our home. Q. Whose signature is the other one appearing thereon? A. My mother's. Q. Did you see that signature placed there? A. Yes, sir. Q. Did this defendant, Samuel E. Wilson, attend the funeral of your father as your husband? A. As Mr. and Mrs. Wilson we attended the funeral; yes, sir. Q. You mean yourself and the defendant? A. Yes, sir. Q. Did you present the defendant to your family as your husband? A. My people supposed he was my husband; yes, sir. Q. Did you ever present him to your people as your husband? A. I had to make them believe he was my husband. Q. Did you hold yourself out to your people and to the public in the community of Felton as his wife? A. Yes, sir."

The Deputy Attorney General here offered the above-mentioned paper in evidence, being a bail bond of said witness, signed and sealed in due form, for her appearance as a witness at the present term of court in the case of State v. Samuel E. Wilson. Pending the ad-

mission of said paper, the witness was cross-examined as follows:

By Mr. Kenney. "X. Q. You say that you represented yourself to be the wife of Mr. Wilson to your family? A. Yes, sir. X. Q. When you signed this bail bond at the time of this occurrence at Felton, on the 15th day of March last, you signed it Mrs. Mina Wilson? A. Yes, sir. X. Q. Why? A. Because my mother was there, and I must. X. Q. Did you hold yourself out to any other persons than your family as the wife of Mr. Wilson? A. No, sir. X. Q. Then it was to them alone that you represented yourself to be his wife? A. Yes, sir. X. Q. Were you, in fact, ever married to Mr. Wilson? (Objected to by the Deputy Attorney General, and question withdrawn.)"

Mr. Richards: We object to this witness testifying upon the ground that she has signed and sealed a bail bond, an instrument of a solemn nature, for her appearance in this court as a witness, and signed it Mrs. Mina Wilson, and has testified upon her oath that in so signing it she signed her name as the wife of this defendant, and, in addition to the signature to this solemn instrument under seal, she held herself out to the people of Felton and to her own family as this man's wife. She has not denied that she is his wife, and she cannot, I think, deny that she is his wife, upon this showing. Upon her own acts and her own testimony she has admitted that she is his wife, and cannot now deny it. *State v. Vincent R. Miller*, 3 Pennwll, 518, 52 Atl. 262.

GRUBB, J. We are prepared to decide this question without hearing the other side. The Deputy Attorney General has cited the case of *State v. Vincent R. Miller*. If you will examine that case as we have just done, you will find that there were a great many more facts furnished in that case than in this. We hold that there is not sufficient proof of a marriage before us to exclude the testimony of this witness at this stage, and therefore we refuse to exclude her testimony at this stage of the case. We consider that she is a competent witness in this case. Let her be sworn.

The witness was thereupon sworn as a witness on behalf of the defendant, and testified in effect that what Wilson did was in self-defense.

GRUBB, J. (charging the jury). This indictment charges Samuel E. Wilson with an assault with intent to murder Edward Dampf, the prosecuting witness. Under this indictment you may find the accused guilty either of the assault with intent to murder, or of the simple assault merely, or not guilty of either, according as the law and the evidence may warrant your verdict.

In order to warrant you in finding that he is guilty in manner and form as he is indicted—that is, not only of the assault, but of the assault with intent to murder, as

charged in his indictment—it is incumbent upon the state to satisfy you from all the evidence in the case, beyond a reasonable doubt, not only that the alleged assault was committed by the accused, but also that it was made by him with the intent to murder the prosecuting witness, Edward Dampf. Such intent to murder is absolutely material and essential to be proven as a fact in this case before you can find him guilty of the said assault with intent to murder.

An assault is an unlawful attempt, by violence, to do injury to the person of another; the person making the attempt having the present ability to commit such injury. As, in addition to the assault, the intent to murder is also charged in this indictment, it is necessary for us to define to you what murder within the meaning of the law is; for you must be satisfied from the evidence, beyond a reasonable doubt, that the prisoner's alleged act (if Edward Dampf's death had actually been caused thereby) would be murder of the first or second degree, before you can render a verdict of guilty of the intent to murder. To constitute the statutory offense of assault with intent to commit murder, the circumstances must be such as to show that it would have been murder if the assailant had accomplished such intent.

Murder is where a person of sound memory and discretion unlawfully kills any human being with malice aforethought, either express or implied. The chief characteristic of this crime, distinguishing it from every other kind of homicide, and therefore indispensably necessary to be proved, is malice prepense or aforethought. Under the statute law of this state there are two degrees of murder, viz., murder of the first and murder of the second degree. The first is where the crime of murder is committed with express malice aforethought, or in perpetrating or attempting to perpetrate any crime punishable with death; and the second degree is where the crime of murder is committed otherwise, and with malice aforethought implied by law.

The express malice, which constitutes murder of the first degree, is proved by circumstances attending the act satisfactorily evidencing a sedate, deliberate purpose and formed design to kill another, such as the deliberate selection and use of a deadly weapon, lying in wait, and the like. Implied or constructive malice is an inference or conclusion of law from the facts found by the jury. Therefore murder of the second degree may be proved where it is not satisfactorily shown by the evidence submitted to the jury that the killing was done with a sedate, deliberate purpose and formed design to take life, or in perpetrating or attempting to perpetrate any crime punishable with death, but is so shown that it was done suddenly, without justification or excuse, and without any provocation, or without provocation sufficient to reduce the homicide to the

grade of manslaughter, or in committing or attempting to commit a felony not capital-ly punishable, or some act of violence from which the law presumes malice. Malice is implied by law from every deliberate, cruel act committed by one person against another, no matter how sudden such act may be; for the law considers that he who does a cruel act voluntarily does it maliciously. And whenever the act from which death ensues is proven by the prosecution, unaccompanied by circumstances of justification, excuse, or mitigation, the law presumes that the homicide was committed with malice; and it is thereupon incumbent upon the prisoner to show by evidence that the killing was not malicious, and therefore does not amount to murder.

Having explained to you what an assault is, and having also stated to you that, in addition to the proof of the assault (if it has been proven to you), the prosecution must show the intent to murder the person named in the indictment—that is, to kill him, with either express or implied malice aforethought—it becomes necessary for us further to state to you how such intent to murder may be shown to your satisfaction. The intent to commit murder may be shown by direct evidence of the intent; that is, by the express confession or declaration of the accused that he committed the alleged assault with intent to murder, or, if there be no such direct evidence, the intent to murder may be proved by the acts or the conduct of the accused and other circumstances from which the jury may naturally and reasonably infer the intent charged. For instance, it is a principle of law that every man must be presumed to intend the natural and probable consequences of his own voluntary or willful act. So that from the use of a deadly weapon against another the jury may infer the intent to commit murder, unless the circumstances in the case satisfy you to the contrary.

As to the question of the intent to murder, as charged in this indictment, it is for you to say from the testimony before you whether there is such evidence, taken in connection with all the facts in the case, as will warrant you in inferring that the accused assaulted Edward Damph with intent to murder him. Such intent, as we have said, being provable by and inferable from the voluntary, unlawful use, in a manner, or under circumstances perilous to human life, or directly tending to great bodily harm, of a loaded pistol or other weapon which the law considers a deadly weapon, or of any other instrument or missile reasonably likely to take human life when so used.

Samuel E. Wilson, the accused, admits that he shot Edward Damph, the prosecuting witness, but claims that he did it in necessary

self-defense. If the jury are satisfied upon consideration of all the evidence in this case that no unlawful violence against the person of Wilson was committed or attempted by Damph, but that the shooting by Wilson was done not for his own protection, but to gratify a feeling of revenge or malice against Damph, then his plea of self-defense cannot avail for his acquittal, as it otherwise might do. The law accords to every one the right to protect his person from assault and injury by opposing force to force, and he is not obliged to wait until he is struck by an impending blow; for, if a weapon be raised in order to shoot or strike, or the danger of other personal violence be imminent, the party in such imminent danger may protect himself by striking the first blow for the purpose of repelling and preventing the attempted injury. But the opposing force or measure of defense must not be unreasonably disproportionate to the requirements of the occasion. Although so much force as is reasonably necessary may be used, yet, if the violence used is greater than was necessary under the circumstances to repel the assault or avert the peril, the party using it is himself guilty; for the law recognizes the right of self-defense for the purpose of preventing, but not of revenging, an injury to the person of the accused.

Where one is assaulted upon a sudden fray, and, in the judgment of the jury, honestly believed on reasonable and sufficient grounds that he was in imminent danger of being killed or of receiving great bodily harm, he would have in self-defense the right to use a deadly weapon against his assailant. But in exercising such right in self-defense, in a manner likely to cause death or great bodily harm to his assailant, he must be closely pressed by him, and must have retreated as far as he conveniently and safely could, in good faith, with the honest intent to avoid the violence and peril of the assault. If these be so sudden, fierce, or urgent as not to allow him to retreat, or to have other probable means of escape, then he may rightfully use a deadly weapon in his defense.

In conclusion, gentlemen of the jury, we remind you that the state must prove to your satisfaction, beyond a reasonable doubt, either the assault with intent to murder, or the simple assault, as charged in this indictment, before you can find a verdict of guilty of either offense. A reasonable doubt is not a mere imaginary, whimsical, or even possible doubt of the guilt of the accused, but is such a real and substantial doubt as intelligent and impartial men may reasonably entertain upon a careful consideration of all the relevant facts proven in the case.

The jury disagreed.

PEPPER v. PEPPER.

(Superior Court of Delaware. Sussex. Oct. 11, 1905.)

1. ARBITRATION — AWARD — EXCEPTIONS BY PERSONS NOT PARTIES.

Persons by excepting as "devisees and legatees" of deceased to the award of arbitrators in an action against an administrator on a claim against the estate are given a standing in court without petitioning for leave to intervene.

2. SAME — JURISDICTION OF EXCEPTIONS — FRAUD.

The superior court has jurisdiction of exceptions of devisees and legatees of deceased, to the award of arbitrators in an action against the administrator on a claim against the estate, though the ground of exception is fraud and collusion between the plaintiff and defendant.

3. SAME—SUBMISSION OF ISSUE TO JURY.

On exceptions of devisees and legatees to the award of arbitrators in an action against the administrator on a claim against the estate, the exceptions being based on fraud and collusion of the plaintiff and defendant, the issue of fraud will be submitted to the jury.

Action by Horace B. Pepper against Rebecca P. Pepper, administratrix c. t. a. of Harriet H. Cannon, deceased. Exceptions to award of arbitrators were filed by Amanda M. Hearne and others. Motion to dismiss overruled, and issue ordered submitted to a jury.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Woodburn Martin and Charles M. Curtis, for exceptants. Robert O. White, C. W. Cullen, Charles F. Richards, and Edward D. Hearne, for respondent.

Harriet H. Cannon died December 7, 1901. Under the provisions of her will, a certain tract of land was to be sold by her executor and the proceeds divided between her stepchildren, Edward F. Cannon and Amanda M. Hearne. John H. Elliott, the executor appointed by the will, renounced, and Rebecca P. Pepper, sister of Harriet H. Cannon, was then appointed administratrix c. t. a. Nearly three years after the death of Harriet H. Cannon an amicable action was instituted by Horace B. Pepper, nephew of the deceased and son of the administratrix, upon the following account:

"Harriet H. Cannon, to Horace B. Pepper, Dr.

To services and use of team from September 2, 1885, to December 7, 1901, at \$50 per year.....	\$812 50
To board for herself during the year 1886, 9 months at \$10.....	90 00
To board for Jennie Parker for the year 1886, at \$6 per month.....	72 00
To board for herself during the year 1887, 9 months at \$10.....	90 00
To board for Jennie Parker for the year 1887, at \$6 per month.....	72 00
To board for herself during the year 1890, 6 months at \$10.....	60 00
To board for herself during the year 1891, 6 months at \$10.....	60 00

\$1,256 50

"State of Delaware, Sussex County—ss.:

"Personally appeared before me, Henry S. Marshall, a justice of the peace in and for

said county, Horace B. Pepper, and maketh solemn oath that nothing has been paid or delivered towards satisfaction of said debt, except what is mentioned, and that the sum of \$1,256.50 is justly and truly due from the estate of Harriet H. Cannon, deceased, with interest.

Horace B. Pepper.

"Sworn and subscribed before me this 6th day of July, A. D. 1904.

"[Probate.] Henry S. Marshall, J. P."

The arbitrators rendered judgment in favor of the plaintiff in said amicable action for \$1,256.50, with interest from the 6th day of July, 1904, that being the full amount of plaintiff's claim.

On October 3, 1904, the following exceptions to the confirmation of the said award were filed by Amanda M. Hearne and Edward F. Cannon, devisees and legatees of Harriet H. Cannon, deceased, to wit: "First. That the said award was obtained through fraudulent collusion between the plaintiff and the said Rebecca P. Pepper at the time said rule of reference was agreed upon and at the time said award was made. Second. That the said amicable action and rule of reference in the above cause was entered into fraudulently and by collusion between the plaintiff and Rebecca P. Pepper, then the administratrix c. t. a. of the said Harriet H. Cannon, deceased, for the purpose of perpetrating a fraud upon the said estate by promoting the said award to the plaintiff, when in fact the deceased was not indebted to the said plaintiff in any sum of money, but, on the contrary, the plaintiff was indebted to the deceased at the time of her death. Third. That the award is based upon a probated claim invalid and fraudulent upon its face, as will appear from an inspection of copy of the said claim herewith annexed, and all of the items in the said claim, except perhaps a small part of the first item therein, were long barred by the statute of limitations, the testatrix having died on or about December 7, 1901, for it appears (1) that the first item runs back about 15 years from the death of the said testatrix, and (2) that all of the other items were for board alleged to have been furnished more than 10 years before her death, part of these items being for board furnished 15 years and some 14 years before the death of the said testatrix. Fourth. That the said award is not only fraudulent and unjust on its face, but was obtained by fraudulent connivance of the said Rebecca P. Pepper and by collusion with her, and without the production before the referees of evidence within the knowledge of the said Rebecca P. Pepper, and of evidence of record which would have proved that the said claim was unjust and unfounded in fact, and which would have demonstrated that the said Horace B. Pepper, the plaintiff, was indebted to the said estate of the said deceased. Fifth. That as appears by the copy of the probated claim of the plaintiff, it is on its face fraudulent and long barred by the statute of

limitations, the testatrix, Harriet H. Cannon, having died on or about December 7, 1901, yet the said Rebecca P. Pepper, administratrix as aforesaid, not only did not plead or rely upon the statute of limitations, but entered into an amicable action, and agreed to rule of reference without the advice or knowledge of her attorneys, Charles W. Cullen and Edward D. Hearne, Esqs., and at the hearing was not represented by counsel, although the plaintiff was so represented; that notwithstanding the fact that all but one of the items in the plaintiff's claim purported to be for board furnished at times more than 10 years prior to the death of the said testatrix, and notwithstanding that the other items ran back for 15 years prior to the death of the testatrix, and notwithstanding the fact that on September 10, 1900, said Horace B. Pepper made his bond or judgment note to the said Harriet H. Cannon for the payment of the sum of \$100, upon which judgment was entered by the said Harriet H. Cannon in her lifetime a short time before her death, and which judgment remains unpaid and unsatisfied of record. Sixth. That as appears of record in the superior court of Sussex county, on April 23, 1901, judgment was entered in said court by the said Edward D. Hearne, Esq., as attorney for the said Harriet H. Cannon, for the sum of \$100, by virtue of a warrant of attorney on a bond or note dated September 10, 1890, made by the said Horace B. Pepper to the said Harriet H. Cannon, said judgment being No. 45 to the April term, 1901, of said court, and that a levy had been made on goods and chattels of the said Horace B. Pepper by virtue of a f. fa. issued on said judgment to the April term, 1902, of said court, said goods remaining unsold by said sheriff; that said judgment was not put in evidence by the said Rebecca P. Pepper, nor brought before the referees or used by her to defeat the said claim of said Horace B. Pepper, or part thereof at least; and that, had said judgment been so used by said Rebecca P. Pepper, the said Horace B. Pepper would not have been entitled to obtain any claim for board or services rendered prior to the giving of said bond on September 10, 1890."

At the October term, 1904, the hearing of the above exceptions was continued until the April term, 1905, at which latter term it was further continued to the October term, 1905.

At the said October term, 1905, the exceptions coming on to be heard, counsel for respondents moved to dismiss the same, for the following reasons: "First. That the exceptions were not tenable, in that they did not aver fraud or misconduct on the part of the arbitrators. Second. That the superior court had not jurisdiction over a question of fraud, that being a subject of equity jurisdiction. Third. That the exceptants were not parties to the record, and had no standing in court. Fourth. That to give the exceptants any standing in the superior court

it would be at least necessary for them to file a petition asking leave to intervene and secure an order of the court to that effect."

Mr. Martin, for exceptants, replied: Every legal transaction is vitiated by fraud, when proven. Arbitrators are instruments of the court, being appointed under the provisions of the statute to expedite its business, and their awards are of no effect until they receive the approbation of the court, but, when so confirmed, are "as available in law as the verdict of a jury; and the party to whom any sum of money shall be awarded, if he be plaintiff, shall have judgment," etc. Rev. Code 1893, c. 116, § 6. All of the doings of the arbitrators are subject to the investigation of the court; for, when approved, they are the acts of the court itself. Therefore the court has the right to hear and determine any allegation of fraud and collusion practiced upon its arbitrators, by which they were influenced in making an award. It has authority to investigate the manner in which an award was made or verdict rendered, and to inquire into any matter of fraud by which the same may have been tainted. *Allen v. Smith's Adm'r*, 4 Har. 234. The court of chancery has no jurisdiction over this case; the subject-matter is primarily of legal jurisdiction. The exceptions are to the misconduct of the parties plaintiff and defendant in this court, the hearing being had under a rule of court. Over all of these proceedings this court has exclusive jurisdiction, and there is no appeal from its judgment to, nor can its finding be revised by a court of equity. The exceptions are filed by "devisees and legatees of Harriet H. Cannon, deceased," and their interests under the provisions of the will would be greatly impaired, if not entirely abrogated, were this award confirmed. The respondents are informed by the exceptions filed of the capacity in which the exceptants sue, and of their interest in the subject-matter, and it would be surplusage for them to file a petition asking leave to intervene.

The motion to dismiss was overruled. Counsel for respondents thereupon moved to have an issue framed to be submitted to a jury, which was objected to by counsel for exceptants, who contended that the court had the same jurisdiction of an award of referees as they had over the verdict of a jury.

THE COURT ordered the following issue to be framed to be submitted to a jury of the superior court, viz.: "And now, to wit, this 11th day of October, 1905, it is ordered by the court that the following issue be tried by a jury of Sussex county at the bar of this court: 'Was there or was there not fraud and collusion between Horace B. Pepper and Rebecca P. Pepper, administratrix c. t. a. of Harriet H. Cannon, deceased, the parties to this suit, in procuring the award therein?'"

The case was then continued to the April term, 1906.

**UNITED RAILWAYS & ELECTRIC CO.
OF BALTIMORE v. WATKINS.**

(Court of Appeals of Maryland. Nov. 23, 1905.)

1. STREET RAILROADS—RIGHT OF COMPANY AND INDIVIDUALS TO USE STREETS.

The rights of a street railway company and of an individual to the use of the streets are equal, and each owes to the other the same duty to avoid injury.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 193.]

2. SAME—INJURY TO TRAVELER—CONTRIBUTORY NEGLIGENCE.

While a street railway company and an individual have an equal right to the use of a highway, an individual who, in disregard of his own safety, undertakes to cross the company's track when no prudent person would do so, cannot recover for the injuries sustained in a collision with a car.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 207.]

3. SAME.

It is not negligence as a matter of law for a traveler driving a four-horse wagon to attempt to cross a street car track when a car approaching is a block distant, but the question is for the jury.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 214, 257.]

4. SAME—NEGLIGENCE OF COMPANY—QUESTION FOR JURY.

Whether a street railway company was guilty of actionable negligence, and liable for injuries received in a collision by a traveler when attempting to cross the tracks, *held*, under the evidence, for the jury.

5. NEGLIGENCE—SUBMISSION OF ISSUE TO JURY—NECESSITY.

Where the nature of an act relied on to show negligence contributing to a personal injury can only be determined by considering all the circumstances, it is the province of the jury to pass on and characterize it.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 333.]

Appeal from Court of Common Pleas; George M. Sharp, Judge.

Action by Stephen Watkins against the United Railways & Electric Company of Baltimore. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Fielder C. Slingluff, for appellant. Robert F. Leach, Jr., for appellee.

McSHERRY, C. J. This is another personal injury case, and the only questions which we are required to consider arise on the prayers for instructions to the jury. The facts are few, and there is no conflict in the testimony. It appears that the appellee, who is a farmer residing in Howard county, was driving a four-horse wagon, loaded with furniture, along Carey street, in Baltimore City. Carey street intersects Baltimore street at right angles. Calhoun street, which also crosses Baltimore street in the same way, is west of, and one block distant from, Carey street. The double tracks of the United Railways & Electric Company of

Baltimore are located on Baltimore street. The north track is used by street cars going west on Baltimore street, and the south track is used by the cars going east on that street. The appellee was driving in a southerly direction; that is, towards Baltimore street. His course took him across the double tracks on Baltimore street at the intersection of that street with Carey street, as he intended to continue on down the last-named street towards his destination after crossing Baltimore street. When he emerged from Carey street into Baltimore street, he saw a car of the appellant company a square distant, up at Calhoun street. The car was on the south track, going east, and therefore going towards the appellee. He concluded that he would have ample time to cross the tracks before the car could traverse the distance separating it, and his team and he therefore drove onward without waiting for the car to pass. Midway between, and parallel to, Calhoun and Carey streets there is an alley opening into Baltimore street. When the car reached the alley, several of the witnesses have testified that it materially increased its speed. At that juncture the lead horses were just up to or perhaps just upon the north track, not the track on which the car was approaching, and the appellee pressed forward, and the car struck between the lead horses and the wheel horses, pushing the wagon around at right angles to the direction it was proceeding, and knocking down and injuring three of the horses and seriously wounding the appellee. The distances from Calhoun street to Carey street, and from Calhoun street to the alley, are not given in the record. There was testimony adduced tending to show that the motorman upon reaching the alley turned on the electric current, instead of applying the brakes, though descending a slight downgrade, whereby a collision became, not only imminent, but inevitable, and that the car then commenced to run and continued onward at a unusually high rate of speed until it struck the team. On this state of facts the appellant asked the court to withdraw the case from the consideration of the jury, on the ground, first, that there was no evidence in the case legally sufficient to entitle the plaintiff to recover; and, secondly, because, according to the uncontradicted evidence in the case, the plaintiff was guilty of negligence directly contributing to the accident complained of.

As we have often said, and now repeat, negligence, both primary and contributory, is essentially, relative, and comparative, and not absolute. Whether it exists or does not exist in either form in a given case must necessarily depend upon the circumstances of that case. In every instance it must in the last analysis be some breach of the duty owed by one person to another, and, as the duty, whose breach is relied on as actionable negligence, varies under different conditions,

the conditions must be known before negligence can be predicated of any act producing an injury. There is no analogy between a case like this and a case which grows out of an injury inflicted at a crossing over a railroad in the open country, because the rights and the reciprocal duties of both the injured and the injuring parties are radically different in the one instance from their rights and their reciprocal duties in the other instance. A street railway company has no exclusive right to the use of a public highway in a city for the movement of its cars, and possesses no greater or superior right to use the street than is enjoyed by any individual, apart from the mere franchise to lay its rails thereon. That franchise in no way exempts such a company from an imperative obligation to exercise due and proper care in propelling its cars to avoid injuring persons who have an equal right to use the same street as a thoroughfare. Inasmuch as the right of the individual to use the street is coextensive with the like right of the railway, each, as a consequence, owes to the other precisely the same duty to avoid an injury, and the railway company has no more right carelessly to run its cars along its tracks than the individual has carelessly to cross or traverse them. Looking to and bearing in mind these mutual and reciprocal rights and duties, the case comes to the question whether there was a breach of duty on the part of the company in carelessly disregarding the right of the appellee to cross the tracks at the intersection of Baltimore and Carey streets, or whether the appellee was careless—that is, negligent—in attempting to make that crossing when he knew, or ought to have known by the simple process of using his eyes, that it would not be possible for him to get over the tracks before the car would collide with the wagon.

When the facts show, as in some of the cases they have shown, that the injury had resulted from a deliberate, but unsuccessful, effort to cross the track in the face of evident danger, or when the disaster had been due to a miscalculation as to the chances of the individual being able to clear the track before the car would reach the point where the collision coincidentally occurred, a recovery has been denied upon the obvious ground that such a reckless attempt was gross negligence on the part of the person injured. Whilst each party, the driver of the team and the railway company, had an equal right to use the highway lawfully, neither was justified in using it in such a way as to imperil the safety of the other, and the individual who disregarded his own safety by rashly undertaking to cross the track when no prudent man would venture to do so was in no position to hold the company answerable for the consequences of his own heedlessness or folly. In the very nature of things, no hard and fast rule can be laid down by which every case of this charac-

ter can be measured, and therefore the ultimate conclusion reached in one controversy cannot necessarily control the final decision of some other similar, though not precisely identical, contest. This fact renders it unnecessary to analyze or to refer to the numerous cases cited in the argument. They, and many others, have grown out of their own peculiar circumstances, and the differences in those circumstances, sometimes very slight, it is true, distinguish and differentiate the cases from each other and from this one.

If it be true, and it was for the jury to say whether it was, that, when the appellee started to cross Baltimore street the car was at Calhoun street, an entire block distant, then it cannot be said as a matter of law that there was negligence on the part of the appellee in attempting to cross over the tracks before the car had passed Carey street, unless it be assumed as a fixed and unvarying postulate that no one who may be driving a four-horse wagon in the city can prudently cross the tracks at intersecting streets whilst a street car coming towards him is as near as the distance of a block from the point of crossing. No such postulate has ever been announced or could be accepted, if asserted. The mere fact, then, of attempting to cross over the street car tracks in a city when an approaching car is no nearer than just indicated cannot be considered an act of negligence, and it was clearly for the jury to say whether, if the speed of the car had not been materially and perceptibly increased after the midway alley had been passed by it, there would have been abundant time for the team and wagon to clear the tracks before the car reached the point where the collision occurred. It is not disputed that the speed of the car was greatly accelerated as it approached the team, or that the nearer it got the faster it ran. If the speed had not been thus increased, it is probable no accident would have happened; and, if this be so, it was obviously not for the court to rule as a matter of law that the appellee was guilty of negligence in not anticipating the possible contingency of a collision resulting from an unusually rapid motion of the car. It does not appear from the record that there was the slightest danger of an accident when the appellee started to cross Baltimore street; and, if the situation changed thereafter, it was for the jury to determine what caused the change and who was responsible for it, since there is no such distinct, prominent, and decisive fact proved, about which ordinary minds would not differ, as to justify the court in pronouncing the appellee's conduct in driving forward such contributing negligence in law as would preclude him from recovering. When the nature and attributes of the act relied on to show negligence contributing to the injury can only be correctly determined by considering all the attending and surrounding circumstances of the transaction, it falls within the province of the jury to

pass upon and characterize it, and it is not for the court to determine its quality as a matter of law. *Cooke v. Balto. Traction Co.*, 80 Md. 558, 81 Atl. 327.

It follows from what we have said, first, that there was, in our opinion, some evidence of negligence on the part of the appellant company, indicated by the unusual speed of the car and by the turning on of the power and the failure to apply the brakes, which evidence the court could not properly withdraw from the consideration of the jury; secondly, that upon the question of contributory negligence the jury was the proper tribunal to pass, in view of the circumstances proved in the case. No special reference need be made to the instructions granted at the instance of the appellee, because similar ones have been so often upheld by this court in other cases that they must be regarded as accurately stating the law.

Finding no error in the rulings excepted to, the judgment, which was in favor of the appellee must be affirmed.

Judgment affirmed, with costs above and below.

KOHLHOSS v. MOBLEY.

(Court of Appeals of Maryland. Nov. 23, 1905.)

1. HUSBAND AND WIFE—CRIMINAL CONVERSATION — CONNIVANCE — QUESTION FOR COURT.

Where, in an action for criminal conversation, it appeared that the husband's conduct was such that reasonable minds could draw no other conclusion than that he had consented, actively or passively, to his wife's misconduct, the question of such connivance was one of law for the court.

2. SAME—DEFENSES—CONNIVANCE.

Connivance by a husband, sufficient to bar an action for criminal conversation, must be such conduct as when, subjected to the test of reasonable human transactions, shows an intention to connive, evidenced by his active or passive assent to transactions tending to convince an ordinarily prudent person of his wife's offense.

3. SAME—EVIDENCE.

In an action for criminal conversation, evidence held to establish the husband's connivance or implied consent to the wife's misconduct as matter of law.

4. EVIDENCE—CONFESSIONS.

In an action for criminal conversation, a confession made by the wife, who was not a party to the action, purporting to be a recital of past events, made in the absence of both plaintiff and defendant, was not binding on either.

Appeal from Circuit Court, Frederick County; John C. Motter and James B. Henderson, Judges.

Action by Harvey T. Kohlhooss against Walter W. Mobley. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

George A. Pearre and Maurice H. Talbott, for appellant. Hammond Urner and Edward C. Peter, for appellee.

SCHMUCKER, J. The appellant, Kohlhooss, sued the appellee, Mobley, in the circuit court for Montgomery county for criminal conversation with the former's wife. Mobley pleaded non cul., and after joinder of issue the case was moved on Kohlhooss' affidavit to the circuit court for Frederick county, where it was tried. On the trial of the case the defendant, at the close of the testimony for the plaintiff, offered a prayer asking the court to instruct the jury that there was no legally sufficient evidence from which they could find for the plaintiff, and that therefore their verdict must be for the defendant. The court granted the prayer, and a verdict was rendered for the defendant and a judgment entered thereon from which the plaintiff appealed.

There was evidence on behalf of the plaintiff legally sufficient to support a verdict in his favor, if it had not also appeared in the opinion of the circuit court, from the uncontradicted evidence, that the plaintiff had debarred himself from asserting a right of recovery by his own connivance at the intercourse complained of between his wife and the defendant. The counsel for the appellant did not in the argument controvert the proposition that connivance on the part of a husband, when properly established, bars an action for crim. con., as it does a suit for a divorce, but they insisted that connivance is always a question of fact, to be determined exclusively by the jury, and that the court below erred in refusing to permit the jury to pass upon the evidence as to its existence in the present case. The question whether the plaintiff in an action like this connived at the misconduct of his wife is primarily one of fact for the jury. It may even be said that, as the essence of connivance is consent which, like malice or good faith, constitutes an unseen motive of human conduct, it is especially a question for the jury. But the connivance is not proven as an independent fact. It is usually established as a conclusion from a line of conduct pursued by the husband in relation to his wife's intercourse with and relations to the alleged paramour. If, therefore, the conduct of the husband as established by undisputed evidence or admitted in his own testimony is such that a rational mind could draw no other conclusion therefrom than that he had consented actively or passively to the conduct on the part of his wife and the defendant of which he complains, the question would become one of law for the court, which in that event would not only be justified in taking the case from the jury, but it would become its duty to do so.

The authorities are in substantial accord as to the character and degree of connivance requisite to bar an action of crim. con. The conduct of the husband must be such, when subjected to the test of reasonable human transactions, as to show an intention to connive; and here, as elsewhere, the presumption of the law is in favor of honesty and correct-

ness of purpose, but the husband, like other persons, is chargeable with an intention to produce the necessary and legitimate consequences of his own deliberate action. A passive connivance has been held to be as effectual as an active one to bar the action. Lord Stowell, in *Morson v. Morson*, 3 Hagg. 87, said: "The first general and simple rule is if a man sees what a reasonable man could not see without alarm, if he sees what a reasonable man could not permit, he must be supposed to see and mean the consequences."

* * * The presumption of the law is against connivance, and, if the facts can be accounted for without supposition of an intention [to connive], the courts will incline to that construction. * * * However, though to bar the husband there must be intention on his part, I have no difficulty in saying that mere passive connivance is as much a bar as active conspiracy." In *Dennis v. Dennis*, 68 Conn. 194, 36 Atl. 36, 34 L. R. A. 449, 57 Am. St. Rep. 95, it is said: "Connivance may be the passive permitting of the adultery or other misconduct, as well as the active procuring of the commission. If the mind consents, there is connivance." Both of the foregoing cases were cited and relied on by us in *Barclay v. Barclay*, 98 Md. 371, 56 Atl. 806, where we said: "Connivance is said to be the consent or indifference of the complainant to the misconduct complained of as a cause of divorce. The defense is in the nature of an estoppel, and is generally set up as a defense to adultery only, although the principle may be applicable to other causes for divorce." It has been held that a husband who has not directly or indirectly put opportunities of committing adultery in the way of his wife will not be guilty of connivance for merely allowing her to utilize an opportunity for committing adultery which she has arranged without his knowledge or participation. And he may do this for the purpose of obtaining evidence against her, but he must not make opportunities for her or smooth her path to the adulterous bed. *Wilson v. Wilson*, 154 Mass. 194, 28 N. E. 167, 12 L. R. A. 524, 26 Am. St. Rep. 237; *Morrison v. Morrison*, 142 Mass. 361, 8 N. E. 59, 56 Am. Rep. 688; *Robbins v. Robbins*, 140 Mass. 528, 5 N. E. 837, 54 Am. Rep. 488.

Let us now examine the facts of the present case in the light of the principles which we have stated. The following facts appear from the uncontradicted evidence on behalf of plaintiff contained in the record: In January, 1895, he was married; his wife being then about 20 years of age. About 1899, suspecting her of infidelity with a man other than the defendant, he followed her to Washington, and, finding her at the same theater with the man, upbraided her, and told her she could go home or where she pleased. She returned to her father's house, and remained there for several months, when her husband, having concluded that her relations to the

man had not been criminal, received her back to his house and their marital relations were fully restored. In February, 1900, Kohlhooss, with his wife, took up his residence at the village of Derwood, in Montgomery county, and opened a small grocery store in the building in which he resided. He also conducted a huckstering business, and was frequently absent from the store driving his huckster's wagon. His wife assisted him in conducting the store, generally occupying a position at the desk, standing near the rear end of the storeroom. Mobley, the appellee, who resided at the distance of only one-eighth of a mile from the store, began to deal with it when it was first opened, and soon became one of its best customers. His visits to the store increased in frequency to such an extent that for a year or more prior to September, 1903, he spent according to Kohlhooss' own testimony "three-fourths of his time" there. Kohlhooss, when asked how Mobley occupied his time when at the store, replied: "He generally sat near the desk. My wife was at the desk. He paid attention to my wife." About the 1st of September, 1903, Kohlhooss observed certain conduct of his wife and Mobley which he says for the first time aroused the suspicion in his mind that illicit relations existed between them, and caused him to watch their movements more closely. On two separate evenings thereafter he saw his wife leave the store about nightfall and go in the direction of a neighboring graveyard and remain for about an hour. Mobley followed her each time after an interval of three or four minutes and did not return to the store. On another day, when he heard his wife and Mobley whispering to each other in the store for four or five minutes, he managed to get near enough to them to overhear part of their conversation, which he describes as follows: "He [Mobley] was after her why she did not come out that night. She gave him some excuse that she went out and fell into the hands of some girl and she could not meet him." Early one morning about the middle of September, while Kohlhooss and his wife were still in bed, they heard a rattling at the store door below them. He got up to see who it was, and saw that it was Mobley, and so informed his wife, and then started to dress in order to go down and open the door; but his wife urged him to return to bed and volunteered to go down for him, saying that it was not Mobley at the store door. Kohlhooss returned to bed for a few minutes, until his wife had had time to get downstairs, and then got up and followed her down, where he found that she and Mobley were in the rear part of the store with the doors closed, and from scuffling which he heard in there he suspected that they were having carnal intercourse with each other. He neither interrupted them nor made any outcry, but went upstairs and fruitlessly endeavored to induce his brother, who was a visitor at his house, to go down and enter the store with him, as

he said he was afraid of Mobley. That interview between Mrs. Kohlhoss and Mobley in the store was permitted to continue 15 or 20 minutes without interruption, until Mobley voluntarily went away, having in the meantime made a purchase from the store. Kohlhoss neither during nor after these occurrences made any protest or objection to his wife in reference to her conduct with Mobley or her supposed relations to him, but he went to Washington and employed Bradley's Detective Agency to send two men up to Derwood to find some evidence of his wife's infidelity. After remaining a day, the men told him it was impossible to accomplish anything by detectives around Derwood, whereupon he sent them back to Washington, and told them not to go any further until they heard from him.

During the early part of September Kohlhoss had several times, while in the store, seen notes secretly passed to his wife from Mobley, and had seen her after reading them tear them up and throw them away. Kohlhoss afterwards collected the fragments of the notes and put them together and found their contents to be ambiguous, but not necessarily incriminating. On the 23d of September, however, Kohlhoss recovered the fragments of a note which he had seen Mobley secretly pass to Mrs. Kohlhoss in the store, which, when put together, read as follows: "I am thinking of going to the city on the milk train in the morning. Will it suit you to go? If so, go on the electric cars and I will see you at the same time and place as the other time. Of course, if it will not suit, say yes, so I will know what to do." On the same day, after Kohlhoss had gotten possession of this note, his wife proposed to him that, as he was not feeling very well, she would go to Washington in his stead on the next day to make purchases for the store. He, instead of forbidding her to go or warning her of the dangers of the course she was pursuing, consented that she should go. Having thus not only consented to, but assisted in perfecting, the assignation between his wife and Mobley, he at once notified Bradley, the Washington detective, of the finding of the note and of his wife's intended visit to Washington on the next day, and asked him to put his men on the lookout for her. On the next morning Kohlhoss took his wife to the train as she started for Washington to keep her assignation, purchased a ticket for her, and kissed her good-by, and then he went promptly by another road to Washington to await developments. Without pursuing the details of the evidence on this subject, it is sufficient to say that Mobley went to Washington on the same train as Mrs. Kohlhoss, and they were followed by the detective to a house known as the "Cosmopolitan Hotel," where they remained together for some time in a private room. The plaintiff further offered in evidence a paper purporting to contain a written confession by

his wife of having committed adultery with Mobley during their interview at the hotel and on previous occasions, not specified, at Derwood, and he offered to also prove by competent testimony that she had signed the alleged confession at the office of her husband's attorney two or three hours after the interview with Mobley at the hotel, but the court sustained the objection of the defendant to the admission of the alleged confession and the offered testimony.

The facts which we have mentioned, all proven by uncontradicted evidence on behalf of the plaintiff, and almost all of them by his own testimony, cannot fail to prove to any reasonable mind such a course on the part of the plaintiff, both before and after the time at which he states that his suspicions as to his wife's chastity were aroused, of indifference to and acquiescence in the habitual conduct and attitude of his wife and Mobley toward each other, as not only deprived her of his marital protection, but afforded to their incipient amour full opportunity to develop and mature into her complete dishonor. This line of conduct on the part of the plaintiff, who was not a stranger to his wife's weakness for other men, in reference to her liaison with Mobley, which was largely conducted under his own eyes, amounted in our opinion to such connivance as to effectually debar his right of recovery in this case. We therefore hold that the circuit court committed no error in withdrawing the case from the jury.

The view which we have taken of the effect of the plaintiff's own conduct upon his right to recover in this case makes it unnecessary for us to notice the ruling of the circuit court upon the admissibility in evidence of the alleged confession of the wife further than to say that we find no error in that ruling. The alleged confession purports to be a recital of past events made by one not a party to the case, out of the presence of both plaintiff and defendant, and having no authority to bind either of them. The judgment appealed from will be affirmed.

Judgment affirmed, with costs.

PRIMROSE et al. v. WRIGHT.

(Court of Appeals of Maryland. Nov. 16, 1905.)

1. MORTGAGES — SALE — ERROR IN ORDER OF RATIFICATION OF SALE — EFFECT.

A proceeding for the sale of mortgaged premises was instituted in the circuit court of Q. county. The report of sale was entitled, "In the Circuit Court for Q. County," and was addressed, "To the Honorable Judges of Said Court." The order of ratification of sale ratified "the sale * * * within reported," but erroneously recited that it was passed by the circuit court of K. county. It was filed with the other papers in the case in the circuit court of Q. county. K. and Q. counties were in the same judicial circuit. *Held*, that the error in the order was a clerical one, and did not affect its validity.

2. SAME—EQUITY—ERRORS IN ORDER—AMENDMENT.

Equity rules 51, 52, codified in Code Pub. Gen. Laws, art. 16, §§ 178, 179, providing that clerical mistakes in decrees may be corrected on petition before the enrollment of the decrees, and declaring that no rehearing shall be granted after the enrollment of the decree, do not take away from courts of equity their inherent power to correct mistakes in their own proceedings at any time, and a clerical error in an order ratifying a sale under a mortgage may be corrected on petition of the purchaser, even after the enrollment of the order.

Appeal from Circuit Court, Queen Anne's County, in Equity; James A. Pearce, Wm. R. Martin, and Edwin H. Brown, Judges.

Petition by Lucie S. Primrose and others against Margaret P. Wright, in which defendant filed a petition. From an order directing the correction of an order ratifying a sale of mortgaged property and overruling exceptions to the ratification, plaintiffs appeal. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, SCHMUCKER and JONES, JJ.

Edwin H. Brown, Jr., and John D. Urle, for appellants. Phil. B. Hopper, for appellee.

SCHMUCKER, J. This is an appeal from an order of the circuit court for Queen Anne's county in equity, directing the correction of a clerical error in an order of ratification of a sale of mortgaged property, and overruling exceptions filed to such ratification. The mortgage in question was made on August 1, 1885, by Thomas Q. Primrose and wife to Elizabeth Curry upon a farm in Queen Anne's county. It contained a power of sale in the usual form authorizing Thomas Hill, as the mortgagee's attorney, to sell the farm at public sale in case of default in any of the conditions of the mortgage. Default having occurred under the mortgage, Hill, the attorney therein named, instituted the present proceeding on March 20, 1896, by filing his bond in the circuit court for Queen Anne's county, as required by law, and also a certified copy of the mortgage, and proceeded to sell the farm. He first sold it, after an appropriate advertisement, at public sale for \$1,470 to one James A. O. Tucker, who failed to comply with the terms of sale, whereupon he resold it at private sale for \$1,550 to Mrs. Margaret P. Wright, and reported the sale to the said circuit court. The usual order of ratification nisi of the sale was passed on April 17, 1896, and was published as required by law. No exceptions to the sale having been filed, it was finally ratified on July 23, 1896, by an order signed by Judge Jos. A. Wickes. This order is in the usual form and is written upon the sheet of paper containing the order nisi, which is attached to the report of sale, and it in terms refers to "the preceding order nisi" and the notice given thereunder and the absence of exceptions, and then finally ratifies "the sale of real estate within reported." Although this

order was filed with the other papers in this case in the circuit court for Queen Anne's county, it erroneously states on its face that it was passed by the circuit court for Kent county. Both Kent and Queen Anne's counties are in the Second judicial circuit of the state, and Judge Jos. A. Wickes was at the time of signing the order an associate judge of that circuit. The purchaser paid for the farm, and the purchase money was distributed by an auditor's account which was finally ratified on January 30, 1897. On March 3, 1905, almost 10 years after the final ratification of the sale, the appellants, who are the children of the mortgagor, Thomas Q. Primrose, filed in the case exceptions to the ratification of the sale, relying among other things upon the contention that the error already mentioned by us appearing on the face of the order finally ratifying the sale rendered that order void and of no effect, and that there had therefore never been any ratification of the sale. On March 11, 1905, Margaret P. Wright, the purchaser of the farm at the mortgage sale, filed a petition in the case, alleging that she had only a few days prior thereto discovered the misnomer of the court in the order of final ratification of the sale to her, and asserting that it was a mere clerical error, and praying for its correction. The circuit court, having heard together the appellants' exceptions and the petition for the correction of the error in the order of ratification, was of the opinion that the misnomer of the court in the order referred to was a mere clerical error and directed it to be corrected in their presence, and at the same time overruled and dismissed the exceptions as having been filed too late. From that order the present appeal was taken.

The learned judges below, in our opinion, correctly disposed of the case. The misnomer of the court in the order of final ratification was obviously a mere clerical misprision which, under the circumstances in which it occurred, did not affect the integrity of the record or impair the validity of the order. All of the other papers in the proceeding showed distinctly that it had been conducted in the circuit court for Queen Anne's county. The report of sale was correctly entitled "In the Circuit Court for Queen Anne's County" and was addressed "To the Honorable Judges of said Court." After the filing of the report the properly entitled order of ratification nisi was indorsed thereon, and below it, upon the same sheet of paper, was written the final order in question which upon its face refers to both the order nisi and report of sale and professes to finally ratify the sale to which they refer. This court has already been called upon to consider the effect of a somewhat similar misnomer inadvertently occurring in the course of legal proceedings. In *Davis v. State*, 39 Md. 355, a party was indicted for murder in the circuit court for Carroll county, and moved his case to Washington county, where it was

tried. The transcript of the record sent from the former to the latter county stated by mistake that the grand jurors who found the presentment were "good and lawful men of Baltimore county." All of the other proceedings in the case prior and subsequent were recorded as of Carroll county. After the traverser had been tried, convicted, and sentenced to be hung, his counsel filed a petition praying that the case might be removed as upon writ of error to this court, assigning as one of his grounds the defect in the record in setting forth that the grand jurors were of Baltimore, instead of Carroll, county. This court held that the error was a mere clerical misprision which did not affect the validity of the proceedings or the verity of the record. Furthermore, in the present case the circuit court had the inherent power as a court of equity to correct the mistake upon the petition of the appellee, even after the enrollment of the decree. The general rule undoubtedly is that, after the enrollment of a decree in chancery, in the absence of fraud, surprise, or irregularity in its procurement, a substantial error in it will not be corrected or a rehearing of the case granted upon a mere petition such as was filed by the appellants in this case; a bill of review or an original bill for fraud being the appropriate form of proceeding in such cases. *Pfeltz v. Pfeltz*, 1 Md. Ch. 455; *Burch v. Scott*, 1 Gill & J. 393; *Tomlinson v. McKaig*, 5 Gill, 279; *Thruston v. Devecmon*, 30 Md. 217; *Krone v. Linville*, 31 Md. 146; *Pfeaff v. Jones*, 50 Md. 269; *Rice v. Donald*, 97 Md. 396, 55 Atl. 620; equity rules 51 and 52, codified as sections 178 and 179 of article 16 of the Code of Public General Laws. It has, however, been several times held by this court, following the settled practice in that respect, that a court of equity has power, upon mere petition or motion, to correct a manifest clerical error in a decree, even after its enrollment. In *Lovejoy v. Ireland*, 19 Md. 56, which was affirmed in *Williams v. Banks*, 19 Md. 523, this court, having decided that an appeal which is reported in 17 Md. 525, should be dismissed, passed a decree for that purpose at the June term, 1860. At the June term, 1862, the appellee's solicitor, having just prior thereto discovered that the decree passed in 1860 on its face dismissed the bill, instead of dis-

missing the appeal, made a motion to have the error corrected. The court, after stating in its opinion the practice in such cases and the authority for it, granted the motion and directed the clerk to bring the original decree and the enrollment thereof and correct it in their presence.

It was contended in argument by the appellant that the fifty-first and fifty-second equity rules, which were adopted since the decision of *Lovejoy v. Ireland*, prohibit granting a rehearing of a case or correcting an error in a decree upon petition filed after the enrollment of the decree; but we have not construed those rules as intended to take away from courts of equity their inherent power to correct mistakes in their own proceedings at any time in the exercise of a sound discretion. In *Straus v. Rost*, 67 Md. 479, 10 Atl. 74, which was decided in 1887 long after the adoption of the rules in question, there was an application by petition to correct an error in an order of final ratification of an auditor's account which had been passed several years before the filing of the petition. This court affirmed an order granting the application, saying in its opinion, through the late Judge Miller: "The general rule of practice that a decree or decretal order after enrollment can be revised or annulled only by a bill of review or by an original bill for fraud is well settled. *Thruston v. Devecmon*, 30 Md. 210; *Downes v. Friel*, 57 Md. 531; *United Lines Tel. Co. v. Stevens*, 67 Md. 156, 8 Atl. 908. But there are certain well-defined exceptions to this general rule, which are equally well established, where the procedure may be by petition. These are in cases not heard on their merits and in which it is alleged that the decree was entered by mistake or surprise or under such circumstances as shall satisfy the court in the exercise of a sound discretion that the enrollment ought to be discharged and the decree set aside. *Herbert v. Rowles*, 30 Md. 278; *Bank v. Eccleston*, 48 Md. 155; *Pfeaff v. Jones*, 50 Md. 204; *Gechter v. Gechter*, 51 Md. 187; *Patterson v. Preston*, 51 Md. 190; *Downes v. Friel*, 57 Md. 533."

The circuit court had in our opinion authority to pass the order appealed from upon the petition of the appellee, and we will affirm it.

Order appealed from affirmed, with costs.

STODDARD v. CROCKER.

(Supreme Judicial Court of Maine. Nov. 16, 1905.)

1. WAREHOUSEMAN—LIEN FOR STORAGE—SALE TO ENFORCE SAME—STATUTES.

April 10, 1902, the plaintiff deposited with the defendant, a public warehouseman, a quantity of household goods. Storage being unpaid, the defendant on May 28, 1904, filed his petition in the municipal court of Portland for process of sale, under the provisions of chapter 91, §§ 48-56, Rev. St. 1883, which are the same provisions contained in chapter 93, §§ 67-75, Rev. St. 1903. The defendant obtained the order and sold the goods.

2. SAME.

Chapter 304 of the laws of 1897, re-enacted in Revision 1903, c. 33, § 10, added a new section to chapter 31, Rev. St. 1883, relating to warehousemen, by which a public warehouseman, having goods in store for one year after the expiration of the time for which the charges had been paid, was authorized to sell the goods subject to the conditions named therein.

3. SAME—VALIDITY.

Held, that this provision is the exclusive and only one under which the goods could have been legally sold, and that the proceedings under the statute (Rev. St. 1883, c. 91, §§ 48-56) were unauthorized and the sale illegal.

(Official.)

Report from Superior Court, Cumberland County, at Law.

Action by Mary Stoddard against Charles H. Crocker. Case reported, and judgment for plaintiff.

Trover for the conversion of a quantity of household goods deposited with the defendant for storage. The storage being unpaid, the defendant, by virtue of process issued by the municipal court of Portland, sold these goods for the purpose of enforcing his storage lien thereon as a warehouseman. After the evidence was closed the parties agreed that the case should be reported to the law court for determination, with the stipulation that, "If decision is for the plaintiff, damages to be assessed at \$100."

Argued before EMERY, WHITEHOUSE, STROUT, SAVAGE, POWERS, and PEA-BODY, JJ.

Dennis A. Meaher, for plaintiff. George H. Allan, for defendant.

STROUT, J. Defendant on April 10, 1902, was a public warehouseman, as defined by Rev. St. 1883, c. 31, § 8. On that day John P. Stoddard, husband of plaintiff, deposited with defendant a quantity of household goods for storage. They were deposited in the husband's name, with the consent of plaintiff; but defendant had no knowledge that plaintiff was the owner. Consequently defendant was justified in dealing with them as the property of John P. Stoddard. Plaintiff and her husband shortly thereafter left the state, and resided in Massachusetts awhile, and then went to St. Andrews, New Brunswick, and did not return to this state till the last week in September, 1904. No storage had been paid. Meantime the goods

remained in defendant's warehouse until the 8th day of August, 1904, when they were sold under process issued from the municipal court of Portland, upon petition therefor by the defendant filed May 28, 1904. This proceeding for sale was taken under the provisions of chapter 91, sections 48 and 56, Rev. St. 1883, which are the same provisions as are contained in Rev. St. 1903, c. 93, §§ 67 and 75.

As warehouseman, defendant had a lien at common law upon the goods for storage; but, in the absence of a statute, he had no right to sell them, but only a right to hold them till the charges were paid. Jones on Liens, § 976; Mulliner v. Florence, 3 Q. B. Div. 489; Jones v. Pearle, 1 Strange, 556.

The statute as to warehousemen (chapter 31, Rev. St. 1883) made no provision for sale. But chapter 91 of the same Revision did provide for a sale in a variety of cases when the claimant had a lien, and that statute was broad enough to include a warehouseman's lien upon goods in storage.

Chapter 304 of the Laws of 1897, re-enacted in Revision 1903, c. 33, § 10, added a new section to chapter 31, Rev. St. 1883, by which a public warehouseman having goods in store for one year after the expiration of the time for which the charges had been paid was authorized to sell the goods, subject to the conditions named therein.

This provision applies only to the lien of a warehouseman. Other liens fall under the general statute. Chapter 91, Rev. St. 1883; chapter 93, Rev. St. 1903.

The question arises whether this special provision for this class of liens is a substitution for the general provision as to liens and is the exclusive remedy by way of sale, or whether it is merely cumulative, affording a double remedy at the option of the warehouseman.

Under the general statute the process may be commenced at any time, when anything is due for storage. Under this it cannot be commenced till after one year of unpaid charges.

Under the general statute, if the owner is a resident of the state, the petition may be filed and notice served 14 days before court, and, if owner is unknown, or not a resident of the state, the court may order "reasonable notice of at least fourteen days" by personal service, "or by publication in a newspaper or both as the court directs"; but it is not required that the newspaper shall be published in the city or town where the warehouse is, or even in the county. In the statute of 1897 the notice, where no address of the depositor has been given, must be given by publication, 30 days before the time of sale, in a newspaper published in the city or town where the warehouse is; if no such paper, then in one published in the county. The notice must contain a

brief description of the property, with such marks thereon as may serve to identify it, if it had such marks, and give the name of the person depositing the articles and of the owner, if known, and specify the time after said 30 days and the place of sale, which must be in the city or town where the merchandise is. In that statute a demand by "registered letter directed to the person who shall have deposited such goods" was necessary, if the depositor's address had been left with the warehouseman, and the 30 days' notice was to be given after such demand; but, if the address had not been given, the demand was dispensed with. In this case Mr. Stoddard said he left his address with defendant's bookkeeper, but she emphatically denied it. No similar provision is contained in the general statute relating to liens.

It is said in *United States v. Clafin*, 97 U. S. 552, 24 L. Ed. 1082, 1085, that it is "necessary to the implication of a repeal [of a prior statute] that the objects of the two statutes are the same, in the absence of any repealing clause." Here the object of the statute of 1897 was to afford a right of sale of the warehoused goods for nonpayment of storage, but the rights of the depositor were much more carefully guarded than in the other general statute. Presumably knowing the existing statute, the Legislature deemed it wise to make this new provision applicable only to warehousemen, and must have intended that it should be the exclusive method of obtaining a sale of the goods. Otherwise there was no occasion for its passage. If the two remedies are to coexist, that provided for in the act of 1897 would probably never be used, as it requires more of the warehouseman than the general statute. It made the right of sale absolutely dependent upon the conditions named in the act, and so negated any right of sale in any other method. The two provisions are repugnant to each other.

The inference is irresistible that the Legislature intended to repeal the general and prior statute, so far as it applied to warehousemen, and substitute in its place the method prescribed in the act of 1897. *Bassett v. Carleton*, 32 Me. 553, 54 Am. Dec. 605; *Sudbury Meadows v. Middlesex Canal*, 23 Pick. 47; *Starbird v. Brown*, 84 Me. 240, 24 Atl. 824.

It follows that the proceedings in the municipal court to obtain an order of sale were unauthorized, and do not conclude the plaintiff. The sale by defendant of the goods was a conversion, even if no demand had been made by the plaintiff, as there was.

The plaintiff, as owner, may maintain the action, notwithstanding the deposit was made in her husband's name.

The parties have agreed that, if judgment is for plaintiff, the damages are to be assessed at \$100.

Judgment for plaintiff for \$100 and interest from the date of the writ.

PRATT et al. v. JOHNSON.

(Supreme Judicial Court of Maine. Nov. 14, 1905.)

SALES — ACTION FOR PRICE — DEFENSES — BREACH OF WARRANTY.

The defendant executed and delivered to the plaintiffs his two promissory notes for goods sold and delivered to him by the plaintiffs, and on the same date the plaintiffs gave the defendant a written warranty and guaranty in relation to the same goods. Held that, in an action on these notes by the plaintiffs, any breach of the warranty and guaranty by the plaintiffs to the detriment of the defendant can be shown in defense.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1215.]

(Official.)

Exceptions from Supreme Judicial Court, Piscataquis County.

Action by Walter I. Pratt and others against William A. Johnson. Judgment for plaintiffs, and defendant excepts. Exceptions sustained.

Assumpsit on two promissory notes, each of the amount of \$22.13, each dated August 7, 1903, payable in two and four months from date, respectively, signed by defendant under name of Johnson & Co., and payable to plaintiffs.

The action was heard by the presiding justice, with the right of exception. Plea, the general issue.

On the 4th day of August, 1903, the plaintiffs, by their agent, F. T. Reed, entered into a contract of sale with the defendant, by which contract the plaintiffs agreed to sell and the defendant, under the name of Johnson & Co., agreed to buy certain toilet articles, amounting to \$94.50, from which amount a freight allowance of \$6 was made. This contract was signed in duplicate, and each party retained a copy.

The contract contained the terms of sale, certain exchange agreements, a memorandum of items of the goods sold, and the price.

There was also a written warranty on each package of the goods.

On the 7th day of August, 1903, the goods were shipped by the plaintiffs to the defendant, and these notes were given by the defendant, dated as August 7, 1903.

At the trial the defendant claimed that the agreement and warranty were a part of the consideration of the notes, and that the whole transaction constituted one contract, and that there had been a breach thereof by the plaintiffs, and that the defendant was not liable on the notes and should be allowed to set up this breach in defense of this action.

The plaintiffs, on the other hand, contended that there was no breach, and that said notes and agreement were independent and collateral, and that said agreement could not be construed with said notes as a part of one and the same transaction, as claimed by the defendant, and the breach of said

agreement and warranty could not be set up in defense.

The presiding justice held that said agreement and warranty were independent and collateral to said notes, and could not be construed with said notes as a part of one and the same transaction, and upon that ground gave judgment for the plaintiffs. Thereupon the defendant excepted.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and PEABODY, JJ.

George W. Howe, for plaintiffs. M. L. Durgin, Hudson & Hudson, and Wm. A. Johnson, for defendant.

STROUT, J. August 4, 1903, plaintiffs and defendant made a written contract by which plaintiffs were to sell and defendant to purchase certain toilet articles at specified prices. August 7, 1903, the goods were shipped by plaintiffs, and the notes in suit bearing the same date were given by defendant to plaintiffs for the purchase price. On the same date plaintiffs gave defendant a written guaranty and warranty in relation to the same goods. At the trial defendant claimed a breach of the guaranty and warranty, and proposed to show it in defense, but the court ruled that the guaranty and warranty were independent and collateral to the notes and could not be construed with the notes, and upon that ground gave judgment for the plaintiffs. Defendant excepted to this ruling.

The exceptions must be sustained. The warranty and guaranty related to the goods for which the notes were given, bore the same date as the notes, and must be regarded as in part consideration for the notes. Any breach thereof by the plaintiffs to the detriment of the defendant may be shown in defense to a suit upon the notes by the original payee. This is not a case of an independent warranty as to another and different transaction, but relates to the particular goods for which the notes were given. The defendant had the option to sue upon the warranty, or, to avoid circuity of action, to set up a breach thereof in defense to this suit. He elected the latter course, and should have been allowed to make the defense. Such is the settled rule in this state. *Herbert v. Ford*, 29 Me. 546; *Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783; *American Gas & Ventilating Machine Co. v. Wood*, 90 Me. 516, 38 Atl. 548, 43 L. R. A. 449; *Hathorn v. Wheelwright*, 99 Me. 351, 59 Atl. 517.

Exceptions sustained.

CUMBERLAND & W. ELECTRIC RY. CO.
v. THOMPSON.

(Court of Appeals of Maryland. Nov. 23, 1905.)
CARRIERS—INJURIES TO PASSENGERS—STREET
RAILROADS — NEGLIGENCE — PROXIMATE
CAUSE.

Plaintiff was injured by coming in contact with a pole located near the side of a street

car on which he was riding. When the car started plaintiff was on the step of the rear platform facing the car, with his hands on the bars and his bucket on his left arm, with his hand through the bail, pushing against his brother, who was on the platform. The pole was located 136 feet from where the car stopped to permit plaintiff to board the same, and while the car was running this distance plaintiff was precluded from getting further up onto the platform by other passengers who preceded him. *Held*, that defendant's alleged failure to afford plaintiff a reasonable opportunity to get in a place of safety on the car before starting it was not the proximate cause of his injury.

Appeal from Circuit Court, Allegany County; Robert R. Henderson, Judge.

Action by Harry Thompson, by Catherine Thompson, his next friend, against the Cumberland & Westernport Electric Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEAROE, SCHMUCKER, and JONES, JJ.

Benjamin A. Richmond, for appellant. Arch. A. Young, for appellee.

JONES, J. The appellant in this case is a corporation owning and operating an electric railroad between the towns of Lonaconing and Frostburg, in Allegany county, this state, and was sued by the appellee in the court below for damages for injuries sustained by the latter as the result of an accident which occurred while the appellee was a passenger on one of the cars of the appellant corporation. The narr in the case alleges that about the 1st day of December, 1904, the appellee, "together with several other persons, was waiting to board one of the cars of the" appellant "at a point near Ocean Mines, * * * and that, when said car arrived at said point, it was stopped by the motorman, an agent" of the appellant, "for the purpose of allowing" the appellee "and the other persons there to board said car; that the motorman on said car motioned" the appellee "to cross over the track and board said car on the opposite side from which he had been standing waiting; that a number of passengers were entering said car; and that" the appellee, "while using due care and caution, and without any negligence on his part, was getting on said car, and while he was in the act of going up the steps of said car, and before he had succeeded in entering said car, the agents and servants of the" appellant, "then and there running and operating said car, negligently and wrongfully started said car before" the appellee "had reached a safe position on said car, by reason of which said negligence, and improper starting of said car by said agents and servants the" appellee "was caught between the said car and a pole which was standing dangerously near to and alongside of the track of" the appellant, and the appellee "was violently and with great force squeezed between said car and pole and thrown to the ground, by reason of

which" he sustained serious injuries which the narr describes. The issues to be tried in the case were presented by the plea of not guilty. At the trial the plaintiff (appellee here), upon the conclusion of the testimony, offered six prayers, the first and sixth of which were modified by the court and granted; the second was rejected; the third conceded; the fourth abandoned; and the fifth was granted as presented. The defendant (appellant here) offered eight prayers, the first, second, third, and fourth of which were rejected, and the others granted. The result of this action of the trial court upon the prayers was a verdict and judgment against the appellant. The questions arising upon this appeal are presented by the appellant's exception to such action.

The main contention here has been as to the propriety of the rejection of the appellant's first, second, third, and fourth prayers, the granting of any of which would have defeated a recovery by the appellee. The first of these affirmed that the plaintiff had "offered no evidence in this case legally sufficient to entitle him to recover." The others denied the right of the plaintiff to recover, because his own negligence had produced, or concurred with that of the defendant so as to directly contribute to producing, the accident which caused his injuries. A statement of the evidence, as brief as may be, upon which the parties based their respective prayers will be necessary. That, as disclosed by the record, shows that the appellee is a young man about 19 years of age and by occupation a miner. In going to and from his work he used the railroad of the appellant. On the day of the accident by which he was injured, he, in company with his brother and a boy by the name of McLuckie, both younger than himself, started for his home from his place of employment and went to the railroad to board a car. With his brother and McLuckie he waited for a car, and as one approached the conductor or motor-man motioned to them to cross to the opposite side from which they were standing. The three accordingly crossed the track in front of the approaching car, which, in the meantime, continuing to move on, they found themselves, when it stopped, near to the rear platform, and they boarded the car at that end. The car could be boarded from either end and from either side. At the same time that they started to board the car a man, a woman, and a girl, who had also been waiting for the car, were getting onto the same by way of the rear platform, but from the opposite side. In starting to board the car McLuckie, of the three boys, was ahead and got upon the platform. The appellee's brother followed next, and also reached the platform just in the doorway leading thereto. These two halted there and did not press on to get inside of the car, as they testified, in order to give the persons getting on from the opposite side opportunity to pass

into the car ahead. The appellee, following after his brother, got upon the steps leading up to the platform—he could not make it clear whether it was the first or second step, nor whether there was another step before reaching the platform besides the one upon which he was standing—and while he was standing upon the steps the car was started. It proceeded 136 feet, when the appellee came into collision with a pole erected near the railway track and was injured. It appears from appellee's testimony that at the time he and his companions got to their respective positions upon the platform and steps of the car the woman and girl had passed into the car and the man with them was going in the door from the platform. An Italian was upon the platform at or near the doorway leading from the platform into the car. The appellee's witnesses also testified the car was stopped about a half a minute; and that when it "came to this pole it could not have been going full force."

We will not stop to discuss the question whether or not it appears that the appellee was afforded reasonable opportunity to get in safety upon the car before it was started, as has been mentioned, nor to refer further to evidence bearing upon it to determine whether or not there was evidence of negligence in that regard. The starting of the car without affording this reasonable opportunity is the only negligence that is alleged or attempted to be shown or is suggested as being the cause of the accident to the appellee. In *Benedick v. Potts*, 88 Md. 52-54, 40 Atl. 1067, 41 L. R. A. 478, this court, through the present chief justice said: "It is a perfectly well-settled principle that to entitle a plaintiff to recover in an action of this kind he must show not only that he has sustained an injury, but that the defendant has been guilty of some negligence which produced that particular injury. The negligence alleged and the injury sued for must bear the relation of cause and effect. The concurrence of both and nexus between them must exist to constitute a cause of action." With the principle here referred to in view, the present inquiry may be resolved into this, if the appellant's servants started the car upon the occasion here in question before the appellee had a reasonable opportunity to reach a safer place thereon than the one he occupied at the time of such starting, and in so doing were negligent, was that the negligence that produced the accident which caused the appellee's injuries? It is clear that the evidence adduced by the appellee affords no direct proof that the accident in question resulted from such negligence, and it would seem to be equally clear that by no rational inference therefrom can such accident be attributed thereto. The appellee's proof shows that, by measurement, the pole that he collided with was, when the car was passing it, between seven and eight inches away from the side of the car. The only description given of the manner of the ac-

cident appears in the testimony of the appellee; and what he said was this, after having testified as to the boarding of the car by his brother and McLuckie: "Then they got on, I just reached up and was taking hold and that car was started, and I could not get in for my brother and the others in front of me. McLuckie was in front. I was waiting on the crowd to push in. I had a bucket on my left arm. The bucket struck first, my head next, and I don't remember anything more." Then upon cross-examination he said: "The pole hit my body. I was squeezed between the car." He was asked on cross-examination if there was "not plenty of chance, standing there on that step, to stand in so that you would not hit anything," and answered, "I was in far enough, but my bucket struck and dragged me back to the pole. My bucket struck the pole." It was not so testified in terms, but it appears from the evidence of the appellee, that when he got upon the step of the car he was facing towards the car, with his back to the side of the track upon which the pole stood, and with his right side towards or in the direction of the pole, with his bucket on his left arm. The evidence showed that he was struck by the pole on the back of the head to the left. As the doctor, who attended him, described it: "Posterior aspect, left-hand side." As to his situation when the car started the appellee testified: "Q. You got upon the step? A. Yes, sir. Q. You had a bucket in your hand? A. On my arm. Q. You had your hand through? A. Yes. Q. You were on the step? A. With one foot. I was trying to get to the next step above." He further said on cross-examination that he had his "hands on the bars"; that he was pushing against his brother trying to get in the car. When examined in chief he said: "I tried to get up on the car fully. When I had the hold I tried to push in. The bucket being on my left arm it pulled me back." It appears, then, from the appellee's own testimony that when the car started he was on the step of the rear platform of the car, facing towards the car, with his hands on the bars, his bucket on his left arm with his hand through, pushing against his brother who was upon the platform. By no possibility in that situation could either his body or his bucket have come in contact, as the car proceeded, with a pole over seven inches away from the side of the car. To bring him into collision with the pole something must have occurred to disturb or change the situation between the time the car started and the contact with the pole. There is in this proof, as has been said, no direct evidence that the position of the appellee, as he described it, was changed or affected by the starting of the car; and the testimony alluded to, unqualified as it is, affords no rational inference that the starting of the car changed his position from one of safety upon the step to one which would bring him into the collision that injured him. The evidence also shows there

was no other act on the part of the servants of the appellant, as the car traversed the 136 feet to the place of the pole, that could have such effect. We think the appellant's first prayer should have been granted. This conclusion makes it unnecessary to discuss any others that were the subject of the appellant's exception. Allusion has been made to the fact that one of the appellee's prayers had been conceded. This conceded prayer related only to the burden of proof upon the plaintiff, is not inconsistent with, and does not embarrass, the ruling here upon the first prayer of the appellant.

It follows from what has been said that the judgment below must be reversed.

Judgment reversed, with costs to the appellant, without awarding a new trial.

PHILADELPHIA, B. & W. R. CO. v. ALLEN.

(Court of Appeals of Maryland. Nov. 16, 1905.)

1. CARRIERS—CARRIAGE OF PASSENGERS—DEGREE OF CARE REQUIRED BY CARRIER.

The degree of care a carrier owes to its passengers is the exercise of the utmost care which human foresight can exercise, though it is not an insurer of the safety of the passengers. [Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1087-1106.]

2. SAME—BREACH OF CARRIER'S DUTY—CAUSE OF ACTION.

The breach of duty by a carrier to its passengers constitutes the cause of action for an injury to a passenger resulting therefrom, and the facts evidencing the breach are not the breach, but merely the facts which prove that a breach has occurred.

3. PLEADING—ALLEGATION OF FACTS—SUFFICIENCY.

A declaration which sets forth the facts constituting the cause of action, without detailing the circumstances constituting the evidence of them, is sufficient.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 31.]

4. CARRIERS—INJURY TO PASSENGER—DECLARATION.

A declaration, in an action against a carrier for injuries to a passenger, which alleges that the carrier "negligently and unskillfully conducted itself in carrying plaintiff and in managing the said railroad and the car, and train in which plaintiff was a passenger," and that he was thereby injured, sufficiently specifies the particulars of the carrier's negligence, at common law and under Code Pub. Gen. Laws 1904, art. 75, § 24, subsec. 36, giving a form for a declaration in an action for injuries received by a passenger, and declaring that the same may be changed to adapt it to other cases by "changing the allegation as to the cause of the accident."

Appeal from Circuit Court, Talbot County: James A. Pearce and Wm. R. Martin, Judges.

Action by Robert J. Allen against the Philadelphia, Baltimore & Washington Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The following is the declaration in the action:

"State of Maryland, Cecil County—to wit:

Robert J. Allen, by his attorney, Albert Constable, sues the Philadelphia, Baltimore & Washington Railroad Company, for that the defendant is a corporation possessing and operating a railroad from between Bridgeville and Seaford, and was a carrier of passengers from said Bridgeville to said Seaford for reward to the defendant; and the plaintiff became and was received by the defendant as a passenger, to be by it safely and securely carried upon said railroad on a journey from said Bridgeville to said Seaford, for reward to the defendant. Yet the defendant did not safely and securely carry the plaintiff upon said railroad on said journey, and so negligently and unskillfully conducted itself in carrying the plaintiff upon said railroad on said journey, and in managing the said railroad and the car and train in which the plaintiff was a passenger upon the said railroad on the said journey as aforesaid, that the plaintiff, while in the exercise of due care upon his part, was thereby thrown down and wounded and injured, and incurred loss of time and expense in and about the care of his wounds and injuries. And the plaintiff claims twenty thousand dollars. *Albert Constable, Plaintiff's Attorney.*"

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, SCHMUCKER, and JONES, JJ.

L. Marshall Haines, for appellant. Albert Constable, Jr., for appellee.

McSHERRY, C. J. The only question which is before the court for decision on this record arises on the plaintiff's demurrer to the defendant's third plea. The plea is undoubtedly bad and the demurrer to it was properly sustained; but the contention of the defendant, the appellant here, is that as the demurrer mounted up to the first error in the pleadings, and as the declaration is insufficient, because indefinite and vague, the trial court should have looked back to the declaration and should have held it bad, instead of striking down the third plea. So the ultimate and single inquiry presented is this: Is the declaration sufficient in law?

The declaration is brief, and will be found set forth above. The suit is between a passenger and a carrier to recover damages for a personal injury sustained by the former in consequence of the alleged negligence of the latter whilst transporting the plaintiff over its railroad. The objection to the declaration is that it fails to specify the particulars wherein the negligence of the railroad company consisted, and was therefore too uncertain to apprise the defendant of the precise act of negligence upon which the plaintiff relied to sustain a recovery. This objection is more of an academic than a practical one in this case; because, had the declaration been so vague as not to inform the defendant of the facts constituting the cause of action, the defendant would have

surely demurred directly to it, instead of interposing several pleas, and would not have gone into a trial lasting five days before a jury on the issues of fact joined on those pleas, and would not have delayed until reaching this court before questioning the sufficiency of the narr, on the ground of the insufficiency of its averments. It seems a little singular that the company, after contesting a case on its merits through all of its stages, and until the rendition of the verdict against it and the entry of the judgment thereon, should fail to discover until the trial had ended and the record was in this court what neglect of duty it was charged with. There is no pretense that by reason of the vagueness of the narr's allegations the company was deprived of an opportunity to present any defense it might have had; and it is not even suggested that, if a new trial were awarded and the narr were amended so as to set forth more specifically the cause of the injury, the railroad company would be any more definitely apprised of the facts relied on to sustain a recovery than it was when it filed its pleas, or that it would be, in consequence of such an amendment, better prepared to shape its defense. The question before us is, therefore, not a practical one; but, as it is raised, it must be disposed of.

As we have said, this is a case between a passenger and a carrier of passengers to recover damages for an injury sustained by the passenger in consequence of the negligence of the carrier during the period the above-named contractual relation existed between them. The degree of care required by such a carrier and the precise duty which it owes to such a passenger is clearly defined in the law. The carrier owes to the passenger the exercise of the utmost care and diligence which human foresight can use, though not an insurer of the safety of the passenger. *Balto. City Pas. Ry. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161. A breach of that duty is negligence, and, if any injury results therefrom and is the consequence thereof, an action will lie at the suit of the person thus injured. It is the breach of the duty which is owed that constitutes the cause of action. The particular circumstances which evidence that breach are not the breach itself, but are merely the facts which prove that a breach of the duty that was owed had occurred. Now, in the structure of pleadings, even in their strictest forms, before the introduction of modern simplified systems, it was a most important principle of the law of pleading that although any particular fact might be the gist of a party's case, and though the statement of it was indispensable, still in alleging the fact it was unnecessary to state such circumstances as merely tended to prove the truth of the fact alleged. The dry allegation of the fact, without detailing a variety of minute circumstances which constituted the evidence of it, was sufficient. 1 Chitty's Pl. (8th Am. Ed.)

mar. page 225. And this doctrine obtains to-day when much of the verbiage and nearly all of the technical precision once required in pleadings have been dropped and abandoned. As only the facts constituting the cause of action need be stated, it is a cardinal rule that they must be averred or set forth with certainty, by which term is signified a clear and distinct statement of them, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment. 1 Chitty's Pl. (8th Am. Ed.) mar. page 233.

Let us now see whether the declaration we are dealing with complies with these requisites. It states that the plaintiff was a passenger between certain named points on the railroad of the defendant company; that the company undertook to carry the plaintiff safely and securely from one of those points to the other; that the company "so negligently and unskillfully conducted itself in carrying the plaintiff and in managing the said railroad and the car and train in which the plaintiff was a passenger * * * that the plaintiff * * * was thereby thrown down and wounded and injured," etc. Here, then, is a distinct statement of the duty owed by the carrier to the passenger, and a like averment of the breach of that duty in the negligent and unskillful management of the railroad, the car, and the train, whereby the plaintiff was thrown down and injured. The dry allegation of fact is that the company negligently managed its railroad and train and car; but the evidentiary facts proving or tending to prove that negligence are not set forth, and there was no occasion to aver them. The asserted negligence, and not the facts which proved the negligence, constituted the cause of action. Negligence may be made manifest by a variety of circumstances; but, whatever the evidentiary circumstances may be, the thing they prove, if they have probative value at all, is negligence, and negligence in respect of some designated act of commission or omission is the thing to be proved, and therefore the thing to be alleged in the pleading. In this instance it was alleged to be the negligence of the company in managing its railroad and the car and train in which the plaintiff was a passenger, and that this averment sufficiently apprised the defendant of the charge it was required to answer is apparent from the circumstances that it entered the plea of not guilty and proceeded to trial thereon, instead of challenging the declaration by a demurrer on the ground of vagueness and uncertainty. An averment that the cause of the injury was the negligence of the company in managing its railroad and the car and train in which the plaintiff was a passenger is a definite statement of the fact upon which the plaintiff relied to sustain a recovery, and did not need to be amplified by a recital of other facts,

which, if established, merely proved that there had been negligence in the management of the railroad and train and car in which the plaintiff was a passenger.

But, apart from the foregoing considerations, there are precedents for the form of the declaration used in this case. In Bullen & Leake, Precedents of Pleading, 284, a very similar declaration will be found. The averments there made are that the carriers "so negligently and unskillfully conducted themselves in carrying the plaintiff upon said railway on the journey aforesaid, and in managing the said railway and the carriage and train in which the plaintiff was a passenger upon the said railway, * * * that the plaintiff was thereby wounded and injured," etc. That form is supported by, or at least a similar one was followed in, the case of Curtis v. Drinkwater, 2 B. & Ad. 169; and the case of Brien v. Bennett, 8 C. & P. 724. See, also, substantially the same form in 2 Chitty's Pl. (8th Am. Ed.) mar. page 650. In article 75, § 24, subsec. 36, Code Pub. Gen. Laws 1904, the form given for a case like this contains the averment that "by reason of the insufficiency of an axle of the car in which he was riding the plaintiff was hurt," and the same subsection declares: "This form may be varied so as to adapt it to many cases, by merely changing the allegation as to the cause of the accident." The declaration in the case at bar conforms to the requirements of the Code, since it distinctly alleges that "the cause of the accident" was the defendant's negligence "in managing its railroad, and the car and train in which the plaintiff was a passenger."

The court below committed no error in not declaring the declaration bad, and the judgment appealed against will be affirmed. It is accordingly so ordered.

Judgment affirmed, with costs above and below.

GALLAGHER v. MARTIN.

(Court of Appeals of Maryland. Nov. 13, 1905.)

1. WILLS—LEGACIES—ADEMPTION.

Where testatrix, after bequeathing a legacy, during her lifetime paid the amount thereof to the legatee in full satisfaction of the legacy, the legacy was thereby adeemed.

2. EXECUTORS—ACCOUNTS—VACATION.

Where, notwithstanding the ademption of a legacy by payment to the legatee during the testatrix's lifetime, the register stated and passed an account ex parte for the executor in the orphans' court in such form as to show that the legacy was distributable to the legatee, it was the duty of such court, on the executor's application, to set aside the account after proof of such facts; and an order dismissing the petition, after answer in denial by the legatee, without hearing or submission on the pleadings, was error.

3. SAME—ORPHANS' COURT—JURISDICTION.

Under Code Pub. Gen. Laws, art. 93, § 234, providing that the probate court shall have full power to settle the accounts of executors and

administrators, superintend the distribution of estates, and secure the rights of orphans and legatees, such court has power to hear and determine the question of the ademption of a legacy because of the alleged payment thereof by the testatrix in her lifetime.

Appeal from Orphans' Court, Allegany County; Millard F. Davis and Wm. A. Bra-shears, Judges.

Suit by Thomas E. Gallagher, as executor of the last will of Mary Navin, deceased, to set aside an account stated by him as executor and a distribution thereunder, in which Bridget Martin filed an answer. From an order dismissing the petition, the executor appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Taylor & Morrison, for appellant. Wm. H. Cole and J. W. S. Cochrane, for appellee.

SCHMUCKER, J. This is an appeal from an order of the orphans' court of Allegany county passed in a proceeding founded on a petition filed by the appellant, Thomas E. Gallagher, as executor of the last will of Mary Navin, deceased. The substantial facts alleged in the petition are as follows: Mary Navin, after having made her will, by which she gave a legacy of \$200 to the appellee, Bridget Martin, had, during her lifetime, on May 1, 1903, through the hands of the petitioner as her agent, paid to the said Bridget Martin \$200 in cash in full satisfaction, extinguishment, and discharge of the legacy, and such payment was at that time understood by all parties to the transaction to have been made for that purpose. Shortly thereafter Mary Navin died, and her will was duly admitted to probate, and letters testamentary on her estate issued to the appellant. In July, 1904, the appellant went to the register of wills of Allegany county to have a testamentary account stated. He mentioned to the register the fact of the payment of the \$200 to Bridget Martin during the lifetime of the testatrix, and the circumstances under which it was made. The register thereupon proceeded to state the account in such form as to show a distribution to be made by the appellant, as executor, to Bridget Martin, of the \$200 legacy which had been paid to her in the lifetime of the testatrix in the manner already mentioned. The appellant, who is a clergyman and unfamiliar with the steps required by the law to be taken in such cases, supposed the account which had been thus stated for him by the register to be correct, and passed it ex parte in the orphans' court. After he had passed the account Bridget Martin sued him in the circuit court for Allegany county to recover the legacy of \$200 as appearing to be due her from him as executor upon the face of the account. The prayer to the petition was that the account be set aside and a distribution of the personal estate of the testatrix in his

hands be made, under the supervision of the orphans' court, on a day to be by it named after due notice to all parties interested, in conformity with the provisions of section 143 (now section 142) of article 93 of the Code of Public General Laws. On the filing of this petition, the orphans' court passed an order, as prayed for, setting aside the account theretofore passed, and appointing a day for the distribution of the estate under the court's direction. Bridget Martin then filed an answer to the appellant's petition, admitting the making of the legacy to her by the will of Mary Navin, but denying, somewhat evasively, the alleged payment to her of \$200 in satisfaction thereof in the lifetime of the testatrix. The answer also admitted the institution of the suit in the circuit court against the appellant, as executor, for the recovery of the legacy. The orphans' court thereupon, without hearing any testimony upon the issue made by the petition and answer, and without the case having been submitted to it, so far as the record shows, by the parties upon the pleadings, passed another order, revoking its former order, by which the account had been set aside, and dismissing the executor's petition. From this last order the present appeal was taken.

It is clear that the order appealed from was improperly passed. If the allegations of the petition filed by the appellant as executor were true, they presented a plain case of the ademption of the legacy made to Bridget Martin, and it was error on the part of the orphans' court to permit the passing of the account by which the legacy was treated as distributable to her by the executor. Had those allegations been substantiated by competent testimony to the satisfaction of the orphans' court, it would have been its duty to set aside the account and direct the distribution of the estate, as it did by the previous order, passed on the executor's petition. The court, therefore, before passing any such order as the one appealed from, should have set the case for hearing, and afforded the appellant an opportunity to offer evidence in support of the allegations of his petition.

It was within the power of the orphans' court to entertain and determine the question of the ademption of this legacy in the manner set forth in the petition. In *Pole v. Simmons*, 45 Md. 249, we held that the orphans' court had power to determine, on a petition filed for that purpose, whether certain sums of money, paid by a testatrix during her lifetime to legatees who were directed by her will to be charged with interest on any advancements made by her to them, were intended to be advancements or absolute gifts; and that the court, having jurisdiction of the question, had the right to hear and receive evidence in relation to it. In that case we said, speaking of the power conferred on the orphans' court by section 230 (now section 234) of article 93 of the Code of Pub-

the General Laws: "We think it clear the orphans' court had jurisdiction of the matter presented by the petition, for it would be impossible to superintend distribution of the estate without the authority to determine what was to be distributed, and this necessarily involves the questions as to what are assets, and where there is a will, and who are the legatees, and what is given them by the will." Similar views as to the extent of the powers of that court in reference to the accounts of executors and the distribution of estates of deceased persons have been expressed by us in *Alexander v. Leakin*, 72 Md. 202, 19 Atl. 532; *Macgill v. Hyatt*, 80 Md. 256, 30 Atl. 710; *Hoffman v. Hoffman*, 88 Md. 60, 40 Atl. 712.

The order appealed from must therefore be reversed, and the case remanded for further proceedings in accordance with this opinion.

Order reversed, with costs, and case remanded for further proceedings in accordance with this opinion.

KENNEWEG v. ALLEGANY COUNTY COM'RS.

(Court of Appeals of Maryland. Nov. 16, 1905.)

1. CONSTITUTIONAL LAW—LEGISLATIVE POWER—SCOPE.

The General Assembly, having all legislative power, except as limited by the federal and state Constitutions, has power to enact a primary election law, unless deprived thereof by the Constitution.

2. ELECTIONS—PRIMARY ELECTIONS—STATUTES—VALIDITY.

Const. art. 3, § 42, providing that the General Assembly shall pass laws for the preservation of the purity of elections, does not confer legislative power, but is a mandate to execute a power existing independently thereof, and does not deprive the Legislature of the power to pass a primary election law.

3. SAME.

Acts 1904, p. 870, c. 508, providing for the holding of primary elections in a certain county for the nomination of candidates for public office, is not, by reason of section 112 (page 875), requiring candidates for nomination to pay a fee to be used exclusively in defraying the expenses of holding the election, void because undertaking to add a property qualification for holding public office not contained in the Constitution; the imposition of the fee not being the imposition of a property qualification on the candidates.

4. CONSTITUTIONAL LAW—POWERS OF LEGISLATURE.

The law is not void, as contrary to public policy, because public policy, without having its foundation in the Constitution, cannot restrain the legislative authority of the General Assembly.

5. SAME—EQUAL PROTECTION OF LAWS.

The law does not, by reason of section 105, which provides that the candidates nominated by the two political parties having the highest votes cast for the highest state office at the last general election shall be nominated by direct vote, and the party casting the highest number of votes shall hold its primary on the first Saturday of September, and the party casting the next highest number of votes shall hold its primary on the first day of registration prescribed by law, deny to one political party the

equal protection of the law, in violation of the fourteenth amendment to the federal Constitution, because a political party has no inherent right to insist that all parties shall hold their primaries on the same day, and both parties are treated alike.

6. ELECTIONS—CONSTITUTIONAL PROVISIONS.

The law is not invalid by reason of section 111 (page 875), whereby the nomination of the candidates of the minority party may, by a dishonest administration of the law, be postponed until a day or two before election, and the candidates thereby excluded from the official ballot.

7. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS.

The General Assembly has the power to pass a law regulating the primaries of the numerically stronger parties only, and excluding from its provisions the smaller parties.

8. COUNTIES—EXPENSES—PRIMARY ELECTION—LEVY OF TAX BY COUNTY COMMISSIONERS.

Acts 1904, p. 870, c. 508, § 105, requires the board of election supervisors to provide, for the primary elections provided for in the act, the voting booths, ballot boxes, stationery, etc., as used for general elections. Section 109, p. 872, declares that the ballot boxes used at the primaries shall be provided by the board of election supervisors and shall be delivered to the primary election board at the same time as the other paraphernalia provided for. Code Pub. Gen. Laws 1904, art. 83, §§ 2, 5, provide that the necessary expenses incurred by the supervisors shall be paid by the county commissioners. *Held*, that the county commissioners must levy a tax to pay the indebtedness incurred by the supervisors in holding primaries.

9. EQUITY—JURISDICTION.

Under Code Pub. Gen. Laws 1904, art. 16, § 102, providing that courts of equity shall not give relief in any cause wherein the original debt does not amount to \$20, a court of equity has no jurisdiction of a suit praying for an injunction to restrain the collection of a tax amounting to about 66 cents.

10. INJUNCTION—GROUNDS OF RELIEF—INJURY ALREADY SUSTAINED.

Equity will not grant an injunction to restrain the levy of a tax to defray the expenses incurred in holding a primary election, under Acts 1904, p. 870, c. 508, where, before the bill was filed, the levy had been made and probably most of the sum levied collected, and the primaries and the general election, at which the candidates selected at the primaries had been voted for, had been held.

Appeal from Circuit Court, Allegany County, in Equity; A. Hunter Boyd and Robert R. Henderson, Judges.

Suit by Christian F. Kenneweg against the county commissioners of Allegany county. From a decree dismissing the bill, complainant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Irvine R. Dickey and W. C. Devecmon, for appellant. A. A. Doub and Benj. A. Richmond, for appellees.

McSHERRY, C. J. The bill of complaint which inaugurated this proceeding was filed by the appellant against the appellees on the equity side of the circuit court for Allegany county on the 28th day of April, 1905. It was demurred to. The demurrer was sustained. The bill was dismissed, and from that decretal order the pending appeal was

taken. The appellant is a taxpayer in, and a resident of, Allegany county, and pays taxes on property owned by him and assessed to the value of \$6,000. He complains that the appellees, the county commissioners, have levied upon the taxable property in said county the sum of \$2,000, to be included in the general levy of said county for the year 1905-1906 for the purpose of defraying the expenses of holding primary elections during the month of September, 1905, for the nomination of state and county officers to be voted for at the general election to be held in November, following; that the levy of the above-named sum was made under a pretended authority supposed to be contained in chapter 508, p. 870, of the Acts of the General Assembly of 1904; that the act just indicated does not authorize the county commissioners to make the levy in question; and that the act is null, void, and unconstitutional. The bill prays that an injunction may be issued restraining the county commissioners "from levying or causing to be collected from the taxpayers of the county the said sum of \$2,000, or any part thereof, for the illegal purpose aforesaid." The appellant does not sue in behalf of himself and other taxpayers who may be similarly situated, and who may come in and make themselves parties to the cause, but he sues alone, in his own name and his own behalf. Laying aside for the moment the question as to whether he has shown on the face of the bill such a pecuniary interest as is required to give a court of equity jurisdiction in the premises, we turn to the main and important inquiry involving the constitutionality of the statute. And in doing so we pass by, for the present, the subsidiary objection as to the lack of authority on the part of the commissioners to make the levy, because a few references later on to the provisions of the act and of the Code of Public General Laws will refute this objection completely.

Had the General Assembly the power to adopt the act of 1904 (Acts 1904, p. 870, c. 508)? In a word is the act in conflict with any provision of the state or the federal Constitutions? The act is an act amendatory of the Public Local Laws of Allegany county, and relates exclusively to the holding of primary elections in that county by the two leading political parties for the selection of candidates to be voted for at ensuing state and congressional elections. It places safeguards around, and gives legal sanction to, these primary contests. It prescribes how nominations are to be made by popular vote; how and upon what conditions candidates may enter those contests, and in what manner and at what times the votes cast thereat shall be counted, and how the results shall be ascertained and certified. Elaborate details—not always consistent or harmonious, perhaps—are prescribed with reference to the conduct of the

primaries; and the duties imposed upon the county committees of the two political parties, as well as the duties assigned to the election supervisors, are set forth with much prolixity, though not always with great clearness. To state more at large the numerous provisions of the statute, would necessitate a transcription of all its terms. Enough has been said to indicate the character, the scope, and the object, but not the minute provisions of, this legislation; and we now repeat the question, had the General Assembly the power to adopt it? The General Assembly possesses all legislative power and authority, except in such instances and to such extent as the Constitutions of the state and of the United States have imposed limitations and restraints thereon. In this respect the Legislature differs from the Congress of the United States, which has, and can exercise, only such power as the federal Constitution expressly or by necessary implication confers upon it. In the General Assembly plenary power to legislate is vested, unless restrained by the Constitution. In the Congress the power to legislate is not vested, unless confided by the federal Constitution. In the state Constitution we look, not for the power of the General Assembly to adopt an enactment, but for a prohibition against its adoption. In the federal Constitution we look, not for the prohibition, but for the delegated power to enact a measure. The General Assembly being, then, the depository of all legislative power, except when restrained by the organic law, it follows that it is clothed with full power to enact a primary election law. If there is no provision in the Constitution depriving it of that authority. There is no such provision to be found in the Constitution of the state. It is true that section 42 of article 3 of the Constitution provides: "The General Assembly shall pass laws for the preservation of the purity of elections"—but the power to enact a primary election law lies back of and beyond this provision, and is not derived from it at all. The power to legislate in regard to elections—primary or general—if unrestrained by the Constitution itself, is inherent in the General Assembly, and the provision just cited, instead of conferring the power, is a mandate to execute a power implicitly assumed to exist independently of the mandate. "The General Assembly shall pass laws," is a direction to bring into activity an antecedent and independent authority.

The power, then, to enact a primary election law being inherent in the Legislature, it only remains to inquire whether in the execution of that power the General Assembly has, by the act in question, infringed upon or broken through some inhibitory provision of the organic law. No section or clause of the act has been pointed out as in conflict with any particular or designated prohibition; and a careful reading of the

statute has not disclosed to us the existence of such antagonism. Whilst this is true, it has been contended that the act is void because it undertakes to add a property qualification for holding public office which is not contained in the Constitution; and this contention is based upon section 112 of the act. By the section just named it is provided that each person who desires to become a candidate for nomination shall pay to the chairman of the committee of the party to which he belongs a certain fee, the amount of which is regulated for the different offices by the section in question, which fees are to be used exclusively as a fund to defray the expenses of announcing candidates, printing ballots, furnishing blanks, and other necessary expenses for holding and conducting the primary election, and for paying such expenses of the return judges as may be determined by the convention of return judges. Now, the exaction of the fee is by no means the imposition of a property qualification on the candidates. Primary contests necessarily require the expenditure of money for the purposes just indicated, and the money must be procured from some source. The requirement that the individuals who, through the primaries, seek to secure nomination, shall pay the expenses which the governing body of their party are compelled to incur for their benefit and in their behalf, is neither unreasonable nor unjust, and most certainly is not the superaddition of a property qualification for holding the offices to which they aspire.

The appellant insists that the act is against public policy and contrary to the fundamental principles of justice; but if this contention were conceded—and it is not—the ground of assault would be shifted to an entirely different position from the one of its alleged unconstitutionality. What public policy is invaded by it? No exact definition of public policy has ever been given or can be found. In *Richardson v. Mellish*, 2 Bing. 229, Mr. Justice Burroughs pointedly observed: "I, for one, protest against arguing too strongly upon public policy. It is a very unruly horse, and, when once you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when all other points fail." We do not deem it necessary to go into a consideration of the several particulars in respect of which it is asserted public policy is violated by the act, because, first, we are at a loss to know what public policy is invaded, and, secondly, because, public policy, of itself and without having its foundation in some constitutional provision, can neither circumscribe nor restrain the legislative authority of the General Assembly. We cannot undertake to declare the statute unconstitutional merely because it is assumed to be at variance with some undefined and undetermined public policy, which at best is but a shifting and variable notion appealed to only when no

other argument is available, and which, if relied on today, may be utterly repudiated tomorrow. The great case of *Regents of the University of Maryland v. Williams*, 9 Gill & J. 365, 31 Am. Dec. 72, is relied on to support the contention that the act of 1904 (Acts 1904, p. 870, c. 508) is contrary to the fundamental principles of right and justice, and is therefore void; but the case is not applicable. The question there involved and discussed and actually decided was whether the act of 1825 (Acts 1825, p. 183, c. 190) was void because it impaired the obligation of the contract created by the prior act of 1812 (Acts 1812, p. 173, c. 159), which incorporated the Regents of the University of Maryland. The conclusion reached by this court is thus stated in the elaborate judgment delivered by the late Chief Judge Buchanan: "This brief view of the character and legal effect of the act incorporating the regents of the University results in the opinion that it is a contract protected by the Constitution of the United States, the obligation of which cannot be impaired by an act of the Legislature of the state without the assent of the corporation, and leads to the conclusion, consequent upon that opinion, that the act of 1825 (Acts 1825, p. 183, c. 190) is repugnant to that instrument and therefore void." After pointing out the particulars wherein the repugnancy consisted, the court proceeded to say: "But the objection to the validity of the act of 1825 does not rest alone for support upon the construction of the Constitution of the United States. Independent of that instrument and of any express restriction in the Constitution in the state, there is a fundamental principle of right and justice, inherent in the nature and spirit of the social compact (in this country at least), the character and genius of our government, the causes from which they spring, and the purposes for which they were established, that rises above and restrains and sets bounds to the power of legislation, which the Legislature cannot pass without exceeding its rightful authority. It is that principle which protects the life, liberty, and property of the citizen from violation in the unjust exercise of legislative power." Though this same doctrine has been alluded to in later cases (*Baughner v. Nelson*, 9 Gill, 307, 52 Am. Dec. 694; *Harrison v. State*, 22 Md. 494, 85 Am. Dec. 658; *Mayor, etc., Hagerstown v. Sehner*, 37 Md. 191; *Cahen v. Jarrett*, 42 Md. 575; *Trustees, etc., v. Manning*, 72 Md. 122, 19 Atl. 599), it is to be noted that it was not necessary to the decision of the *Regents Case*, which turned upon the "contract" clause of the federal Constitution; and that no statute, as far as we are aware, has ever been stricken down by this court solely and exclusively because it exceeded the bounds set to legislative power by that fundamental principle of right and justice to which Chief Justice Buchanan referred. It was held, in *Mayor, etc., of Baltimore v. Board of Police, etc.*, 15 Md. 469, that this principle, with the limitation "that it was designed to protect the life, liberty,

and property of the citizen from violation in the unjust exercise of legislative power, * * * asserts a very correct doctrine." There is no occasion to affirm or deny the principle, so far as this case is concerned, because nothing in the act of 1904 (Acts 1904, p. 870, c. 508) affects, in the most remote way, the life, liberty, or property of the citizen.

This brings us to the objection that the statute is void because in conflict with the fourteenth amendment of the federal Constitution, in this: That it denies to one political party the equal protection of the law. The particulars in which it is alleged this denial of equal protection or this unlawful discrimination exists will now be considered. By section 105 of the act it is provided that "all candidates for election to office nominated by the two parties having the highest number of votes cast for the highest state office at the last general election * * * shall be nominated by the direct vote of the members of said party * * * and the party casting the highest number of votes for the highest state officer at the last general election shall hold its primary election on the first Saturday of September, and the party casting the next highest number of votes shall hold its primary election on the first day of registration prescribed by law." It is because the act fixes a different day for each of the two leading parties to hold its primaries, and because the act applies only to the two parties which cast at the previous election the highest number of votes, and does not include other political parties, that it is supposed to be in conflict with the fourteenth amendment. In neither of these respects is there intrinsically any denial of the equal protection of the law. State legislation is not obnoxious to this provision, if all persons subject to it are treated alike, under similar circumstances and conditions, in respect, both to the privileges conferred and the liabilities imposed. *Mo. Pa. R. Co. v. Mackey*, 127 U. S. 209, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. There is no such thing as an inherent right in any political party to insist that all political parties shall hold their primaries on one and the same day; and there can therefore be no denial of an equal protection of the law in the mere fact that different days have been prescribed by the statute for the respective primaries. But it is contended that the denial of equal protection consists in according to one particular party a longer campaign for its candidates than to the other by reason of the primaries of the former being fixed for an earlier day than the primaries of the latter. Both political parties are treated precisely alike under similar circumstances. The right to hold a primary first is not given to either party by name, but to the one which had cast the highest vote for the highest state officer at the preceding election; and no court has authority to assume that the same political party will at every election cast the high-

est vote for the highest state officer, and will therefore always be entitled to hold the first primary. The party which at the last election did cast the highest vote may at the next election cast fewer votes than the other party, in which event the latter party would at the ensuing primaries be entitled to the earlier date. It is argued, however, that by reason of other provisions in section 111 the nomination of the ticket of the minority party may be postponed until a day or two before the election, whereby it will be excluded from the official ballot altogether, and that in consequence there is a glaring discrimination against the candidates of that party. This argument proceeds upon the assumption that either fraudulent or crooked devices will be resorted to for the purpose of accomplishing that result, because it is not pretended that an honest administration of the law can produce such an effect. It is needless to say that an objection founded on an hypothesis like this cannot prevail as a constitutional infirmity of the statute. The circumstance that the act applies only to two of the political parties does not affect its validity. The General Assembly has the power to pass an act regulating the primaries of one party alone, if it sees fit; and if, for reasons satisfactory to the legislative branch of the government, it is desirable that only the numerically stronger parties should be brought under the provisions of a primary election law which has to do merely with the selection of candidates to be voted for, and is in no way concerned with the elective franchise, it is not the province of the courts to declare the measure invalid simply because other political parties polling a few scattering votes are not included within the enactment.

We now come to the question as to whether the act empowers the county commissioners to make the levy which is sought to be enjoined. The expenses which must be defrayed out of the funds contributed by the candidates in accordance with section 112 of the act have already been mentioned, but there are other items of cost incident to the holding of the primaries which must be incurred by the election supervisors of the county in providing, under section 105, "the voting booths, ballot boxes, stationary, and such other paraphernalia as is used for general elections," and in delivering and setting "up the same at said places of registration ready for use." Section 109 declares that "the ballot boxes used at said primary election shall be provided by the board of election supervisors of said county, and shall be delivered to said primary election board at the same time as other paraphernalia hereinbefore provided for." By sections 2, 5, art. 33, Code Pub. Gen. Laws 1904, the necessary expenses incurred by the supervisors in performing the duties imposed by law are required to be paid by the county commissioners. The act now assailed imposes upon the supervisors the duties just

indicated, and the performance of those duties involves the expenditure of money. It therefore follows, from the provisions of the Code, that the county commissioners are not only authorized, but required, to make a levy to pay the indebtedness contracted by the supervisors in discharging the duties prescribed by the act of 1904.

Has the appellant shown on the face of his bill of complaint such a pecuniary interest in the subject-matter of this contestation as to give a court of equity jurisdiction? He alleges that he is assessed, as a taxpayer, with property valued at \$6,000. The total sum levied under the act of 1904 is \$2,000. The taxable basis of Allegheny county is slightly over \$18,000,000. The rate needed to produce the sum levied is a fraction over 1 cent and 1 mill on each \$100 of assessed property, or about 11 cents on each \$1,000 thereof. On \$6,000 the sum total demanded from the appellant would be slightly in excess of 66 cents. It is declared by section 102, art. 16, Code Pub. Gen. Laws 1904, that "the courts of equity in this state shall not hear, try, determine or give relief in any cause, matter or thing wherein the original debt or damages does not amount to twenty dollars." The relief sought in the pending case is an injunction to restrain the collection of about 66 cents, a sum of money considerably less than \$20; and, under the express words of the Code, the court below had no jurisdiction to grant that relief. *Kuenzel v. M. & C. C. Baltimore*, 93 Md. 750, 49 Atl. 649; *Pentz v. Citizens' Fire Ins. Co.*, 35 Md. 73; *Reynolds v. Howard*, 3 Md. Ch. 333.

There is another difficulty in the path of the appellant, and it is this: The levy was made before the bill was filed: probably most of the sum so levied has been collected; the primaries have been held, the tickets have been nominated; the general election, at which the candidates selected at the primary have been voted for, is over; and now it is too late to ask a court of equity to strike down everything which has been done under the apparent, if not the actual, sanction of law. Under somewhat similar circumstances the Supreme Court refused to interfere with the results of an election in South Carolina. *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293.

We have intimated that there are some matters of detail in the act of 1904 which are inharmonious, but they do not affect its validity, and apparently did not interfere with its practical enforcement. They are blemishes which can be readily removed by the General Assembly. They need not be particularly alluded to, inasmuch as they can have no bearing upon the question actually involved in this proceeding, and cannot influence in any way the solution of those questions.

As we agree with the circuit court in

the order it made dismissing the bill of complaint, that order will be affirmed, without regard to the jurisdictional objection, which, though not suggested at the argument, has been considered in this judgment.

Order affirmed, with costs above and below.

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MORGAN v. REEL et al.

(Supreme Court of Pennsylvania. Oct. 30, 1905.)

1. COURTS—CONSTITUTIONAL PROVISIONS.

Act April 18, 1905 (P. L. 208), authorizing judges of separate orphans' courts to hear and determine equity proceedings at the request of the judges of common pleas, is not repugnant to Const. art. 5, § 4, providing that until otherwise directed by law the courts of common pleas shall continue as at present established, nor to section 6 of the same article, providing that in Philadelphia and Allegheny counties each court shall have exclusive jurisdiction of all proceedings of law and equity commenced therein, nor to section 26, prohibiting the creation of other courts to exercise the powers vested by the Constitution in the judges of the courts of common pleas and orphans' courts, nor to section 20, relative to chancery powers of the court of common pleas, nor to section 15, requiring all judges to be elected by the qualified electors in the respective districts over which they are to preside.

2. ADOPTION — INHERITANCE BY ADOPTED CHILDREN.

Where a man adopts a child of a deceased child and dies intestate, the adopted child inherits as a child only, and not as both child and grandchild.

Brown, Mestrezat, and Stewart, JJ., dissenting.

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by James W. Morgan against Mary Olive Morgan Reel and others. From a decree in favor of plaintiff, defendants appeal. Affirmed.

Bill in equity for partition. The case was heard by Over, J., a judge of the orphans' court of Allegheny county, specially presiding at the request of the judges of the common pleas under the provisions of the act of April 18, 1905. From the record it appeared that on March 24, 1870, Conrad Reel died seised in fee simple of certain real estate, and that on May 31, 1886, his widow died seised also of certain real estate in her own right. They left to survive them as heirs at law four children, Jacob G. Reel, Annie E. McGuire, John A. Reel, and William H. Reel. John A. Reel died on January 24, 1893, leaving to survive him, as his heirs at law, a widow and seven children, all named as defendants in the bill. William H. Reel died on May 26, 1901, intestate, seised of the undivided one-fourth of the real estate of his father and mother. He left to survive him as his heirs at law, a widow, Catherine T. Reel, and two daughters, Stella C. Reel and Catherine Pauline Matthews, and two grandchildren, James W. Morgan and Mary Olive Morgan. These two grandchildren were the children of William

H. Reel's deceased daughter, Rosanna C. Morgan. On November 14, 1885, William H. Reel and his wife, Catherine T. Reel, by proper proceedings in the court of common pleas No. 1, at No. 578, December term, 1885 adopted his said granddaughter, Mary Olive Morgan, under the name of Mary Olive Reel, she being then a minor about four years old. James W. Morgan filed this bill for the partition of the lands of his grandfather, Conrad Reel, and his grandmother, Rosanna Reel. The court held that Mary Olive Reel, who was named as one of the defendants, was entitled only to a child's share of the estate of her adopted father, and was not entitled to share with her brother in the portion which their deceased mother would have taken if she had lived. The court also decided that Judge Over had a right to hear the case.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, STEWART, and ELKIN, JJ.

George H. Quail, for appellant. William H. McClung, Thomas D. Chantler, and William M. McGill, for appellee.

MITCHELL, C. J. 1. The important public question in this case is the constitutionality of the act of April 18, 1905 (P. L. 208), "to authorize the judges of separate orphans' courts to hear and determine proceedings in equity at the request of the judges of the common pleas." Section 1 provides that "in addition to the powers now possessed and exercised by the judges of the separate orphans' courts of this commonwealth, said judges shall, when called upon by the president or other law judge of any court of common pleas, as hereinafter provided, have power to hear and determine all issues and other matters in equity so fully and effectually, as to dispose thereof in the same manner as may be done by the courts of common pleas or the law judges thereof sitting in equity, in accordance with the laws, rules, regulations and practice governing the exercise of equity jurisdiction in this commonwealth. And whenever any service shall be rendered, in pursuance hereof, by a judge of such orphans' court, he shall be deemed to be specially presiding in, and to have the powers of, the court of common pleas of the proper county, sitting in equity." Other sections provide that the service shall not be compulsory on the judges of the orphans' court, and supply the necessary details for the working of the act.

A number of sections in the judiciary article of the Constitution are referred to as being contravened by this act. Such as refer to the orphans' court may be dismissed without detailed notice. Notwithstanding the phraseology of the title and the first section that "the judges of the orphans' court are authorized," etc., the act has no bearing on the court itself. No in-

terference or change is made in any way in the organization, jurisdiction, powers, or practice of that court. There is merely a special grant of authority to the judges individually, not compulsory on them, but to be exercised voluntarily under certain circumstances. The cases in which they sit by invitation remain in the common pleas where they were brought, and the records of the orphans' court take no notice of them. We must disregard, therefore, all suggestions of infringement on the constitutional province of the orphans' court. Section 4 of article 5, the judiciary article of the Constitution, provides that "until otherwise directed by law the courts of common pleas shall continue as at present established." This act is not an infringement of that section, for so far as it makes any change it is one "directed by law." Section 6 directs that in Philadelphia and Allegheny counties each court "shall have exclusive jurisdiction of all proceedings at law and in equity commenced therein." There is no infringement of this provision, for as already said the common pleas retains the record and the jurisdiction of the cases, and whatever is done by the special judge is done in that court. The same consideration answers the citation of section 28 of the judiciary article, prohibiting the creation of other courts "to exercise the powers vested by this Constitution in the judges of the courts of common pleas and orphans' courts." No other or new court is created by the act.

Stress was laid in the argument on section 20 of the judiciary article that "the several courts of common pleas, besides the powers herein conferred, shall have and exercise, within their respective districts, subject to such changes as may be made by law, such chancery powers as are now vested by law in the several courts of common pleas of this commonwealth or as may hereafter be conferred upon them by law." But it is not apparent how the act contravenes this section. It takes away no jurisdiction from the common pleas, nor vests any in the orphans' court, and, if it did either or both, it would be within the proviso "subject to such changes as may be made by law." Indeed, the act may be wholly justified and sustained upon the equity feature of it. Subject to the constitutional guaranty of trial by jury, the jurisdiction, powers, practice, and procedure in equity are inherently matters of legislative control, and are expressly recognized as such in the section quoted of the judiciary article. It is conceded that the Legislature might confer a general jurisdiction in equity, concurrent with the common pleas, upon the orphans' courts. And if it might do so in general, as a whole, it is certain that it could do the same pro tanto as to cases it thought proper. As already shown no such change of jurisdiction in either court is in fact made by the act, though

It might have been. But a settled and unquestionable part of the procedure in equity from its earliest days is the authority of the chancellor to avail himself of the assistance of examiners, masters, and other quasi judicial officers in the disposition of cases pending before him. Until quite recently that was the general practice in Pennsylvania, and for the taking of evidence, investigation of facts, and report upon the law, cases were sent ordinarily and regularly to such officers. Except for the general equity rules now in force, the court of common pleas might have referred this case to the judge of the orphans' court, with his consent, as examiner and master, and what the court might have done by rule or order the Legislature might do by statute. In substance it has done nothing more by this act. The case remains in the common pleas, and the decree is the decree of the common pleas, sitting in banc after hearing upon exceptions to the report of the judge who conducted the trial. Had this been an action at law with a charge to a jury, a larger question would have arisen on the right of the judge to sit, which will be considered under the next head, but the act is confined to cases in equity, and, as to them, is clearly within the constitutional powers of the Legislature.

The last provision to be noticed, and the only one really needing discussion, is section 15 of the judiciary article, that "all judges required to be learned in the law * * * shall be elected by the qualified electors of the respective districts over which they are to preside." If this question were now presented for the first time, we should be bound to say that it was one of quite serious difficulty, for the requirement of election of the judges by the electors of the district would seem to be a requirement of election by them to the very court in which his right to sit is challenged. But the historical view of the constitutional provisions on the subject, and the uniform course of decisions under them, have clearly settled the principles we must now apply. Very interesting and instructive discussions of the legislative power of reorganization and control over the courts named and established by the constitution will be found in *Com. v. Flanagan*, 7 Watts & S. 68; *Com. v. Zephon*, 8 Watts & S. 382; *Kilpatrick v. Com.*, 31 Pa. 198; *Foust v. Com.*, 33 Pa. 338; *Com. ex rel. v. Green*, 58 Pa. 226; *In re Application of President Judges*, 64 Pa. 33; and *Com. ex rel. v. Hipple*, 69 Pa. 9. The Constitution of 1790 (article 5, § 4) provided that "until it shall be otherwise directed by law the several courts of common pleas shall be established in the following manner." The Constitutions of 1838 and 1873 contained the same provisions. The same article in the Constitutions of 1790 and 1838 provided (section 5) that the judges of the common pleas should be judges of the oyer and ter-

miner for the trial of capital and other offenders, and "any two of said judges, the president being one, shall be a quorum," etc. Under these sections it was decided in the cases above referred to that the Legislature could create a court of criminal sessions, could afterwards abolish it and transfer its jurisdiction to the quarter sessions, that it could authorize two judges of the common pleas (and afterwards a single judge), the president not being one, to hold the oyer and terminer, that it could establish a special court of criminal jurisdiction within the territory of a judicial district of the common pleas, and other changes not necessary to be specified here.

In sustaining the power to change the constitutional requirement that the president judge should be one of the quorum of the oyer and terminer (*Kilpatrick v. Com.*, 31 Pa. 198), *Strong, J.*, said (page 214): "the act is not an attempt to establish a new court, which the Legislature are authorized to do by the first section of the fifth article. If it be valid at all, it is because it is a reorganization of the existing court of common pleas, under the clause of the Constitution which ordains that 'the courts of common pleas shall continue as at present established, until otherwise directed by law.' The plaintiff in error denies that the act is constitutional. We cannot regard this as an open question. Whatever doubts we might have were the question *res nova* (and speaking for myself I should have many) we are not now at liberty to entertain them. The validity of this act of assembly, as well as the intent of the constitutional provisions have heretofore been authoritatively defined"—citing the cases already referred to with others. The amendment of 1850 introduced the election of judges in substantially the same terms as the present section 15 of the judiciary article. *Kilpatrick v. Com.*, 31 Pa. 198, was decided after the amendment, but this question was not involved, as both the associate judges who held the oyer and terminer there had been elected by the electors of the district. In *Com. v. Green*, 58 Pa. 226, however, the point was made, and *Sharswood, J.*, after noting that the letter of the Constitution was not violated, said: "But it is said that the spirit of it is violated because, while the court for Schuylkill county is made an active and important tribunal, the provisions for the courts of Lebanon and Dauphin are contingent and illusory. The justices of Schuylkill county are commanded to make their returns to the special court. A grand jury is to be summoned to act upon the bills and other matters given them in charge, while the jurisdiction in Dauphin and Lebanon is restricted to bills found in the oyer and terminer and quarter sessions and transferred to the special court at the option of the district attorney. Thus, in effect, the electors of Dauphin and Lebanon choose the judge for

Schuykill. With the justice, wisdom, or policy of this legislation we have nothing whatever to do." The act was held constitutional, and the decision was affirmed and followed in *Com. ex rel. v. Hipple*, 69 Pa. 9, which was a mandamus to the district attorney of Schuykill county to perform his duties in the criminal court established by it.

The controlling case, however, is the Application of President Judges, 64 Pa. 33, decided in 1870. The act of April 2, 1860 (P. L. 552), provided that, where the president judge of any judicial district should be unable to hold the regular term of his courts, he might call in any other president judge, and that judge so called in should be authorized "to discharge the duties appertaining to said office as fully as the regularly commissioned president judge of said district could do if present." Two president judges, being unable to hold their courts, and their power to call in another to hold the oyer and terminer either being challenged or considered by themselves as doubtful, applied to the Supreme Court to assign one of its members for that purpose. The question of the extent of the requirements of the elective clause was thus directly raised. The act was held constitutional; Agnew, J., saying: "This legislation is evidently a special organization of the several courts for necessary purposes, when the proper president judge is disabled, by the substitution of another judge in his place. Is this within constitutional power? We think it is, whether the act be a reorganization, or the creation of a new court for special purposes. If anything can be considered as settled by judicial determination it is that another judge learned in the law can be substituted for the president of the court as judge of the court of oyer and terminer." And, referring to the previous cases, cited *supra*, he added, "The reasoning on which these decisions rest is incontrovertible." Page 35. "In such a case it is only the organization of the court which is changed by the substitution of one president for another. Now the power to substitute is the very point decided in the Cases of Zephon, Kilpatrick and Foust, where it was held that an associate judge, learned in the law, could constitutionally take the place of the president. Whatever might have been the impression of any one formerly on this question, the point is conclusively adjudged." Page 37. And in the same case Chief Justice Thompson, in a concurring opinion, after referring to his dissent in *Com. v. Kilpatrick*, and the other cases, said: "I am not satisfied of error yet; but I must admit that the law is at present conclusively settled against me, and I am, as every other citizen, bound by it."

The elective clause of the Constitution was not specifically discussed in the opinion, but it was directly and necessarily involved in the case, and, in view of Chief Justice Thomp-

son's reluctant concurrence, we are not at liberty to assume that so obvious and serious an objection was not considered and meant to be decided. We must concur with him that the case is of binding authority, and that the law is "conclusively settled." It is to be said for the act of 1905 that it nowhere indicates any intent to transgress the Constitution, to impair or restrict the powers of any constitutional court, or to impede or diminish the rights of electors. On the contrary, it is a bona fide effort for the relief of temporarily congested and overburdened court lists, without permanently burdening the judicial establishment of the state with officers who may not be permanently required. It is certainly in accord with the spirit of the constitutional control by the Legislature over the organization of existing courts and the creation of new ones. As such, all presumptions are in its favor. Viewed in this light, and under the authority of the preceding decisions, we must regard it as a valid special reorganization of the courts of common pleas for the disposition of cases under special and exceptional circumstances.

2. The further question raised by this case depends on the statutes for the adoption of children. Where a grandfather adopts a grandchild, daughter of a deceased daughter, and dies intestate, does the adopted grandchild inherit as a child only or in a double capacity, as child and grandchild? The act of May 19, 1887 (P. L. 125), after prescribing the conditions and mode of adoption, and, *inter alia*, that the adopted child "shall have all the rights of a child and heir of the adopting parent," continues: "Provided, that if such adopting parent shall have other children, the adopted shall share the inheritance only as one of them; in case of intestacy, he, she, or they, shall respectively inherit from and through each other as if all had been the lawful children of the same parent." The adopted child does not stand on the full footing of an actual child even as to his legal rights. He has only such rights as the statute clearly gives him. This has been uniformly held, with much strictness, not only under this act, but also under the prior acts on the same subject. Thus it was held that a devise from the adopting parent to the adopted child is not exempted from collateral inheritance tax (*Com. v. Nancrede*, 82 Pa. 389; *Com. v. Ferguson*, 137 Pa. 595, 20 Atl. 870, 10 L. R. A. 240), though it may be so if the special statute authorizing the adoption, clearly so intends (*Com. v. Henderson*, 172 Pa. 135, 33 Atl. 368), and a devise to the children of A. does not include adopted children (*Schafer v. Eneu*, 54 Pa. 304).

The act of 1887 intended to put the adopted child on the same footing as actual children, if such there should be, but not on any more favorable footing. This would be the natural and presumed intent, but it is put beyond question by the proviso. Having enacted that the adopted child shall have all the

rights of a child and heir," the framers of the act, apparently out of caution lest the word "heir" should seem to give a preference over other children, added the proviso that he should inherit "only as one of them." The act did not apparently contemplate, certainly did not expressly provide, for the case of the adoption of a grandchild, but the plain intent that the status of the adopted child should be equal but not superior to that of the others is enough to settle the question. Had William H. Reel died intestate just before his adoption of the appellant his estate would have descended to three stocks, to wit, one-third to each of his daughters, Stella and Catherine, and one-sixth to each of his grandchildren, the plaintiff and appellant, children of his deceased daughter. By his adoption of the appellant he transferred her from the class of grandchildren to the class of children, and her status in the former was merged in her status in the latter. When he died thereafter his estate descended to four stocks, one-fourth to each of his actual daughters, another fourth to his adopted daughter, the appellant, and the remaining fourth to the plaintiff as representative of his deceased mother. Thus, and thus only, can the equality intended by the statute be maintained.

Decree affirmed.

BROWN, J. (dissenting). As a rule, it is better that a member of a court of last resort, not concurring in the view of the majority, confine, if possible, his dissent to the consultation room. This is especially true in the disposition of constitutional questions, which are always important. But there are times when public dissent cannot be withheld without being misunderstood, and, as I am unwilling to be understood as concurring in the view of the majority of my brethren in this case, I must dissent of record, and briefly state my reasons for doing so. By section 22 of the judiciary article of the Constitution, creating separate orphan's courts, it is provided that they are to exercise all the jurisdiction and powers vested in orphans' courts at the time of the adoption of the Constitution, and, in addition, such as might thereafter be conferred. The act of 1905 confers no jurisdiction or powers upon separate orphan's courts. These are just what they were before the passage of the act, and the judges of the separate orphans' courts can now do nothing in their own courts that they could not have done prior to April 18, 1905; but, when transplanted into the equity side of a court of common pleas by the process pointed out by the act, a judge of the orphans' courts becomes, so long as he remains there, a judge of that court. The words of the act are that, while sitting in the common pleas at the invitation of one of its judges, "he shall be deemed to be specially presiding in, and to have the powers of, the court of common pleas of the proper county, sitting in equity." When

this was enacted, section 15 of the same article of the Constitution was either overlooked or forgotten. It declares that "all judges required to be learned in the law, except the judges of the Supreme Court, shall be elected by the qualified electors of the respective districts over which they are to preside." The common pleas is recognized by the Constitution as a district court from a separate orphans' court, and the words of the fifteenth section of the judiciary article mean that the judges of the common pleas shall be elected as such by the qualified electors of the district over which they preside; and so of the judges of the separate orphans' courts. How, then, can one sit on the judgment seat of the common pleas unless he is sent to it as one of its judges "by the qualified electors"? The Constitution declares that to be the only way in which a seat there can be reached, and the Legislature cannot point out any other. It may modify and change the jurisdiction and powers of the court of common pleas, but it cannot change the mode of the selection of its judges. If the Legislature can authorize a judge of the common pleas to call an orphans' court judge to his assistance as a temporary part of his court, why can it not authorize the calling of any member of the bar for such a purpose? If allowed to sit in the common pleas as one of its judges, a judge of the orphans' court will not be there simply as an examiner or master to aid that court, but as a component part of it, and, when sitting or presiding alone, the court itself.

Even if the Legislature could direct an orphans' court judge to sit and act as a judge of the common pleas, it has not undertaken to do so, but has committed or delegated to a common pleas judge the power to create, for the time being, out of an orphans' court judge a judge of his own court, and to clothe him with all of his equity powers and jurisdiction. If for no other reason, for this delegation of power, which, if it existed at all, would be in the Legislature alone, not to be delegated by it to any one, the act ought not to be sustained. It is true that the act of April 2, 1860 (P. L. 552), providing that a president judge in any judicial district in the state may call in another judge to hold courts for him, was sustained; but the cases sustaining it are certainly not to be stretched in view of what has been said of them, and, in citing them as authority for the constitutionality of this act, it has been entirely overlooked that under that act, when one judge calls in another to hold court for him, the judge called has in his own court, to which he was elected by the qualified electors, the same jurisdiction and powers that the calling judge possesses, and into the court outside of his district the invited judge takes with him all the powers which he possesses in his own court; but not so here. In his own court the orphans' court judge has no more jurisdiction over a bill in equity for a decree for specific performance of a

contract between living parties than a justice of the peace; but by the act of 1905, when he gets into the common pleas, he at once acquires all of its equity powers. The spectacle of a judge of a separate orphans' court sitting in the common pleas under the act of 1905 is truly anomalous. He is not a common pleas judge, for he was not elected as such, and therefore possesses none of the powers of such a judge. In his own court he cannot do what he does in the court into which he goes, for in his own court he has no such jurisdiction and powers, even under the act of 1905, as he exercises in the common pleas. This is a situation not only not contemplated by the Constitution, but in clear violation of it.

MESTREZAT and STEWART, JJ., concur in the dissent.

In re CHESTER COUNTY REPUBLICAN NOMINATIONS.

Appeal of GARRETT et al.

(Supreme Court of Pennsylvania. Oct. 26, 1905.)

1. ELECTIONS—CONTESTS—APPEAL.

Where the facts appear upon the record in an election contest, the Supreme Court may determine whether the judgment is correct upon such facts, and may for that purpose consider the opinion of the lower court.

2. SAME—CONTESTS—SCOPE OF REVIEW.

Under the primary election statutes, which make party rules the law of a case, the duty of the courts in reviewing such an election is merely to see that the acting body of the party proceeded regularly according to its own rules.

3. SAME—COUNTY COMMITTEES—TERM OF OFFICE.

The words "ensuing year," used in the rules of a political party requiring the election by the voters of a district of a member of the county committee for the district for the ensuing year, mean the political year intervening between one election and the next annual election, and not a calendar year, when construed with other rules of the party providing for the management of the affairs of the party by the county committee, and making the whole machinery of party elections largely dependent upon the initiatory action of the county committee and the committeemen.

4. MANDAMUS—GROUNDS—SUPERVISION OF POLITICAL COMMITTEES.

Where members of a county political committee, who hold office for a political year, postpone a new election of committee members for the perpetuation of their own power or other unlawful or insufficient reason, mandamus will lie to compel them to hold such an election.

5. ELECTIONS—POLITICAL COMMITTEES—TERM OF OFFICE.

Members of a county political committee were, under the rules of the party, elected for a political year. Other rules gave the chairman of the committee power to fill all vacancies. The chairman, erroneously supposing that the committeemen held office for only a calendar year, reappointed the committeemen after the expiration of the calendar year, but before the termination of the political year for which such committeemen were elected. Held, that the appointments made by the chairman were nugatory, and any action of the committee before the end of the political year was valid by

reason of the previously existing authority of the committeemen.

Potter and Mestresat, JJ., dissenting.

Appeal from Court of Common Pleas, Chester County.

Exceptions by Thomas Lack and others to a certificate of nomination issued to R. Thomas Garrett and others, as candidates, etc. From an order sustaining the exceptions, the candidates appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Alfred P. Reid and D. T. Watson, for appellants. C. Wesley Talbot, George B. Johnson, and Wayne MacVeagh, for appellee.

MITCHELL, C. J. This proceeding, though under the confusing directions of the procedure act of May 9, 1889 (P. L. 158), called an appeal, is in fact a certiorari, and must be so treated. The principles and practice by which this court is governed in such cases are fully discussed in Independence Party Nomination 208 Pa. 108, 57 Atl. 844, and for present purposes may be stated to be that where the facts appear upon the record this court will examine whether the judgment is correct upon such facts, and may for that purpose consider the opinion of the court as part of the record. In this case there is no difficulty or dispute about the facts. They appear on the face of the certificate and the objections filed, and we take them without change from the specific findings of the court below. It is contended that there were certain other facts in connection with other nominating papers which were before the court below but are not here. But they related to a separate matter and are not relevant or material to the question of the correctness of the decision appealed from.

The court's statement of facts, slightly condensed, but otherwise unchanged, is as follows: (1) It is uncontroverted that on March 18, 1904, a county committee was duly elected in the several districts, and was duly organized March 23d by the election of Mr. Ruth as chairman and two others as secretaries. (2) That as the committeemen were elected for one year their term of office expired on March 18, 1905, but the chairman, secretaries, and treasurer held over until their successors should be elected. (3) That this county committee called primary elections to be held April 15, 1905, in the several districts of the county, for the purpose of electing delegates to a convention to nominate a county ticket, and also a member of the county committee, to serve for the ensuing year. Before the date for holding these elections had arrived many of the registered candidates had withdrawn their names, leaving no more than just sufficient to fill the various offices to be nominated, and on April 10, 1905, the chairman sent to each of the late committeemen a letter, in which, after quoting the act of June 22,

1897 (P. L. 179), as follows: "If any political party has, by its rules, provided for a registration of candidates for nominations, and at the time limited for such registration or at any subsequent time by reason of withdrawals or other cause there should be no more candidates for any office registered or remaining than are to be elected to such office, the person or persons so registered or remaining shall be deemed the nominee or nominees with the same effect as if he or they had been nominated by a convention or primary meeting or caucus or board. And one or more or all of the officers of the committee of such political party with which such registration shall be made or the officer with whom it is made shall make a certificate of such nomination in the same manner and with the same effect as if there had been a nomination by a convention or primary meeting or caucus or board"—he notified them that "in consequence of this condition it will therefore not be necessary to hold a primary election on Saturday evening next, and a convention on Tuesday, April 18th. I therefore notify you that said primaries and county convention will be abolished this year and the nominations will be certified by the county committee, in conformity with the aforesaid act of 1897." (4) On June 15, 1905, the chairman, in accordance with the provisions of the act of June 22, 1897, and as announced in the above letter, certified the remaining registered candidates to the county commissioners as the nominees of the Republican party. (5) On April 15, 1905, the chairman, by the authority conferred upon him, as he claimed by rule 5, to "fill all vacancies in the county committee," reappointed each and all of the late committee, the committeemen for their respective districts. (6) The committee thus appointed met on April 18, 1905, and reelected H. Morgan Ruth as its chairman, and William Taylor and J. Howard Coates as its secretaries. (7) On August 17, 1905, all the nominees, excepting the nominee for district attorney, withdrew their names from the certified ticket, and on the same day chairman Ruth called a meeting of his committee, resigned his office, and Thomas Lack was elected chairman in his place. (8) At a meeting of the committee on September 26, 1905, called by Mr. Lack, nominations were made to fill the vacancies created by the withdrawal of those certified by Mr. Ruth on June 15, 1905, and the same were duly certified and filed with the commissioners by Mr. Lack on October 2, 1905. These are the nominations objected to in the present proceeding. (9) In the meantime, many republicans of the county, dissatisfied with the management of their party affairs and especially with abolition of the primaries called for April 15, 1905, effected a new organization, in the manner detailed in the evidence of record, and in a convention duly called and held for the purpose on October 8, 1905, nominated a full county ticket to be voted for at the approaching election, and

on October 4, 1905, Edward S. Darlington, the chairman of said convention, and its secretaries certified and filed the same with the commissioners as the ticket of the Republican Party or policy, and now claim that it is entitled to the Republican column on the official ballot.

The ninth finding sets out the facts alleged to as the ground of contention by appellees that all the facts before the court below are not now before us. But as already said they related to a separate matter. The court below held for reasons given that the nominations certified by Mr. Darlington on October 4th were not entitled to a place in the Republican column on the ticket, and, as there has been no appeal by those parties from his decision on that point, it is not before us.

The statutes make the party rules the law of the case, and the authority of the courts, as in the review of corporate or ecclesiastical elections and trials, is merely to see that the acting body proceeded regularly according to its own rules. The rules of the Republican Party of Chester county appear among the uncontroverted facts on the record, and the determination of this case depends upon their construction and application. Those which are relevant to the present discussion are the following:

"Rule 2. The party should hold a convention to nominate a county ticket, a convention to elect delegates to the national and state conventions when necessary, and such other conventions as may become necessary, to all of which conventions these rules shall apply.

"Rule 3. The convention to nominate the county ticket to be composed of delegates from the different election districts of the county shall be held at such time and place as may be fixed by the county committee.
* * *

"Rule 4. On the Saturday next before the time for holding the nominating conventions the Republicans of the respective election districts of the county shall assemble at the usual place of holding delegate elections, or at such place as shall be designated by the members of the county committee for the respective district, and elect by ballot the delegate or delegates to represent them in the nominating convention. At the same time and place they shall elect a member of the county committee for such district for the ensuing year. * * *

"Rule 5. The affairs of the party shall be managed by a county committee elected as aforesaid. Ten members thereof shall constitute a quorum to transact business. The county committee shall meet in West Chester for organization immediately after the convention for the purpose of nominating the county ticket has adjourned. They shall elect a president who shall be styled chairman of the county committee. They shall elect two persons as secretaries of the party, who shall audit the accounts of the former treasurer.

They shall elect one person treasurer who may be a member of the committee or otherwise. The chairman and officers of the preceding year shall act until their successors are elected. * * * The chairman of the county committee shall fill all vacancies in the county committee by the appointment of another Republican from the same district. * * * The chairman of the county committee shall be the executive officer of the party in the county, and shall put in operation these rules, the resolutions and orders of the county committee, and of the nominating convention, and shall preside at all meetings of the committee. * * *

"Rule 6. The county committeeman of each district shall be the executive officer thereof, and organize it in such a way as to bring to the election the whole vote of the party. * * *

"Rule 12. Each candidate for nomination by the Republican convention to nominate county officers shall be required to give his name and post office address and pay \$5.00 to the chairman of the county committee not less than 30 days before the date fixed for the delegate elections. * * *

"Rule 13. In case of a vacancy by death, resignation or otherwise after the nominating convention of the party has been held, and before the next ensuing election, it shall be the duty of the chairman of the Republican county committee to call together the members of the county committee, and the members thus assembled shall have power to fill such vacancies."

The crucial question now before us is the regularity of the county committee which filed the certificate of nominations which is objected to. By rule 4 the primaries or delegate elections are to be held on the Saturday next before the nominating conventions, and the electors are then to elect delegates to represent them in the nominating convention, and "at the same time and place they shall elect a member of the county committee for such district for the ensuing year." The learned president judge of the court below in his second finding held that the term of the committee duly elected, as is conceded, on March 18, 1904, expired on March 18, 1905, and the committee became functus officio on that day, except the chairman, secretaries, and treasurer, who held over under rule 5 till their successors should be appointed. This part of the finding is a conclusion of law based on the interpretation of the phrase "for the ensuing year" in rule 4, and was an erroneous construction of the rule. The "ensuing year" meant by the rule was not the calendar, but the political year; that is, the interval between one election and the next annual election, which might be more or less than 12 calendar months. The delegate elections are not held at any set date, but at "such time and place as may be fixed by the county committee." Rule 3. The time is in the discretion of the committee, and it is

common knowledge that it varies in different years, according to the exigencies or convenience of each year. Thus in the years of election of the president, or the governor, or other state officers, the date of county conventions is largely dependent on the date of the national or state conventions, while in years of election of county officers only the date is governed by local convenience. If a county election and convention should be held, as it often is, in August of one year and another in March in the next year, the new committee would come into power at once, and the term of the prior committee would end, though it had lasted only seven months, and, vice versa, the term of a committee elected in March might extend to August of the following year and thus cover 17 months, if the date of the primary election should be so fixed.

A brief consideration of the powers and duties of the county committee will show that this is necessarily the intent of the rules. By rule 3 the time and place of the county convention are to be fixed by the committee; by rule 4, on the Saturday before such date, the electors are to assemble at the usual place of holding delegate elections, "or at such place as shall be designated by the members of the county committee for the respective district," and the committeeman shall call the assembly to order, and they shall then proceed to elect a judge and two inspectors, and to hold the election; and by rule 6 "the county committeeman of each district shall be the executive officer thereof." It thus appears that the whole party machinery of party elections is centered, and to a large extent dependent, on the initiatory action of the county committee for the county and of the committeeman for his district. If the whole committee is liable to become officially dead at a fixed date of exactly a calendar year after their election, then the whole organization is in danger of being thrown into inextricable confusion by the accidental or intentional or factional failure by the old committee to fix a date for the election of a new committee before the expiration of their own year. The party will be helpless to proceed regularly under its own rules, for there will be no one with authority to make the calls or start the proceedings. It is impossible to suppose that the party in framing its rules meant to subject itself to such obvious risks. But, on the other hand, if the "ensuing year" was intended, as it must have been, to mean the political year, there is full provision for an organization always in existence ready for regular party action under the rules.

Testing the regularity of the nominations objected to by the rule thus understood it appears: (1) That the committee elected in March, 1904, has not been superseded by any new committee subsequently elected, and

is therefore still in office de jure as well as de facto. (2) That on June 15, 1905, the chairman of the committee regularly certified the names of the candidates, as authorized by the act of 1897. (3) That on August 17, 1905, the committee met, and, the chairman having resigned, elected a new chairman. (4) That on September 26, 1905, all the nominees certified to the county commissioners on June 15, 1905, excepting the nominee for district attorney, having previously withdrawn, the committee met and made nominations to fill the vacancies caused by these withdrawals. (5) That on October 2, 1905, the chairman of the committee duly certified these nominations to the county commissioners. (6) That the nominees so certified, the appellants, are the regularly nominated candidates of the party, and as such are entitled to the Republican column on the official ticket.

Some collateral matters may be briefly noticed. The chairman of the county committee acted within his authority under the act of 1897 (quoted in the third finding of fact by the court below) in dispensing with the county convention to make nominations, but he was mistaken in assuming that there was no occasion for district elections to elect a new committee. Under rule 4 the two elections are to be held at the same time and place, but they are separate elections and involve separate rights of the electors. The rule requires the election for committeemen to be held at the time and place fixed by the committee, but it clearly contemplates an election each political year, and, if the electors should see or suspect a design on the part of the committee to postpone a new election for the perpetuation of their own power or other unlawful or insufficient reason, mandamus would lie to compel the committee to act. In the present case no such action was taken by any elector, and the action of the committee was acquiesced in so far as any contest in a regular way under the rules was concerned. The chairman of the committee was also in error in supposing that the terms of the committeemen had expired, and in reappointing them on April 15, 1905. Under rule 5 he had power to fill all vacancies in the committee, whether one or all of the number, but as there were no vacancies his action was nugatory. Having reappointed the same persons, however, no trouble ensued. The committee acted, and their action was valid by reason of their previously existing authority.

The judgment of the court below is reversed, and the objections to the nominations directed to be dismissed.

POTTER and MESTREZAT, JJ. (dissenting). It is certain that the writ of certiorari does not lie to revise the decision of the court below upon matters of fact. And

without conceding that the record proper in this case contains sufficient to give us jurisdiction to inquire into the merits of the question, we are clearly of the opinion that under a reasonable construction of the party rules the terms of the county committeemen elected in March, 1904, expired at the time fixed for holding the meeting in April, 1905, to elect members for the then ensuing year. Apparently no other construction than this occurred to the mind of any one connected with the county committee, and the chairman showed that he so construed and understood the rule, by his action in attempting to appoint the members of an entire new committee to act from that date. It is suggested for the first time, in the opinion of the majority of this court, that the terms of the old committeemen were not limited to the ensuing year after their election, but, that they continued in office indefinitely, owing to the failure of a convention to elect their successors in April, 1905. With this view we cannot agree. Rule 4 provides "that on the Saturday next before the time for holding the nominating convention, the Republicans of the respective districts * * * shall elect a member of the county committee for such district for the ensuing year." In the present instance the time designated by the chairman for holding the convention was April 18, 1905, and the Saturday before was April 15th, so that, under the rule, the term of the committeemen elected for the previous year ended at that time. And the chairman so understood it and appointed new committeemen under his claim of right to fill vacancies. It was this action which the court below held was unauthorized and illegal, and we think the view taken by the court in this respect was right. Clearly under the rules, the county committee was an elective body to be chosen by the people of the districts, to serve only for the ensuing political year. The power of the chairman to fill vacancies extended only to such as occurred in the elective body and during the current year. We can see no power given to him by the rules to appoint an entirely new committee, without submitting the choice of the membership to the votes of the people of the respective districts at the time fixed, under rule 4.

We would dismiss the assignments of error, and affirm the proceedings in the court below.

SCHUCHLER v. COOPER.

(Superior Court of Delaware. New Castle.
Feb. 10, 1904.)

1. LIMITATION OF ACTIONS — ACKNOWLEDGMENT — SUFFICIENCY.

A statement by a debtor to a creditor that the debtor did not have the money to make payments, but that his farm was big enough to pay

the bill, did not amount to an acknowledgment sufficient to revive the debt, as against limitations.

2. WORK AND LABOR—AMOUNT OF RECOVERY.

One furnishing board and services in the absence of an express contract is entitled to recover their reasonable worth.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Work and Labor, §§ 1, 2.]

Action by Henry T. Schuchler against Alexander B. Cooper, as administrator of Robert Coburn Dickson, deceased. Verdict for plaintiff.

Action of assumpsit for care and attention and board furnished Robert Coburn Dickson by plaintiff from June 10, 1892 to May 25, 1900. At the trial testimony was adduced as to the time covered by the board furnished and services rendered to Robert Coburn Dickson by the plaintiff, and the acknowledgment of indebtedness therefor by said Dickson, as follows:

Louise Schuchler, Jr., testified on direct examination as follows: "By Mr. Whiteman: Q. What relation are you to Henry Schuchler? A. I am his daughter. Q. Where do you now reside? A. At 1103 Clayton street, in this city. Q. With whom do you reside? A. Mr. H. W. Gause. Q. You are employed in his household? A. Yes, sir. Q. Where did you reside in June, 1892? A. With my father, on the Joe Morrow place. Q. Was that in Christiana Hundred? A. Yes, sir. Q. In this county? A. Yes, sir. Q. And that it near Walnut Run School House? A. Yes, sir. Q. Did you attend that school? A. Yes, sir. Q. Did you know Mr. Robert C. Dickson in his lifetime? A. Yes, sir. Q. How far did he reside from your home? A. It was not very far from the Morrow place. Q. About how far, as near as you can tell? A. About a half mile. Q. How old were you when you first knew him? A. About seven. Q. How did you become acquainted with him? A. When we started to carry his meals, that is the way we first got acquainted with him. Q. Who started to carry his meals? A. My sister and I. Q. Is your sister older than you? A. She is two years younger than I. Q. How far did you have to go when you first began carrying his meals? A. When we first began carrying them we had to go about a half mile. Q. How long did you continue to take his meals to him? A. Eight years; from 1892 to 1900. Q. How many times a day did you take his meals to him? A. Three times a day. Q. What meals did you take to him? A. The best kind of meals. Q. Who took care of Mr. Dickson, if you know? A. My father. Q. What care did he take of him? A. He cleaned the house for him and swept the rooms for him, and saw that his fires were fixed and that everything was all right before father left the place. Q. What time would your father get away from there to go to his home? A. Between 10 and 11 o'clock sometimes, and sometimes it would be half-past 11. I know

that because I used to wait for father at nights and go home with him. Q. Did Mr. Dickson ever pay your father for this board furnished him? A. No, sir. Q. How do you know that? A. Because I heard father ask him for the money, and Mr. Dickson asked him if he could not wait until he could get the money. Q. When did you hear that conversation? A. I guess it was about a year before he died. Q. What else, if anything, did he say about paying your father for the board furnished? A. He said the farm was big enough to pay for the bill. Q. What did your father say to him about being paid for this board furnished? A. He said, 'Mr. Dickson, could not you let me have the money for the bill?' And Mr. Dickson said he did not have the money for the board bill. Q. Where did this conversation between your father and Mr. Dickson relative to the payment of this bill take place? A. In the dining room of Mr. Dickson's house. I was in the kitchen. Q. Was the door open or closed? A. The door was open. Q. How far was the kitchen from the dining room? A. It was adjoining the dining room. The kitchen adjoined the dining room. Q. Did you say it was a year before or within a year of his death? A. It was a year before his death. Q. When did he die? A. He died in June, 1900."

Louise Schuchler, Sr., testified upon the same point as follows: "By Mr. Whiteman: Q. You are the wife of Henry T. Schuchler, the plaintiff, are you not? A. Yes, sir. Q. Did you know Robert Coburn Dickson in his lifetime? A. Yes, sir; I knew him well. Q. How long did you know him? A. I knew him from 1892 until he died, on June 5, 1900. Q. Where did you live during those eight years? A. The first two years we lived on the Morrow place, and then we lived at the 'Owl's Nest,' and then from there we moved to Susie Donohue's place. Q. Did you and your husband ever do anything for Mr. Dickson? A. We boarded him, and Mr. Schuchler looked after him and took care of him. Q. Who prepared the food for him? A. I did. Q. What would you prepare? A. I prepared all kinds of vegetables that come on the table, and everything that the market brings. Q. Did you ever prepare any meats of any kinds for him? A. Yes, sir; beef, leg of lamb, and all kinds of meats. Q. Did you ever prepare any chicken? A. Yes, sir; he got chicken every day. Q. How many meals did you furnish him each day? A. Three meals. Q. And this was during the time that you lived on the Morrow property, at the Owl's Nest, and on the Donohue property? A. Yes, sir. Q. Was your husband ever paid for that board furnished Mr. Dickson? A. No, sir. Q. Did Mr. Dickson ever say anything in your presence about paying your husband that bill? A. Yes, sir; he did. Q. What did he say? A. My husband asked him about it, and he said had he not patience; that he had plenty of money coming to him, and he ain't

got it at the present time. Then he said, 'If you don't get the money, the farm is big enough to pay you.' Q. Did he say anything about paying him when he got the money? A. He said he did not have it to spare. Q. What did Mr. Dickson say about paying your husband for this food that was provided for him? A. Well, he said that he would pay him \$10 a week. Q. And when did he say he would pay it? A. He said when he got the money. Q. When was this conversation? A. That was about a year or two years before he died. Q. Where was he when he said this? A. He was in the dining room of Mr. Dickson's house. Q. When was the first time anything was said between your husband and Mr. Dickson as to how much board should be charged? A. Well, it was the first time, when Mr. Dickson asked my husband about whether he could board him. Q. What was said as to how much should be charged? A. He told my husband to make up the bill; how much the bill was. Q. What was the bill made out for? A. For his victuals, and for the work. Q. How much money? A. Ten dollars a week. Q. Was that satisfactory to Mr. Dickson? A. Mr. Dickson said he was satisfied with that. Q. And you say that that was the first week you began supplying him with food? A. Yes, sir."

The witness further testified, in cross-examination, upon the same points, as follows: "By Mr. Hilles: X. Q. About what year was it that your husband had this talk about the \$10 a week that Mr. Dickson was going to pay for his board? A. It was in the fall. X. Q. What year? A. About two years, I think, before he died. X. Q. Was that the only talk that you ever overheard about it? A. No, sir; I heard it many times. X. Q. Before that? A. Before that. X. Q. I understood you to say, in answer to Mr. Whiteman's question, that, when you went on the farm, there was a talk about \$10 a week. Is that right, or was I mistaken? A. When we took Mr. Dickson to board the first week, he told my husband to make up the bill, and he was satisfied with the bill which my husband made up for him at \$10 a week. X. Q. When was that? A. That was in the spring of the year of 1892. X. Q. In the spring of the year 1892 your husband made up a bill, did he, for \$10 a week? A. Yes, sir. X. Q. And he presented it to Mr. Dickson? A. Yes, sir. X. Q. And did Mr. Dickson pay him? A. No, sir. X. Q. Did he present a bill every week? A. No, sir. X. Q. Did he ever present a bill to Mr. Dickson? A. Yes, sir; he did. X. Q. When? A. In the spring of the year, the first time when we started to board Mr. Dickson. X. Q. Was that the only one that he presented? A. Yes, sir; the only one."

The defendant prayed the court to charge the jury as follows: (1) That under the evidence in this case the plaintiff, if entitled to recover anything in the opinion of the jury, can only recover for the items in the bill

of particulars occurring within three years before the commencement of this suit. *Burton v. Robinson*, 1 Houst. 260. (2) In order to take the case out of the statute of limitations, the plaintiff must prove an unconditional acknowledgment of liability on the account, which is the basis of the suit. (3) That, unless the jury shall believe from the evidence that there was an express contract to pay a certain amount, they can find for the plaintiff only nominal damages, as there is no proof of the value of the service rendered. *Carpenter v. Hays*, 153 Pa. 434, 25 Atl. 1127. (4) Claims against a dead man's estate, which might have been made against himself, while living, are always subjects of just suspicion, and our books, from *Graham v. Graham*, 34 Pa. 475, to *Miller's Est.* 136 Pa. 239, 249, 20 Atl. 796, are full of expressions by this court of the necessity of strict requirement of proof and the firm control of juries in such cases. The present is no better than most of its class.

Wages for domestic service are presumed to be paid at the periods customary at the time and in the neighborhood, and claims for such wages for unusual length of time, and especially those not made until after the claimant has left the service, must be supported by affirmative proof that they have not been paid. As said by Strong, J., speaking of the similar presumption of payment of a bond after the lapse of 20 years, the legal presumption shifts the burden of proof, and "after 20 years the creditor is bound to show, by something more than his bond, that the debt has not been paid. *Reed v. Reed*, 46 Pa. 239. The English rule in regard to wages has long been settled. It is founded on the habits and usages of the people, the solid foundation of all common-law presumptions of fact. The same habits and usages obtain in this country, and the same rule was therefore adopted in *McConnell's Appeal*, 97 Pa. 31, and is now the settled law of the state. *Houck's Ex'r's v. Houck*, 99 Pa. 552; *Webb v. Lees*, 149 Pa. 13, 24 Atl. 169. The presumption grows stronger as each period of payment goes by. In the nature of things it is less potent against a claim for two or three months' wages than for two or three years; and, again, its strength is increased or diminished by other circumstances that in the usual experience of life make payment more probable or explain the delay. And the evidence to sustain the claim must vary in the same ratio. As said by our late Brother Clark, in *Gregory v. Com.*, 121 Pa. 611, 15 Atl. 452, 6 Am. St. Rep. 804, "the presumption will gather strength with each succeeding year, and the evidence to overthrow it must, of course, be correspondingly increased."

Argued before LORE, C. J., and PENNEWILL and BOYCE, JJ.

William T. Lynam and J. Harvey Whiteman, for plaintiff. William S. Hilles, for defendant.

LORE, C. J. (charging the jury). In this action Henry T. Schuchler, the plaintiff, seeks to recover from Alexander B. Cooper, administrator of Robert Coburn Dickson, deceased, the defendant, for personal services and for board which he rendered and furnished to the deceased in his lifetime, and which are itemized in his bill of particulars as follows:

Board from June 10, 1892, to May 25, 1900, at \$10 per week.....	\$4,120 00
Nursing, May 25 to June 5, 1900, at \$5 per day.....	55 00
Care and attention, cleaning up and waiting upon deceased, from June 19, 1892, to May 25, 1900, at 75 cents per day.....	1,463 00
Probate.....	15

Aggregating.....\$5,638 15

One of the pleas relied upon by the defendant is the statute of limitations. Under that plea the defendant claims that no recovery can be had for any parts of the items named in the bill of particulars which were furnished or rendered more than three years before the date of the commencement of this action, which was September 13, 1901. Running back three years from that date, would bring you to September 13, 1898. The statute of this state provides that no action shall be brought, in cases like this, after the expiration of three years from the accruing of the cause of action. Portions of the claim in this case appear, upon the face of the bill of particulars, to be barred by the statute. We are unable to find in the evidence any acknowledgment of the part so claimed to be barred by the statute as a subsisting demand made either by the deceased in his lifetime or by his administrator, the defendant, since his decease, which would remove this bar. We say to you, therefore, that in reaching your verdict you are not to consider any part of the plaintiff's bill for services rendered or board furnished prior to September 13, 1898.

Should you be satisfied from the evidence that after September 13, 1898, and before the death of the defendant, which it is not disputed occurred June 5, 1900, the plaintiff rendered services or furnished board, or both, as claimed in his bill of particulars, for which he has not been paid, he would be entitled to your verdict covering that period of time. In ascertaining the value of such services or board, you should be governed by the price fixed by the parties, if any price was agreed upon and shown. If no price was agreed upon, your verdict should be for such sum as the services rendered and board furnished were reasonably worth, as disclosed by the evidence.

Verdict for plaintiff for \$925.15.

NOTE. The above case was taken up to the Supreme Court on a writ of error and at the June term, 1904, thereof the writ of error was dismissed on motion of defendant's counsel, on the ground that the plaintiff, Schuchler, had no standing in said court; he having assigned to his counsel all his interest in the verdict immediately after same was obtained, but before judgment, and before the writ of error was taken.

MELVIN et al. v. CONNER.

(Superior Court of Delaware. Kent. Oct. 30, 1905.)

1. PLEADING—AFFIDAVIT OF DEFENSE—TIME OF FILING—EXTENSION.

An application to extend the time within which to file an affidavit of defense must be made by the first Friday of the term.

2. SAME—SUFFICIENCY OF AFFIDAVIT.

In an action of assumpsit, an affidavit of defense alleging that defendant "verily believes that there is a legal defense to the whole of the cause of action in the above stated suit, the nature and character whereof is as follows: That there is nothing due and owing from the said defendant to the said plaintiffs" is insufficient, in that it fails to state the nature and character of the defense, as required by Rev. Code 1893, p. 789, c. 106, § 4.

Assumpsit by Riley Melvin and another, trading under the firm name and style of Melvin & Son, against Alvin B. Conner. Judgment for plaintiff.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Rosewell Hammond and W. Watson Harrington, for plaintiffs. George M. Jones, for defendant.

The defendant filed the following affidavit of defense, viz.: "Be it remembered that on this twenty-sixth day of October, A. D. 1905, before me, Walter Pardoe, prothonotary of the superior court of the state of Delaware in and for Kent county, personally comes Alvin B. Conner, the defendant in the above-stated suit, who having been by me duly affirmed according to law, doth depose and say that he is the defendant in the above-stated suit; that he verily believes that there is a legal defense to the whole of the cause of action in the above-stated suit, the nature and character whereof is as follows: That there is nothing due and owing from the said defendant to the said plaintiffs." The above affidavit was duly signed and affirmed by the affiant.

Mr. Harrington, for plaintiffs: We ask for judgment notwithstanding the affidavit of defense. This is an action of assumpsit on a book account, and the affidavit does not state the nature and character of the defense according to the provisions of the statute (Rev. Code, 1893, p. 789, c. 106, § 4). *Reynolds v. Fahey*, 4 Pennewill, 265, 55 Atl. 221.

Mr. Jones, for defendant: This is an action of assumpsit, and the affidavit sets out what is equivalent to non assumpsit. But, if the court have any doubt about the sufficiency of this affidavit, I would ask that the time be extended in which to file an affidavit of defense.

LORE, C. J. You are too late to make that application now. That must be done by the first Friday of the term, and that time has passed. We hold that the affidavit of defense is insufficient, in that it does not set out the nature and character of the defense

relied upon, as must appear in such affidavit under the well-settled rulings of this court.

We therefore order judgment to be entered notwithstanding the affidavit of defense.

STATE v. MAHANEY.

(Supreme Court of New Jersey. Dec. 5, 1905.)

1. CRIMINAL LAW—CONSECUTIVE SENTENCES.

After convictions upon two indictments for breaking with intent, the court has power to impose a sentence of imprisonment upon one of the convictions to begin at the expiration of sentence imposed upon the other conviction.

2. SAME.

This power to impose consecutive sentences is not affected by the provisions of section 67 of the Criminal Procedure Act (P. L. 1898, p. 891).

(Syllabus by the Court.)

Petition of John Mahaney for writ of habeas corpus. Writ denied.

Argued November term, 1905, before FORT, GARRETSON, and REED, JJ.

Peter J. McGinnis, for petitioner. William H. Speer, for the State.

REED, J. The petition for the writ sets out that John Mahaney was convicted at the December term, 1899, of the Hudson county court of quarter sessions on two indictments for the crime of breaking with intent, and that he was sentenced on the first indictment to be imprisoned for the term of seven years, and on the second indictment for the term of five years in the State Prison. The petition states that the sentence of seven years expired on the 25th day of August, 1905, and that he is still imprisoned by virtue of the second sentence of five years. Copies of the commitments are annexed to the petition. The first commitment recites that the petitioner was sentenced to hard labor for the term of seven years, and that he pay the costs of prosecution, and be further imprisoned from and after the said term of seven years until the costs of prosecution are paid. The second conviction recites that he be imprisoned for the term of five years, with the same conditions. On the back of the second conviction is indorsed: "This term to begin at the expiration of the sentence imposed in indictment No. 53, September term, 1899."

The return to the writ contains a certified copy of the judgment record, setting out that in the September term, 1899, two indictments were found against the petitioner for breaking with intent, and that on the first of these indictments he was tried and convicted, and on the second indictment he pleaded guilty. On the first indictment, indictment No. 53, he was sentenced to be imprisoned in the New Jersey State Prison for the term of seven years, and thence till the costs of prosecution were paid, and on the second indictment he was sentenced to be imprisoned for the period of five years, and thence until the costs of the prosecution

were paid, which said last-mentioned sentence was ordered to commence upon the expiration of the sentence imposed under indictment No. 53 of the term of September, 1899. Thus the judgment record shows that, as a part of the sentence of five years, it was adjudged that the sentence do commence upon the expiration of the sentence imposed on indictment No. 53 of the term of September, 1899. A prisoner confined on a sentence will not be released on habeas corpus for errors in the mittimus when the court has the judgment before it. *Sennot's Case*, 146 Mass. 489, 16 N. E. 448, 4 Am. St. Rep. 344. The judgment is the source of the right of the keeper of the State Prison to detain the petitioner. *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; *People v. Baker*, 89 N. Y. 461.

The question, then, is whether the court had the power to pronounce the second judgment imposing a sentence to commence after the term of the preceeding sentence should terminate. That a court possesses this power was decided in England before the period of the American Revolution. In 1770 John Wilkes, having been twice convicted of libel, was sentenced to a term of imprisonment on each indictment, the sentence on the last to begin at the end of the period for which he was sentenced on the first. This judgment was taken by writ of error to the House of Parliament, and by that house the question was propounded to the bench of judges, whether the judgment upon the second conviction to commence from and after the termination of imprisonment to which he was sentenced for another offense was good in law. The answer was that the judgment of imprisonment is good in law. This case of *Rex v. Wilkes* is reported in 4 Burrows, 2577, and in 19 Howell's State Trials, 1133, 1134. As appears from the opinion of Chief Justice Wilmot, reported in the last-mentioned book, the doctrine was confined to misdemeanors, the reason being that in treason and felonies a certain known judgment which cannot be departed from, namely in the present tense of the subjunctive passive, must be imposed; but in misdemeanors, where punishment is discretionary, the limitation as to time seems only to be that the punishment shall take place before the total dismissal of the party. A punishment shall not hang over a man's head when he has once been discharged. This declaration respecting felonies has no application in the present case, for the reason that the offenses of which the petitioner was convicted are, under our statutes, high misdemeanors, and the court has a discretion as to limitation of time in the imposition of the punishment. This right to impose consecutive sentences, which had its origin before the American Revolution, is one well recognized in common law. 1 Chitty, Cr. Law, 718; Bish. Cr. Law, § 953; Bish. Cr. Pro. § 1827; *Castro v. Reg.*, 6 App. Cas. 229. The doctrine is one resting in common sense,

as well as in authority. It is apparent that, unless consecutive sentences can be imposed, the court must either suspend sentence for one offense until the expiration of the time of imprisonment named in the other sentence, at which time the personnel of the court and of the prosecutor's office may have changed, and the facts essential to the imposition of a sentence become difficult of ascertainment, or else the court must impose concurrent sentences, the effect of which is to entirely nullify the effect of one of them. For these reasons the great weight of authority in this country is that, without any statutory provision for consecutive sentences, the power to impose them resides in the court. *Church on Habeas Corpus*, 534. *Kite v. Comm.*, 11 Metc. (Mass.) 581; *Williams v. State*, 18 Ohio St. 46; *Brown v. Comm.*, 4 Rawle, 259, 28 Am. Dec. 130; *Mills v. Comm.*, 13 Pa. 631; *In re Esmond* (D. C.) 42 Fed. 827; *In re Fry*, 3 Mackey, 135; *Johnson v. People*, 83 Ill. 431. The practice of imposing consecutive sentences has, so far as I am aware, been followed in this state during the entire period of its existence as a state. Nor do I find anything in our statutes which in any degree modifies the power of the court in this respect.

The counsel for the petitioner insists that a provision of the criminal procedure act, now embodied in section 67, p. 891, of the crim. proc. act of 1898, exhibits a legislative intention inconsistent with the imposition of consecutive sentences. This provision in substance enacts that upon a sentence of imprisonment in the State Prison the sheriff or his deputy shall, within 15 days after sentence and receipt of a copy of the taxed bill of costs, transport to the said prison, and deliver to the custody of the keeper thereof, the person so sentenced. It then provides that the person so delivered shall be safely kept therein until the time of his confinement shall have expired, and the costs of prosecution be paid or remitted or otherwise discharged by law. It is perceived that the first part of this provision contains only directions to the sheriff respecting the time he shall have to remove the prisoner to the said prison. The only part of the section which can be regarded as at all in point is the declaration that the person so delivered shall be safely kept in the said prison until the time of his confinement shall have expired. But, conceding the power to impose consecutive sentences, the time of confinement of this petitioner was fixed by the sentences, namely, first seven years and then five years, and the time of his confinement mentioned in the provision will expire when both these terms end. So there seems nothing inconsistent between the declaration of the statute and the imposition of the sentence.

For these reasons, we think the petition should be dismissed and the petitioner remanded.

KNICKERBOCKER IMPORTATION CO. v. STATE BOARD OF ASSESSORS et al.

(Supreme Court of New Jersey. Nov. 13, 1905.)

TAXATION—CORPORATIONS—FRANCHISE TAX.

Stock owned by the corporation which issued it should not be considered in determining the amount of the franchise tax or license fee under the corporation tax act.

(Syllabus by the Court.)

Certiorari by the Knickerbocker Importation Company against the State Board of Assessors and others to review a tax assessment. Tax reduced.

Argued June Term, 1905, before SWAYZE and DIXON, JJ.

Rulif V. Lawrence, for prosecutor. Robert H. McCarter, Atty. Gen., for the State.

DIXON, J. The corporation tax act (Gen. St. p. 3335; P. L. 1901, p. 31) imposes on certain domestic corporations an annual license fee or franchise tax of one-tenth of 1 per cent. on all amounts of capital stock issued and outstanding on January 1st up to \$3,000,000. The prosecutor, one of these corporations, claims that on September 26, 1903, its entire capital stock, \$500,000, was issued to the Cazanove Champagne Company, and afterwards, before January 1, 1904, \$346,000 of the stock was returned, and on January 1, 1904, was still held by the Knickerbocker Company. On the evidence before us some doubt may be entertained whether there was ever a real issue of the stock, but, if issued, it was certainly returned and held as claimed. Because of an erroneous report made by the company to the State Board of Assessors, a tax of \$500 was levied for January 1, 1904, and the company now seeks to have it reduced to \$154, on the ground that the stock so held by it was not outstanding.

On behalf of the state it is insisted that stock once issued is outstanding, within the meaning of the statute, until it has been retired, under the twenty-ninth section of the corporation act. Laws 1896, p. 236, c. 185. But stock thus retired has ceased to exist, and cannot properly be designated as stock at all. I think that the Legislature had in mind only existing stock, out of which it selected that which was outstanding, as the basis of the tax imposed. If all the stock not retired had been intended, it would have been sufficiently described as "stock issued," or, perhaps, with more certainty, as "stock issued and not retired." The Legislature, however, chose a different term to qualify "stock issued," by requiring that it should be also "stock outstanding." If a corporation were incapable of owning stock issued by itself, "stock outstanding" would be equivalent to "stock not retired," for all existing stock must then have been owned by other persons. But before the statute now under consideration was passed the Legis-

lature had empowered domestic corporations to own stock issued by themselves, and the stock so owned still continued in legal contemplation to possess the qualities of real stock. Such stock is, I think, most obviously distinguished from other stock of the corporation by describing it as "not outstanding"; that is, not standing as a real charge against the corporation, just as a municipal bond in the sinking fund of the municipality might be regarded as an obligation not outstanding. But, even if it be conceded that the argument of the learned Attorney General creates some doubt, it should be remembered that, in the interpretation of tax laws for the purpose of ascertaining what persons and things are subjected to taxation, the courts incline to a strict, rather than a liberal, construction, on the idea that the Legislature, in imposing public burdens, will express its intention with clearness. We think it is not clearly declared that stock in the corporate treasury must be included in fixing the amount of this franchise tax.

The tax should be reduced to \$154. No costs are allowed.

GRAVES v. WOODBRIDGE TP.

(Supreme Court of New Jersey. Nov. 13, 1905.)

APPEAL—REVIEW—FINDINGS OF JURY.

Findings of fact by a district court upon a trial without a jury are binding upon this court, unless unsupported by testimony.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3955-3995½.]

(Syllabus by the Court.)

Appeal from District Court of New Brunswick.

Action by Ferdinand L. Graves against the township of Woodbridge. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued June term, 1905, before GARRISON and GARRETSON, JJ.

C. D. Ward, for appellant. Ephraim Outter, for appellee.

GARRISON, J. Plaintiff sued the township of Woodbridge for the damages occasioned by his carriage being overturned by a miry place in the highway. The action is founded upon the following statute: "That if any damage shall happen to any person or persons, his, her or their team, carriage or other property, by means of the insufficiency or want of repairs of any public road in any of the townships of this state, the person or persons sustaining such damage shall have the right to recover the same with costs in an action on the case in any court of competent jurisdiction in this state, to be instituted by said person or persons, his, her or their executors or administrators, against such township by its corporate name." Gen. St. N. J. p. 2844, § 192.

It was incumbent upon the plaintiff, under his state of demand, to prove by preponderance of testimony the want of repair

in the highway to which he ascribed his accident.

The state of the case settled by the judge who tried the issue in the district court of Perth Amboy, without a jury, fails to show that the plaintiff successfully sustained this burden; but, on the contrary, when taken in connection with his verdict, shows that the highway had just been repaired, and that the accident was attributable to natural causes, for which the defendant was not chargeable. There is nothing in the case that suggests that this finding of fact is not supported by the testimony.

Under these circumstances the judgment of the district court must be affirmed.

CITY OF PASSAIC v. PATERSON BILL POSTING, ADVERTISING & SIGN PAINTING CO.

(Court of Errors and Appeals of New Jersey. Nov. 20, 1905.)

MUNICIPAL CORPORATIONS — ORDINANCES — BILLBOARDS.

A city ordinance requiring that sign or billboards shall be constructed not less than 10 feet from the street line is a regulation not reasonably necessary for the public safety, and cannot be justified as an exercise of the police power.

(Syllabus by the Court.)

Error to Supreme Court.

The Paterson Bill Posting, Advertising & Sign Painting Company was convicted of violation of an ordinance of the city of Passaic, and brings error. Reversed.

William B. Gourley, for plaintiff in error. James Sullivan, for defendant in error.

SWAYZE, J. The plaintiff in error was convicted of the violation of an ordinance of the city of Passaic regulating signs or billboards and the conviction was affirmed by the Supreme Court. 71 N. J. Law, 75, 58 Atl. 343. The ordinance provides that no sign or billboard shall be at any point more than eight feet above the surface of the ground, and requires that it shall be constructed not less than ten feet from the street line. The statutory authority for this ordinance is the act of April 8, 1903 (P. L. 1903, p. 513, c. 240), which authorizes the governing body of any city to regulate the size, height, location, position, and material of all fences, signs, billboards, and advertisements. The statute does not limit the power of the municipal authorities to cases where the structures may be in a condition dangerous to the public safety, and the first section of the ordinance absolutely prohibits signs and billboards within ten feet of the street line. In the present case, the billboard was erected in 1902, prior to the passage of the act, and the police justice has certified that no evidence was offered of it being dangerous to life or limb because of insecure fastening. It is obvious that the effect of the ordinance is to

deprive the landowner of the ordinary use for a lawful business purpose of a portion of his land. Such deprivation is a taking within the meaning of the constitutional provision (*Trenton Water Power Co. v. Raff*, 86 N. J. Law, 335, approved by this court in *Pennsylvania R. R. Co. v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1); and where no compensation is given to the land owner, the taking can only be justified if it is done in the exercise of the police power of the state.

Upon this question the legal rule is accurately stated in the opinion of the Supreme Court in this case as follows: "The true rule to be extracted from the cases, and the one abundantly supported by them, is that when statutes are obviously intended to provide for the public safety, and the ordinances prescribed under them are reasonable and in compliance with their purposes, both the statutes and the ordinances are lawful, and must be given due effect. When the control attempted to be exercised over private rights is in excess of that essential to effectuate such legitimate authority, it deprives the owner of his property, by circumscribing the use of it, without giving him the just compensation secured to him in such case by the organic law." The Supreme Court held that because the erection of such signs might be attended with danger to the public at times of severe storms or by the decay of their supports, the ordinance was not without legal authority. In our opinion the legality of the ordinance does not depend upon the possibility of danger thus suggested, but upon whether such a regulation is reasonably necessary for the public safety. There must always be a possibility of danger from the erection of any structure, and from its decay; but such a possibility is not sufficient to justify the municipal authorities in depriving a man of the ordinary use of his land. In all our cities and towns, fences and buildings are erected upon the street line, involving the same or even greater possibility of danger from severe storms or natural decay, but it would hardly be maintained that a municipality could be authorized by the Legislature to compel the owners of buildings already erected to take them down or move them 10 feet back from the street line. Yet the danger to the public from bricks or slates, ice and snow, falling from a building is much greater than any possible danger from a billboard. In determining whether a regulation is reasonably necessary to secure the public safety, and therefore within the legitimate exercise of the police power, existing habits and customs are of great weight, and the universal custom of building upon the street line is cogent evidence that the public safety does not require that structures like billboards should be set back from the line. The very fact that this ordinance is directed against sign and billboards only, and not against fences, indicates that some consideration other than the public safety led to its passage. It is ob-

vious from the face of the ordinance that the object of the first section was not to secure the public safety; that section contains no reference to a dangerous condition of billboards, while the second section expressly undertakes to deal with those that become dangerous.

We think the control attempted to be exercised is in excess of that essential to effect the security of the public. It is probable that the enactment of section 1 of the ordinance was due rather to æsthetic considerations than to considerations of the public safety. No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Æsthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation. In two similar cases, the courts of other states have reached the same result. *Crawford v. Topeka*, 51 Kan. 756, 33 Pac. 476, 20 L. R. A. 692, 37 Am. St. Rep. 323; *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 74 N. E. 601. The view taken by the majority of the Appellate Division in New York is to the same effect. *People v. Green* (Sup.) 83 N. Y. Supp. 460. In Missouri it was held that the owners of property along a boulevard could not be restricted from building within forty feet of the street. *St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226. And in Maryland it was held that an ordinance of Baltimore forbidding the grant of a building permit unless in the judgment of the municipal board, the size, general character, and appearance of the building would conform to the general character of the buildings previously erected in the same locality, was invalid. The proposed building in that case was for the purpose of showing wild animals and in reality conducting a continuous circus performance upon one of the most beautiful streets in Baltimore. *Bostock v. Sams*, 95 Md. 400, 52 Atl. 665, 59 L. R. A. 282, 93 Am. St. Rep. 394. The case differs from *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 890, 2 L. R. A. 81, 12 Am. St. Rep. 560. The statute in that case gave a right of action in tort to an adjoining owner where a fence unnecessarily exceeding six feet in height was maliciously erected and maintained. Two elements were necessary for the right of action; the unnecessary character of the fence, and the malicious motive; and the court held that not only must the motive be malicious but the malevolence must be the dominant motive. Such a statute does not deprive the landowner of any ordinary or beneficial use of his property. It merely prevents him from using it to injure his neighbors without benefit to himself. In *Rochester v. West*, 164 N. Y. 510, 58 N. E. 673, 79 Am. St. Rep. 659, 53 L. R. A. 548, the ordinance under consideration went no further than to require the permission of the

common council for the erection of a billboard more than 6 feet in height, and that permission could only be given after notice to owners and occupants of land within 200 feet. The ordinance did not authorize the council to regulate the location and position of the billboard, and we must assume that in granting or withholding the permission, the council would act judicially and solely with reference to considerations of the safety, health, or morals of the public. The court said: "We think this statute conferred upon the common council of the city authority to regulate boards erected for the purpose of bill posting, so far, at least, as such regulation was necessary to the safety or welfare of the inhabitants of the city or persons passing along its streets." The invalidity of the ordinance in the present case, in our opinion, lies in the fact that it exceeds that necessity. Since the effect of the ordinance is to take private property without compensation, and cannot be justified as an exercise of the police power, it is invalid.

The judgment of the Supreme Court should be reversed, and a judgment entered reversing the conviction.

FLAHERTY v. PACK et al.

(Supreme Court of New Jersey. Nov. 13, 1905.)

NEW TRIAL—TIME FOR APPLICATION.

A district court has no authority to grant a new trial upon an application made more than 30 days after judgment, unless the application is based on newly discovered evidence.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 240.]

(Syllabus by the Court.)

Certiorari to District Court of Atlantic City.

Action by James Flaherty against William H. Pack and others. Judgment for plaintiff. On an order setting aside the same, plaintiff brings certiorari. Order set aside.

Argued June term, 1905, before SWAYZE and DIXON, JJ.

Thompson & Cole, for prosecutor. Eli H. Chandler, for defendants.

DIXON, J. In a case commenced by attachment in the district court of Atlantic City the plaintiff on September 17, 1903, obtained judgment after a hearing, without the defendants having entered an appearance to the action under sections 71 and 72 of the district court act (P. L. 1898, pp. 583, 584). In December 1904 the defendants moved to open the judgment so that a new trial might be had, and on January 5, 1905, the court made an order granting the motion. This order the prosecutor seeks to have set aside for lack of authority in the court to make it.

The power of district courts to grant new trials is derived from, and therefore limited by the seventeenth section of the statute above cited (page 559), which enacts that "In every case tried in any of said courts the

judge may * * * order a new trial * * * provided that application for such new trial, except where the said application is based on newly discovered evidence, shall be made within thirty days after judgment." In the present case the application on which the new trial was ordered was not based on newly discovered evidence, and assuming, without deciding, that the hearing was a trial within the intent of the statute, the application was not made in time to authorize its allowance. The fact that a previous application had been made in time did not alter the legal situation. When that application was on April 14, 1904, formally and finally overruled, the power of the court to grant a new trial was exhausted, unless newly discovered evidence was presented.

The order under review must be set aside, with costs.

FRANZ-MILTON CO. v. HALL.

(Supreme Court of New Jersey. Nov. 13, 1905.)

APPEAL—SETTLEMENT OF CASE.

If the party who has appealed from a judgment of a district court fails to have the state of the case agreed upon or settled, and also fails to obtain a grant of further time therefor within 15 days after the judgment, his right to prosecute the appeal is at an end.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1923.]

(Syllabus by the Court.)

Appeal from District Court of Trenton.

Action by the Franz-Milton Company against William I. Hall. Judgment for defendant, and plaintiff appeals. Dismissed.

Argued November term, 1905, before GARRISON, SWAYZE, and DIXON, JJ.

John T. Bird, for the motion. John H. Backes, opposed.

DIXON, J. On September 28, 1905, the district court of Trenton rendered judgment for the defendant, and on October 7th the plaintiff gave notice of appeal, and executed the necessary bond, which was approved by the judge of the court and filed. On October 21st the judge, at the request of the plaintiff made after the rendition of judgment, reduced his findings of law and fact to writing, and filed the same, and on November 6th, he signed an order granting the plaintiff 15 days thereafter, in which to have a state of the case agreed upon or settled. The defendant now moved to dismiss the appeal, insisting that, after the lapse of 15 days from the date of the judgment, the judge had no authority to extend the time for preparing the case on appeal.

We think this position of the defendant is correct. The provisions of the act giving the right of appeal (P. L. 1902, p. 565) are evidently intended to secure a speedy hearing, and in furtherance of that intent we think the third section shall be held to mean that, if the appellant allows 15 days to elapse after judgment without having the case agreed

upon or settled, and without obtaining from the judge an extension of time therefor, his right to prosecute the appeal is at an end. *Jones v. Proprietors*, 38 N. J. Law, 206; *Jones v. Morristown Aqueduct Co.*, 37 N. J. Law, 556. The request of the plaintiff that the judge would put his findings in writing, although assented to by the judge, cannot be deemed an implied extension, because the grant of further time should be in writing, and for a definite period, in order that the adverse party may be able to learn when the appeal is being duly prosecuted. Perhaps the assent of the judge to write down and file his particular findings of fact and law might have been regarded as a postponement of the final rendition of judgment, but it was not so treated by either the judge or the appellant; and it would not now avail the appellant for us so to treat it, because the appellant did not give notice of appeal and enter into bond within 10 days after the findings were filed, or have a state of the case perfected or an order of extension signed within 15 days after such filing.

The appeal must be dismissed.

CITY OF LAMBERTVILLE v. APPLE-GATE.

(Supreme Court of New Jersey. Nov. 13, 1905.)
MUNICIPAL CORPORATIONS — ORDINANCES —
VALIDITY—LEGISLATIVE DISCRETION.

When the authority to impose a penalty conferred upon the legislative body of a municipality involves a purely legislative discretion, such body must itself exercise such discretion by fixing the precise sum of such penalty.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 154, 1310.]

(Syllabus by the Court.)

Certiorari by Richard B. Applegate against the city of Lambertville to review a conviction of a violation of a city ordinance. Reversed.

Argued June term, 1905, before GARRISON and GARRETSON, JJ.

Walter F. Hayhurst and Frank S. Katzenbach, for prosecutor. Lambert H. Sergeant, for defendant.

GARRISON, J. The prosecutor of this writ of certiorari was convicted before a justice of the peace of the violation of an ordinance of the city of Lambertville, entitled "An ordinance to license and regulate hawkers and peddlers," passed September 6, 1893. Judgment was given for \$10 penalty and costs.

The charter of the city of Lambertville (P. L. 1863, p. 960, § 21) authorizes the passage of such an ordinance. Section 23 (page 962) provides "that in all cases where by the provisions of this act the common council have authority to pass ordinances on any subject they may prescribe a penalty or penalties for violation thereof, either by im-

prisonment, not exceeding seven days if in the town jail, or by fine not exceeding one hundred dollars or both."

The ordinance under review in its fourth section provides:

"Sec. 4. Any person found guilty of a violation of this ordinance shall be fined a sum not less than five dollars nor more than twenty dollars or be imprisoned in the city jail for a time not exceeding seven days or in the common jail of the county of Hunterdon not exceeding sixty days, or to be both fined and imprisoned."

This delegation to the magistrate of the power to fix the penalty for the violation of the ordinance is not within the authority conferred by the Legislature upon the common council of the city of Lambertville. *Slocum v. Ocean Grove*, 59 N. J. Law, 110, 35 Atl. 794.

The determination of the penalty that will be likely to induce peddlers to take out the prescribed license or to deter them from pursuing their calling without one is purely a legislative question; hence when the authority to prescribe such penalty is conferred upon a legislative body such body must itself fix the precise sum of such penalty. *Young & McShea v. Atlantic City*, 60 N. J. Law, 125, 37 Atl. 444.

This is equally so with respect to license fees imposed for revenue. Where the fixing of the amount of the penalty presents a judicial question arising from the circumstances of each case that calls for its imposition, the exercise of such right by a magistrate within limits prescribed by the legislative body of the municipality is not deemed a delegation by such body of its authority, but only a mode for its more efficient exercise. *Haynes v. Cape May*, 52 N. J. Law, 180, 19 Atl. 176.

It is a question of legislative intention for the ascertainment of which the guide applicable to the present case is that a legislative function conferred upon a legislative body is intended to be exercised by it, and not to be handed over to the determination of a judicial tribunal.

The ordinance brought up by this writ being invalid in this essential particular, the conviction of the prosecutor under it is set aside without regard to the other reasons filed and argued by him.

LANG v. MAYOR OF CITY OF BAYONNE et al.

(Supreme Court of New Jersey. Nov. 13, 1905.)
MUNICIPAL CORPORATIONS — DISMISSAL OF
PATROLMAN.

The action of a de facto board of police commissioners, expelling a patrolman from the police force, is as to him valid.

(Syllabus by the Court.)

Rule to show cause why mandamus should not issue on the petition of Lewis Lang

against the mayor and chief of police of the city of Bayonne. Rule discharged.

. Argued June term, 1905, before DIXON, GARRISON, GARRETSON, and SWAYZE, JJ.

Gilbert Collins, for the rule. Thomas F. Noonan, opposed.

GARRISON, J. The relator was appointed as a patrolman on the police force of the city of Bayonne on July 3, 1893, and served continuously as such until April 24, 1905, when after notice and a hearing he was expelled by a resolution of the board of police commissioners of that city. His present application is for a mandamus requiring the mayor and chief of police to assign him to duty as a patrolman on the police force of the city.

If the action of the board of commissioners by which the relator was expelled from the police force was as to him valid, his present application, of course, must fail. His contention is that his said expulsion was invalid, for the reason that the act of the Legislature (P. L. 1905, p. 155, c. 76) under which the board of police commissioners was created was unconstitutional.

This contention, if sound, avails the relator nothing. The board at the time it directed his expulsion was a de facto body, exercising public functions under a color of right. Hence, its acts so far as the relator is concerned are valid. *Mitchell v. Tolan*, 38 N. J. Law, 201; *Bownes v. Meehan*, 45 N. J. Law, 189; *Dugan v. Farrier*, 47 N. J. Law, 383, 1 Atl. 751.

The rule to show cause will be discharged.

CONN v. REED, DAWSON & CO.

(Supreme Court of New Jersey. Nov. 13, 1905.)

SALE — FAILURE TO DELIVER — LIABILITY OF CONSIGNEE — DEFAULT OF CARRIER.

As between consignee and consignor, the loss of goods by a common carrier falls upon the consignor when the carrier was selected by him in the performance of his agreement to make a delivery to the consignee.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 535.]

(Syllabus by the Court.)

Appeal from District Court of Newark.

Action by Charles G. Conn against Reed, Dawson & Co. Judgment for plaintiff, and defendants appeal. Affirmed.

The case settled by the judge of the district court is as follows:

"The suit was brought to recover the amount due on a book account for goods sold and delivered by plaintiff to defendants. The trial was had before the court without a jury and resulted in a judgment for the plaintiff for \$160.60.

"I find the facts of the case as follows:

"Plaintiff, a manufacturer of musical instruments at Elkhart, Ind., agreed with de-

fendants, retailers, of the city of Newark, in this state, to consign to them on sale certain goods, the same to be paid for when sold by defendants, and the latter to have the right to return at their expense any goods which they might not sell and to have credit for the same. In pursuance of that agreement plaintiff shipped to defendants several consignments of goods, and payments were made and goods returned on account from time to time. After thus dealing for something over one year, the account was closed at request of the plaintiff, and defendants agreed to settle the account by the payment of cash and return of goods then remaining in their hands. Defendants packed and shipped all the said goods remaining, but when the packages were delivered to the plaintiff it was discovered that certain instruments were missing. The price at which the missing instruments were bought by defendants was \$61.60; and it is only this item of plaintiff's claim which the defendants dispute.

"The amount charged to defendants before it was agreed that the account should be closed was \$199. The price charged for the goods received by plaintiff in return was \$38.40, and defendants admitted that they owed plaintiff \$99 for instruments sold by them.

"I find that the goods about which the dispute arises were packed and shipped by defendants, but were not received by the plaintiff. The correspondence between the parties, which was admitted in evidence, shows that defendants were to pay all charges of transportation; that the goods consigned by plaintiff to defendant from time to time were shipped by express; that, when the account was closed, plaintiff requested defendants to return the goods by express, and that defendants refused to return goods by express unless plaintiff should pay the charges; and that defendants shipped the goods by freight over the Pennsylvania Railroad. There is no evidence before the court that plaintiff consented to this means of returning the goods, nor is there evidence that he objected to the same after defendant's first refusal to return the goods by express.

"All of which is respectfully submitted this 10th day of March, 1905.

"Thomas J. Lintott, Judge."

Argued June term, 1905, before GARRISON and GARRETSON, JJ.

Michael T. Barrett, for appellants. Horton & Tilt, for appellee.

GARRISON, J. (after stating the facts). Upon the case stated by the district court its judgment should be affirmed. The parties, while holding the relation of principal and agent with respect to the title to the goods, dealt at arm's length in reference to the agreement between themselves regarding the manner in which the settlement should be made and the unsold goods returned. Part of this agreement was that the defendant should return such goods and bear

the expense of such return. If the parties had agreed as to the method of making such return and the goods had then been lost in transitu, a different question might arise, but here the defendant for his own pecuniary benefit and without the concurrence of the plaintiff selected the mode of carriage he desired and which the plaintiff did not desire; hence the district court properly held that the loss must fall upon the defendant, whose duty it was under the contract to return the goods to the plaintiff, if he would be credited with their value.

For this purpose the railroad company was in no sense the agent of the plaintiff to accept delivery, but, on the contrary, was clearly the agency selected by the defendant to make delivery.

The judgment of the Second district court of Newark is affirmed.

HAINES v. ROGERS et al.

(Supreme Court of New Jersey. Nov. 13, 1905.)

EXECUTORS—ACTIONS AGAINST—PLEADING.

A count stating that N. H. in his lifetime was indebted to the plaintiff in the sum of \$500, and made a writing by which he ordered his executors to pay, one year after his death, to plaintiff the sum of \$500, does not state a cause of action against the executors. There is no statement of a promise to pay, nor statement of a delivery of the paper. The paper set out is testamentary.

(Syllabus by the Court.)

Action by Sarah B. Haines against Edward Rogers and others. Demurrer to the declaration overruled.

Argued June term, 1905, before GUMMERE, C. J., and GARRETSON, GARRISON, and REED, JJ.

Charles Ewan Merritt, for demurrant. Henry S. Scovel, opposed.

REED, J. This is an action against the executors of Nathan Hollinshead. The first count sets out that Nathan Hollinshead in his lifetime became indebted to the plaintiff in the sum of \$500, and thereupon, in full consideration, did make a certain writing, bearing date May 1, 1888, by which writing he did order and direct his executors, named in his will, to pay said plaintiff, one year from the date of his death, the sum of \$500; that said Nathan Hollinshead died November 2, 1903, testate, having appointed the defendants executors; that the will was duly probated; that the plaintiff presented her said claim in writing to both of them, who refused to pay it, and notified her to bring suit therefor. There is attached to the declaration a writing, presumably the one alluded to in the declaration, but it is not made by reference thereto a part of the declaration itself. The question before us is whether the first count, as it stands, presents a cause of action.

It is clear that the mere statement that the deceased was indebted to the plaintiff

presents no cause of action. There must be a statement of a promise to pay, whether the promise is express or implied. 1 Chitty on Pleading, p. 802. But, considering the statement of indebtedness as an allegation of a valuable consideration, does a written order create a right of action? The writing itself contains no admission of the existence of a debt. The pleader does not say that the written order was executed to pay \$500, being the amount which he was indebted to the plaintiff. Nor as a promise to pay a debt would it have any efficacy, for it never was delivered to the plaintiff, and was revocable at any time. Indeed, the writing seems to have been testamentary in character, and void for want of proper execution as a will. In *Cover v. Stem*, 67 Md. 449, 10 Atl. 231, 1 Am. St. Rep. 406, an order by the deceased upon his executors to pay at his death to a certain person a certain sum was held to be void, as testamentary in character, although sealed, thus importing a consideration, and also delivered. Upon the first count judgment must be for the demurrant.

The remainder of the declaration contains the common counts, without reference to the paper writing, so is good. Upon this there must be judgment for the plaintiff.

BUTLER et ux. v. HOBOKEN PRINTING & PUBLISHING CO.

(Supreme Court of New Jersey. Nov. 13, 1905.)

1. NEW TRIAL—EXCESSIVE DAMAGES.

On a rule to show cause a new trial may be granted, where an error has resulted in a verdict for excessive damages, although such error was not the subject of an exception at the trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 131.]

2. LIBEL AND SLANDER—DAMAGES.

In an action for libel or slander, damages cannot be assessed for physical sickness alleged to have been caused by the libel or slander.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 343, 347.]

(Syllabus by the Court.)

Action by Frank E. Butler and Annie E. Butler against the Hoboken Printing & Publishing Company. Verdict for plaintiffs. Rule to show cause made absolute.

Argued June term, 1905, before GUMMERE, C. J., and GARRETSON, GARRISON, and REED, JJ.

McCarter, Williamson & McCarter, for plaintiffs. Bedle, Edwards & Thompson, for defendant.

REED, J. This is an action for damages for libel, defaming the plaintiff. The plaintiff was a professional rifle expert. Her professional name is Annie Oakley. As such she traveled with Buffalo Bill's show for a number of years. The Hoboken Observer, published by the defendant, published an article headed "Downfall of a Famous Woman Sharpshooter. Annie Oakley, a Vic-

tim of Drugs, Sent to Jail." It was asserted that Annie Oakley was a prisoner in the Harrison street police court; that she was arrested, charged with robbery; that she pleaded guilty, and was fined; that according to the police she was addicted to the use of drugs; that she was formerly with Buffalo Bill's show; that she was then destitute, and forced to accept shelter from an old colored man named Curtis; that a justice of the peace sent her to bridewell for 25 days. For the injury occasioned by this publication this action was brought, and a verdict of \$3,000 recovered. This hearing is upon the return of a rule to show cause why this verdict should not be set aside and a new trial granted. It appears that the same item was sent out from Chicago, and was published in a number of newspapers throughout the country. The trial justice very properly charged that the defendant was liable for only that portion of the entire injury resulting from these publications as could be attributed particularly to the defendant. The trial justice also properly overruled testimony to show the particulars of actions brought against other newspapers for publishing a similar libel and the amount of damages received in some of those suits.

There is, however, another phase of the case which seems to call for more consideration. The declaration charged, as the result of the publications, that the defendant was greatly injured in health and obliged to go to great expense for procuring physicians and medicines. The trial justice charged that the defendant was responsible for so much of the injury to her health and resultant disability to follow her profession as was produced by this article. No exception was taken to this part of the charge, nor was the attention of the trial justice called to this language, nor, indeed, was any modification of this language suggested. The counsel for the defendant now insists that injury to health is not a legitimate element of damage in actions for defamation of character. Even if this insistent is well grounded, as no exception was taken at the trial to the charge, the defendant is not strictissimi juris entitled to now raise that point. When an exception is taken to an instruction or to the admission of illegal evidence, the court, upon motion for a new trial, will not set aside the verdict if it appears that justice has been done. So, on the other hand, a verdict may be set aside when the rules of damages adopted are erroneous or testimony concerning them irrelevant, although no objection was made at the trial. *Stewart's Digest*, pp. 838, 839, §§ 10, 11, 40; *Lippincott v. Souder*, 8 N. J. Law, 161-165; *Hatfield v. C. R. R.*, 33 N. J. Law, 251. The *Hoboken Observer* is a local newspaper circulating in the southern part of Hudson county. It is impossible to resist the conclusion that the element of ill health and its alleged consequences must have figured most

influentially in inducing the jury to award \$3,000 as damages. The injury caused by this publication to the private or professional reputation of the plaintiff, she following her profession in Europe as well as the United States, could hardly have been, under the circumstances, equivalent to \$3,000. Indeed, in her testimony the money feature of special importance was her inability to shoot because of nervous prostration caused by this and other publications. By reason of this, she says, she was compelled to abandon an arrangement for the season of 1903 by which she was to receive \$150 a week. So it would seem clear that this factor must have entered into the assessment of damages returned by the jury. If, therefore, it be true that injury to the health of a libeled person and the consequences flowing therefrom is not a legitimate ground for assessing damages, a new trial should be directed, although the error crept into the trial without objection.

The case upon the authority of which the defendant's insistent is grounded is *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420. That was an action for slander charging the plaintiff with unchastity. The special damages proved were impaired health and mental trouble caused by the spoken words. The words spoken were not actionable in themselves, and so it required proof of some special damages to support the action. It was held that ill health, although actually produced by the slander was not, in a legal view, a natural or ordinary consequence of the slander. This case was decided in 1858. Two years later the English Court of Exchequer, in *Allsop v. Allsop*, 5 Hurl. & N. 534, was called upon to deal with an action for slander, in which damages were claimed for sickness caused by a false charge of unchastity. *Pollock, C. B.*, said: "There is no precedent for any such special damage as that laid in the declaration being made a ground of action, so as to render actionable what would otherwise not be so. * * * This particular damage depends upon the temperament of the party affected, and it may be laid down that illness, arising from the excitement which the slanderous language may produce, is not that sort of damage which forms a ground of action." In *Lynch v. Knight*, decided in the House of Lords in 1864, and reported in 9 House of Lords Cases, 593, and in 8 English Rul. Cases, 382, 388, Lord Brougham, in giving judgment, remarked: "I think *Allsop v. Allsop* was well decided, and that mere mental suffering or sickness supposed to be caused by the speaking of words not actionable in themselves, would not be special damages to support the action." Lord Wensleysdale said: "Mental pain or anxiety the law cannot value, and does not pretend to redress when the unlawful act complained of causes that alone; though, where a material damage occurs and is connected with it, it is

impossible a jury in estimating it should altogether overlook the feelings of the party interested. For instance, when a daughter is seduced, however deeply the feelings of the parent may be affected by the wicked act of the seducer, the law gives no redress, unless the daughter is also a servant, the loss of whose services is a material damage, which a jury has to estimate. When juries estimate that, they usually cannot avoid considering the injured honor and the wounded feelings of the parent."

Each of the three cases mentioned was an action for slander, and the slander charged was for speaking words which were not actionable per se, and only became such if followed by special damage. The question in each case was in respect to the kind of special damage which would give rise to a cause of action. These cases seem to settle the rule that neither mental suffering nor physical sickness will alone do so in that class of actions. The present action belongs to a different class. The words for which damages are sought, not only charged the defendant with a crime and so were actionable per se, but they were printed and, as a libel, were similarly actionable. In this class of actions for defamation of character, upon proof of the publication, damages are presumed to have accrued; therefore in such actions it is not necessary for the plaintiff in his declaration to plead special damages in order to support his action. If he desires to prove special damages he must plead them, it being the rule that no evidence shall be received of any loss or injury which the plaintiff sustains from the words used unless it be specially stated in the declaration and if named it must be proved as stated. 2 Saunders on Pleading & Evidence, marg. p. 927.

At this point arises the important question whether the range of what may be pleaded or proved as damages is wider in this class of actions than in those which depend entirely upon proof of special damages. Mr. Odgers, after stating the rule respecting special damages in the first class, if they have been properly pleaded proceeds to say that the law is not quite so strict in actions where the words are actionable per se; and that although when the words are not actionable per se, mental distress, illness, etc., do not constitute special damages, yet where the words are actionable per se the jury may take such matters into their consideration in according damages. Odgers on Libel & Slander. His authority for this statement is the remark of Lord Wensleysdale in *Lynch v. Knight*, supra, already quoted. Now it is to be observed that Lord Wensleysdale did not say that mental sufferings are to be regarded as a subject for special damages when the words are actionable per se. What he did say was that a jury, if permitted to return damages for a legal cause of action, would be influenced by the con-

siderations mentioned. It is conceded, however, that while mental suffering will not support an action for words not actionable per se, nevertheless, damages for mental suffering may be assessed in actions for defamation actionable per se. In Massachusetts, such damages for mental distress are regarded as general, and are recoverable, without being specially pleaded. *Chesley v. Thompson*, 137 Mass. 136; *Lombard v. Lennox*, 155 Mass. 76, 28 N. E. 1125, 31 Am. St. Rep. 528. In New York such damages seem to be regarded as punitive and assessable only in cases where there is proof of actual malice. *Brooks v. Harrison*, 91 N. Y. 83-92; *Warner v. P. P. Co.*, 132 N. Y. 181, 30 N. E. 893; *Van Ingen v. Star Co.*, 1 App. Div. 429, 37 N. Y. Supp. 114, affirmed 157 N. Y. 695, 51 N. E. 1094.

The right of a libeled person to recover damages as a compensation for her feelings was recognized by our Court of Errors and Appeals in the case of *Knowlden v. Guardian Printing Co.*, reported in 55 Atl. 287. Indeed, mental anguish, mortification, and anger are the necessary results from defamation of character, and so may be said to be legally inferred from the fact of defamation. But, when physical injury is predicated of the defamatory words spoken, it cannot be said that it is either the necessary or natural consequence therefrom. In rare instances physical sickness may result from mental worry, but it is an exception to the rule. Even then, it is a step removed from the first result, and cannot be said to be the proximate consequence of the defamatory words. The entire absence of any precedent, so far as I have examined the question, for the assessment of damages in this class of cases for physical ailment is a remarkable feature in the administration of the law, if such right to damages exists. There is an abundance of authority supporting the assessment of damages for mental anxiety, but none for damages for physical sickness. The same may be said of the other class of actions alluded to by Lord Wensleysdale, actions for seduction based upon the fiction of loss of services. By inveterate usage, the relations of master and servant having been established, the parent is to be permitted to recover for injured feelings. But it admittedly rests upon the ground of inveterate usage, and not upon any logical basis. *Sedgwick on Damages*, p. 542.

In the present case the damages resulting from physical illness which the jury was permitted to consider did not stop with the mere compensation for such physical pain and expenses for medical treatment. The important loss resulting from her broken health was that she was compelled by reason of it to abandon her profession for a season at a loss of \$150 a week. This alleged loss, it is perceived, did not result from failure to procure engagements by reason of loss of professional standing caused by

the defendant's words. The loss of employment, therefore, was not the result of injured reputation, but of physical inability to shoot. This inability is traced back to mental worry, which resulted from knowledge by the plaintiff that she had been defamed. I am of the opinion that damages for loss of earnings so resulting, as well as for physical distress, are too remote. Nor can the amount of damages found be vindicated upon the ground that they might have been exemplary. The absence of actual malice was admitted by the plaintiff upon the trial, and the right to recover punitive damages was disclaimed.

The rule should be made absolute.

SPOUL et al. v. BOROUGH OF STOCKTON.

(Supreme Court of New Jersey. Nov. 13, 1905.)

1. MUNICIPAL CORPORATIONS—CONSTRUCTION OF SIDEWALKS—PROCEDURE.

An ordinance of the borough of Stockton undertook to make it lawful for the borough council to require the construction of sidewalks by resolution when in their judgment it might be necessary. *Held* that, notwithstanding this ordinance, the council must proceed in accordance with the statute, by general or special ordinance, to require the construction of a sidewalk.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 802.]

2. SAME—SHADE TREES—REGULATION.

A borough ordinance, which makes it the duty of any person having shade or ornamental trees in a street to cut down and remove the same within 10 days after notice so to do, is not authorized by the statutory power to regulate the planting and protection of shade trees.

(Syllabus by the Court.)

Certiorari by Amy H. Spoul and Hannah Dilts against the borough of Stockton to review an assessment. Assessment set aside.

Argued June term, 1905, before DIXON and SWAYZE, JJ.

H. B. Herr, for prosecutors. O. I. Blackwell and George H. Large, for defendant.

SWAYZE, J. The assessment is for the cost of a new sidewalk, and of removing a tree. It is sought to sustain it under two ordinances. The first ordains that, to provide for the construction, relaying, repairing, and keeping in repair the sidewalks on any and all streets, roads, and public places in the borough, it shall be lawful for the common council, by resolution, when in their judgment it may be necessary to construct, relay, or repair said sidewalk, to order and require the owners of the respective lots fronting on such streets, roads, or public places to construct, relay, or repair said sidewalks with the same or any other material, and of such width as they may determine and adjudge that there is a public necessity for so doing. The ordinance does not provide that any specified sidewalk, nor that all the sidewalks in the borough, shall be

constructed, relaid, or repaired. It seeks only to authorize the common council to act by resolution when in their judgment it may be necessary. The statute requires that it act by general or special ordinance. P. L. 1897, p. 301, § 33, pt. 3. It might, under this power, provide for the construction of sidewalks in all streets, or in specified streets, or in a single street, or perhaps in a portion of a street; but that is not the aim of this ordinance. There is another objection equally serious. By the amendment of the borough act (P. L. 1899, p. 171) ordinances passed pursuant to section 33 must be preceded by an application in writing for such improvement, describing the nature, kind, and extent of the work or improvement desired, signed by at least 10 freeholders of the borough, residing therein. There seems to have been no such application in this case. It is argued that this application is not required when the only thing to be done is to repair the sidewalk. Whether the substitution of a flag sidewalk for a board walk is a repair may well be doubted, but need not be decided, since section 33, pt. 3, relates to repairs as well as to original construction. The assessment for the sidewalk was without warrant.

The removal of the tree is justified under an ordinance which makes it the duty of any person having shade or ornamental trees, shrubs, or bushes, in any street or public grounds to cut down and remove the same within 10 days after having been properly notified so to do. The case fails to show that any notice was given, but the ordinance itself cannot be sustained. The statutory power of the council is to regulate the planting and protection of shade trees in the streets and parks. P. L. 1897, p. 296, § 28, pt. 1. The attempt of the ordinance is to compel the cutting down and removal of all trees upon notice. This is not protection, but destruction. The council is empowered to prevent and remove all obstructions, encroachments, incumbrances, and nuisances in and upon any street or sidewalk. Such a power is only a police ministerial power to prevent and relieve the public from such obstructions in the enjoyment of their streets as are apparent or readily ascertainable without the necessity of any adjudication. *Associates of the Jersey Company v. Jersey City*, 34 N. J. Law, 31, 38, 39. Such a power does not authorize the summary removal of growing trees without notice to the owner. *Avis v. Vineland*, 56 N. J. Law, 474, 28 Atl. 1039, 23 L. R. A. 685. Such trees are not necessarily an unlawful incumbrance or encroachment. In a proper case an action lies in favor of the landowner for their destruction. *Winter v. Peterson*, 24 N. J. Law, 524, 61 Am. Dec. 678. In the present case no attempt was made to adjudge that the tree in question was an obstruction, encroachment, incumbrance, or nuisance. The testimony taken after the destruction of the tree, and after the

writ in this case was allowed, cannot take the place of a prior adjudication. The landowner was entitled to notice. *Vantilburgh v. Shann*, 24 N. J. Law, 740; *Clark v. Pierson*, 37 N. J. Law, 216; *Dawes v. Hightstown*, 45 N. J. Law, 127.

The assessment must be set aside, with costs.

MILLER v. BARBER et al.

(Supreme Court of New Jersey. Nov. 18, 1905.)

INSANE PERSONS—AVOIDING CONVEYANCE—TENDER OF CONSIDERATION.

Payment or tender of the consideration received by the lunatic, after proper reduction for rents and profits, is a condition precedent to avoidance of his deed of assignment for a valuable consideration of a leasehold interest, made before his lunacy was found by commission, to one having no knowledge or notice of the insanity and acting in good faith, so that such assignee is entitled to judgment in ejectment for the premises against the lunatic's guardian, she having made no payment or legal tender, but merely requested a reconveyance, and offered to return the consideration on ascertainment of the amount due after an accounting of the rents; the guardian having the right, however, to further proceed in such action, or by bill in chancery, on her right to avoid the deed, on making a proper tender or bringing the money into court.

Action by Alexander A. Miller against Siscilla Barber and others. Heard on plaintiff's motion for judgment on a special verdict. Judgment for plaintiff.

Argued June term, 1905, before PITNEY, J.

George H. Pierce and Coult, Howell & Ten Eyck, for plaintiff. Alonzo Church, for defendants.

PITNEY, J. This is a motion to enter judgment for the plaintiff upon a special verdict in ejectment. Plaintiff claims the right of possession as assignee of a leasehold interest in the premises. The verdict sets forth that one John Barber, being owner of the entire leasehold interest in question, and being in actual possession of the whole of the premises as such lessee, assigned the leasehold interest to one Anna Miller, who, in turn, assigned it to the plaintiff. John Barber was at the time mentally incapable of understanding the nature and effect of the transaction in which he was engaged. The assignment, although taken in the name of Anna Miller, was taken by her for the plaintiff's benefit through one August Miller, who acted as the plaintiff's agent in the negotiations for and purchase of the lease. He did not know at the time, nor did he have such knowledge as would have led a reasonably prudent person to believe, that John Barber was mentally incapable. The price paid by August Miller, as agent for the plaintiff, to John Barber as the consideration for the assignment was \$3,500, which was paid to Barber in cash. This was \$1,500 less than the fair market value of the leasehold interest. Immediately after the assignment Barber disappeared, and his

whereabouts from that time have been unknown. The family of Barber, who are defendants in this suit, continued to occupy a part of the premises and refused to recognize the assignment, having neither paid rent to the plaintiff nor recognized his title as owner of the lease. Shortly after the disappearance of John Barber a commission in lunacy was issued by the Court of Chancery, under which he was found to be a lunatic, and his daughter Matilda Barber was appointed his guardian prior to the beginning of this action. She was in actual possession of a part of the premises, with her mother and brothers and sisters, at the commencement of this suit. No formal tender of any amount was ever made by or on behalf of Barber or his guardian either to Anna Miller or to the plaintiff or to any one representing him; but Matilda Barber, as guardian, through her attorney, prior to the beginning of this action, requested a reconveyance of the leasehold interest, and offered to return the amount of the consideration paid to John Barber, upon proper ascertainment of the amount remaining due after an accounting should be had of the rents received by the plaintiff up to that time for the residue of the premises. This offer was refused.

It is properly conceded by counsel for defendants that since John Barber's deed of assignment was made before his lunacy was found by commission, and since the plaintiff or his agent had no knowledge or notice of the insanity, and dealt with the lunatic in good faith, paying for the assignment a good and valuable consideration, the deed is not void, but only voidable, and that it can be avoided only on paying or tendering back to the plaintiff the consideration paid to him, less so much as he has received by way of rents and profits since the assignment. *Eaton v. Eaton*, 37 N. J. Law, 108, 116, 18 Am. Rep. 716; *Blakeley v. Blakeley*, 33 N. J. Eq. 502, 508; *Doughten v. Camden B. & L. Ass'n*, 41 N. J. Eq. 556, 561, 7 Atl. 479; *Matthiessen & Weichers Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536. Until avoidance the deed of the lunatic in such cases remains good in law. Payment or tender of the consideration money received by the lunatic, less any proper offsets, is a condition precedent to avoidance. The special verdict in the present case does not set forth a legal tender, and there is, therefore, no legal obstacle to the recovery by the plaintiff of the premises in dispute. As the case stands, the plaintiff is entitled to judgment on the special verdict. This judgment, of course, will only settle the legal title and right of possession as they stand at present. Ejectment Act, §§ 42, 43, 44 (Gen. St. p. 1288). Whenever the deed of the lunatic shall be legally avoided, the premises may be recovered back from the plaintiff, for the judgment herein will not conclude the defeated party as to a title or right of possession subsequently accruing. *Hoboken L. & L. Co. v. Mayor, etc., of Hoboken*, 36 N. J.

Law, 540, 545; Hunt v. O'Neill, 44 N. J. Law, 564. Nor does it necessarily follow, even from the present judgment, that the defendants must submit to be actually ousted from the premises. They, or at least one of them (the guardian in lunacy), asserts a right to avoid the deed of assignment, which right is legally incomplete because the tender has not been effectively made and followed up. The judgment herein will not be conclusive against such an equity. The guardian is still at liberty to assert it by making an effective tender of the amount paid by the plaintiff to John Barber, with interest, subject to a proper discount for the amount of rentals received by the plaintiff from the premises since the assignment.

Whether this relief shall be sought by the defendants through application to this court for a stay of execution, or by bill in chancery to restrain the enforcement of the judgment in ejectment, is for the defendants to determine. It is well settled that this court, like other courts of law, has a summary jurisdiction of an equitable nature, exercised through stay of execution and the like, for the purpose of preventing its own judgments and process from being made the means of working injustice. Numerous instances of the exercise of this jurisdiction are cited in Johnston v. Bowers, 69 N. J. Law, 544, 547, 55 Atl. 230. See, also, Wemple's Adm'r v. Van Arx, 46 N. J. Law, 531; Hickman v. State, 62 N. J. Law, 499, 504, 41 Atl. 942; Weatherby v. Weatherby's Ex'rs, 63 N. J. Law, 445, 448, 43 Atl. 683; Intiso v. Metropolitan, etc., Assoc., 68 N. J. Law, 588, 590, 53 Atl. 206; Bailey v. Penna. R. R. Co., 70 N. J. Law, 308, 311, 58 Atl. 83.

Let judgment be entered for the plaintiff upon the special verdict, with a stay of execution for 30 days, within which time the defendants may apply either to the Court of Chancery for an injunction or to this court for a further stay, on bringing into court a proper sum to cover what will be found due to the plaintiff for the consideration paid to John Barber, with interest, after proper allowance on account of rents and profits received by the plaintiff from the property.

BRADY v. FRANKLIN SAVINGS INSTITUTION OF NEWARK.

(Supreme Court of New Jersey. Nov. 13, 1905.)

MONEY HAD AND RECEIVED—ESTOPPEL.

The plaintiff acquired an interest in mortgaged premises after a final decree on foreclosure of the mortgage, and thereupon made a payment to the solicitor of the mortgagee on account of interest, costs, and sheriff's fees. No credit was made for this payment, and upon a subsequent sale of the mortgaged premises the mortgagee was paid the full amount of the decree. Thereafter the plaintiff applied to the Court of Chancery for surplus money, and his share was decreed to be paid to him. In a suit against the mortgagee to recover the amount paid its solicitor, *held*:

1. That the failure to credit the payment upon the final decree entitled the plaintiff to recover as for money had and received.

2. That the application of the plaintiff to the Court of Chancery for surplus money did not estop him from such recovery.

(Syllabus by the Court.)

Appeal from District Court of Newark.

Action by Henry M. Brady against the Franklin Savings Institution of Newark. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued June term, 1905, before DIXON and SWAYZE, JJ.

Edwin A. Rayner and Alexander Grant, for appellant. F. M. P. Pearse, for respondent.

SWAYZE, J. This action was for money had and received. The money had been paid by the plaintiff to the solicitor of the defendant, then the complainant in a foreclosure suit, on account of interest, costs, and sheriff's fees. The mortgaged premises were at the time advertised for sale. The plaintiff had acquired an interest in the property after the final decree. Six months after this payment by the plaintiff the property was sold for more than enough to pay the amount of the decree, and the full amount of that decree with interest and costs was paid to the present defendant, without any credit for the money paid by the plaintiff. Subsequently the plaintiff filed a bill in chancery to secure reimbursement out of the surplus money for all that he had paid on account of the purchase of the property. To this bill he made the sheriff and one Zubler, who was jointly interested with him in the property, parties. The defendant was not a party. The decree adjudged that the defendant was entitled to one-ninth of the surplus money and Zubler to the balance. The district court judge found as a fact that the money paid to the solicitor was not directly involved, nor was the same disposed of in the chancery suit. Judgment was rendered in the district court for one-ninth of the money paid, and the defendant appealed.

The only legal question presented by the state of the case is the admissibility of a letter from the plaintiff's attorney to the solicitor in the foreclosure suit, notifying him not to pay over the money to any person claiming the same. This was objected to as immaterial, and upon the further grounds that it was written by a stranger to the defendant, and that it showed no reason for the claim in that there was only one fund and that fund was then impounded in the Court of Chancery subject to its adjudication. As to the first objection, it is enough to say that, if the evidence was immaterial, no harm was done to the defendant by its admission. Justice v. Davis (N. J. Sup.) 59 Atl. 6. Since the state of the case fails to show that the defendant made any other complaint of the conduct of the trial, we are not required to examine the questions argued in the brief (O'Donnell v. Weller [N. J. Sup.] 59 Atl. 1055); but, inasmuch as the third objection to the

admissibility of this letter suggested a defense upon the merits, we have considered the whole case. The situation presented is that the plaintiff paid the defendant (through its solicitor) money to be applied upon the decree of foreclosure, and that the defendant did not apply the money to that purpose. The consideration for the payment failed, and the defendant retained the plaintiff's money. This fund was, by the defendant's failure to act in accordance with the intention when the payment was made, treated as a fund separate and distinct from the fund realized upon the foreclosure sale. It could not have been disposed of by the Court of Chancery on the application for the surplus money. That amount was fixed by the proceeds of sale and the amount decreed to be due. The payment by the sheriff was in accordance with the command of his writ. It is true that the amount of the surplus money would have been greater by \$400 if the defendant had made the application of the money to the decree; but the defendant chose not to do so, and it was not obligatory upon the plaintiff to take proceedings in the Court of Chancery to have this credit made. He had the right to treat the decree as an outstanding decree for the full amount, and to make his application for the surplus money on that basis, without making the defendant a party. The defendant then held money of the plaintiff which it had been authorized, but failed, to apply on the decree. Upon its failure, the plaintiff was entitled to reclaim his money. The court below allowed him to recover only one-ninth of the amount, evidently upon the theory that Zubler was interested to the extent of eight-ninths. She would have been so interested if the defendant had applied the money as was contemplated at the time of its payment; but, until that application was made, she had no interest in this fund.

The plaintiff has not appealed, and, as there is no error harmful to the defendant, the judgment must be affirmed, with costs.

WOOLLEY, Custodian of School Moneys, v. HENDRICKSON, Collector of Taxes.

(Supreme Court of New Jersey. Nov. 18, 1905.)

1. SCHOOL AND SCHOOL DISTRICTS—TAXATION—VALIDATING TAXES LEVIED—CONSTITUTIONAL LAW.

The act of October 19, 1903, entitled "An act to validate taxes heretofore levied," etc. (P. L. 1903, Sp. Sess. p. 96), is constitutional.

2. SAME—EFFECT.

Said act (P. L. 1903, Sp. Sess. p. 96) has the effect of validating all appropriations, taxes, and assessments theretofore made, levied, and imposed, and all other acts theretofore had, passed, done, or taken, for school purposes, under or pursuant to the provisions of the general school laws of 1900 and 1902, which laws, respectively, were declared unconstitutional in *Lewis v. Jersey City*, 50 Atl. 848, 66 N. J. Law, 582, and in *Riccio v. Hoboken*, 55 Atl. 1109, 69 N. J. Law, 649, 63 L. R. A. 485.

3. SCHOOL AND SCHOOL DISTRICTS—ASSESSMENT OF TAXES.

Upon a review of the general school law of October 19, 1903 (P. L. 1903, Sp. Sess. p. 5), together with the validating act approved on the same day (P. L. 1903, Sp. Sess. p. 96), held, that this legislation had not the effect of disarranging pending proceedings for the assessment and collection of taxes already ordered to be raised to meet the payment of school bonds maturing during the school year, even in cases where by section 32 (page 14) of the new general school law the boundaries of school districts were changed, and notwithstanding the provisions of section 34 (page 15) respecting the transfer to new school districts of the obligation to pay outstanding indebtednesses of the former school districts.

4. SAME—OPERATION OF GENERAL SCHOOL LAW.

Section 33 of the new general school law (P. L. 1903, Sp. Sess. p. 15) indicates a legislative intent to postpone the operation of the act with respect to all fiscal adjustments between new school districts and the former school districts until the end of the then current school year.

5. SAME—BOARDS OF EDUCATION.

Quære, whether the establishment of new boards of education required for the new districts created by section 32 of the act (P. L. 1903, Sp. Sess. p. 14), and the assumption by new boards of education of outstanding indebtednesses as required by section 34, were not intended to be postponed until after the annual school election that was to be held in March, 1904?

(Syllabus by the Court.)

Application by the state, on the relation of Thomas R. Woolley, custodian of school moneys of Ocean township school district, for a writ of mandamus to Samuel W. Hendrickson, collector of taxes of the Borough of Deal. Writ granted.

Argued November term, 1904, before FORT and PITNEY, JJ.

John W. Slocum, for relator. Robert L. Lawrence for respondent.

PITNEY, J. This is a rule to show cause why a mandamus should not be issued to require the collector of taxes of Deal borough, in the county of Monmouth, to pay over to the relator, as custodian of school moneys of Ocean township school district, certain moneys in his hands belonging to that district. The controversy is with respect to the sum of \$3,057.19, which was assessed in the year 1903 upon the taxpayers resident in Deal borough for school purposes for the school year 1903-04, collected by the respondent, then being tax collector of the borough, and demanded by the relator on June 11, 1904 (prior to the termination of the school year); the relator then being custodian of school moneys of the Ocean township school district, a district that included the territory of the borough of Deal at the time the taxes were ordered and assessed. It is admitted that since the year 1894 the township of Ocean (outside of the Long Branch school district) constituted a township school district, including the boroughs of Deal and Allenhurst, until changed by the new general school law of October 19, 1903.

It is not easy to determine what constitutional legislation existed as a support for the tax proceedings of 1903, at the time those proceedings were taken. A general revision of the school laws enacted in 1900 (P. L. p. 192) was adjudged unconstitutional in *Lewis v. Jersey City*, 66 N. J. Law, 582, 50 Atl. 340, and a subsequent revision (P. L. 1902, p. 69) was held unconstitutional in *Ricclo v. Hoboken*, 69 N. J. Law, 649, 55 Atl. 1109, 63 L. R. A. 485. The latter decision was promulgated September 21, 1903; the decision of the Supreme Court in the same case (69 N. J. Law, 104, 54 Atl. 801) having been favorable to the constitutionality of the act of 1902. We find that the proceedings which resulted in the levying and assessment of the taxes in question conformed to the provisions of the act of 1902. This is not disputed. The elimination of that act would have necessitated a search for constitutional enactments antedating the revisions of 1900 and 1902 (a confusing task), but for the fact that shortly after the decision of the *Ricclo* Case the Legislature met in special session, and not only enacted a new general school law, but also an act (P. L. 1903, Sp. Sess. p. 96) declaring that all contracts, bonds, and obligations theretofore entered into, made, or incurred, all appropriations, taxes, and assessments theretofore made, levied and imposed, and all other acts theretofore had, passed, done, or taken, for school purposes under or pursuant to the provisions of any law declared by the court to be unconstitutional, were thereby validated and confirmed. We have no doubt of the constitutionality of this validating act, and hence may deal with proceedings antedating its passage, and taken pursuant to the acts of 1900 and 1902, respectively, as being valid in law. Of the \$8,057.19 now in controversy, approximately one-half was assessed for the share chargeable upon the taxpayers of Deal borough out of a special school district tax of \$3,525 appropriated and ordered to be raised by the voters of the combined school district at their annual meeting, held March 17, 1903, for the purpose of paying teachers' and janitors' salaries and for fuel, repairs, tuition, etc. The remainder of the moneys in question were assessed and collected as the quota chargeable against the taxpayers of Deal borough out of a total tax of \$3,690, ordered by the district president and district clerk of the combined school district to be raised for paying principal and interest moneys falling due during the school year upon the bonds of that district. The case shows that the school building for whose construction these bonds were issued was erected in the spring of the year 1900, and is situate in that part of the territory of the township which is outside of the borough limits of Deal. The total bond issue was \$11,600, amounting with interest to \$13,080. Prior to the school year 1903 \$9,340 had been paid for the principal and interest, leaving

unpaid only the \$3,690, which fell due during the school year 1903-04.

The school law provides what may be called an "automatic tax" (that is, operative without the annual approval of the voters of the school district) for the purpose of raising each year an amount sufficient to pay the bond or bonds of the school district maturing during the year, with the interest accruing upon the unpaid bonds. Thus the statute law has stood at least since 1894. P. L. 1894, p. 515, § 20; Gen. St. p. 3060, pl. 253; P. L. 1900, p. 263, § 211; P. L. 1902, p. 142, § 191; P. L. 1903, Sp. Sess. p. 39, § 100. The language of section 191 of the act of 1902 in this behalf is that "whenever a township, incorporated town or borough school district shall have ordered and authorized the issue of bonds and the same shall have been issued, the district clerk shall each and every year issue to the assessor of the taxing district in which such school district shall be situate, an order directing him to assess upon the owners of property in said taxing district and their estates and the taxable property therein, an amount sufficient to pay the bond or bonds maturing in such year, together with the interest accruing upon all the unpaid bonds of such district, which order so issued as aforesaid shall be duly executed by said assessor. The moneys so assessed shall be levied and collected by the collector of said taxing district, who shall, on or before the fifth day of January next thereafter, pay the full amount so ordered to be assessed, levied and collected to the custodian of the school moneys of said school district," etc. Section 100 of the general act of 1903 contains identical language, and from this we derive the duty of the respondent with respect to proceedings from and after its approval on October 19th in that year. By sections 181 and 182 of the act of 1902 (P. L. 1902, p. 138) the collector of the municipality in which a school district was situate was made custodian of school moneys, with the duty of receiving and holding in trust all school moneys belonging to such district, whether received from the state appropriation, state school tax, district tax, appropriation, or from other sources, and of paying out the same only on orders signed by the president and district clerk or secretary of the board of education; it being declared in section 182, in effect, that the township committee, common council, or other governing body of the municipality should have no control over moneys belonging to the school district in the hands of the custodian. By section 183, whenever in any school district there were two or more collectors, the board of education was to appoint a suitable person as custodian of school moneys. By section 184 the collector or treasurer of each municipality in which a school district was situate was required to pay to the custodian of school moneys the amount ordered to be as-

sessed, levied, and collected in such municipality for the use of the public schools therein on the requisition of the board of education. The provisions of the new school law with respect to the custody of school moneys and the duty of the custodian are of like import. P. L. 1903, Sp. Sess. pp. 71, 72, §§ 184-186.

The evidence in the case shows that the legal voters of the combined school district, at their annual meeting in March, 1903, ordered a special school district tax of \$3,525, and that the assessors of the three municipalities whose territory formed the school district were duly notified of this, and also of the requirement for an assessment of \$3,690 to pay principal and interest upon school bonds falling due during the year. The three assessors met at the proper time and apportioned the moneys thus required to be raised among the taxpayers resident in their several municipalities, viz., Deal borough, Allenhurst borough, and the township outside of the boroughs. The amount thus apportioned against the taxpayers of Deal borough was \$3,057.19. The evidence also shows that the tax was properly assessed in Deal borough, and that sufficient moneys were realized by the respondent, as collector of that borough, to enable him to pay to the custodian of school moneys the amount assessed for school taxes. The claim of the relator for the payment of these moneys to him, if valid, has preference over the claims of the borough treasury upon the moneys in the collector's hands, under *Ross v. Walton*, 63 N. J. Law, 435, 44 Atl. 430, affirmed 67 N. J. Law, 688, 52 Atl. 1132; *Coe v. Englewood*, 68 N. J. Law, 559, 53 Atl. 562. At the beginning of the school year 1903-04, the relator was custodian of school moneys for the combined district. He demanded payment from the respondent of the money in question on June 11, 1904, which was before the termination of the school year. The relator at that time still remained custodian of the combined district, unless his office in that behalf had been terminated by the force and effect of the new general school law of October 19, 1903. Payment of the moneys is resisted on the ground that, by section 32 of the latter act (P. L. 1903, Sp. Sess. p. 14), each township, city, incorporated town, and borough was made a separate school district, thus abolishing the former combined district of Ocean township, and that by section 34 of the same act the new school district thereby established for the territory of the township of Ocean lying outside of the boroughs became invested with the title of the school building for which the bonds in question had been issued, and that by the terms of section 34 the outstanding bonded indebtedness was made the obligation of the board of education of this new district.

The question is whether this transfer of the burden of outstanding bonded indebtedness has reference to that portion of such

indebtedness for whose payment provision had already been made in the tax levies of 1903, and, if so, whether the Legislature intended to effect the purpose by disarranging pending proceedings for the collection and transmission of taxes already levied to meet bond payments, or to reach the same end through the use of other means. In seeking out the Legislative intent upon these points, we must have regard to the whole of the general school law of 1903, and the contemporaneous validating act, and must keep in mind the practical situation that confronted the Legislature at the time they were enacted. These acts were approved on October 19th, in the very midst of the "school year" previously established and by the new act perpetuated for fiscal and administrative purposes, which began on July 1st. P. L. 1903, p. 326, § 2; Gen. St. p. 3050, pl. 206; P. L. 1900, p. 281, § 264; P. L. 1902, p. 165, § 242; P. L. 1903, Sp. Sess. p. 93, § 238. Everywhere throughout the state the public schools were being maintained and conducted pursuant to arrangements already undertaken for the full year. Fiscal budgets had already been made up in the several school districts, including provision for payment of all school bonds that were to mature during the school year. The operations of ordering and assessing local taxes for school purposes, throughout all the school districts, had already been completed, the moneys to be raised had already been appropriated to specific purposes exigent during the current year, and the taxes were in course of collection. Among the existing school districts there were many, like that of Ocean township, that had been made up by combining the whole or parts of the territory of adjoining municipalities. These the Legislature designed to dismember, so that school district lines might thenceforth generally conform to municipal boundaries. Without doubt the Ocean township district was only one of many combined districts that had bond payments falling due during the year, to meet which taxes had already been ordered, apportioned and assessed. We may therefore properly treat this typical instance as being distinctly presented to the legislative mind in the framing of the new act. It was by section 32 (P. L. 1903, Sp. Sess. p. 14) that each township, city, incorporated town, and borough was made a separate school district, and the two sections immediately following have reference to adjustments thereby necessitated. These sections are as follows:

"Sec. 33. Whenever a new school district shall be created, the children residing in said new district shall continue to attend the schools in which they shall be enrolled until the end of the then current school year. In case there shall be a schoolhouse in such new district in which school shall be then maintained, the board of education of the school district from which such new district shall have been set off shall have charge and

control of such school until the end of the then current school year, and shall pay the salaries of the teachers, janitors and other persons employed in such school until the end of said year. In case there shall be any balance at the end of said school year in the hands of the custodian of the school moneys of the school district to the credit of the school district from which said new district shall have been set off, said custodian shall certify to the county superintendent of schools the amount of such balance, and what portion of such balance was received from state appropriation, state school tax and interest of the surplus revenue, and what portion was received from district school tax. Said county superintendent of schools, upon receipt of such notice, shall divide between said districts that portion of the balance arising from the state appropriation, state school tax and interest of the surplus revenue on the basis of the aggregate number of day attendance of pupils in the public schools as ascertained from the last published report of the state superintendent of public instruction, and shall divide between said districts that portion of said balance arising from district school tax on the basis of the respective ratables of said districts, and shall issue an order in favor of the custodian of the school moneys of such new district for that portion of said balance found to be due said district from the district from which it shall have been set off.

"Sec. 84. In any new school district the board of education, in its corporate capacity, shall become vested with the title to all school property real and personal in such district, and if for the erection, repair or purchase of any such property there shall be an indebtedness for which the board of education of the school district to which said property originally belonged shall be liable, the said indebtedness shall be assumed by and become the obligation of the board of education of the school district which shall have become vested with the title to such property, and upon payment of said indebtedness by the school district originally liable therefor, an action may be maintained therefor by the board of education so paying the said indebtedness against the board of education of the school district which shall have become vested with the property for which the said indebtedness was originally incurred."

The act, by its 247th section, is made to take effect immediately. But this does not make its provisions operative previous to the time when by their own terms, fairly interpreted, they become operative.

Dealing with the case before us as a typical case, for which the Legislature intended to make provision, it will be observed that at the date of the approval of the new act (October 19, 1903) the moneys that the respondent was engaged in collecting from the taxpayers of Deal borough for school pur-

poses were public moneys that, by force of legislation existing at the time the levy was ordered (coupled, if need be, with the validating act already alluded to), had been duly appropriated to specific public purposes, to wit, in part for the maintenance of education in the combined school district during the school year 1903-04, and in part for the payment of principal and interest upon bonded indebtedness of the combined district maturing during the same year. These moneys, when collected, were no longer the property of the taxpayers of Deal borough; but were in every sense public funds in course of transmission to effectuate the ends for which they had been appropriated. The municipal corporation of Deal borough had no possible claim upon them. On the contrary, that corporation and its governing body had been, by express legislative enactment, excluded from any control over or interference with them. Conceding that the Legislature, while enacting the new school law, might have diverted those moneys, or so much thereof as had been previously appropriated toward the bond payments, to another public purpose (such, for instance, as the reimbursement to the taxpayers of Deal borough of a part of what had been already taken from them towards the construction of a schoolhouse which by the same act was vested in a separate school district), the question is whether by a reasonable construction of the whole of the act of 1903 such a diversion of this portion of the public moneys from the purposes for which it had been raised was within the legislative intent. Our examination of the matter constrains us to reply in the negative. Many considerations concur in leading us to this view. In the first place, it is manifest from section 33 that the Legislature realized and intended to avoid the confusion that would have resulted in fiscal arrangements already undertaken if the act had been made operative with respect to these at the date of its passage, occurring in the midst of the fiscal school year. By the express terms of that section (applying them to the case before us) the schoolhouse of the combined district was required to be maintained by the old board of education until the end of the then current school year, and the salaries of teachers, janitors, etc., were to be paid by them, and any balance remaining in the hands of the custodian at the end of the school year was required to be certified to the county superintendent of schools with the sources from which it was derived, and to be by him apportioned. The sources specified in the section include the district school tax. No more express mention is made of moneys raised for bond payments; but, of course, the Legislature contemplated that there would be no balance remaining unexpended at the end of the year of any amount raised for payment of school bonds maturing during the year, for the whole amount would

have been expended in the payment of the bonds.

Again, the school laws of this and previous years make no distinction between moneys ordered to be raised by district tax for current school purposes and moneys required to be raised for payment of school bonds, so far as concerns the assessment and collection of the taxes and the turning over by the collector to the custodian of the amounts collected. It is a combined assessment, with whose apportionment neither the assessor nor the collector has anything to do. That is the duty of the board of education. Moreover, it is reasonable to suppose that if the Legislature in enacting the school law of October 19, 1903, had intended to relieve the taxpayers of Deal borough, and of other places similarly circumstanced, from all further payments for account of school bonds, they would have stopped the money in the hands of the taxpayer by nullifying tax proceedings pro tanto, and would at the same time have provided some other fund out of which the maturing bonds might be met; for it is most important to remember that the Legislature has at all times (at least since 1894, as above pointed out) been scrupulously careful to safeguard bond payments against repudiation or even deferment at the instance of local taxpayers or local officials. Now, if by the new act they intended to stop the moneys that had been assessed and were in process of collection to meet bond payments accruing during the current year, in all cases where, by the force of the act, they created new school districts, it is manifest that at the same time they were driving the combined Ocean township school district, and all other school districts similarly situated, into the necessity of making default upon the public school bonds; for we have found nothing in the act to provide for any other source of payment, and it is plain there could be no other source, except an additional tax levy upon the district, which would be thus required to assume the entire payment of bonds maturing during the year. And, still further, if the Legislature intended to subvert pending tax proceedings in order to appropriate moneys that had been once devoted pursuant to law to specific public purposes and devote them to some other public purpose (as in the case before us, typical of many others, to divert the moneys of the taxpayers of Deal borough previously appropriated and ordered to be raised to pay bonds of the combined district), it is significant that the Legislature has not in terms declared that this shall be done, and has not expressly, nor, as we conceive, has it by implication, pointed out to what other public purpose these moneys shall be devoted. It is not reasonable to attribute to the Legislature an intent to cause such confusion and such impairment of the credit of school districts without clear language requiring it. We find

no such language in the act of 1903. We find language indicating, on the other hand, an intent to postpone the operation of the act with respect to all fiscal adjustments until the end of the then current school year. We think this is the reasonable construction to be placed upon section 33. And we find corroborative evidence of the same intent in the validating act approved on the same day and already alluded to, which, so far from disturbing in any wise previous appropriations, taxes, and assessments, expressly validates and confirms them.

Nor do we find any sufficient evidence of a contrary intent in section 34 of the new general school law. Referring to the language of that section above quoted, and applying it to the case in hand, the "new school district" which is to become vested with the title to the school property is the district established by section 32 in that portion of the township of Ocean which lies outside of the bounds of the boroughs. Now it is significant that there seems to be no provision in the act for the establishment in a corporate capacity of a board of education for such new district prior to the annual school meeting to be held in March, 1904. Section 77 provides that in each township school district the members of the board of education shall be chosen at the annual school meeting. Section 79 provides that this meeting shall be held on the third Tuesday in March. Section 84 provides that each board of education thus elected shall be a body corporate. And section 85 provides that the board shall organize within 10 days after the annual school meeting. Section 242 provides that members of the boards of education who are residents of the territory contained in the several school districts as constituted by this act, and who are now acting as such, shall continue to serve for the full term for which they were severally elected or appointed as though elected or appointed under this act. This would continue members of the board of education of the combined school district of Ocean township, who were residents in that portion of the township that lies outside of the boroughs, as members of the board of education of the new township school district; but it has no bearing upon the question when the new board of education is to begin its corporate existence. It is true that by section 25, par. 4, of the act, the county superintendent of schools is given power to appoint members of the board of education for a new township school district, to serve until the next election in the district for members of the board of education. But this power of appointment may be fairly construed as limited to cases where there exists a necessity for such appointment. Now by section 33 the ordinary functions of the board of education, with respect to the charge and control of the schools, are expressly reserved to the old boards until the

end of the then current school year. Until that time there seems to be nothing for the new board to do beyond meeting for the purpose of organization.

Upon the whole of the act, therefore, we are inclined to think that the establishment of the new boards of education required for the new districts created by section 32 was intended to be deferred until the election of members of such boards at the annual meetings to be held in March, 1904. If this view is correct, then the taking effect of section 34 with respect to the assumption by such new boards of education of outstanding indebtednesses must be postponed in like manner, and the assumption would relate only to such indebtednesses for which a tax levy had not already been made at the time of the passage of the act. But, if this view is not correct, and the Legislature intended by section 34 that the new district should assume payment of outstanding school bonds that fell due during the school year 1903-04, still section 34 is clearly consistent with the view that those obligations should be paid by the combined district out of the moneys already ordered to be raised by tax for that specific purpose, and that the remedy of the combined district against the new district should be by action for reimbursement, pursuant to the express provisions of section 34 in that behalf. The moneys recovered in such a case would, of course, be subject to apportionment among the several school districts that resulted from the dismemberment of the combined district; such apportionment being provided for by section 33. And so, upon a review of the whole of the act of 1903, we are unable to give to it such a force and effect as to absolve the collector of Deal borough from the duty of turning over to the custodian of the combined district the taxes that were collected in the year 1903 from the taxpayers of the borough, pursuant to the appropriation and levy that antedated the act of 1903.

The argument to the contrary is rested largely upon the hardship that results from requiring the tax payers of Deal borough to contribute further toward payment of the school bonds of the combined district, when by the same act the schoolhouse for whose construction the bonds were issued was practically taken from them. In one of the views above suggested for the interpretation of section 34 the moneys now payable would eventually be restored by means of an action against the new district and an apportionment of the proceeds thereof. In this event, there would be no hardship beyond a temporary inconvenience. But, even though that view be untenable, so that the moneys now payable are never to be restored either directly or indirectly, still, unless there be some express provision of law to relieve this hard-

ship, it must be dealt with by the courts as one of the necessary incidental burdens of government. It is impossible that any system of taxation shall be absolutely just to every taxpayer. Approximation to justice is all that is possible, and all that the Constitution requires. It must be remembered that the inhabitants of the combined district were already legally liable for the payment of the bonds; their public credit having been already pledged in that behalf by authority of the Legislature. The real hardship of the act of 1903 consists in depriving them of property in the schoolhouse. If the hardship of paying their quota of the \$3,690, which fell due during the school year in question, must be considered in solving the question of statutory construction, what is to be said with respect to the larger sum previously contributed by the taxpayers of the borough as their quota towards paying the \$9,340 of principal and interest upon bonds that had been liquidated by the combined district previous to the year in question? It is manifest that, wherever in the state a combined school district had a school building previously erected from the proceeds of combined taxation, the force of the act in rendering school district lines conformable to municipal boundaries necessarily resulted in hardship to some of the taxpayers. Doubtless the Legislature deemed that the general benefits of the new adjustment of district lines outweighed its incidental burdens. Nor, as we think, can the respondent place himself in the attitude of resisting the payment now in controversy on the ground of any equity supposed to inhere in the municipality of Deal borough or in the taxpayers resident within that borough. He is not their agent or representative in this matter, but, on the contrary, is a public functionary of the state, charged by law with specific public duties. It happens that the Legislature, from motives of convenience, selected the borough collector as the public agent for the collection of school taxes. But it might have selected any other public agency. His duty in this behalf is not to the taxpayers from whom he has collected the money, nor to the borough in which his municipal functions are exercised. His duty, as a public agent is to transmit to the relator, as the public agency designated for the purpose by law the public funds which he has been instrumental in gathering from the taxpayers. From the moment the tax was lawfully collected the individual taxpayers lost all property interest therein. The municipality never had any interest in the moneys, being expressly debarred therefrom by law.

For these reasons, we are of the opinion that a mandamus should issue; and as the matter is of public importance, and the facts are not at in dispute, it may be peremptory in form.

HAYES v. ADAMS EXPRESS CO.

(Supreme Court of New Jersey. Nov. 16, 1905.)
CARRIERS — LOSS OF FREIGHT — DAMAGES — LIMITATION.

On delivering to a common carrier a drop curtain of ordinary character and value, the shipper received as a voucher therefor an instrument in which it was stated that, when the shipper omits to declare the value of the goods, he agrees that the value does not exceed \$50. *Held*, that the responsibility of the carrier for the real value in case of loss was not thereby restricted, unless the shipper had knowledge of the stipulation; and his knowledge that the carrier's charges depend on the value of the goods is not sufficient to render the limit of liability obligatory.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 691, 692, 693.]

(Syllabus by the Court.)

Appeal from District Court of Elizabeth.

Action by Norman S. Hayes against the Adams Express Company. Judgment for defendant, and plaintiff appeals. Reversed.

Argued June term, 1905, before SWAYZE and DIXON, JJ.

P. H. Gilhooly, for appellant. Conover English and R. H. McCarter, for respondent.

DIXON, J. On April 2, 1904, the plaintiff's employé delivered to the defendant's agent in Elizabeth a drop curtain consigned to Syracuse, and received from the agent a document on which were written the names of the shipper and consignee, and a description of the article shipped. The document also contained in print many terms and conditions, to which, it declared, the shipper agreed, and among them one to the effect that, if no value of the goods was declared the value did not exceed \$50. Nothing was then said by either the employé or the agent about the value of the curtain, or the contents or nature of the document. The curtain should have reached Syracuse within three days, but no tidings of its whereabouts since shipment appear. In an action brought in the Elizabeth district court to recover compensation for its loss, the plaintiff produced evidence tending to show that the curtain was worth \$300, and the defendant relied on the terms of the document to bar a recovery for more than \$50. On this issue the judge instructed the jury that the only point was whether the plaintiff knew that the defendant's rates depended on the value of the goods. If he did, the verdict in his favor should be for \$50 only; but, if he had no reason to know that the rates depended on value, then the verdict should be for \$300. On this charge the jury awarded the plaintiff \$50, and he now appeals to this court.

At common law, of course, the defendant, being a common carrier, would be responsible for the actual value. The weight of authority in this country is to the effect that, in order to lessen the responsibility of a common carrier, it must appear that the shipper assented to the restriction, and that in gen-

eral a declaration of limited liability, made by the carrier in a public advertisement or in a receipt handed to the shipper, will not suffice to bind the latter to the limitation so declared. We approve of the views on this subject expressed by Mr. Justice Nelson in *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 382, 12 L. Ed. 465, and by Mr. Justice Davis in *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318, 328, 21 L. Ed. 297. It has, however, sometimes been held that an exception to this general rule should exist in regard to the value of the goods shipped; that, because of the comparatively slight means of knowledge as to value possessed by the carrier, the shipper should assume that the carrier has fixed a limit to his liability on this point, unless he is expressly charged with a specified liability; and on this assumption the shipper assents to the limitation in all cases where his dissent is not shown. Such a doctrine is said to be necessary to secure fair dealing. But it is undoubtedly a departure from the rule of the common law, and in both of the Constitutions adopted in this state it was declared that the common law should remain in force until altered by the Legislature. This part of the common law, which relates to the responsibility of the carrier, has always been regarded by our courts as embraced in our system of jurisprudence. Thus, in *Pennsylvania R. R. Co. v. New Jersey R. R. & T. Co.*, 27 N. J. Law, 100, this court adjudged that, "where a common carrier undertakes to transport an article in the line of his business, the legal presumption is that he does it subject to his common-law liability, and this presumption remains until it is overcome by positive proof of a special agreement." We are unable to see on what principle this feature of the common law can be abrogated by the judiciary. Where unfair dealing actually appears, the courts may, in harmony with the law, afford an appropriate remedy, but for other cases the suggestion that the law might be improved calls for the intervention of the Legislature alone. The circumstances of the case now in hand disclose no unfair dealing. The nature of the article shipped was known to the carrier, and its value does not appear to have been abnormal. The shipper, therefore, had the right to assume, in the absence of notice to the contrary, that the carrier would form his own judgment as to its value, so far as was necessary for the fixing of his compensation, without attempting to restrict his responsibility under the general law. There was evidence from which the jury might have inferred that the plaintiff knew and assented to the defendant's limitation of value; and, if the matter had been submitted to the jury on that question, a determination against the plaintiff would have been legal. But the question presented by the judge was quite different. It required the jury to find merely knowledge on the part

of the plaintiff that the defendant's charges depended on the value of the goods shipped. Every person who thinks intelligently must know so much, for, of course, as the carrier's responsibility varies with the value, so should his compensation. But such knowledge in a shipper by no means justifies an inference that, if he does not declare the value of the goods, he assents to a limitation of value fixed by the carrier.

The exceptions taken by the plaintiff at the trial properly present for review this portion of the charge, and therefore the judgment should be reversed, and the cause remitted to the district court for a new trial.

COHN et al. v. COMMON COUNCIL OF CITY OF NEW BRUNSWICK.

(Supreme Court of New Jersey. Nov. 22, 1905.)
MUNICIPAL CORPORATIONS—WATER COMMISSIONERS—REMOVAL FROM OFFICE.

The common council of the city of New Brunswick is authorized to remove from office members of the board of water commissioners who fail to comply with the requirements of "An act regulating the receipt and disbursement of money and the passage of ordinances pertaining thereto in any city of this state." P. L. 1904, p. 259.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 559.]

(Syllabus by the Court.)

Certiorari by Theodore Cohn and others against the common council of the city of New Brunswick to review a removal from office. Affirmed.

Argued June term, 1905, before GARRISON and GARRETSON, JJ.

Robert Adrain, for prosecutors. Theodore B. Booraem, for respondent.

GARRETSON, J. The prosecutors, Theodore Cohn, Henry C. Price, and Thomas Meacham, were removed from their office as water commissioners of New Brunswick by the common council of that city after a hearing upon charges preferred against them. The charges were preferred by the finance committee of the common council February 24, 1905. The committee to investigate the charges met for that purpose March 10, 1905. The investigating committee reported to the common council on March 15, 1905, and on that day the report of the committee recommending the removal of the prosecutors was adopted, and the prosecutors were removed from their office as water commissioners. The charges were: First. That the water commissioners, since the 4th day of July, 1904, and to the 1st day of January, 1905, have failed to comply with the provisions of an act of the Legislature of the state of New Jersey, approved March 28, 1904 (P. L. p. 259), entitled "An act regulating the receipt and disbursement of money and the passage of ordinances pertaining thereto in any city of this state," in this particular, viz., that the said water commissioners as a municipal

board and department established in the city of New Brunswick have failed and neglected to pay all moneys received by them from any source to the treasurer of said city, the person charged with the custody of the funds of said city. Second. That the said water commissioners have failed and neglected to hold the regular monthly meetings as required by law. Third. That the said commissioners have unlawfully permitted the estate of John Collier to establish and maintain a nuisance in the shape of a privy on the banks of Lawrence brook, about 200 feet up stream from the intake to the city pump established on said brook, thereby contaminating the water supply of the said city of New Brunswick.

The board of water commissioners of New Brunswick exists by virtue of a further supplement to the act entitled "An act to revise and amend the charter of the city of New Brunswick," approved March 18, 1863, which supplement was approved March 27, 1873 (P. L. p. 450). This act authorizes the purchase of the stock and property of the New Brunswick Water Company and for the establishment of a board of water commissioners for the management thereof. This board is made a body corporate liable to sue and be sued; by section 15 of the act of the common council of the city was authorized to appoint a board to consist of such number of inhabitants of the city as they might think best, who were to determine at the first meeting by lot the terms during which they should hold office, one-third for one year, one-third for two years and one-third for three years. Section 16 (page 456) provided for the appointment by the common council in each year of one-third of the commissioners, who should hold office for three years from the date of the expiration of office of one-third, and for filling vacancies. This section contained a proviso "that any or all of said commissioners may at any time be removed from office and others appointed in their place by the said common council, for good and sufficient cause, shown upon examination and inquiry by a committee of said common council at which said commissioner or commissioners shall have due opportunity to be present and make defense." It seems that the first board of water commissioners consisted of six members, and that the terms of two expired each year. That the four against whom the charges above mentioned were presented were all who held over on January 2, 1905. They were the three prosecutors and Charles M. McCormick. McCormick was not tried, because he was sick and absent at the time of the trial of the prosecutors. Under the language of the act the board was a continuous corporate body, and the members thereof in office might be removed by the common council for any unlawful act committed by them while holding office, without reference to any changes in the personnel of the board.

The first charge is based upon the failure of the board of water commissioners to com-

ply with the provisions of "An act regulating the receipt and disbursement of money and the passage of ordinances pertaining thereto in any city of this state," approved March 28, 1904 (P. L. 1904, p. 259). This act went into effect July 4, 1904. It provides, in the first section: "All moneys received from any source by municipal boards or departments established in cities in this state shall be paid by such boards or departments to the treasurer or other person charged with the custody of the funds of such city." In other sections the mode of disbursing moneys for the uses of the different departments is outlined; payments are to be made by warrant on the treasurer of the city to be signed by certain officers designated or to be designated by ordinance; bills must be approved by the mayor, and, if he disapproves, there are provisions for passing them over his veto. This provides a radical change in the system of disposing of the funds and the payment of claims of many departments and boards in the various city governments of the state. It is a general act applicable to all cities, and all the provisions come within the title. It appears from the testimony taken before the committee of the common council that the board proceeded, as to the receipt and disbursement of moneys after July 4, 1904, in the same manner as they had proceeded before that time. They had a treasurer, they kept a bank account, bills were presented to them and ordered paid and paid by the treasurer out of the funds to the board's credit in the bank, and what was left was turned over to the city treasurer. After the 4th of July, 1904, this method was illegal. The prosecutors allege that they did not know of the passage of that law, and that, in ordering bills paid out of funds which were held by them, they acted in ignorance of the law. But their ignorance of the law will not excuse. They were guilty of a violation of positive law, and that being proved to the satisfaction of the council was sufficient ground to justify their removal from office.

For this reason the action of the common council is affirmed, with costs.

STATE v. DIMANT.

(Supreme Court of New Jersey. Nov. 22, 1905.)

DISORDERLY HOUSE—WHAT CONSTITUTES.

Those who maintain a place where usurious rates of interest are taken, and where the statutes prohibiting usurious interest are habitually violated, are indictable for keeping a disorderly house.

(Syllabus by the Court.)

Certiorari to Court of Quarter Sessions, Camden County.

Jacob N. Dimant was indicted for keeping a disorderly house, and defendant brings certiorari. Motion to quash denied.

Argued June term, 1905, before GARRISON and GARRETSON, JJ.

Frank T. Lloyd, Prosecutor of the Pleas, for the State. Ferdinand A. Rex, for defendant.

GARRETSON, J. The indictment has been removed into this court for the purpose of allowing the defendant to move to quash it. This motion is now made, and the ground of objection to the indictment is that it does not charge any crime or misdemeanor under the law. The allegations of the indictment are that Jacob N. Dimant and others, at times and a place specified, "unlawfully did keep and maintain a certain common ill-governed and disorderly house, and in the said house, for their own lucre and gain certain persons, then on the said other days and times unlawfully and willingly did cause and procure to frequent and come, and that the said Dimant and others then and there in said house did make loans to said persons of certain sums of money at usurious rates of interest and in excess of the amounts provided by law, to the great damage and common nuisance," etc.

It cannot be disputed that a place where persons gather together to do acts which by law are made crimes or misdemeanors is a disorderly house. *State v. Lovell*, 39 N. J. Law, 463. It is provided by statute (Gen. St. p. 3704, § 7) "that no person or corporation shall upon contract take, directly or indirectly for a loan of any money, wares, merchandise, goods and chattels above the value of six dollars for the forbearance of one hundred dollars, for a year and after rate for a greater or less sum or for longer or for shorter time," and the penalty for the violation of this statute is found in section 2, Gen. St. p. 3708, and is that in suits to enforce any contracts on which a higher rate of interest shall be reserved than is allowed by the law of the place where the contract was made no interest whatever is recoverable.

In the case of *McClellan v. State*, 49 N. J. Law, 471, 9 Atl. 681, decided in the Court of Errors, Chancellor Runyon delivered the opinion of the court. McClellan was indicted for keeping a disorderly house. The offense was carried on by him in a box or booth upon the grounds of a society for horse racing, in the business of bookmaking or betting upon horses. The box or booth was frequented during the racing season by numbers of persons who were wont to bet upon the races. The court says: "The defendant there kept a place of public resort for the purpose of betting upon the result of horse races. Under the fifty-sixth section of the act for the punishment of crimes (Revision, p. 237) betting upon horse races was a criminal offense. While the supple-

ment to that act passed in 1880 (P. L. 195) so amended that section as to repeal the provision making such betting a misdemeanor, it did not repeal or affect the provisions of the act to prevent gaming (Revision, p. 458), which declared all wagers, bets, or stakes made to depend upon any race to be unlawful. The place kept by McClean was kept in order that the public might resort thereto and engage in the unlawful practice of betting upon horse races and such practices were habitually carried on. Any place of public resort in which illegal practices are habitually carried on is a public nuisance, and a person who keeps such a place is guilty of an indictable misdemeanor. * * * The mere fact that the Legislature has repealed the enactment by which betting on horse races was made an indictable offense obviously does not render the practice of betting upon horses any the less injurious to public morality than it was before."

In *Haring v. State*, 51 N. J. Law, 386, 17 Atl. 1079, the defendant was convicted of keeping a disorderly house. The offense consisted of keeping a room in the city of Paterson, for several months in 1887, to which persons commonly resorted for the purpose of betting upon horse racing. The question for decision was whether under the law as it stood in 1887 the defendant was subject to indictment for keeping a disorderly house. Judge Van Syckle in an opinion in that case finds, by reference to the various statutes as to horse racing and betting upon horse races, that in 1887 no statute was in force under which betting upon horse racing was indictable, and he concluded from these statutes and the statute to prevent gaming that while betting upon horse racing was not indictable by force of the Statutes of 1880 (P. L. p. 196, § 1), yet that a pronounced public policy against betting as a vice has found a clear expression. "Betting was no longer indictable and punishable as a crime but it was still interdicted, it was still unlawful and against the declared policy of the law."

The taking of usurious interest is a violation of the positive law of the state, and to maintain a place for such habitual violation or a place where agreements for such habitual violations may be made is a misdemeanor, and everybody concerned in the maintenance of such a place is guilty of a misdemeanor. The other objections to the indictment are not well founded.

The motion to quash is denied.

KING v. ZIERZ.

(Supreme Court of New Jersey. Nov. 22, 1905.)

TRIAL—NONSUIT—WHEN GRANTED.

A nonsuit cannot be granted, upon the ground that plaintiff has failed to prove want of reasonable care, unless the proof in the case

is so clear that no other legitimate conclusion can be reached by the jury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 282, 283.]

(Syllabus by the Court.)

Appeal from District Court of Newark.

Action by Esther E. King against Frank Zierz. From a judgment of nonsuit, plaintiff appeals. Reversed.

Argued June term, 1905, before GARRISON and GARRETSON, JJ.

William E. Hampson, for plaintiff. George M. Titus, for defendant.

GARRETSON, J. The plaintiff sued the defendant to recover the value of a seal-skin coat left to be repaired, and which was not returned to the plaintiff; the defendant alleging that it had been stolen. The case was tried before a judge and a jury. At the close of the plaintiff's case the court granted a nonsuit.

The judge certified that he found the facts as follows: "The defendant is a furrier having a store in the city of Newark, N. J. The rear window of this store was secured by ordinary locks or window fasteners. There were no iron bars at the rear windows, where there was a yard abutting a stable. The plaintiff was the owner of a sealskin coat, which she took to the defendant's store for the purpose of having it repaired on September 14, 1904. The price for the repairs was to be \$15. She called on him on October 22, 1904, and asked for her coat and defendant said: 'Oh, your coat has been stolen; I am so sorry.' On December 9, 1904, the plaintiff tendered to the defendant the sum of \$15 in gold, but he refused to deliver the coat to her, again stating that it had been stolen. It appears that on the evening of about October 20th the store had been entered through one of the rear windows and the plaintiff's coat stolen, and that a pane of glass had been broken, and that the window was then unlocked; that the store was not wired against burglars; that the rear windows of some stores in Newark are protected by iron bars; that the rear windows in the store of two furriers, namely, Max Kirschbaum, at 876 Broad street, in Newark, and Charles McClelland, of 17 Academy street, in Newark, were protected by iron bars. It also appeared that the coat had been finished some time before it was stolen, and that the defendant had not explained why it had not been sent home." For these facts the judge certified that he decided that it could not be inferred therefrom that the defendant had failed to use ordinary care in the custody of the fur coat, and therefore directed a nonsuit.

The judge correctly placed the liability of the defendant upon the use of ordinary care in the custody of the fur coat, but erroneously decided that question himself. That ques-

tion should have been left to the jury. There was evidence from which the jury might have inferred the absence of the care required. The trial judge cannot order a nonsuit unless the proof in the case is so clear that no other reasonable legitimate conclusion can be reached by the jury. Consolidated Traction Co. v. Reeves, 58 N. J. Law, 573, 34 Atl. 128; Day v. Donohue, 62 N. J. Law, 380, 41 Atl. 934; Voorman v. North Jersey Street Railway Company, 70 N. J. Law, 818, 59 Atl. 459.

The judgment of the district court is reversed.

STILES v. CITY OF LAMBERTVILLE.

(Supreme Court of New Jersey. Nov. 27, 1905.)

1. MUNICIPAL CORPORATIONS—CITY COUNCIL—VOTE—RECONSIDERATION.

A deliberative assembly may lawfully reconsider and annul a vote previously taken at the same meeting.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 211.]

2. SAME—MEETINGS.

The session of a deliberative assembly, which is held in pursuance of a special motion, adopted at a regular meeting, to adjourn the meeting to a fixed time, is a continuation of the regular meeting, and at such session the assembly can do anything that it could have done at the earlier session.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 194.]

(Syllabus by the Court.)

Action by C. Spangler Stiles against the city of Lambertville. Heard on rule for mandamus. Rule discharged.

Argued November term, 1905, before GARRISON, SWAYZE, and DIXON, JJ.

R. S. Kuhl, for relator. Walter F. Hayhurst, for defendant.

DIXON, J. In pursuance of "An act to establish an excise department in cities of this state," approved April 8, 1902 (P. L. p. 623), an ordinance for that purpose was adopted in the city of Lambertville on March 14, 1903, and under it a board of excise commissioners was duly organized. The fourth section of the ordinance provides that "in case of the * * * resignation * * * of any member of said board * * * the common council shall appoint another person in his stead." At a regular meeting of the council held on August 7, 1905, a member of the board sent in his resignation, to take effect immediately, and the council accepted it. Thereupon, on motion, the relator was appointed by unanimous vote to fill the vacancy. Before these proceedings, the council, having under consideration an appropriation for the fire department, laid it over for one week, and resolved that when the coun-

cil adjourned it would adjourn to meet on August 14th at 8 o'clock p. m., and subsequently the council so adjourned. When the council reassembled on August 14th, a motion was made to reconsider the vote by which the relator had been appointed, and that motion prevailed. On further motion, the matter of appointing a member of the excise board was left open for a month. The act of 1902 requires the excise commissioners to give such bond for the faithful performance of their duties as the council shall fix by ordinance, and the ordinance requires that each person appointed as a member of the board shall, before entering upon the duties of the office, take an oath, etc., and give bond, etc., to be approved by the council. The relator took the required oath on August 8th, but when, on August 14th, he tendered a bond to the council, it was refused because of the reconsideration above stated. The application of the relator is for a mandamus ordering the council to approve his bond and give him a certificate of election.

The proposition that every deliberative assembly may reconsider any vote previously taken at the same meeting was adjudged by this court in *State v. Foster*, 7 N. J. Law, 101. In other tribunals it has sometimes been denied (*State v. Barbour* [Conn.] 22 Atl. 688, 55 Am. Rep. 65), and sometimes been admitted (*Baker v. Cushman*, 127 Mass. 105). In this state it has more than once been affirmed, and should be regarded as settled. *Jersey City v. Howeth*, 30 N. J. Law, 521, 529; *Whitney v. Van Buskirk*, 40 N. J. Law, 463, 467. In the present case the general doctrine is expressly supported by a rule of the council, providing that "when a motion or resolution has been once made and carried * * * it shall be in order for any member voting with the majority to move for a reconsideration of the vote at the same meeting."

The next question, therefore, is whether the session of August 14th was the "same meeting" as the session of August 7th. The authorities hold that the session of a deliberative assembly, convened in pursuance of a special motion, adopted at a regular meeting, to adjourn the meeting to a stated time, is a continuation of the regular meeting, and at such session the assembly can do anything that it could have done at the earlier session. 1 Dill. Mun. Corp. § 287 (225); *Durant v. Jersey City*, 25 N. J. Law, 309, 312; *Staates v. Borough of Washington*, 44 N. J. Law, 605, 611, 43 Am. Rep. 402; *Lantz v. Hightstown*, 46 N. J. Law, 102, 107. At the session of August 14th, therefore, the council legally reconsidered the vote appointing the relator, and such reconsideration annulled the appointment.

The rule for a mandamus must be discharged.

KNOWLTON v. PATRONS' ANDROSCOGGIN MUT. FIRE INS. CO.

(Supreme Judicial Court of Maine. Nov. 16, 1905.)

1. FIRE INSURANCE—DWELLING HOUSE—NON-OCCUPANCY.

The legislative enactment of 1895 (Laws 1895, p. 14, c. 18) prescribed a form for a standard policy of insurance, prohibited insurance companies doing business in this state from issuing policies of fire insurance in any other form, and by section 3 (page 19) of the act expressly repealed all provisions of law inconsistent with the terms of the policy thus enacted. This standard policy, by its terms, is declared void, if the premises become vacant by the removal of the owner or occupant, and so remain vacant for more than 30 days, without the assent of the company in writing or in print, irrespective of the question whether such vacancy materially increases the risk or not. This provision is clearly inconsistent with the statute of 1883, declaring that a change in the occupation of the property should not affect the policy unless it materially increased the risk. *Held*, that the earlier enactment of 1883 was expressly repealed by the terms of section 3, c. 18, p. 19, of the Laws of 1895.

2. SAME—INCREASE OF RISK.

The question of material increase of the risk from vacancy or nonoccupancy is not open, under the provisions of the standard policy itself, as prescribed by chapter 18, p. 14, of the Laws of 1895.

3. SAME—TIME OF NONOCCUPANCY.

Furthermore, in the case at bar these provisions of the standard policy relating to the vacancy of the premises are modified by the separate slip or rider attached to the policy, according to the general authority therefor given by section 4, c. 49, Rev. St. By this modified contract the parties definitely stipulated that the policy should be rendered void for vacancy or nonoccupancy continued for more than 10 days. This is the contract which the parties themselves made, and the court is not authorized to substitute for it another and a different contract which the parties did not make.

4. SAME—EVIDENCE.

In the case at bar the property insured, a set of connected farm buildings situated about one mile from Liberty Village, where the plaintiff resided, was destroyed by fire April 19, 1903. The house was not occupied by the plaintiff himself, but had been occupied by his tenant, Albert Turner, and his family. A stock of cattle, and also some hay and farming tools, the property of the plaintiff, were kept in the barn and cared for by Turner. On the 28th day of March, preceding the fire, Turner hired a tenement in Liberty Village, and removed from the house in question sufficient furniture and goods to furnish it. On the 4th day of April, following, his wife and family moved into this tenement in Liberty Village, but he continued to pay rent for the plaintiff's house up to the time of the fire. He continued to work upon the farm pleasant days, leaving his family in the village in the morning, taking his dinner with him to the farm, and returning to his family in the village at night. Rainy days and Sundays he was not at the farm. On these days the stock was cared for by a neighbor, one Weed. Turner was not at the farm on the day of the fire: Weed caring for the stock on that day. He intended to return to the Knowlton place with his family in about two months.

Held, that upon these facts the plaintiff's buildings, insured by the policy in suit, must be deemed to have become "personally unoccupied," without the consent of the company, for more than 10 days immediately preceding their destruction by fire.

5. SAME—WAIVER.

Subsequent to the date of the fire the defendant company sent to the plaintiff an "assessment card" for the twenty-eighth assessment made by the company, dated July 30, 1903, informing the plaintiff that the assessment on his premium note was \$1, and requesting payment of the same. This general assessment covered eight losses that occurred prior to the fire, and ten that occurred after the fire. The plaintiff paid this sum of \$1, assessed on his premium note, some time in August, 1903. The plaintiff contended that the acceptance by the defendant company of the plaintiff's proportional part of this assessment operated as a waiver of the forfeiture resulting from such nonoccupancy.

In two previous decisions of this court, questions of waiver were raised precisely analogous to that in the case at bar, and were decided adversely to the plaintiff's contention. In each of these cases the provisions of the charter of the company relating to membership, the obligation of every member to pay his proportion of all losses happening during his connection with the company, and the existence of the lien on the buildings for the security of the deposit note, were in effect precisely identical with the statutory provisions in force at the date of the plaintiff's policy in this suit. These authorities must be deemed decisive of the case at bar.

6. SAME.

On the question of waiver, *held*, that the forfeiture resulting from the nonoccupancy of the plaintiff's buildings was not waived by the company in accepting payment of an assessment upon the plaintiff's premium note under the circumstances stated.

(Official.)

Report from Supreme Judicial Court, Waldo County.

Action by Willis J. Knowlton against the Patrons' Androscoggin Mutual Fire Insurance Company. Case reported. Judgment for defendant.

Assumpsit upon a policy of fire insurance in the standard form, issued by the defendant company upon the buildings of the plaintiff situated in Montville. Plea, the general issue with the following brief statement: "That the buildings insured by the policy declared upon in the plaintiff's writ had become vacant by the removal of the occupant, and had so remained vacant for more than 10 days prior to their destruction by fire, without the consent in writing of the company, certified on the back of the policy by the president and secretary or by two of the directors, whereby said policy became void.

That the buildings insured by the policy declared upon in the plaintiff's writ had become personally unoccupied, and had so remained personally unoccupied for more than 10 days prior to their destruction by fire, without the consent in writing of the company, certified on the back of the policy by the president and secretary or by two of the directors, whereby said policy became void."

After the evidence in behalf of the plaintiff had been fully taken out the defendant notified the court that it did not propose to offer any evidence, and did not question the facts as proved by the plaintiff. Thereupon it was agreed that the case be reported to the law court "for the law court to pass upon and decide all questions of law involved

and all questions of fact, if any, and inferences from facts, if any, involved in the case, and to order such judgment as the law and facts may require."

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and PEABODY, JJ.

Arthur Ritchie, for plaintiff. John A. Morrill, for defendant.

WHITEHOUSE, J. This is an action upon a policy of fire insurance in the standard form, dated March 26, 1902, issued by the defendant company upon the buildings of the plaintiff situated in Montville, as follows: On dwelling house and L, \$200; on barn, \$125; on wood shed, \$25; on hen shed, \$25; on silo, \$25—\$400.

All the buildings except the silo, which had not then been constructed, but the lumber for which was then on the premises, were totally destroyed by fire on the night of Sunday, the 19th of April, 1903, between 10 and 11 o'clock.

Attached to the policy was a "rider" or additional paper, containing the following stipulation: "It is also a part of the consideration of this policy, and it is especially agreed that this policy shall be void and the whole amount of premium paid forfeited to the company, if the buildings hereby insured shall become vacant by the removal of the owner or occupant, or shall become personally unoccupied for more than 10 days, without the consent in writing of the company, certified on the back of the policy by the president and secretary or by two of the directors."

Section 20 of chapter 49 of the Revised Statutes of 1883 reads as follows: "A change in the property insured or in its use or occupation or a breach of any of the terms of the policy by the insured, do not affect the policy unless they materially increase the risk."

But the legislative enactment of 1895 (Laws 1895, p. 14, c. 18) prescribed a form for a standard policy of insurance, prohibited insurance companies doing business in this state from issuing policies of fire insurance in any other form, and by section 8 (page 19) of the act expressly repealed all provisions of law inconsistent with the terms of the policy thus enacted. This standard policy, by its terms, is declared void, if the premises become vacant by the removal of the owner or occupant, and so remain vacant for more than 30 days, without the assent in writing or in print of the company, irrespective of the question whether such vacancy materially increases the risk or not. This provision is clearly inconsistent with the statute of 1883 above quoted, declaring that a change in the occupation of the property should not affect the policy unless it materially increased the risk. It is accordingly claimed in behalf of the defendant company that the earlier enactment of 1883 was expressly repealed by the terms

of section 8, c. 18, p. 19, of the Laws of 1895.

In accordance with this view, the clause above quoted from section 20, c. 49, of the Revised Statutes of 1883, was omitted from the Revision of 1903.

But it is contended in behalf of the plaintiff that the question of material increase of the risk from vacancy or nonoccupancy is still open, under the provisions of the standard policy itself, as prescribed by chapter 18, p. 14, of the Laws of 1895. It is there provided that the policy shall be void, if, without the assent in writing or in print of the company, "the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks." It will be seen, however, that this provision relied on by the plaintiff is one of 11 independent clauses in the policy, by each of which the policy is declared to be void upon the conditions therein specified, and it is immediately followed by these two clauses, viz., "or if, without such assent, the said property shall be sold or this policy assigned, or if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than 30 days without such assent."

It was impossible for the Legislature to anticipate and specify the infinite variety of changes in the situation and circumstances that might cause an increase of the risk. It, therefore, inserted the comprehensive provision relied upon by the plaintiff. In the light of experience, however, it was practicable to specify 10 conditions or changes in the situation of the property, each of which would render the policy void without opening to actual inquiry the question of the increase of risk. The language of the standard policy is not to be construed to mean that an issue of fact is to be raised upon the question of increase of risk under each of the independent clauses in question. It would not be reasonable to suppose that the Legislature contemplated a judicial inquiry under the clause relating to the keeping of gunpowder or naphtha, or under the clause respecting other insurance on the property, or the clause in regard to the sale of the property and the assignment of the policy without the assent of the company as there specified. With no greater or better reason can it be claimed that the question of increase of risk is open under the clause rendering the policy void for vacancy or nonoccupancy. It is an independent and absolute stipulation that the policy shall be void, if the premises become vacant and remain so for more than 30 days as there specified. It is not qualified by any other clause in the policy.

Furthermore, in the case at bar these provisions of the standard policy relating to the vacancy of the premises are modified by the separate slip or rider attached to the policy according to the general authority therefor

given by section 4, c. 49, Rev. St. By this modified contract the parties definitely stipulated that the policy should be rendered void for vacancy or nonoccupancy continued for more than 10 days. This is the contract which the parties themselves made, and the court is not authorized to substitute for it another and a different contract which the parties did not make.

The case comes to this court upon a report of the uncontroverted evidence of the plaintiff, and the question arises in the first place whether, upon the facts thus disclosed, the buildings did become vacant by the removal of the owner or occupant, or did become personally unoccupied and so remain vacant or personally unoccupied for more than 10 days, without the consent in writing of the company. It has been suggested that the two words "vacant" and "unoccupied" are synonymous, and there are, doubtless, conditions of a dwelling house, when either word applied to it, or both words applied to it, will express a like condition of it. But, as stated by the court in *Herrman v. Adriatic Fire Insurance Co.*, 85 N. Y. 162, 39 Am. Rep. 644: "A dwelling house is chiefly designed for the abode of mankind. For the comfort of the dwellers in it, many kinds of chattel property are gathered in it. So that, in the use of it, it is a place of deposit of things inanimate, and a place of resort and tarrying of beings animate. With those animate far away from it, but with those inanimate still in it, it would not be vacant, for it would not be empty and void. And as a possible case, with all inanimate things taken out, but with those animate still remaining in it, it would not be unoccupied, for it would still be used for shelter and repose. And it is because, in our experience of the purpose and use of a dwelling house, we have come to associate our notion of the occupation of it with the habitual presence and continued abode of human beings within it; that that word applied to a dwelling always raises that conception in the mind. Sometimes, indeed, the use of the word 'vacant,' as applied to a dwelling, carries the notion that there is no dweller therein; and we should not be sure always to get or convey the idea of an empty house by the words 'vacant dwelling' applied to it. But, when the phrase 'vacant or unoccupied' is applied to a dwelling house, plainly there is a purpose—an attempt to give a different statement of the condition thereof; by the first word, as an empty house; by the second word, as one in which there is not habitually the presence of human beings." See, also, *Sonneborn v. Insurance Co.*, 44 N. J. Law, 220, 43 Am. Rep. 365.

In the case at bar the property insured was a set of connected farm buildings situated in a farming community in the town of Montville, about one mile from Liberty Village, where the plaintiff resided. The nearest house was from 500 to 700 feet

distant. The house was not occupied by the plaintiff himself, but had been occupied by his tenant, Albert Turner, and his family, consisting of a wife and three children. A stock of cattle, and also some hay and farming tools, the property of the plaintiff, were kept in the barn and cared for by Turner. On the 28th day of March, preceding the fire, Turner hired a tenement in Liberty Village, and removed from the house in question sufficient furniture and goods to furnish it. On the 4th day of April, following, his wife and family moved into this tenement in Liberty Village, but he continued to pay rent for the plaintiff's house up to the time of the fire. He continued to work upon the farm pleasant days, leaving his family in the village in the morning, taking his dinner with him to the farm, eating it in the house there, and lying on the couch while the horses were feeding. At night he returned to his family in the village. Rainy days and Sundays he was not at the farm. On these days the stock was cared for by a neighbor, one Weed. Turner was not at the farm on the day of the fire; Weed caring for the stock on that day. The removal to Liberty Village was occasioned by the approaching confinement of his wife, and he intended to return to the Knowlton place after his wife became able to do so. Her confinement occurred on the 22d day of May, following the fire. A few articles in the house belonged to Turner's mother, and he had made arrangements for their removal, because, as he says, he was afraid some might be stolen.

Upon these facts it is contended in behalf of the defendant company that the premises had become vacant or personally unoccupied by the removal of Turner, and remained so for more than 10 days prior to their destruction by fire, without the consent of the company in writing, and that the policy, by the terms on the rider attached to it, had therefore become void.

In *Corrigan v. Conn. Fire Ins. Co.*, 122 Mass. 298, a policy of insurance upon a house provided that the policy "shall be void, if the house shall remain vacant or unoccupied for the space of 10 days, without written notice to and the consent of the company," and it was held that, if the house had not been used as a dwelling place by some one within 10 days of the loss, the policy would be void; and that if the former occupant had moved with his family into another house, where they slept and took their meals, the fact that some of his furniture remained in the house, and the key had not been surrendered to the landlord until within the 10 days, would not constitute an occupancy of the premises. The fact that the plaintiff left a dwelling house furnished and in charge of his farmer, who kept the farmhouse near by, and whose wife visited and aired the dwelling every

few days, will not satisfy the condition of occupancy. For a dwelling house to be occupied, it must be used by human beings as their customary place of abode. *Herrman v. Insurance Co.*, 85 N. Y. 162, 39 Am. Rep. 644.

In *Hanscom v. Insurance Company*, 90 Me. 338, 38 Atl. 325, the court say: "The fact that the furniture remained in the house, and that the plaintiff's hired man made a frequent inspection of the household goods and had a general oversight of the buildings during the day, is not a full equivalent for the constant supervision involved in the occupancy of the premises as a customary place of abode, and the actual presence in the building of those who are living in it and using it as a dwelling house day and night." *Ashworth v. Builders' Ins. Co.*, 112 Mass. 422, 17 Am. Rep. 117; *Herrman v. Adriatic Ins. Co.*, 85 N. Y. 162, 39 Am. Rep. 644; *Bonefant v. Insurance Co.*, 76 Mich. 654, 43 N. W. 682; *May on Insurance*, 249a; *Wood on Insurance*, p. 180. A purpose to move into a house, though partly executed by filling it with furniture, will not aid the insured, unless the purpose is rendered complete by actual occupancy. If the premises became unoccupied and remained so up to and at the time of the fire, the condition is broken. 1 *May on Insurance*, 502. The mere presence of goods in the house, and a supervision over it, is not "occupancy." That requires "living" in it. *Moore v. Insurance Co.*, 64 N. H. 140, 6 Atl. 27, 10 Am. St. Rep. 384; *Sonneborn v. Insurance Co.*, 44 N. J. Law, 220, 43 Am. Rep. 365. A house in which no one lives, but in which a former occupant had left some trifling articles of furniture, not of such character as to be valuable for use elsewhere, is "vacant and unoccupied," within the meaning of those terms as used in a fire insurance policy. *Moore v. Phoenix Ins. Company*, 64 N. H. 140, 6 Atl. 27, 10 Am. St. Rep. 384.

In *Sleeper v. Insurance Company*, 56 N. H. 401, the policy provided: "If the premises hereby insured become vacant by the removal of the owner or occupant without immediate notice to the company and consent indorsed hereon, * * * this policy shall be void." The tenant paid for rent up to May, 1872. He left in April, 1871, and went to Laconia; his family having left a short time previous. The wearing apparel of himself and family had all been taken away, and a portion of what little furniture they possessed. He intended to return the next spring, or earlier, if business should be dull in Laconia. No person lived in the buildings after he left. The buildings were totally destroyed by fire October 30, 1871, up to which time he had not decided to return at any definite period. Neither plaintiffs nor defendants had any notice that the tenant had vacated the premises until after the fire.

Held, that the premises were vacant. The court says: "I think when the occupant of a dwelling house moves out with his family, taking part of his furniture and all the wearing apparel of the family, and makes his place of abode in another town, although he may have an intention of returning in eight or ten months, such dwelling house, while thus deserted, must be regarded as unoccupied; that is, vacated according to the natural and ordinarily received import of those terms." Where the occupant moved out, leaving only a bedstead and strip of carpet, and one of his sons slept in the house for a month after, but afterwards the house was entirely abandoned for six or seven weeks before the fire, the court held the premises unoccupied and the policy void, not only as to the house, but also as to all farm buildings insured; since the condition as to vacancy of the premises belonged to all the subjects of the contract and is a potent influence on the assumption of the entire risk. *Hartshorne v. Insurance Co.*, 50 N. J. Law, 427-429, 14 Atl. 615. See, also, *Sonneborn v. Insurance Co.*, 44 N. J. Law, 220, 43 Am. Rep. 365.

The plaintiff's buildings, insured by the policy in suit, must therefore be deemed to have become "personally unoccupied," without the consent of the company, for more than 10 days immediately preceding their destruction by fire.

It is finally contended in behalf of the plaintiff, however, that the acceptance of the company of the plaintiff's proportional part of the assessment of July 30, 1903, operated as a waiver of the forfeiture resulting from such nonoccupancy.

It is not in controversy that a representative of the company had an interview with the plaintiff four or five days after the fire, and was then fully informed of the situation and circumstances connected with the loss of the buildings. Subsequently on the 20th day of July, 1903, the secretary of the company addressed to the plaintiff the following letter, which was received in due course of mail, viz.:

"Dear Sir: The directors of this company to a man would be glad to include your loss with our assessment, but our attorney, after being made acquainted with the facts as stated by you, says to do so would invalidate our whole assessment, which, of course, we cannot do. He cited us to *May on Insurance*, page 502, which seems to fit your case, and, when in some attorney's office, I wish you would have them refer to it, so you can see for yourself.

"I am very sorry to have to write this letter, for I had hoped we might pay you."

It appears from the plaintiff's testimony that he understood this to be a letter "denying the risk."

Subsequently the treasurer of the company sent to the plaintiff an "assessment card"

for the twenty-eighth assessment made by the company, dated July 30, 1903, informing him that the assessment on his premium note was \$1, and requesting payment of the same. This general assessment of the company covered eight losses that occurred prior to April 19, 1903, and ten that occurred after that time. The plaintiff paid this sum of \$1, assessed on his premium note, some time in August, 1903.

The following provisions are found in chapter 49 of the Revised Statutes of 1883, relating to mutual fire insurance companies, viz.: "Sec. 25. Every person insured by such company, or its legal representatives or assigns continuing to be insured therein, is a member of the company during the term specified in his policy and no longer.

"Sec. 26 [as amended by chapter 95, p. 93, of the Laws of 1895]. The insured before receiving his policy, shall deposit his note for the sum determined by the directors, which shall not be less than five per cent. of the amount insured, and such part of it as the by-laws require, shall be immediately paid and indorsed thereon; and the remainder in such installments as the directors from time to time require for the payment of losses and other expenses, to be assessed on all who are members when such losses or expenses happen, in proportion to the amounts of their notes. * * *

"Sec. 28. The company shall have a lien against the assured on the buildings insured and the land appurtenant thereto, for the amount at any time due on said note, to commence from the time of the recording of the same, as hereinafter provided, and to continue sixty days after the expiration of the policy on which the note was given. * * *

These statutory provisions were in force at the date of the policy in suit, and are retained in chapter 49 of the Revised Statutes of 1903, in sections 26, 27, and 31, respectively.

In *Philbrook v. N. E. Mutual Fire Ins. Co.*, 37 Me. 137, a question of waiver was raised precisely analogous to that in the case at bar, and was decided adversely to the plaintiff's contention. In that case there was a forfeiture of the policy, resulting from the act of the plaintiff in obtaining other insurance without the consent of the company in violation of the provisions of the charter; and the plaintiff contended that the collection of an assessment on the plaintiff's premium note, ordered by the company within the life of the policy, but after the fire, operated as a waiver of the forfeiture. All the losses covered by the assessment in that case occurred after the forfeiture, and a part of them after the fire and after the denial of liability. The provisions of the charter of that company relating to membership, the obligation of every member to pay his proportion of all losses happening during his connection with the company,

and the existence of the lien on the buildings for the security of the deposit note, were in effect precisely identical with the statutory provisions above quoted in force at the date of the plaintiff's policy in suit. In the opinion the court say: "No provisions in the act of incorporation exonerate a member from his obligations, or put an end to his connection with the company by a rejection of his claim for a loss which may occur; neither does it provide that, when a policy is made void by the holder's voluntary act, he is excused from the payment of assessments made afterwards. If it were so, it would be in the power of the party assured to relieve himself of his obligations at pleasure, if he should choose to give up the benefit of his insurance by conduct of his own. The most satisfactory reasons may exist for a rejection of a claim by the directors. Paragraph 1, of the act refers to such, and is it to be supposed that, by the refusal to pay for a loss not covered by the policy, the premium note of the person who sustained the loss is thereby canceled? A waiver, in such a case, is quite unlike a waiver of strict compliance with the charter and by-laws in certain preliminary steps, in order to make a valid policy available. Here the foundation of the claim is an insurance followed by a loss, and the defense is upon the ground that the insurance ceased utterly before the loss, and consequently, if it be so, the claim is baseless. *Heath et al. v. Franklin Insurance Company*, 1 Cush. 257. The evidence in this case fails to satisfy us that the directors designed to exercise the power not possessed by them, and gave their consent to a second insurance, or that they did anything which gave validity to a policy which had become void by the plaintiff's acts and omissions."

This decision was affirmed in *Gardiner v. Piscataquis Mutual Fire Ins. Co.*, 38 Me. 439. In that case a forfeiture had resulted from the plaintiff's failure to give notice of a material increase in the risk, happening after the receipt of his policy, and it was contended that by making and collecting an assessment upon the plaintiff after the fire, covering losses which occurred after the forfeiture, the defendant company was "estopped from treating the policy as void." But the court said: "The making of such assessments by the defendants for subsequent losses would not revive the policy; nor was it inconsistent with the legal right of the company to treat it as void. *Neely v. Onondaga M. Ins. Co.*, 7 Hill, 49; *Smith v. M. F. Ins. Co.*, 3 Hill, 508; *Philbrook v. N. E. M. F. Ins. Co.*, 37 Me. 137."

In *Neely v. Onondaga Mutual Ins. Co.*, supra, the court say: "Although the plaintiff's policy became void by the alienation of the property insured, it does not follow that his deposit note was also void. On the contrary, until he surrendered his policy

and paid his proportion of all losses which accrued 'prior to such surrender,' the deposited note remained obligatory upon him. He does not pretend that he surrendered his policy previous to the assessment mentioned in the replication, and he was therefore liable to pay his proportion of the losses for which that assessment was made. The replication shows that the defendants have enforced this liability; but their acts, instead of evincing an intention to affirm the existence of the policy, are perfectly consistent with their right to treat it as void."

These authorities must be deemed decisive of the case at bar. The cases cited by the defendant are clearly distinguishable from it.

It is accordingly the opinion of the court that the forfeiture resulting from the non-occupancy of the plaintiff's buildings was not waived by the company in accepting payment of an assessment upon the plaintiff's premium note under the circumstances stated, and that the entry must be:

Judgment for defendant.

BOYD v. CLOUD.

(Superior Court of Delaware. Kent. Oct. 30, 1905.)

CONTINUANCE—ISSUES—ABSENT WITNESSES—AFFIDAVIT.

Where issues from the register of wills had been regularly placed on the trial list under the court rules, requiring cases at issue 20 days before the convening of the court to be placed on the trial list, an affidavit for a continuance thereof at the first term, alleging the absence of a material witness, was not defective for failure to disclose his name or state what was proposed to be proved by him.

Issue from the register of wills in and for Kent county between John L. Boyd, an insane person, by William Boyd, his trustee by appointment, and Mary H. Cloud. On application for continuance. Granted.

Affidavit filed in regular form alleging the absence from the state of a material witness, upon which counsel for plaintiff asked for a continuance to the next term of court.

Mr. Hughes, for defendants, contended that inasmuch as under the statute the first term was the trial term for issues from the register of wills, whilst the second term was the trial term for other cases, and therefore such issues were in the same position at the first term as other case at the second term, and the rule of court requiring that an affidavit for continuance at the second term should disclose the name of the witness, and what is proposed to be proved by said witness should apply to issues from the register of wills at the first term; that the affidavit upon which the motion for continuance was made in the above case did not disclose the name of the witness or what was proposed to be proved by him, and therefore the affidavit was defective on that ground, and the motion should be refused.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Henry Ridgely and William M. Hope, for plaintiff. James H. Hughes and William L. Gooding, for defendant.

LORE, C. J. There is no distinction between issues and other cases in that regard. This has been regularly placed upon the trial list, under the rules of court requiring that cases at issue 20 days before the convening of the court shall be placed upon the trial list, and we think the affidavit discloses all that is necessary.

Let the case be continued until the April term.

BOYD v. CLOUD.

SAME v. CLOUD et al.

(Superior Court of Delaware. Kent. Oct. 31, 1905.)

1. APPEAL—RECORD—FAILURE TO CERTIFY—DISMISSAL.

Appeals from orders of the register of wills removing an administrator and appointing another will not be dismissed because the register failed to certify the record, but the papers will be remanded to the register for the required certificates.

2. SAME—SEPARATE APPEALS—TRANSCRIPT.

Where two appeals were prosecuted from two orders of the register of wills, one removing an administrator, and the other appointing another as administrator in his stead, such appeals will not be dismissed for failure to file separate transcripts, under Rev. Code 1893, p. 673, c. 89, § 15, authorizing an appeal to the Superior Court from the register exercising jurisdiction touching the grant or revocation of letters and the removal of an executor or administrator.

3. ADMINISTRATORS—RIGHT TO APPOINTMENT—TRUSTEE OF INSANE PERSON.

The trustee of an insane person is entitled to administer on an estate to the residue of which such insane person is entitled, the same as the insane person would be if capable.

Petition by Mary H. Cloud for revocation of letters of administration issued to William Boyd. From an order of the register of wills removing Boyd from his office as administrator of Joshua Boyd, deceased, and from an order of the register of wills removing Boyd as administrator and appointing James Francis Wilds as administrator for said decedent, said Boyd appeals. Reversed.

Joshua Boyd died in the early part of June, 1905. He left to survive him as his only heir at law, a brother, John L. Boyd, who some years previous had been declared a lunatic upon a commission duly issued for that purpose. William Boyd, his son, was trustee by appointment of the chancellor of the said John L. Boyd. Shortly after Joshua Boyd's decease, William Boyd applied to be and was appointed the administrator of Joshua Boyd by the register of wills in and for Kent county. At the same time a paper writing purporting to be the last will and testament of the said Joshua Boyd was

filed in the office of the said register. Immediately, and before any proof was made of the will, a caveat was filed by the said William Boyd, acting as trustee for John L. Boyd, and issue was prayed for and granted by the register, which issue is now pending. The paper writing, purporting to be the will of Joshua Boyd, devised a lot and house to his stepdaughter, Mary H. Cloud, and she was also made the legatee therein of certain personal property. The paper writing named no executor, disposed of no other property than as stated, and mentioned no other beneficiary. Joshua Boyd owned other real estate, and left other personal property not referred to in the will.

Shortly after the grant of letters of administration to William Boyd, Mary H. Cloud, the stepdaughter of the deceased, and the devisee and legatee named in the paper writing, filed her petition with the register of wills praying for the revocation of the letters to William Boyd, and his removal as administrator. The grounds stated in the petition were confined to allegations that Mary H. Cloud was preferred to the office of administrator because William Boyd was not an heir at law of the deceased, nor entitled to share in the residue of his personal estate; that the said Mary H. Cloud was a legatee named in the will of the deceased, and was also a creditor of the estate. Joshua Boyd had, upon commission duly issued, been declared a lunatic about one year prior to his decease, and William Boyd had been appointed trustee, also, by the chancellor. Shortly before Joshua Boyd's decease, Mary H. Cloud had brought suit against the former, claiming that he was indebted to her for board and maintenance. After a hearing upon the petition of Mary H. Cloud, the register of wills in the latter part of June, 1906, made an order revoking the letters theretofore granted to William Boyd and removing him from his post as administrator. William Boyd thereupon took an appeal to the Superior Court. In September of the same year the register appointed J. Frank Wilds administrator c. t. a. in the place of William Boyd. William Boyd thereupon took an appeal from this last order.

The above facts appeared in the petitions, affidavits, and other papers sent up by the register. There was no certificate of the register accompanying the said papers.

The appellant assigned the following causes of appeal: "First. That the register erred in removing the said William Boyd as administrator of Joshua Boyd, deceased, without allegation or proof that he was incapable of performing or was neglecting the duties of such administration. Second. That the register erred in removing the said William Boyd from the administration aforesaid, on the petition of Mary H. Cloud, when in fact the said Mary H. Cloud had consented to the appointment of the said William Boyd

at the time of his appointment. Third. That the register erred in the removal aforesaid upon the application of Mary H. Cloud, who was neither entitled to share in the residue of the personal estate of the deceased, nor was a bona fide creditor of said deceased nor of his estate. Fourth. That the register erred in the removal aforesaid, because the application for such removal was made by Mary H. Cloud on the sole ground that she was a creditor of the estate of said deceased, whereas in fact the said estate did not and does not owe the said Mary H. Cloud anything. Fifth. That the register erred in removing the said William Boyd as administrator as aforesaid, because said removal was made upon the sole application of Mary H. Cloud, claiming to be a creditor of said estate, whereas in fact the said Mary H. Cloud was not a bona fide creditor of said estate, and the only claim she held against it was a pretended one, which was contested in the lifetime of said deceased, and for which suit is now pending in this court. Sixth. That the register erred in the removal aforesaid, because the said William Boyd was the trustee and legal representative of John L. Boyd, who was the only person entitled to the residue of the personal estate of said deceased. Seventh. That the register erred in the removal aforesaid, because there was no person capable of the administration who was by law preferred to the said William Boyd; there being no allegation or proof that the said William Boyd was neglecting his duties as administrator. Eighth. That the order of the register was against the law. Ninth. That the order of the register was against the evidence. Tenth. That the order of the register was against the law and the evidence."

The causes of appeal in the second case were identical with the above, except that the following additional cause was added, viz.: "That the register erred in appointing James Francis Wilds administrator of said estate in place of William Boyd, because the said James Francis Wilds was not entitled to the residue of the personal estate of said deceased and was not a creditor of the said deceased or of his estate."

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Henry Ridgely and William M. Hope, for appellant. James H. Hughes and William L. Gooding, for respondents.

Counsel for the respondent moved to dismiss the appeal in the first case on the following grounds: "First. There is no record or transcript of a record on file in this court. Second. The papers filed have no certificate of the register or anything else to indicate what they relate to. Third. The papers filed do not contain any depositions of the witnesses examined or show any evidence in the cause."

Motion was also made by counsel for re-

spondent to dismiss the appeal in the second case for the above reasons, and for the additional reason that "there was no such judgment of the register as is stated in the appeal."

LORE, C. J. We remand the papers to the register of wills, and order him to send up such certificates as will satisfy us that the record is before us. We do not know of any statutory provision to the effect that an appeal from the register of wills will abate because of lack of certificate. It is not like a certificate of a justice of the peace. The motion to dismiss the appeals on that ground is refused.

The register thereupon appended his certificates to said papers, stating that the annexed papers were a true and correct copy of all his record entries in the above-stated causes and of all papers filed or produced in said causes.

Counsel for respondent argued further, in support of their motion to dismiss the appeals on the other grounds above stated, as follows: The statute (section 15, c. 89, Rev. Code 1893, p. 873) provides that "there shall be an appeal to the Superior Court from the register exercising jurisdiction, touching the grant or revocation of letters, the ordering of further bond or removal of an executor or administrator." The record sent up in this case shows no such judgment as that appealed from. The record shows two distinct judgments of the register in relation to the administration of the estate of the said Joshua Boyd. The first judgment dated June 29, 1905, revoked the letters of administration granted on the estate of Joshua Boyd deceased to William Boyd, bearing date June 7, 1905, and removed the said William Boyd from the office of administrator. The other judgment of the register of wills, dated the 25th day of September, A. D. 1905, granted letters of administration c. t. a. upon the estate of Joshua Boyd unto J. Frank Wilds. There seem to be no reported cases in this state on the subject of appeals from registers of wills touching the granting of letters of administration, nor is there any statute or rule other than the statute before recited touching the subject; so that we are left to the general principles of law touching appeals. In 2 American & English Encyclopedia of Pleading & Practice, under the title of "Appeals," on page 282, we find it laid down, where different appeals were taken from separate and distinct judgments, each appeal must be based on a separate transcript. These two judgments of the register are separate and distinct, and were in no sense contemporaneous. The first judgment was rendered in June. The second one in September.

LORE, C. J. We decline to dismiss the appeals, or either of them, on the grounds stated and argued.

Argument upon the appeals was then begun; the appellant submitting the following brief:

"First. The appointment by the register in the first instance of William Boyd as administrator was an exercise of the judicial function, binding upon the register and upon the whole world. That officer could not thereafter review or rescind his action arbitrarily or capriciously. It is true that our statute (Rev. Code 1893, p. 670, c. 89, § 12) confers upon the register of wills the power of removing an administrator, but that statute expressly enumerates the causes for such a removal. It is manifest, therefore, that the statutory causes are exclusive of all others not specified therein, and that the register cannot remove, except upon one of the specified grounds. So far as the present case is concerned, the only cause enumerated in the statute which could possibly apply is that of neglect of duty by reason of absence or inability. The proceedings disclose, however, that the register did not act upon this ground. There was absolutely no allegation, and there was no scintilla of evidence before him, even hinting at neglect on the part of William Boyd. The register, therefore, acted without the statute and of necessity without warrant of law.

"Second. The register makes no statement of the grounds upon which he acted in revoking the letters of administration theretofore issued to William Boyd. He was, however, proceeding upon a petition for such revocation filed by Mary H. Cloud. No evidence was heard by him in support of the revocation, except as contained in said petition. It would seem a proper assumption, therefore, that he based his determination upon the allegations contained in said petition. When, however, we examine these allegations, we find the only one in point to be that Mary H. Cloud is a creditor of the estate of the deceased, and that William Boyd is neither a creditor nor a person entitled to the residue of the personal estate. The petition, then, raised the sole issue before the register whether William Boyd or Mary H. Cloud should be the personal representative of the deceased. We repeat there was no allegation and no evidence on any other head. Nevertheless the register arbitrarily removed William Boyd, and appointed James Francis Wilds, who was not a creditor nor a person in any wise interested in the estate. The register, therefore, utterly failed to determine the one question raised by the petition, namely, whether Mary H. Cloud was the person preferred by law to administer.

"Third. The register made two orders in the proceedings. One, the removal of Boyd; the other, the appointment of Wilds. If his first order had been based upon any of the statutory causes for removal, then it might be considered as separate and distinct from his second order. This, however, was not the case; for as we have stated, the only allegation and proof heard by him was on

the single point that Mary H. Cloud was preferred by law over William Boyd. It follows, therefore, that the order of removal and the order of appointment constituted a single act or decree. The arbitrary division of his finding by the register cannot vary the fact that the removal of Boyd and the appointment of Wilds together formed one and only one determination of the proceeding. The question then before the court is not simply whether the register had the right to remove Boyd, but is, had the register the right to remove Boyd in order to appoint Wilds? We submit that there was absolutely no allegation for evidence before him authorizing such action.

"Fourth. We have attempted to show that there is no issue before the court between William Boyd and Mary H. Cloud, but only between Boyd and Wilds. If, however, we assume for the sake of argument that the court may consider whether Mrs. Cloud or Boyd was the proper person to be appointed administrator we think our position is not weakened. The proceeding now before the court is of course an appeal from an order of the register removing an administrator theretofore appointed. If, however, this were not the case, and Mary H. Cloud and William Boyd had both applied to the register for appointment, and the register having preferred the latter, and appeal had been taken, we believe that even then the court would decide that William Boyd was the proper person for such appointment. The law gives the preference of the administration to the person entitled to the residue of the personal estate of the deceased. The only person so entitled in the present instance is John L. Boyd. It is true that he is incapable, because he has been found to be a lunatic, but William Boyd is his trustee by appointment of the chancellor, and is therefore his legal representative. As such trustee, William Boyd stands in the shoes of John L. Boyd. Any proceeding taken against the latter or any proceeding instituted in his favor must be in the name of William Boyd. We contend, therefore, that William Boyd was the natural and logical person to be appointed by the register. We submit that a rational conclusion of our statute giving preferences in the right of administration warrants the appointment of a trustee of a person so preferred when there is none other in that class capable of administering. On this head we would call the attention of the court to the case of *Ex parte Ostendorf*, 17 S. C. 22.

"Fifth. If we again assume (what is not the case) that this appeal came up upon the contest in the first instance between Mary H. Cloud and William Boyd as to which had the right to administer, we submit that the court would decide in favor of Boyd. We contend that Mary H. Cloud is not a proper person to be interested with the administration of this estate. The sole ground upon which she bases her claim to administer is

that she is a creditor of the estate. This contention is good only if she substantiates her allegation of creditorship. We would respectfully insist that she has utterly failed to do this. In the first place, we have affidavits denying absolutely and entirely that the deceased and his estate owes her anything. In the second place, the claim which she pretends to hold is one now mooted in an action pending before this court, and which was instituted in the lifetime of the deceased. Whether Mary H. Cloud is or is not a creditor of the estate cannot be determined, until the termination of the action which she brought before this court in the lifetime of Joshua Boyd, the deceased. We submit the court will not anticipate the final determination of that suit by now holding that Mary H. Cloud is a creditor, and yet, if the court does not hold her to be a creditor, she certainly is not preferred over William Boyd in the administration of the estate in question. It is true our statute gives the preference in the grant of letters (after persons entitled to the residue of the personal estate) to creditors, but it is obvious that the statute contemplated only those whose claims had either been adjudicated, or were not in dispute. Any other conclusion would be manifestly irrational. If we are right in this, then William Boyd, not having been shown to have neglected his duties, cannot be removed to give way to a person not by law preferred over him.

"Sixth. Assuming again (for the sake of the argument) that the question is between William Boyd and Mary H. Cloud, we submit that Mary H. Cloud is an improper person for the appointment. The office of an administrator is an important one; its object is the preservation of the estate. Any person not likely to accomplish this object is manifestly unfit. Our Delaware statute gives the preference first of all to persons entitled to the residue of the personal estate. The reason is obvious. He who is entitled to share in the residue would be the most likely person to conserve the estate, because, in so doing, he would be working for his own interest. The next preference is given by the statute to creditors. Here again the reason is plain. If the person entitled to the residue is incapable or neglects to administer the class of persons, then next most likely to preserve the estate would be those holding claims against it, since the payment of their claims might depend upon the amounts of assets which were secured to the estate. There is, however, a wide distinction between the persons entitled to the residue and creditors. The latter may be interested only to the amount of their claims, whereas the former are interested in the whole. This is why creditors are subordinated in preference to those entitled to the residue. If, however, the person seeking to administer is neither entitled to the residue, nor holds a claim against the estate which has been adjudicated or

is not disputed, but is merely one claiming or pretending to claim a right of action against the estate which is contested, by the residuary beneficiary, it is patent that the estate cannot derive any benefit from his appointment. Mary H. Cloud stands in precisely this same position. She and her husband have brought suits in this court against the deceased. These were instituted in the lifetime of the latter. Suppose she is now appointed the administrator, what will be the result? Either she will exercise her powers by voluntarily paying hers and her husband's out of the estate to full amount of the contested claims, or else she will be driven to make herself as such administrator a party defendant to the suit which she as an individual is party plaintiff. In the latter event can it reasonably be expected that the litigation will be more than merely formal and the defense anything except of the most perfunctory character? It may be answered that redress can be had by a proceeding upon her bond. We submit that it would be most unfair to force us to such action; at the best a dilatory and expensive redress. We think the authorities are abundant to the effect that courts have universally declined to appoint as administrator any one one having a claim or interest adverse to the estate. Even if Mary H. Cloud were entitled to share in the residue of the personal estate, we believe that the books support the proposition that she would still be an unfit person to administer, because she holds a contested claim against said estate. *Ex parte Ostendorf*, 17 S. C. 22; *Pickering v. Pendexter*, 46 N. H. 69; *In re Bieber's Appeal*, 11 Pa. 157; *Owings v. Bates*, 9 Gill (Md.) 463; *In re Mills*, 22 Or. 210, 29 Pac. 443.

"Apart from the sufficiency of any of the preceding points of argument, however, we submit that the action of the register in removing Boyd, and in appointing Wilds is clearly error, for the reason that Mary H. Cloud had notice and knowledge of the application in the first instance of Boyd to the register to be appointed administrator of the estate of the deceased and that she expressly consented to said appointment. She is therefore estopped from now calling it into question. We submit that this is decisive of the whole case, because the action of the register was based upon the petition of Mary H. Cloud, and if Mary H. Cloud had no right to petition for the removal of Boyd then the register had no power to act in the premises. We are confident that our position on this head is unassailable."

Counsel for respondent submitted in reply the following brief:

"The grounds of appeal as appear from the exceptions and cause of appeal filed are briefly: First. Error in removing administrator without allegation or proof that he was incapable of performing or was neglecting the duties of his office. Second. That

the petitioner for such removal consented to the appointment at the time it was made. Third. That the petitioner or applicant for removal was not entitled to share in the residue of the personal estate of deceased and was not a bona fide creditor. Fourth. That the estate does not owe the petitioner anything. Fifth. That the petitioner was not a creditor only having a pretended claim which was contested in the lifetime of the deceased. Sixth. That William Boyd was the trustee and legal representative of John L. Boyd, and was the only person entitled to the residue of the personal estate. Seventh. That there was no person capable of the administration, who was by law preferred to William Boyd and allegation that William Boyd was neglecting his duties as administrator. Eighth, Ninth, and Tenth. That the order was against the law and evidence.

"The record as sent up discloses a petition of Mary H. Cloud, stating the appointment of the said William Boyd as administrator, and that he is not one of the persons entitled to the residue of the personal estate of the deceased, and that the only person who is so entitled is incapable of administering on said estate. That she is a creditor of said estate, and a legatee under the last will and testament of Joshua Boyd, deceased, and, as such, is entitled to administer on said estate in preference to said William Boyd. In reply to this, is an answer in the shape of an affidavit, signed by persons claiming to be the children of John L. Boyd, and denying the part of said petition in which Mary H. Cloud claims to be a creditor, but admitting that there are cases pending in court in which the said Mary H. Cloud is plaintiff for the recovery of alleged claims against said estate, but setting up other facts in relation to the matter. The order of the register states that a decree is made after a full hearing on both sides.

"The Constitution of Delaware (section 22 of article 6) provides that the register of wills of the several counties shall respectively hold the registers' court in each county upon the litigation of the cause, and the depositions of the witnesses examined shall be taken at large in writing, and made a part of the proceedings in the cause. The record in this appeal does not contain depositions of the witnesses or show any evidence in the said cause. The only thing that the record presents to the court is what in effect constitutes the pleadings in the said cause. It is submitted that appeals from the decision of the register are not new trials, but like appeals from the orphans' court, or an examination of the decision below on precisely the same facts as were presented to that court. This ruling in relation to appeals from the orphans' court is to be found in *Crawford v. Short*, 1 Har. 355, 360. In the same case the court holds

that appeals from the orphans' court cannot be heard without a statement of the points decided, and that it is the right of the party appealing to apply for such a statement unless the record shows the points so decided.

"It is submitted that the record in this case does not show the points decided. The allegation in the petition for removal of William Boyd states that he is not one of the persons entitled to the residue of the personal estate, and that the person who is so entitled is incapable of administering. This, under the statute on page 670 of the Revised Code of 1893, c. 89, § 9, makes the next class of persons entitled to administration the creditors, and the petitioner claims to be such creditor. The statute also provides that in case of administration with the will annexed as in this case, a legatee shall be preferred to creditors. The petition states that the petitioner is also a legatee, and the record as sent up discloses this fact. The only claim which William Boyd makes to a right to administer is that he is the trustee of John L. Boyd, an insane person, who is the heir or person entitled to the residue of the personal estate of the deceased. This fact appears in the affidavit or answer filed in the said proceeding, but does not appear from any evidence filed with the said record. If William L. Boyd is such trustee of his father, it is submitted that a trustee of an insane person appointed by the Chancellor has charge of such insane person and the management of his property; that such trustee has no title to the property of his ward, and can neither sell nor dispose of the same without authority from the Chancellor; that such trustee is merely an officer of the Court of Chancery acting under the Chancellor's authority for the care of the person and property of his ward. That the letters granted to William Boyd were granted to him in his individual capacity, and not as trustee of John L. Boyd, as is disclosed by that part of the record sent up in this case showing such appointment. There is no provision in the statute providing for the appointment of such trustee or preferring him in any way. On the contrary, the statute provides that if the person entitled to the residue of the personal estate be not capable, then letters shall be granted to the creditors. The person claiming to be entitled in this case was John L. Boyd, and he was an insane person. The appointment of the said William Boyd was therefore without statutory right or authority, and was contrary to the preference provided for in said suit. Such statute is mandatory, and the appointment of the said William Boyd contrary to its provisions was a mistake on the part of the said register of wills.

"A trustee is not entitled to administer by virtue of his office. *Matter of Thompson's Estate*, 83 Barb. 334; *Glenn, Trustee*,

v. Reid, 74 Md. 239, 24 Atl. 155. The trustee of a lunatic under our statute is appointed 'to take charge of them and manage their estates.' Rev. Code 1893, p. 381, c. 49, § 1. At the time of Boyd's appointment, the record discloses no application for his appointment, on the ground that he was trustee of John L. Boyd. He appears to have been appointed as any other stranger. There were no notices or citations to others interested. There appears no renunciation of persons entitled to preference. The appointment was therefore void and the register had a right to revoke letters. 1 Am. Law of Ad. § 243. That the said register of wills had the right to remove William Boyd from the office of administrator, we think there can be no doubt. If it be contended that such removal is statutory, and that it is confined to the provisions of section 12 of the statute on page 670 of the Revised Code of 1893, we submit that the Constitution provides for a register's court in each county and such a court has, by necessity, the incidental powers, and is not confined to those prescribed by the statute. In the case of *Rash v. Purnell*, 2 Har. 451, it is held that 'the register is a judge and the sentence of his court is the judgment of a tribunal of exclusive and peculiar jurisdiction on the subject-matter before him.' The question is very ably discussed in the case of *Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213, which was an appeal from a decree of the probate court declaring void the appointment of an executrix, and revoking her letters. On page 258 of 44 N. H. (82 Am. Dec. 213), the court says that probate courts 'exercise many powers solely by virtue of the provisions of our statutes, but they have a very exclusive jurisdiction, not conferred by statute, but by a general reference to the existing law of the land; that is, to that branch of the common law known and acted upon for ages, the probate or ecclesiastical law.' And, further, 'it is settled by the authorities that at common law the grant of letters testamentary and of letters of administration may be revoked,' and 'there are many cases where the courts of probate may remove such executors or administrators beside those enumerated in the statute.' In *South Carolina*, in *Thompson v. Hockett*, 2 Hill, 347, 348, the same principles are upheld.

"The power to revoke letters of administration is necessarily inherent in the register's court, and is a part of the essence of the power delegated to it of granting administration. *Pew et al. v. Hastings, Ex.*, 1 Barb. Ch. 452; *Proctor v. Wanmaker*, 1 Barb. Ch. 302; *Sipperly v. Baucus*, 24 N. Y. 46; *In re Ex. of Verplanck*, 91 N. Y. 439; *Williams' App.*, 7 Pa. 259; *McCaffrey's Estate*, 38 Pa. 331; *Neidig's Estate*, 183 Pa. 492, 38 Atl. 1033."

LORE, C. J. The court order that the judgment of the register of wills in each

of the above-stated cases be reversed. The matter is decided on the one point, viz., whether the trustee of an insane person is entitled to administer on an estate to which such insane person is entitled to the residue, and therefore entitled under the statute to administer. The court hold that such trustee is entitled the same as the insane person would be if capable.

In No. 96 the court rendered the following judgment: And now, to wit, this 31st day of October, A. D. 1905, it is ordered by the court that the order of the register of wills in and for Kent county and state of Delaware, bearing date the 29th day of June, A. D. 1905, revoking the letters of administration granted on the estate of Joshua Boyd, deceased, to William Boyd, and bearing date June the 7th, A. D. 1905, and removing the said William Boyd from his office of administrator of the goods and chattels, rights and credits of the said Joshua Boyd, deceased, be reversed, and that all the papers sent up in this cause be remanded to the register with this order: that the costs of this appeal be taxed against Mary H. Cloud, the respondent.

In No. 97 the court rendered the following judgment: And now, to wit, this 31st day of October, A. D. 1905, it is ordered by the court that the order of the register of wills in and for Kent county, bearing date the 25th day of September, A. D. 1905, granting letters of administration c. t. a. upon the estate of Joshua Boyd, late of East Dover hundred, unto J. Frank Wilds, be reversed, and that all the papers in this proceeding be remanded to the register with this order.

DASEY v. STATE ex rel. FARLOW.

(Superior Court of Delaware. Sussex. Oct. 11, 1905.)

1. FINES—COLLECTION—EXECUTION.

Appeal from judgment of a justice in a summary proceeding, under Rev. Code 1893, c. 128, § 21, for trespass declared to be a nuisance, being allowable only where defendant claims ownership, execution cannot be issued where such claim is not made, but the fine must be collected in accordance with such section, providing that if it be not paid the justice shall commit the offender to prison.

2. SAME—JUDGMENT OF JUSTICE.

The fine imposed in a summary proceeding before a justice, under Rev. Code 1893, c. 128, for trespass declared to be a nuisance, constitutes a judgment.

Action under Rev. Code 1893, c. 128, § 21, by the state, by complaint of Elijah J. Farlow, against Elijah Dasey. Defendant brings certiorari. Affirmed.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Charles F. Richards and Charles S. Richards, for plaintiff in error. Woodburn Martin, for defendant in error.

The record of the justice was as follows:

"State of Delaware, Sussex County—sa.:

"To Any Constable in Said County—Greeting: Whereas, Elijah J. Farlow, of Baltimore hundred, Sussex county, state of Delaware, has upon oath before me, a justice of the peace of said county, declared that on the 5th day of July, 1904, in Baltimore hundred aforesaid, one Elijah W. Dasey, late of the county and state aforesaid, did then and there willfully enter into, upon, and trespass upon the ways, lands, and premises of the said Elijah J. Farlow, situate in Baltimore hundred, county and state aforesaid, and was then and there and thereby guilty of a nuisance, under section 21, chapter 128, of the Revised Code, and that he, the said Elijah J. Farlow, has just cause to suspect and does suspect the said Elijah W. Dasey of Baltimore hundred, of committing the said offense: You are therefore commanded to take the said Elijah W. Dasey and bring him before me, or some other justice of the peace of the county, forthwith to answer said charge. Witness the hand and seal of the said justice the 8th day of July, 1904.

"[Seal.] William S. Long, J. P.

"State of Delaware, by complaint of Elijah J. Farlow. Justice costs.....65 Const. costs.....98	Action upon the charge of willfully committing a nuisance upon the lands of an- other, under section 21, chapter 128 of the Revised Code. July 8th, affidavit of com- plainant filed, warrant issued, and directed to James Long, Const.,
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returnable at my office in Frankford forthwith.

"And now, to wit, this the 9th day of July, 1904, warrant returned cepi corpus, says James Long, Const., and upon arraignment Elijah W. Dasey, the said defendant, says not guilty, and after hearing the proofs and allegations on the part of both the complainant and the defendant, and duly considering the same, I do find, adjudge, and decree the said Elijah W. Dasey guilty of having willfully committed the nuisance alleged, and do fine him five dollars and the costs of this suit.

"William S. Long, J. P.

"On the 9th day of July, 1904, Elijah W. Dasey appeals, and John M. Rogers becomes surety in the sum of twenty dollars that the said appeal shall be prosecuted with effect; also any judgment which shall be rendered against the said Elijah W. Dasey, or his executors or administrators, upon said appeal shall be satisfied.

E. W. Dasey.

"J. M. Rogers."

This appeal was never entered in the superior court, which justice ascertained from prothonotary before issuing executions.

Exceptions: "Elijah Dasey, the plaintiff in the above certiorari, by Charles F. Richards & Son, his attorneys, files the following exceptions why the judgment of state of

Delaware, by complaint of Elijah J. Farlow, against Elijah Dasey, should now be set aside and vacated: First, for that the said justice rendered said judgment without warrant or authority of law; second, for that the said record does not show or state the amount for which judgment was rendered; third, for that the judgment rendered by the said justice is void and of no effect, in this: that he had no jurisdiction or authority to render judgment for any amount; fourth, for that the execution issued upon the said judgment was void and without authority of law; fifth, for that the execution issued by the said justice was void and of no effect in this: that the requirements of the statute under which the proceedings were instituted were not complied with; sixth, that the said execution was and is void and of no effect in this: that the record shows an appeal had been taken, and the said justice issued an execution without any certificate that said appeal had been dismissed, or had not been duly entered."

THE COURT held that an appeal could be allowed only when the party charged with committing the trespass claimed the ownership of the premises: that, as the appeal was improperly allowed, execution could not be issued, but the fine should be collected as provided by section 21; that the fine was a judgment.

Judgment affirmed. Execution set aside.

MOTT v. STATE.

(Superior Court of Delaware. Kent. Oct. 27, 1905.)

SUNDAY—LABOR—INFORMATION.

Rev. Code 1893, p. 953, c. 181, § 4, provides that, if any person shall perform any worldly employment, labor, or business on the Sabbath day (works of necessity and charity excepted), he shall be fined four dollars, etc. Held, that an affidavit of complaint alleging that defendant did perform worldly business on a certain Sabbath day, etc., but failing to negative the exceptions of the state, was fatally defective.

Certiorari to review a conviction of James R. Mott before a justice of the peace for the alleged breaking of the Sunday law. Judgment reversed.

The affidavit of complaint of William A. Stokesbury alleged the following: "That on the 6th day of August, 1905, at Duck Creek hundred, Kent county, and state of Delaware, James R. Mott did perform worldly business, said 6th day of August, 1905, being the Sabbath day, commonly called Sunday, and that he had cause to suspect and doth suspect James R. Mott, of Duck Creek hundred, of committing the said offense," etc.

The record of the justice stated the offense for which the plaintiff in error was tried and convicted, as follows: "Affidavit, August 22nd, 1905, on oath of William A. Stokesbury, that at Duck Creek hundred, Kent county, and state of Delaware, August 6th, 1905,

James R. Mott did perform worldly business, said August 6th, 1905, being the Sabbath day, commonly called Sunday," etc.

The prosecution was instituted before the said justice under chapter 181, § 4, Rev. Code 1893, p. 953, which is as follows: "Sec. 4. If any person shall perform any worldly employment, labor, or business, on the Sabbath day (works of necessity and charity excepted), he shall be fined four dollars, and on failure to pay such fine and costs, shall be imprisoned not exceeding twenty-four hours."

The following exceptions were filed to the record of the justice, namely: "(1) That the affidavit of complaint on which the warrant was issued was not such as was required by the statute. (2) That it does not appear from the affidavit of complaint that the defendant was not engaged in a work of necessity and charity. (3) That the affidavit of complaint does not allege that the defendant was not engaged in works of necessity or charity. (4) That it does not appear from the record that the defendant was not engaged in works of necessity and charity. (5) That the case was not within the jurisdiction of the justice, because it does not affirmatively appear, both in the affidavit of complaint on which the justice acted and in the adjudication or conviction itself, that the defendant was not engaged in works of necessity and charity."

Attorney General Richards: "After examining the case of Socum v. State, 1 Houst: 204, which is decisive of this case, and also numerous decisions outside of our own state to the same effect, I feel that it is hardly necessary to take up the time of the court with an argument."

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Horace G. Eastburn, for plaintiff in error. Robert H. Richards, Atty. Gen., for the State.

LORE, C. J. We reverse the judgment upon the ground that neither the complaint nor the record negatives the exceptions contained in the statute.

Judgment below reversed.

RICARDO et al. v. NEWS PUB. CO.

(Supreme Court of New Jersey. Nov. 29, 1905.)

ACTION—JOINDER OF CAUSES.

A declaration which joins in one count a cause of action by a married woman for the publication of a false and malicious statement concerning her separate real estate with a count for damages to both husband and wife by reason of a publication of a false and malicious statement as to the wife personally is bad on demurrer.

(Syllabus by the Court.)

Action by Abbie L. Ricardo and Norton C. Ricardo, her husband, against the News Publishing Company. Judgment for defendant on demurrer to declaration.

argued November term, 1904, before GUM-MERE, C. J., and GARRISON, GARRETSON, and REED, JJ.

Peter J. McGinnis, for plaintiffs. John B. Humphreys, for defendant.

GARRETSON, J. This is a demurrer to a declaration containing two counts. In the first count it is alleged that Abbie L. Ricardo, wife of Norton C. Ricardo, was the owner in fee of certain real estate consisting of a plot of land with a building erected thereon, which building was used for tenement purposes, and was divided into separate apartments to be rented or let to persons desiring to dwell therein, or which had been rented or let for that purpose, which building was known as the "Ricardo Flats"; that the defendant, contriving, and wrongfully and maliciously intending, to injure the plaintiff, and to induce those who had already rented or let the said building or apartments not to continue to rent or let the same, and not to pay rent for them, and to induce those who desired or intended to rent or let the said building or apartments not to do so, and to bring said building and apartments into infamy and disgrace, and thereby deprive the said plaintiff of all profits, etc., from said premises, building and apartments, "did falsely and maliciously print and publish, and cause to be printed and published, in a certain daily newspaper commonly called the 'Passaic Daily News,' owned and published by the defendant, and having an extensive and wide circulation, the false, wicked, malicious, and defamatory libel, containing false, scandalous, and libelous matter concerning the said premises, building, and apartments, and the appurtenances thereto of and belonging to the plaintiff, that is to say, in large headlines, 'Here Sanitary Dangers Lie,' thereby meaning that in and throughout the said premises, building, and apartments there existed sanitary dangers which exposed to risk and danger the lives of those dwelling in the building or apartments aforesaid, and that a nuisance existed and was allowed to exist therein"—and going on to set out innuendoes the article in question. Immediately following is a denial of the truth of the article, and then the allegation of damages, that by means of the committing of the several grievances by the defendant divers persons who were then and there about to rent or let, or who had let and rented, the said premises, building and apartments, and who would have otherwise rented and occupied the same, were then and there deterred from so doing, and from thence hitherto have respectively wholly declined to rent, let, or occupy the same, and thereby the said plaintiff was then and there hindered and prevented from renting or letting the said premises, building, and apartments, or any part thereof, and has thereby lost and been deprived of all the advantages, emoluments, rentals, and rewards which she might and would have derived and acquired from the

letting or renting thereof, and by means of committing the said grievances divers persons who had been renting or letting the premises or apartments, or a part thereof, have declined and refused to continue to rent, let, or occupy the same, whereby the plaintiff has lost rentals which she would have derived from the continuing of the renting and letting, and by means of the committing of the said grievances the reputation and character of her said premises, building, and apartments have been ruined and injured and brought into infamy, so that divers persons who were about to or had rented and let the said premises and apartments did believe and still believe that the imputations, assertions, and libelous matters were true; and the count concludes with the allegation wherefore the said plaintiffs, Abbie L. Ricardo and Norton C. Ricardo, her husband, say they have been injured and sustain damage to the amount of \$5,000.

The second count sets forth that the defendant is a corporation of New Jersey; that the plaintiff Abbie L. Ricardo, wife of Norton C. Ricardo, was and is a good, true, honest, and faithful citizen and resident of New Jersey, and conducted herself as, and was always esteemed to be, a person of good name, fame, and credit; that the plaintiff was known to be the owner of the Ricardo Flats used for tenement purposes, which she had or intended or desired to let to tenants, and for which she received or desired to receive rentals, and that she was owner, managed and controlled the same, and always kept them in a clean, healthful, and sanitary condition and manner and in orderly proper and legal manner and condition; that the plaintiff had never been guilty of or suspected of being guilty of offenses and misconduct mentioned to have been charged against and imputed to the said plaintiff, or of any other offense or misconduct; that the defendant owned a daily newspaper called the "Passaic Daily News," published at Passaic, having an extensive circulation, and composed and published, and caused to be printed and published, of and concerning the plaintiff, a certain false, scandalous, malicious, and defamatory libel setting out the article at length with innuendoes, and alleging that by means of the grievances set forth the plaintiff is and has been greatly injured in her name, fame, and credit, and has been held up to public ridicule and disgrace, and has been brought into public scandal and infamy among her neighbors and others, so that divers of these neighbors and others have suspected and still do suspect the plaintiff to have been guilty of the misconduct and improper actions published as aforesaid, and have refused to have any transactions with the plaintiff, to the plaintiff's damage of \$5,000.

The first count in the declaration sets forth the publication of a false and malicious statement concerning the separate real

estate of the plaintiff Abbie L. Ricardo. The second count sets out the publication of an article alleged to be a libel upon the same plaintiff personally. The plaintiff demurred to the first count in the declaration that it was improper to join the husband with the plaintiff in an action for damage to her separate real estate. Notice of misjoinder of the plaintiff was given as required by the practice act of 1903, Laws 1903, p. 544, § 36.

The defendant's first ground of demurrer to the first count is that the husband is not a proper party to the action therein set forth. In an action for damages to a married woman with respect to her separate property, it is not proper to join her husband with her in the action. Gen. St. p. 2014, § 11; *Lehman v. Hauk*, 42 N. J. Law, 206. But this defect is one of form and not of substance, and should be taken advantage of by motion to strike out, and not by demurrer. *Van Horne v. Central R. R. Co.*, 38 N. J. Law, 133. It is also alleged as a ground of demurrer to the whole declaration that it contains two separate and distinct causes of action; one vested solely in the plaintiff Abbie L. Ricardo, and the other in the plaintiffs jointly.

The second count is for a tort to the wife, and in this count the husband is properly a party, but it is joined to the first count, to which the husband is not a proper party; and so the declaration contains two distinct causes of action; one vested solely in the female plaintiff, and the other in the plaintiffs jointly. This renders the whole declaration bad. Misjoinder of counts will support a demurrer to the whole declaration. *Topf v. Westshore & Ont. Terminal Co.*, 46 N. J. Law, 34.

This conclusion renders unnecessary a consideration of the other grounds of demurrer specified.

There will be judgment for the defendant on demurrer.

MEACHEM v. COMMON COUNCIL OF CITY OF NEW BRUNSWICK.

(Supreme Court of New Jersey. Nov. 22, 1905.)

1. MUNICIPAL CORPORATIONS—COMMON COUNCIL—QUALIFICATION OF MEMBERS.

The common council of the city of New Brunswick, in declaring vacant a seat of one of its members under the provision of the charter that the common council shall be the sole judge of election, return, and qualification of its own members, is subject to the supervisory jurisdiction of this court.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 180.]

2. SAME—EVIDENCE.

The proceedings set aside; it appearing that the action of the common council was not justified by any evidence whatever.

(Syllabus by the Court.)

Certiorari by Thomas Meachem to review the action of the common council of the city of New Brunswick in setting aside an elec-

tion for membership therein. Proceeding set aside.

Argued June term, 1905, before GARRISON and GARRETSON, JJ.

Robert Adrain, for prosecutor. Theodore B. Booraem, for defendant.

GARRETSON, J. This writ brings up the proceedings of the common council of the city of New Brunswick as to the investigation of the right of the prosecutor to a seat in that body, and the action of the common council declaring that seat vacant.

At the meeting of January 2, 1905, a protest dated on that day, signed by one Lewis A. Board, who seems to have been the opposing candidate at the election, was presented against the seating of the prosecutor as a member, for the reason that he had not been duly elected. It further sets forth that on November 8, 1904 (election day), when it was claimed that said Meachem was elected for the Sixth Ward, no election was in fact held in the First election district of that ward, and the majority of 24 votes found by the county canvassers to have been received at said election by Meachem over the petitioner was the result only of the election held in the Second election district of that ward, and represents the choice of the voters of only about one-half of said ward; the voters of the First election district of that ward being prevented from voting by the failure to hold any election in said district. The protest further sets forth that, if an election had been duly held in said First election district on said day, the normal majority at that poll in favor of the Republican ticket, on which the protestant was a candidate, which normal majority was much increased at said election throughout the city and in the county generally, would have more than overcome the majority of said Meachem at said Second poll, and would have elected the protestant, instead of Meachem, to the office of alderman. Upon the protest being filed a resolution was adopted "that this board investigate and inquire into the alleged election of said Thomas Meachem to the office of alderman in and for the Sixth Ward and his right to be a member of the board, and determine the same, and that Monday, the 9th day of January, instant, at 8 o'clock in the evening, at the common council chamber, is hereby fixed as the time and place when said board will proceed with said investigation and inquiry and determination; and the said Thomas Meachem is hereby notified to attend at said time and place and show cause why he should not be excluded from membership in this board and his seat declared vacant." Upon the 9th of January the investigation proceeded according to the return as follows: Counsel "for the protestant said the investigation was a sort of judicial inquiry, and he would present his case as if before a court. He first offered in evidence a copy of the county board of canvassers'

statement, filed with the city clerk and produced at his request by the clerk, which showed that Thomas Meachem had been declared elected in the Sixth Ward, and that the county board has certified that no votes were cast in the First poll of the Sixth Ward. The statements showed that in the Second poll 224 votes were cast for Lewis M. Board and 248 for Thomas Meachem, giving Meachem a majority of 24 in that poll." Protestant's counsel "then asked if William Rastall was in the room. Mr. Rastall came forward and was called as a witness by protestant's counsel. He was sworn by the city attorney at the request of President Groves." Mr. Rastall was questioned by the protestant's counsel as follows: "Were you a member of the election board of the First poll in the Sixth Ward—one of the clerks at the last election?" "I was," was the answer. "Was there any election held at that poll on election day, November 8th?" "No, sir." "Were you there all that day?" "I was there until 2 o'clock in the afternoon." "That is all," said the lawyer. "No questions?" said incumbent's counsel. Protestant's counsel said he had nothing further to present. Incumbent's counsel "asked if he did not intend to open up the whole matter." Protestant's counsel said "he had nothing else," and incumbent's counsel "said he had nothing then to offer." "I move," said Alderman Owens, "that the seat of Mr. Thomas Meachem be declared vacant." "I second the motion," said Alderman Orpen. "The roll call was ordered and was as follows: Ayes: Blue, Collins, Groves, Hendricks, Hope, Mailler, Orpen, Owens—8. Nays: Oliver, Puerschner, Zaker—3." "The name of Alderman Meachem was called, but he did not vote. The president declared the motion carried, and the seat of Alderman Meachem vacant. The board then adjourned."

There was nothing in any of the evidence above adduced that could satisfy a judicial mind that the prosecutor was not entitled to his seat. The only legal, pertinent testimony, the return of the board of canvassers, went to prove his title. Whether the council be regarded as a board of canvassers or as a quasi judicial tribunal, there was nothing in the testimony thus before it that would justify its action. For the only canvass of the votes that was made showed that the prosecutor was elected, and the only other fact adduced was that no other votes than those canvassed had been cast. Upon this latter point it will be observed that there was no testimony that any persons who desired to vote had been prevented from doing so, or that such persons would have voted against the prosecutor, or that the number of those so desiring was sufficient to overcome the certified majority of the prosecutor. There was, therefore, no evidence that justified the council in its nullification of the election of its duly certified member, unless the bare fact that no ballots were returned from a given polling place was of itself a legal and suffi-

cient ground for such a decision. That this is not so is conclusively shown by Judge McCrary in his *Work on Elections* (4th Ed.) p. 380, § 522. The further consideration that under such a rule the failure of a single voting machine to operate would nullify an entire election for state or county officers is of itself sufficient to make us pause before giving our assent to such a doctrine.

The action of the common council is claimed to be justified upon the ground that, by the charter of the city of New Brunswick (P. L. 1863, p. 347), it is provided in section 26 (page 356) "that the common council shall * * * be the sole judge of the elections, returns and qualifications of its own members." The common council, by the section above quoted, is made a judge, and it must exercise its judgment and not its arbitrary will upon these matters. And that judgment is subject to the regularly organized judicial tribunals. The provisions in the state and federal Constitutions that each house of the legislative bodies shall be the judge of the elections, returns, and qualifications of its own members stands upon quite a different footing from the like provision in the charter of the defendant. The federal and state Legislatures are creatures of the federal and state Constitutions, and constitute one of the three branches of government provided for by those instruments, which also contain distinct provisions against interference by each branch with the other. The provision in the city charter is a grant by the Legislature of one right and power, together with many others, all of which are under the superintending jurisdiction of the courts of law. A clause in the charter of a municipal corporation that the city council "shall be the judges of the election, return and qualifications of their own members and of all other officers of the corporation" was held by the Supreme Court of Delaware not to oust the Supreme Court of the state (invested with the usual powers of the King's Bench) of its superintending jurisdiction over corporations, and it was declared that, if the council should erroneously decide that a person duly elected by the people to any office was not qualified to hold it, a mandamus might issue commanding them to admit him to office. *State v. Wilmington*, 3 Har. (Del.) 294; 1 Dill on Mun. Corp. (4th Ed.) § 203.

It is urged, however, that, even if the action of the common council be without legal support or justification, it is not within the power of this court to review it upon certiorari. This contention, however, loses sight of the constitutional and prerogative power of the Supreme Court of this state to review the proceedings of all special statutory tribunals, and ignores the established doctrine of our courts that the Legislature is powerless to take away or to abridge such prerogative. *East Orange v. Hussey*, 70 N. J. Law, 244, 57 Atl. 1086, and cases there cited. The common council, when sitting

in judgment upon the election of one of its own members, does so by virtue of the grant of legislative authority contained in its charter. It is, in fine, a special statutory tribunal for that purpose, and as such is subject to the supervisory jurisdiction of this court, regardless of the language in which such special authority has been conferred upon it. The remarks of general text writers upon this subject to the contrary simply ignore the provisions of our Constitution, and disregard our doctrine touching the inviolability of such prerogative powers as are perpetuated by it.

This jurisdiction was exercised by this court in the case of *Kendall v. Camden*, 47 N. J. Law, 64, 54 Am. Rep. 117. This was a certiorari to the city council of Camden to review the proceedings concerning the trial for removal of the prosecutor from his office as councilman. The prosecutor having been returned elected in March, 1883, and having been sworn in, a petition and notice of contest was presented, which was referred to a committee of five, who investigated and made a report to the council. This report was adopted, and the prosecutor retained his seat. In March, 1884, the same contestant filed a notice of contest, and a committee of five was appointed to investigate that claim. This action was reviewed by certiorari. Justice Scudder, in the opinion, cites the provision of the Camden city charter, which is identical with that in the New Brunswick charter, and goes on to say: "But this council, like all other special statutory tribunals, is subject to the supervisory jurisdiction of this court when it departs from or exceeds the express terms of the power given in the charter. It was a mistake made in the argument of counsel when he claimed the same exclusive authority for a city council having a charter like this as that exercised by Congress or the Legislatures of our states. They are co-ordinate branches of the government under the Constitution, and cannot be controlled by the judiciary in the discharge of their appropriate functions. The Constitution has divided the powers of government into distinct departments, and cautiously provided for their independent exercise. It has expressly forbidden any person belonging to or constituting one of these departments from exercising any of the powers properly belonging to either of the others, except as expressly provided in the Constitution itself. But municipal bodies have only such powers as are given them by the Legislature, and in the exercise of these have not the independent authority to act without control by the court, which belongs to the legislative branch of state government. How far they will be controlled in the exercise of this particular power given to a common council to judge of the election and qualification of its members, it is said, depends on the exact language in which the provision is couched, viewed in the light of the general laws of the state

on the subject of contested elections and quo warranto. But, whatever may be the extent or limitations of the authority given, it is the province of this court to see that no arbitrary act is done, under the guise of legislative sanction, to deprive citizens of their right of representation, or to unseat a candidate who, by the proper and final tribunal, has been adjudged to be elected.

There was no evidence to justify the action of the common council, and the proceedings are set aside, with costs.

KERANS v. KERANS.

(Court of Chancery of New Jersey. Oct. 28, 1905.)

1. EQUITY—BILL OF REVIEW—DECREE—VACATION—FRAUD—LEAVE OF COURT—DEMURRER.

A bill, indorsed "bill of review," was filed to set aside a divorce decree recovered by defendant. It alleged that defendant falsely represented his residence in the original suit, and falsely alleged that complainant had deserted him, and that, though defendant had knowledge of complainant's residence when he brought the suit for divorce, he fraudulently procured the same to be conducted as against an absent defendant, whose whereabouts could not be ascertained, and that therefore complainant had no opportunity to appear and defend, though she had a good defense. *Held*, that the bill was not an original bill to set aside the divorce decree for fraud, but was a bill of review, and was therefore subject to demurrer for failure to allege that it was filed by leave of court.

2. DIVORCE—DECREE—VACATION—FRAUD—PETITION.

Where complainant alleged that defendant obtained a divorce from her by fraudulently and falsely alleging his residence, that complainant had deserted him, and that he had no knowledge of her whereabouts, whereby he acquired his decree ex parte, and that she had no notice whatsoever thereof, she was entitled to have the decree set aside by petition in the cause, and was not required to resort to a bill of review.

3. SAME—APPLICATION TO FILE—DISCRETION.

On an application to file a petition to set aside a divorce decree for fraud in the cause in which the decree was entered, the court is entitled to exercise the same discretion in granting or refusing the filing thereof as on applications to file a bill of review.

Suit by Catherine Kerans against William F. Kerans. On demurrer to a bill of review. Sustained.

Frank P. McDermott, for complainant.
Henry W. Runyon, for defendant.

STEVENSON, V. C. One of the causes of demurrer specified is that the bill which is indorsed "bill of review" does not allege that it was filed with leave of the court. It is conceded by counsel for the complainant that if the bill is in fact a bill of review, as the solicitor for the complainant evidently thought it was when he filed it, the point taken is fatal on demurrer. Story's Eq. Pl. (7th Ed.) § 421b; 2 Dan. Ch. Pl. & Pr. 1578, 1579. In order to avoid the objection above set forth, counsel for complainant endeavors to make it appear that even though the bill was intended

as a bill of review, and even though leave to file the same as such might in fact have been obtained, an examination of the bill itself shows that it is not a bill of that character, but is an original bill to impeach a decree for fraud which may be filed without leave from the court. Story's Eq. Pl. (7th Ed.) § 426. I do not think that this view of the bill is tenable. It attacks the decree on some grounds which may properly be presented to the court upon a bill of review, but in my judgment cannot be presented to the court in any original bill filed without leave. Bills of review frequently are based upon, or necessarily involves, charges of perjury, forgery, and other fraud. The distinction between bills of review alleging fraud from original bills to impeach a decree on account of fraud, has not always been sharply drawn. Leaving the decrees of foreign courts out of view, the former class of bills seems to include the latter. See discussion of the nature of the fraud necessary to sustain a bill to impeach a judgment or decree on account thereof by Vice Chancellor Van Fleet, in *Dringer v. Receiver of Erie Ry. Co.*, 42 N. J. Eq. 578-582, 8 Atl. 811. Also opinions of Lords Justices James and Baggallay, in *Flower v. Lloyd*, 10 Ch. Div. pp. 333, 334; 2 Freeman on Judgments, § 489.

In the present case there seem to be three charges of fraud contained in the bill. Two of these charges, which may be considered together, are in effect that the defendant in his original suit falsely represented that he had been a resident of New Jersey for two years, when in fact he was a resident of New York, and that the defendant also falsely alleged that the complainant had deserted him, whereas in fact the defendant had deserted the complainant by driving her away from their place of abode. These charges of fraud it must be conceded are not distinctly made. The bill does not allege that the complainant was sworn in the cause, and falsely testified to these things. A close examination of this bill illustrates the propriety of the rule which requires the party desiring to file a bill of review to submit his case to the court on petition, and obtain an order permitting the bill to be filed, which order is to a large extent within the discretion of the court, and is based upon the finding of the court that a meritorious case for a rehearing has been made out *prima facie*. I shall, however, in view of the form of the demurrer and the argument of counsel for the defendant, assume that the bill sufficiently charges that the defendant in his original suit, his divorce suit, imposed on the court by fraudulently making it appear that he was a resident in New Jersey when in fact he was a resident in New York, and by further making it appear that his wife had deserted him when in fact, as he well knew, he had deserted his wife. With this understanding of the gravamen of this bill I think that it is clearly a bill of review. The residence of the

complainant was one of the matters presented by the defendant's petition for divorce and actually tried in that case. The question whether the complainant had or had not deserted the defendant was also an issue—the main issue—in the suit. This bill in effect charges that the court came to an erroneous conclusion upon these issues relying upon false and fraudulent testimony. Whether in any case a party who has suffered defeat in a litigation can, without leave of the court, file a bill to have the judgment or decree of which he complains set aside, on the ground that it was based upon perjured testimony or evidence otherwise fraudulent, and, if so, in what cases and under what limitations, such an equitable action will lie, are far broader questions than any which need be discussed for the disposition of this case. I think that there are very few, if any, such cases which cannot be presented to the court upon a bill of review, and, if they can be so presented, then plainly they ought to be so presented, and ought not to be presented by original bills. If this is not a sound conclusion, then there would seem to be no escape from the evils pointed out by Lord Justice James in *Flower v. Lloyd*, *supra*.

The bill also charges that the defendant knew that the complainant was a resident of the state of New Jersey when he brought his suit for divorce, and could readily have ascertained her address, and it is the evident intention of the framer of the bill to make it appear that the defendant fraudulently procured the divorce suit to be conducted as against an absent defendant whose whereabouts could not be ascertained, whereby a decree was obtained without giving the complainant a chance to appear and defend. Admitting that the bill sufficiently alleges this sort of a fraud, and that this sort of a fraud, being collateral to the litigation in which the decree complained of was obtained and not being one of the matters at issue in that cause and decided therein, presents a sufficient basis for an original bill to impeach the decree for fraud, it still remains that this ground for attack on the decree is combined with these other grounds and that all of the grounds may be presented, investigated, and disposed of upon a bill of review. In this state of the case the election of the complainant to file a bill of review is an important consideration. The allegations of matters which properly may be considered on a bill of review, but which cannot be properly considered on an original bill to impeach a decree for fraud, certainly cannot be rejected as surplusage in determining the character of the bill. Complainant by his bill presents all these grounds, and he frames and indorses his bill so as to invoke the jurisdiction of the court in such a way that all his grounds of complaint may be considered.

There is another reason in my opinion why the complainant's bill should be deemed strictly a bill of review. The complainant had no notice of the divorce suit which the

defendant brought against her. She had no opportunity to be heard. The cause was tried *ex parte*. She now comes forward alleging her surprise, her lack of opportunity to present her case, and offers proofs that fraud was practiced and injustice done which would not have occurred if she had had an opportunity to present her defense. In this sort of a case no bill of review is necessary, even though the decree has been enrolled. *Brinkerhoff v. Franklyn*, 21 N. J. Eq. 334; *Cawley v. Leonard* (1877) 28 N. J. Eq. 467; *Day v. Allaire* (1879) 31 N. J. Eq. 303, 315; *Richardson v. Richardson* (N. J. Ch. 1904) 58 Atl. 820. The last-cited case is very nearly on all fours with the present one, although the defendant therein, the wife, had notice of the suit. She was, however, deprived of her opportunity to make her defense by a mistake on the part of her solicitor. An order was made in the cause upon petition, after notice to the husband who had obtained the decree, vacating the enrollment, setting aside the decree, and giving the petitioner time to file an answer. In *Clayton v. Clayton*, 59 N. J. Eq. 310, 44 Atl. 840, and *Watkinson v. Watkinson* (N. J. Ch.) 58 Atl. 384, Vice Chancellor Pitney deals with the general rule requiring a bill of review where the party aggrieved by a decree makes his complaint after the enrollment. The learned Vice Chancellor was not dealing with the exception to this rule, illustrated in the cases above cited and in this case, where the decree has been obtained *ex parte*, and the party aggrieved by it has had no opportunity to make the defense which otherwise he would have put in. In both of the last-cited cases the complainant had full notice of the suit in which the decree was made of which she complained.

Of course, upon applications by petition the court can exercise the same discretion as upon applications to file a bill of review, and in the same way recognize and protect all new interests. Where the party aggrieved by a fraudulent or unjust decree is able to obtain full relief upon a petition for the vacation of the enrollment and the opening of the decree, it seems to me that in many, if not all, cases an application for leave to file a bill of review ought to be denied. If this bill should be regarded as an original bill to impeach a decree for fraud, the court would lose this wholesome control over the case. In my opinion the application by petition in the cause to vacate the enrollment and open the decree is to be encouraged, if not exclusively prescribed, in all cases where such procedure will accomplish justice. I am also of opinion that the bill of review is to be preferred to the original bill filed as of right without leave, and this last-named bill should be left to that comparatively small class of cases, perhaps not as yet fully defined, in which the remedy by an application in the cause for a rehearing or a new trial, and the remedy by a bill of review, are inapplicable or inadequate.

It should be observed that we are not dealing with foreign judgments, which are open to impeachment on the ground of fraud either by the complainant or the defendant in a suit in this court. Foreign judgments, in respect of the jurisdiction of this court to impeach judgments and decrees on the ground of fraud, to some extent constitute a class by themselves. To compel the party injured by a fraudulent judgment of a foreign court to seek redress in the cause, or in the court in which the judgment was rendered, would be to compel such defrauded party, although a citizen of New Jersey, to go to a foreign state for justice. In the case of judgments and decrees of our own courts the present policy of the law in accordance with considerations of simplicity, cheapness, and common sense, should be, I think, to require the party alleging that the judgment or decree is tainted by fraud to seek his remedy in the action at law or suit in equity in which the judgment or decree was rendered, when that remedy is adequate, rather than to commence an independent, original, and expensive suit in this court. This policy is illustrated by the withdrawal of the exercise of jurisdiction by this court on bills for new trials. As fast as the power of the courts of common law has been extended, so as to permit those courts to set aside judgments and grant new trials on the ground of fraud, mistake, or newly discovered evidence, the exercise of jurisdiction by this court has been renounced and curtailed. *Hayes v. U. S. Phon. Co.* (1903) 65 N. J. Eq. 5, 55 Atl. 84; *Wolcott v. Jackson*, 52 N. J. Eq. 387, 28 Atl. 1045; *Hannon v. Maxwell*, 31 N. J. Eq. 318.

My conclusion is that this bill must be deemed a bill of review, and cannot be deemed an original bill filed as of right to impeach a decree for fraud. If the complainant in fact has obtained leave to file this bill as a bill of review, upon notice to the defendant, an amendment may be made alleging such fact. If no leave in fact has been obtained, then upon application for such leave the court will not only look into the merits of the case, but also determine whether if the complainant's case calls for an investigation by this court, such investigation should be made on petition in the original cause to vacate the enrollment and open the decree, or by a bill of review.

I shall advise an order that the demurrer be sustained.

CUNNINGHAM v. MUTUAL LOAN & BUILDING ASS'N OF CITY OF PASSAIC.

(Court of Errors and Appeals of New Jersey. Nov. 27, 1905.)

BUILDING AND LOAN ASSOCIATIONS—MATURITY OF STOCK.

When a building loan association, incorporated under the act entitled "An act to encourage the establishment of mutual loan, home-
stead and building associations," approved April

9, 1875 (Rev. St. 1875, p. 64), has issued shares of stock in different series, as permitted by the supplement to that act, approved March 29, 1887 (P. L. 1887, p. 62), it may designate by its constitution and by-laws the manner in which such series shall mature and determine. If maturity is thereby to be declared by the directors, the holder of shares in a series thus declared to have matured ceases to be a member, and becomes a creditor of the association, entitled to maintain an action at law for the declared value of the matured shares.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Annie Cunningham against the Mutual Loan & Building Association of the City of Passaic. Judgment for plaintiff, and defendant brings error. Affirmed.

Thomas M. Moore, for plaintiff in error.
Hugh B. Reed, for defendant in error.

MAGIE, Ch. The judgment brought before us by this writ of error was entered in an action brought by Annie Cunningham, the plaintiff below, against the Mutual Loan & Building Association of the City of Passaic, incorporated under the provisions of the act entitled "An act to encourage the establishment of mutual loan, homestead and building associations," approved April 9, 1875 (Rev. St. 1875, p. 64), the defendant below, to recover money claimed to be due her from that association. The Chief Justice, before whom the issue was tried, refused a motion to nonsuit, and at the close of the evidence directed a verdict for the plaintiff below. Exceptions were duly taken and allowed, and the assignments of error present the question of the propriety of these rulings of the trial judge.

It is first contended that the proofs before the court showed that the plaintiff below was not entitled to maintain an action at law against the association for the recovery of the money she claimed. If the plaintiff below was a member of the association claiming to receive the amount of money due on matured shares upon a claim which required an accounting to determine whether the shares had matured, it seems obvious that her remedy would be in the court of chancery. In the case of Campbell, Receiver, v. Perth Amboy Loan Association, 67 N. J. Law, 71, 50 Atl. 444, a declaration at law averred that by the constitution of one such association, it was provided that each member should receive \$200 for his share when the board of directors of the association should have ascertained that the actual value amounted to that sum, and that on a certain day, the board of directors did ascertain the actual value to be that sum. This declaration was demurred to, and the Supreme Court held that the averment that the constitution provided for an ascertainment of value by the board of directors, and upon such ascertainment allowed the member to make claim, was opposed to the provisions of the act above referred to, under which such associations were

formed, the first section of which, among other things, declares the purpose of the association thus: "For the further purpose of accumulating a fund to be returned to its members who did not obtain advances, when the funds of such association shall amount to a certain sum per share, to be specified in the articles." This was construed as making the maturity of shares depend, not upon the declaration of the board of directors, but upon the fact of the fund amounting to a specified sum per share. Whether this correctly represents the status of the shareholder in what has been called by the text writers a "terminating society"; that is, a society which ceases to maintain its existence when the shares of stock have attained to the value of the sum fixed by the articles of the association, need not be decided. For the plaintiff below was a shareholder of an association issuing its shares in successive series, and the question is whether such associations have not enlarged privileges in respect to the maturity of successive series, and whether they are limited by the language of the first section of the act, which formed the basis of the conclusion of the Supreme Court in the case above cited. The power to issue shares of stock in series was granted by a supplement to the original act, approved March 29, 1887 (P. L. 1887, p. 62), the first section of which is in these words: "That any association which now is or hereafter may become incorporated under the provisions of the act to which this is a further supplement, may issue shares of stock in different series, to mature and determine in such manner as may be designated in and by the constitution and by-laws of such association or any amendment lawfully made thereto. By a further supplement, approved February 14, 1888 (P. L. 1888, p. 36), the preamble to which recited that doubts had arisen as to the right to issue new shares or series of shares under their original acts of incorporation, and that to remove all doubts and authorize the forming of such new series, it was provided that such series as had previously been issued, and series which might thereafter be issued, should be valid and effective, although they increased the number of shares of the association beyond the limit fixed in the certificate of incorporation. By this supplement it was further provided that the relative value of the shares of successive series should be kept separate and distinct, and the value thereof reported in an annual statement to the shareholders. A comparison of the first section of the supplement of 1887 with the first section of the original act, clearly indicates a legislative intent to make the maturity and termination of series of shares depend upon the scheme designated in the constitution and by-laws of the association.

The constitution of this association was put in evidence. By section 4 of article 2,

it provided for a new series of shares to be issued at each annual meeting of the association, unless such shareholder should otherwise determine. Section 6, of the same article, provides that at each monthly meeting of the board of directors, the approximate value of each share shall be declared, for the convenience of all concerned, estimated upon the profits actually made. By section 4 of article 3 it was provided that each shareholder should pay \$1 per month per share until, by the payments so made and the profits accumulated thereon, the said share should be declared to have attained a par value of \$200, when that sum should be payable in cash or its equivalent, in the manner set forth in section 8 of article 2. Section 8 of article 2 provides that when the shares in a particular series shall have attained a par value of \$200 each, one-half of the receipts of the association should be appropriated and set aside by the board of directors, exclusively, for the refunding and repayment thereof, and priority in such payments should be given to that shareholder willing to allow the highest premium; but one-half of 1 per cent. a month should be allowed on all such money from the time such share is declared at par, until the whole of such payment is made. The change of scheme indicated by the difference between the language of the first section of the original act and the first section of the supplement of 1887, was within legislative competency, and need not be vindicated by the court. I think, however, that the legislative change of scheme was upon the ground of material difference in the cases. A terminating society, whose existence ceased with the maturity of all its stock, stood upon a different footing from a continuing society, or serial company, issuing series of stock and dealing with the respective profits arising from respective payments. In regard to those successively maturing series of shares, the association continued to maintain its corporate existence, and a reason existed for providing how the maturity of shares should be determined. The legislative scheme was to permit that to be fixed by the association, and if the association has fixed a scheme, the shareholders must be held bound thereby. That this association had fixed a scheme, seems to be clear. By the extracts from the constitution above referred to, it thereby committed to the board of directors the power to declare when a series had reached maturity. When that declaration has been made, a shareholder in that series is in a changed relation to the association. He is no longer a member, but has become a creditor, to whom the association is liable for the amount of his matured shares, payable according to the provisions of the constitution.

The proofs showed that the plaintiff below became a member of the association in 1886, taking five shares in the fifth series,

and that, in 1889, she took five more shares in the same series; that she paid all dues and charges on her 10 shares until July or August, 1897, when William Malcolm, who had been the secretary of the association from the time she became a member, and who continued to hold that office, for some time after, told her that the fifth series had matured; that the book in which her payments and credits were entered, showed entries by Malcolm, indicating credits to her of \$2,007.50, in August, 1897; that the minutes of the board of directors showed that, at a meeting on July 12, 1897, a vote was had, declaring the actual value of the various series of shares from the fifth to the twenty-fourth, inclusive, and that the value of the fifth series was thus declared to be \$200.75. Under the provisions of section 140 of the practice act (P. L. 1903, p. 575), interrogatories were served on the association, the defendant below, and written answers thereto under the oath of its president were served on the plaintiff below. They were filed and received in evidence. The following are pertinent: "Interrogatory 1. Upon what date did the fifth series of stock in the defendant association mature? Answer. July 12, 1897. * * * Interrogatory 18. Has one-half of the revenue of the association been sufficient since the maturity of the fifth series of stock to pay the maturity value of all the shareholders in said series? Answer. The defendant believes that it has." Plaintiff below further testified that about a month after the secretary had told her that the fifth series had matured, she called on him for the money due on her shares, and was asked by him to leave it in the association, and was told that it would draw interest. She demanded and received from him \$300. While she declares that he persuaded her to leave the balance, she also declares that she left it because she could not get it. Her book shows a payment of \$300 at that time, and that since that time she had been paid interest by the association on the shares left undrawn, so that in May, 1900, there was \$1,700 yet undrawn. There were produced by the association at the trial, two drafts, which plaintiff below put in evidence. They were dated August 11, 1897, and drawn by the proper officers of the association to the order of Annie Cunningham, one for \$1,007.50, and one for \$1,000. Each was expressed to be for "account of withdrawal of book 471," which was the book of plaintiff below. Although plaintiff below could neither read nor write, each draft purported to have her signature indorsed thereon. Both were stamped paid, but there was no claim that Annie Cunningham received the money thereon.

Upon this evidence, it seems clear that the maturity of these shares had been declared in the manner prescribed by the scheme of the constitution, and that it had

been recognized by the association by its officers. Thereafter the plaintiff below became a creditor of the association, entitled to receive her money, provided the funds arising from the appropriation of one-half of the receipts of the association should be sufficient for her payment. Under such circumstances, her remedy could be had by an action at law. The learned trial judge was justified in declaring that she had become a creditor of the association. On the part of the association it was, however, further insisted that it was erroneous to direct a verdict for the whole amount of the claim of the plaintiff below as indicated by her book. The evidence on its part disclosed that Malcolm, the secretary of the association, had been a defaulter, and that the funds of the association, to a large amount, had disappeared so that, in 1902, there was a deficiency of \$116,000. The contention is that the plaintiff below should submit to bear her share of the loss thus disclosed. If she were a member holding shares in a nonmatured series, such, undoubtedly, would be the case, and an accounting, which she might demand in equity must recognize her liability to share the losses of the association. But such is not her position. From the declaration of the directors in July 1897, or at least, from the period in August when her book disclosed the maturity of her shares, she was not a member, but a creditor of the association. It is said that there is proof that some of the embezzlements of Malcolm antedated the declaration of the maturity of the fifth series, so that it would, or might affect the maturity and the declaration of the directors. The evidence was entirely insufficient to disclose any embezzlement prior to the date in question. If such prior defalcation had been disclosed, and it had been proved that it, in fact, affected the fifth series, it would not have disturbed the conclusion above reached. If the declaration of the directors, made within the scheme of the constitution, was erroneous and mistaken, the right of the other shareholders and the directors representing them was to have their declaration reviewed and set aside. They could not defeat the holder of matured shares in an action at law, except by avoiding the declaration which formed the foundation of the shareholder's claim.

There is no contention made that the fund out of which the shares of plaintiff below may be paid, has not amounted to sufficient to serve that purpose and to be applicable thereto. This appears from the answers to the interrogatories served upon the association, and the proofs. There was therefore nothing to submit to a jury. The Chief Justice correctly held that plaintiff below was a creditor of the association, entitled to sue at law, and he was justified in directing a verdict.

The judgment must therefore be affirmed.

WILSON v. TERRY et al.

(Court of Chancery of New Jersey. Nov. 2, 1905.)

1. MORTGAGES—ABSOLUTE DEED—SUFFICIENCY OF EVIDENCE.

Evidence in a suit to have a deed from a husband to his wife, through a third person, declared a mortgage, *held* insufficient to authorize finding for complainant, in view of the rule that complainant's proof must be clear and convincing, and the rule that a conveyance from husband to wife, so far as not based on consideration, is presumed to be intended as a gift.

2. WITNESSES—COMPETENCY—TRANSACTION WITH DECEDENT.

Where complainant, in an action to have his deed to decedent declared a mortgage and for an accounting, in which action he is also a party as administrator of decedent, is called generally as a witness, his testimony of transactions with decedent to show the deed was a mortgage is in his own behalf, and not in his behalf as administrator, and so is inadmissible under Evidence Act (P. L. 1900, p. 363) § 4.

3. EVIDENCE—ADMISSION—EFFECT.

Evidence of statements of the grantee in a deed, made after its execution, in the nature of admissions that it was intended as a mortgage, to overcome, after her death, the effect of the previous conduct of the parties and the written admissions of the grantee, must be very clear and convincing.

Suit by Frederick F. Wilson against Georgiana B. Terry and others. Heard on bill, amended bill, answer, replication, and proofs. Decree for defendants.

Frank Durand and David Harvey, Jr., for complainant. James D. Carton and Gilbert Collins, for defendants.

EMERY, V. C. The complainant's bill is filed by him in his individual capacity and as administrator of his deceased wife against the two defendants, Mrs. Terry and Mrs. Smith, the sisters and heirs at law of his wife. The general object of the bill is to have the absolute deed under which the wife at her death held the title to a hotel property at Asbury Park, called the "Laurel House," declared to be only a mortgage given to secure the wife for the advances made, or liabilities assumed, by her in the payment of debts incurred by her husband, in the purchase and improvement of the property. The money for the payment of these debts of the husband, amounting to about \$6,000, was procured from the Long Branch Banking Company, upon the individual note of the wife for that amount, on the transfer of the property to her by the husband, and it is claimed by the bill that the object of the conveyance to the wife was to secure her for the liability assumed on the note, and that the note was subsequently paid out of the rents of the property. The entire indebtedness is alleged to be paid, and a decree is asked declaring and directing a conveyance from the heirs to the complainant. The bill was originally filed by the complainant alone; but, being in effect also a bill to redeem, including an account of the

amount due on the mortgage, the administrator of the alleged mortgagee was thought to be a necessary party, and at the hearing the bill was amended by consent making complainant a party in that capacity. No claim, however, is made for rents received beyond the payment of the mortgage, and it is alleged by the bill that complainant, as well as his wife, had control of the rents after the execution of the deed. The circumstances under which the deed to the wife was executed were as follows:

The complainant in July or August, 1883, agreed to purchase of Rev. George Clarke the land in question, which was then unimproved, for \$8,000, and paid \$200 on account of the purchase money. In the fall of 1883 complainant, before securing title, commenced the erection of a large hotel building on the premises, which was ready for renting by May, 1884, and was then rented to a Mrs. Pemberton for three years at \$1,600 a year, besides \$225 per year for the rent of two stores in the building, altogether \$1,825, all of which was paid to complainant before the delivery of the deed in December following. Complainant had not sufficient means to pay for the building erected, but had from his own property made payments on account to the extent, as he claims, of about \$4,000, including the amounts received from rent. One thousand seven hundred dollars was paid to the mason, of which \$1,300 was paid by conveying to the mason a property owned by complainant and taken at that value, and complainant claims to have paid besides about \$600 to Martin, a carpenter, on account of his bill, between \$200 and \$300 to the painter, and other payments to the slater and men working on the building, the amounts of which are not specified. He also paid Barber, Towner & Fielder about \$2,000 on account of their bill of \$4,000, borrowing for this purpose the note of a Mrs. Harrison, which was indorsed over by him to this firm. There is no sufficient reason to doubt that the complainant before the passing of the title, about December 15, 1884, had expended from his own funds (including the rents of the property) about \$5,000 (including the \$2,000 note) towards the purchase and improvement of the property. There still remained debts to the amount of about \$6,000, and complainant's means, as well as his credit, were exhausted. Complainant had previously arranged for a loan of \$9,000 on the property from the executors of a Robert Patterson, but beyond this does not seem to have been able to borrow from outsiders money on the property. Mrs. Wilson had considerable property in land and securities, but had not in cash sufficient means to pay the balance due on the property. The builders were pressing for payment, and threatening suits and liens, and at least one suit was commenced against Wilson, on which judgment was obtained.

In this situation Wilson applied to his wife, who agreed to take over the property and pay the outstanding debts. The arrangement by which this agreement was carried out was as follows:

On December 15, 1884, Mr. Clarke, the vendor, together with Mr. and Mrs. Wilson, Mr. David Harvey, Jr., counsel for Mr. Wilson, and Mr. Hawkins, counsel representing building creditors, and Mr. Johnson, the cashier of the Long Branch Banking Company, met at Freehold. Mr. Clarke delivered his deed for the property, made out to the complainant, dated October 21, 1884, and acknowledged November 28, 1884, by Mr. Clarke and his wife, before an officer of Westchester county, N. Y., where they then resided. Complainant executed and delivered to Clarke his own bond (bearing the same date as the deed) for \$8,000, the entire purchase money, payable in three years, which was secured by a mortgage on the premises executed by Mr. and Mrs. Wilson to Clarke, dated October 21, 1884, but acknowledged on December 15, 1884. Wilson delivered, also, his bond for \$1,000 to the executors of Robert Patterson, also payable three years after its date, and Mr. and Mrs. Wilson also executed a mortgage on the property to secure this bond. The bond and mortgage were both dated October 21, 1884, but this mortgage was executed and acknowledged December 15, 1884, the first day of the meeting at Freehold, but because of the omission to have checks certified the deliveries were not made on that day. On the following day the Patterson executors paid to Clarke \$8,072 (being the principal sum, with interest from the date of the mortgage), taking an assignment of his mortgage, and the \$1,000 loaned on the mortgage was, according to Mr. Harvey, paid to the complainant, but was probably used to pay the expenses of obtaining the loan and the interest due Mr. Clarke. On the 16th of December Wilson and his wife executed to Edward M. Fielder a general warranty deed for the premises, subject only to the \$9,000 mortgages, for the nominal consideration of \$1. This deed to Fielder was made for the purpose of conveying the title to Mrs. Wilson, and Fielder did not assume the payment of the mortgages. The deed from Fielder and his wife, drawn and dated on the 15th of December, was acknowledged and delivered on the 19th. This was a bargain and sale deed, conveying the premises to Mrs. Wilson for the nominal consideration of \$1, subject to the \$9,000 mortgages, the payment of which was assumed by Mrs. Wilson. Whether Fielder was present on the 16th does not clearly appear, but his wife was not there, and the delay of three days in conveying the property to Mrs. Wilson was probably due to the necessity of having her join in the deed. On December 15, 1884, and before the conveyance to her of

the hotel property, Mrs. Wilson and her husband executed to the Long Branch Banking Company a mortgage upon other property in Asbury Park belonging to Mrs. Wilson to secure the sum of \$6,000. This sum is declared to be payable according to the condition of a certain bond in the penal sum of \$12,000, but the bond has not been produced. This mortgage was recorded on the date of its execution, and before any of the deeds or mortgages on the hotel property were delivered, and before the mortgages were executed. Mrs. Wilson also assigned to the bank, as further security for the loan, mortgages on property in Cincinnati, held by her as her own property. On the same day, December 15, 1884, Mrs. Wilson gave her individual note to the bank for \$6,000, payable three months after date, and the amount of this note, less the discount \$93, was placed to her credit in the bank on December 17th.

By checks on this account, all dated December 16, 1884, amounting to \$5,809.50, Mrs. Wilson paid all the bills outstanding against the property. This included \$180 insurance and \$82.50 taxes on the property. The \$1,000 received from the Patterson executors was probably taken for the payment of the commission and expenses of the loan, about \$400, Mr. Wilson says, and the interest due to Mr. Clarke. A memorandum in Mrs. Wilson's diary, under date of December 16th, states that Clarke received \$8,478.53. On this transfer of title no evidence of debt from Mr. Wilson to his wife was given, nor was any written agreement or other paper executed either at the time or afterwards to further explain or qualify the transaction as between Mr. and Mrs. Wilson, nor does Mrs. Wilson seem to have been specially represented by counsel. The value of the property at the time of the transfer has been estimated at from \$15,000 to \$20,000. None of the defendants' witnesses fix the value at less than \$15,000 in 1884, which figure is also fixed by one of the complainant's witnesses. The estimates of value, given after this length of time and only from general knowledge and recollection of the values of property at that time, are, of course, to be considered with some caution. Complainant and Mr. Clarke, estimating the values rather from the basis of the cost of the land and buildings, fix, respectively, about \$19,000 and \$20,000 as the value, in which latter estimate Mr. Winsor, another witness for complainant, concurs. He was in 1884 secretary of a building loan association, which made loans in Asbury Park, and also owns property in the neighborhood and has bought and sold property in that locality. The property was in a good location, and a fair value at the time, had the question been one between seller and purchaser dealing at arms length, would probably not have been as low as \$15,000; neither, on the other hand, as between borrower and lender, dealing on the

same basis, would a sum as large as \$15,000 have been loaned on the property. Mr. Johnson, for the bank, had declined to loan \$3,500 on the property subject to the \$9,000 mortgage.

It is clear, I think, that in this transaction, and in order to determine whether by the agreement between the parties made at the time, the absolute title was to be conveyed to Mrs. Wilson, or whether, as complainant claims, she took the title only to secure her against the liabilities she assumed on the note and mortgages, due weight must be given to the fact that the transaction was between husband and wife, and that the husband was dealing with the wife's money for his benefit in relieving him of obligations he had incurred. The relations then existing between husband and wife were not only amicable, but it appears, also, the wife was devoting her own income to the support of herself and husband, as for personal reasons she did not wish him to continue active work in his profession of minister. The complainant, Mr. Clarke, the vendor, and Mr. Harvey, the attorney for Mr. Wilson, are the only survivors of the persons attending the meeting at Freehold, and their evidence is strongly relied on to support complainant's claim. Mr. Clarke, whose testimony impressed me as entirely truthful, says frankly that it is difficult after the lapse of 20 years to recall the conversation; but it was the general subject of conversation in the room that Mr. Wilson was to transfer the property to his wife for this loan from the Long Branch Bank. He says it was understood that after he conveyed the title to Mr. Wilson he conveyed it to Mr. Fielder, and Mr. Fielder to Mrs. Wilson, as security for a loan, but that he cannot after this lapse of time swear that it was stated by any one there in Mrs. Wilson's presence that the property was to be conveyed to her as security. His impression, moreover, is that the conversation he speaks of in relation to the loan was between him and Mr. Johnson, the cashier of the bank, with which Mr. Clarke also kept his own account.

Mr. Harvey's account is somewhat more definite. He attended as representing Mr. Wilson in procuring the loan of \$9,000 from the Patterson estate. He says that there was talk about an additional amount of \$6,000, which was to be raised to pay claims against the property incurred by Mr. Wilson, over and above the amount he was borrowing, and it was stated that Mrs. Wilson was to raise the money from the Long Branch Banking Company on her securities, and that to secure her Mr. Wilson was to convey the Laurel House property. Mr. Harvey was called on to prepare the deeds at that time, and did so. As he thinks, an application had been made to the bank for a loan on Wilson's note, indorsed by his wife, and he recalls distinctly the statement of Mr. Johnson (the cashier of the bank) on that day that he could not loan on that kind of

security, because Mrs. Wilson was a married woman, and that he thinks this was what suggested the conveyance to Mrs. Wilson, so that she could become the principal. The deeds from Wilson to Fielder and from Fielder to Mrs. Wilson were prepared at Mr. Wilson's direction, and Mrs. Wilson was present the first day when the talk occurred, but whether on the second or not Mr. Harvey is not sure. On cross-examination he says that his recollection is that it took a little persuasion to get Mrs. Wilson to go into the deal. So far as this witness can now recall in detail the conversation about the deed, between the parties who were there, including Mrs. Wilson, they finally agreed that Mrs. Wilson was to execute a note to the bank, and the amount of \$6,000 was agreed upon, and the property was to be conveyed by Mr. Wilson to his wife, through Mr. Fielder, and it was stated that it was taken to make Mrs. Wilson safe for her liability. The exact words witness cannot give, and he thinks nothing was said about giving Mr. Wilson anything to show that it was for security only. He did not understand from the conversation that Mrs. Wilson was to own the property, but the impression he got was that she took title as security for her liability, but he does not know that word was used. As he recalls, when the matter first came up, Mrs. Wilson didn't care to have anything to do with it. She was opposed at first to giving her note. She took the position that the property would not secure her, and he thinks they persuaded her that it would. Mr. Harvey was Mr. Wilson's counsel, and Mrs. Wilson had no counsel in the transaction. As to Mrs. Wilson's assuming payment of the mortgages for \$9,000 as part of the consideration of the conveyance, Mr. Harvey, who drew the deed, says that the assumption was omitted purposely from Fielder's deed, because he wished to relieve him from any responsibility; that he does not recall any suggestion to him that he should or should not put the clause in Mrs. Wilson's deed; that he did it of his own accord, simply because she was the grantee, and it was his custom when making conveyances from husband to wife through third persons, where the intention is to vest the title in the wife; that he followed his custom of drawing papers, and probably didn't give any consideration at all to its not being a natural thing to do if the wife was going to hold the deed as a mortgage.

Mr. Wilson's own account of the circumstances of giving the deed is substantially this: That after arranging for the \$9,000 loan from the Patterson estate he applied to Mr. Johnson for a \$3,500 loan on his note, with a second mortgage on the property, but Mr. Johnson did not think the security was quite sufficient. He then asked Mrs. Wilson if she would not raise the money. Mr. Johnson said, if Mrs. Wilson would put up certain securities, he would

loan \$6,000. Mrs. Wilson said she would, but she would like to be secured. "As I had nothing better, I said to her, 'Take title to secure you for the papers you put up.'" And this was agreed upon. This seems to be an account of a conversation between the witness and his wife alone, before the meeting at Freehold, and complainant's account of the interview at Freehold is confined to a statement of the papers which were then executed to carry out the agreement between him and his wife. Complainant's evidence as to transaction with the wife was admitted subject to objection, and leave reserved to move to strike out the evidence at the argument. My impression at the hearing was that under the ruling in *Smith v. Burnet* (Err. & App. 1882) 35 N. J. Eq. 314, and *Adoue v. Spencer* (Err. & App. 1900) 62 N. J. Eq. 782, 794, 49 Atl. 10, 56 L. R. A. 817, 90 Am. St. Rep. 484, the evidence was inadmissible, under the evidence act (Revision of 1900, P. L. p. 363, § 4), excluding "testimony to be given by any party to the action as to any transaction with or statement by any testator or intestate represented in said action, unless the representative offers himself as a witness on his own behalf, and testifies to any transaction with or statement by his testator or intestate, in which event the other party may be a witness on his own behalf, as to all transactions with or statements by such testator or intestate, which are pertinent to the issue." The administrator being a necessary party in the suit, the rule considered by me in *McKinley v. Coe* (1904) 66 N. J. Eq. 70, 57 Atl. 1030, to be settled in this court, that the evidence was admissible in suits against heirs or devisees, to which the administrator was not a party, does not apply.

Counsel for complainant urge that the evidence is admissible as evidence given by the administrator on his own behalf under the statute. The complainant was, however, called generally and the evidence was given on his behalf individually, and not specially on his behalf as administrator. On a bill to have a deed declared a mortgage the interest of the mortgagor and of the personal representative is perhaps the same, so far as it involves the conversion of real estate into a personal security, upon which the personal representative is entitled to receive the amount due, but it is essentially an adverse interest, in that it seeks to impose on the personal representative a contract of the testator under which the representative is bound to account under the mortgage. Regularly, therefore, the representative would be a party defendant in such suit, not a party complainant, and the fact that complainant is himself the representative, and must therefore be complainant in that character, does not make the evidence given by complainant, tending to establish his

claim against the personal estate, evidence given by the representative on his own behalf; i. e., on behalf of the estate. Excluding the evidence of complainant as to the circumstances under which the deed was originally given, I do not think the evidence of Mr. Clarke and Mr. Harvey, the only other witnesses as to the facts transpiring at the time of execution of the deed, warrants the conclusion that the title was intended to be conveyed to the wife by way of mortgage only, and not absolutely. Their evidence must be taken in connection with the things actually done, and their statements as to the wife taking title go no further than to show that the property was supposed to be the wife's security for the liabilities she was personally incurring, and which she was expected to pay, and was able to pay. This would be the case whether the title was absolute or by way of mortgage, for the wife undoubtedly supposed she was running some risk in raising the money, and had nothing to show for it but the property. The documents executed are all consistent with the intention, as between husband and wife, that the title then taken should be absolute in the wife. Her assumption of the mortgages for \$9,000 is not to be explained in any other view, nor is the absence of any writing or document, showing either that any debt from the husband to his wife existed or that the husband held any right in the property, consistent with the view that the title was not absolute. The wife was acting without counsel, and it was a situation in which no counsel would probably have advised her that the transaction was a safe or prudent loan. She should, therefore, not be deprived of any right or advantage given to her by the transfer, unless it clearly appears that it would be inequitable for her to retain it. Nor should she be deprived of the title she received, except upon very clear and satisfactory evidence that she then understood that the title was not absolute in her, but was then intended merely as a mortgage, and that her husband had the right to call for a reconveyance. The general rule in all cases where absolute deeds are claimed to be mortgages is that the burden of proof is upon the grantor, and his proof must be clear and convincing, and the present case is within the application of the additional rule or presumption relating to conveyances of property from the husband to the wife, viz., that the conveyances, so far as they are not based on consideration, are presumed to be intended as gifts of the husband's property to the wife.

In this case the husband and wife were not bargaining with each other at arm's length, but the wife, at the husband's instance, was undertaking to relieve him of the liabilities then pressing him for the purchase and improvement of the property, and to save the amount he had already ex-

pended. The amount which Mrs. Wilson assumed and advanced was much more than would be advanced as a mere loan on the property, and was nearly, if not quite, the full value of it. The husband's entire property was exhausted, and beyond the amounts paid by Mrs. Wilson he was liable on the \$2,000 note of Mrs. Harrison, borrowed for his benefit and indorsed over to Towner for debts incurred in building the hotel. Mrs. Wilson did not assume this or any other indebtedness or obligations beyond the \$15,000 for debts which were chargeable on the property itself. It is probable that Wilson's financial situation at the time was a motive, at least on his part, and probably on the part of both husband and wife, for having the absolute title of the property in his wife, and for passing the title in such manner as to clearly show a purchase on her part for the fair value of the property. All documents indicated a purchase, and none were executed which indicated a loan to the husband or a mortgage of his interest in the land, and this view that Wilson's financial position and prospects was one reason for making the transaction an absolute sale to the wife, rather than a mortgage, derives additional probability from Wilson's subsequent conduct. Several judgments were obtained against him in the years 1887 and 1888, amounting altogether to about \$1,000, and in 1898 one for \$800 was obtained by the bank, of which Mr. Johnson was still the cashier. Two of the judgments recovered in 1887, amounting to about \$330, and which were recovered against complainant and his brother, were satisfied by defendant's brother in 1901, and the other judgments remained outstanding until about the same time, and the judgment held by the bank, on which over \$1,000 was due, was settled with Mr. Johnson for \$250. In explaining Johnson's willingness to make this settlement for the bank after the \$6,000 note given by Mrs. Wilson had long been paid, complainant says that Johnson was a good man, that he offered to take in settlement this \$250, which came out of property complainant owned, and that he (complainant) didn't then claim this hotel as his individual property. But, in view of Johnson's participation in the transaction at Freehold, it would seem probable that no agreement was made in his presence that the title to Mrs. Wilson was taken only as security for her liability on the note.

The view that Wilson's financial condition received some consideration at the time, if the transfer may be fairly inferred from Wilson's own statement at the hearing of his evidence is to be considered. He says that in 1891 and 1892, after the notes and mortgages were paid (for the most part by Mrs. Wilson's own money), he talked to his wife about reconveying the property, and she

said "that, as I hadn't been able to keep it in the first place, perhaps it had better remain where it was at present." He seems to have acquiesced in this as long as Mrs. Wilson lived, without making any further claim on her for the property. And in October, 1897, in letters hereafter referred to, he assures her that the property is hers, and the only claim then made against her was that she had said when the Laurel House was out of debt she would make him a monthly allowance. This conclusion that the transfer papers as executed contained the whole agreement between the parties, and that Mrs. Wilson intended to buy the property, is corroborated by the only other direct evidence bearing on the intention of the parties prior to the execution of the deed, being the testimony of Mr. Smith, the husband of the defendant Mrs. Smith, a sister of Mrs. Wilson. He was in business at Asbury Park, and for some years before 1884 had been Mrs. Wilson's agent in many transactions, collecting rents, procuring insurance, etc. He says that in the summer of 1884 Mrs. Wilson came to him in relation to the purchase of the hotel, and he ascertained for her the amounts against the property, which were approximately \$15,000, including the purchase of the land. After this ascertainment, and in the latter part of September or early part of October, Mr. and Mrs. Wilson, together with witness and his wife, met at the office of Mr. Hawkins, who represented most of the claimants. The question of Mrs. Wilson's purchasing the property came up, and Smith's advice was asked as to whether it would be advisable for her to purchase or not, and Smith said to her that it would be a good purchase, a good property to own at that price. She was reluctant to purchase, but finally consented to purchase, if, on further investigation, there were no other claims against the property, and said that she would pay them off and buy the property as an investment. When she consented to do this, Wilson said to his wife: "Frank, that is the best bargain you ever made in your life." After this interview, and in October, the witness, on Mrs. Wilson's behalf, went to see Mr. Johnson (in whose bank witness was also a depositor) about placing a loan on Mrs. Wilson's property in Asbury Park to secure a loan of \$6,000, and told Johnson that Mrs. Wilson wanted to purchase the hotel property, that she had not the money, but had mortgages on Cincinnati property which she was about to turn into money, and wanted to borrow this money temporarily until she could cash the mortgages. After going over the security she could give, Mr. Johnson agreed to loan the \$6,000 to her, taking the Asbury Park property and the further security of the Cincinnati mortgages. Smith reported this agreement to Mrs. Wilson, and this was the plan actually carried out in December. The delay of over two months occurred because, as Mr. Smith says, it was

subsequently ascertained that there was an additional charge on the property, and this was more than Mrs. Wilson wanted to pay, but finally she consented to go ahead and pay the extra amount and take the property. A memorandum made by Mrs. Wilson in her diary for October 22, 1884, indicates that the amount of her note was then to be \$5,000, but one of December 13, 1884, states that she and her husband went to Long Branch to see about getting the \$6,000 mortgage. Mrs. Smith corroborates her husband as to the interview in Mr. Hawkins' office, but her evidence of statements in the presence of testatrix is, by stipulation, to be stricken out, if Mr. Wilson's evidence is not competent, and I therefore do not consider it. Smith's evidence, if true, is very important, for the arrangement of purchase proposed in his presence and acquiesced in by complainant was the one actually carried out, and agrees with all the written evidence of the transaction.

Complainant's counsel suggest that the arrangement for purchase may have been subsequently changed, but clear proof of this is necessary, as the change was one against Mrs. Wilson's interest, rather than in her favor, and the proofs offered in relation to the interview at Freehold are not sufficient to establish such an entire change in the original plan. Wilson's own evidence, if competent, does not prove or suggest that there ever was any change in the plan agreed on between himself and his wife, and, if his evidence is considered, it must be noted that he did not contradict this evidence of Smith and his wife as to the interview in Mr. Hawkins' office and his declaration to his wife that this was the best bargain she had ever made. In support of the contention that this plan of purchase, if originally made, was afterwards changed, it is urged that the execution of the deed from Clarke to Wilson, and the subsequent transfer to Mrs. Wilson, show that Wilson, and not Mrs. Wilson, was to purchase. But a more probable reason for the transaction in this form is that Clarke, the vendor, having agreed to sell to Wilson, had the deed, signed by himself and wife, made out to Wilson in October and acknowledged in November in New York state, where Clarke resided, and on his attending in December without his wife it was necessary, in order to avoid delay, that the sale should be carried out in the form actually adopted by a deed to Wilson and then through an intermediary to Mrs. Wilson. Looking alone at the whole evidence relating to the circumstances up to the time of the execution of the deed, I find that this evidence is not sufficient to establish that the deed was not an absolute deed, but a mortgage. And the further question is whether the evidence relating to the action, conduct, or declarations of the parties, and especially of Mrs. Wilson, subsequent to the deed, either alone or taken in connection with the other evidence in the case, is sufficient

to establish that the deed was originally intended as a mortgage. The intention of the parties at the time of the execution is the vital question, and the evidence of subsequent transactions is generally important only as authorizing inferences in relation to the intention at the time. *Frink v. Adams*, 38 N. J. Eq. 485 (Van Fleet, V. C.; 1883), affirmed on appeal 38 N. J. Eq. 287. But, in relation to their subsequent conduct, the relation of the parties has also an important bearing; for, even if the original transaction was only for securing the wife's obligation on the note, as the bill alleges, the subsequent investment in the property of the wife's money, with the consent and acquiescence of the husband, while the title stood in her name, might, under the usual presumption as to husband and wife, be considered as indicating a gift on the husband's part of his entire interest in the property.

The evidence relating to the dealings of the parties, Mr. and Mrs. Wilson, with the hotel property subsequent to the delivery of the deed, including the evidence offered as to their declarations in regard to it, is substantially as follows: At the time of the transfer of title the hotel was under lease to a Mrs. Pemberton, for a term expiring in 1887, at an annual rental of \$1,600, payable March 1st, June 1st, and August 1st, as appears by an entry in Mrs. Wilson's diary under date of December 16, 1884. This tenant continued the occupation until the termination of her lease; her payments of rent, when made in cash, being, as Mr. Wilson says, by checks payable to the order of Mrs. Wilson, and indorsed by her and deposited to the credit of her bank account with the Long Branch Banking Company. For the rent of the year 1885 the tenant, as appears by Mrs. Wilson's entry in her diary of April 18, 1885, was allowed on account of the rent of the year \$384.23 for ranges and gas fixtures put in the property. On August 12, 1885, a payment of \$500 was made on account of the \$6,000 note. Mrs. Wilson appears to have paid the interest charges on the whole amount (\$15,000) carried on mortgage, besides insurance and taxes. These annual charges amounted to about \$1,200 in 1885. In 1886 payments were also made on the \$6,000 note; three payments of \$500 each being credited on the dates May 6th, August 4th, and August 20th. Three payments of \$500 each were also made in 1887, on April 12th, July 7th, and August 8th, and in 1888, on April 11th, May 8th, and August 8th, leaving due on the note \$1,000, which was paid on May 15, 1889. Mr. Wilson says that these payments were all made out of the rents of the hotel property, except the last payment of \$1,000, which was paid in part out of the rents of other property owned by Mrs. Wilson. As to some of the payments, those of May 6, 1886, the three payments in 1887, and the payments of April 11 and May 8, 1888,

his statement as to the source of the money is corroborated by the bank account of Mrs. Wilson, which shows deposits to her credit on or shortly after the dates when the rent came due, and charges against her account for substantially these amounts. The bank accounts, however, seem to have been the general bank accounts of Mrs. Wilson, and the rents deposited (if these were the rents) comprised only about one-half of the deposits. The deposits for the year 1887, for instance (which is the only year for which complete accounts have been produced), show a total credit of \$2,964, and the account of 1888, up to October 4th, of about \$3,000. Mrs. Wilson drew generally against this account, especially for the payment of the semiannual interest due on the Patterson mortgages (\$270), which, together with the other charges on the property, including repairs, were paid from this account. Mr. Wilson's statement, therefore, as to the note being paid from the rents can, in view of these accounts, only be taken to mean that amounts equivalent to the rent were annually paid on the note from the bank accounts in which the rents were deposited. These payments of \$1,500 yearly from the rents, if specially applied on the note, left Mrs. Wilson to make up from other funds the entire annual charges on the property; and, while these payments on the note may show that Mrs. Wilson was desirous of paying off this liability as soon as possible from all her resources, including the rents of the hotel, they do not show that the payments were so made from the rents of the hotel as to justify the inference that these were specially applied to the payment of the note, in pursuance of any prior agreement that the transfer of title was made only to secure against liability on the note. Manifestly the net rents only (after deducting all charges) would be applicable under such an agreement, and the entire absence of anything like an account against this property or against Mr. Wilson for payments on account of it, in connection with this confusion of the rents and the note payments with all her other receipts and payments in her bank account, indicates to my mind that as between Mr. and Mrs. Wilson the rents from this property belonged to her as much as the rents of her other property. No bank accounts after 1888 of either Mr. or Mrs. Wilson have been produced. In reference to the Patterson mortgages, it appears by a receipt on the bond for \$8,000 that on October 22d, 1889, Mrs. Wilson paid \$2,500 of the principal of this mortgage. On October 21, 1890, Mrs. Wilson, as appears by a separate receipt, made another payment of \$2,000, reducing it to \$4,500; the source of the money not appearing. But in 1891 Mrs. Wilson received \$4,500 from the payment of a mortgage on her Cincinnati property, and this money was used, as Mr. Wilson says, to pay the balance due on the Patterson mortgage, and on Feb-

ruary 6, 1891, the last payment of \$1,079.50 was made on this mortgage, and it was canceled of record. The large payments in 1889 and 1890 could not have been made from the clear net rents of the hotel property, and must have been made largely from Mrs. Wilson's other resources. No account as between Mr. and Mrs. Wilson was ever kept as to any of these payments, and the fact that the mortgages were, with Mr. Wilson's knowledge, paid off mainly by money not derived from the property, and were canceled of record, goes very far, in my judgment, to establish the fact that, whatever may have been the original understanding, the property was then considered to belong absolutely to Mrs. Wilson, and that she did not hold it as mortgagee to secure merely her liability on the note or debts from her husband. The subsequent dealing between husband and wife, bearing upon the title to the property, point to the same conclusion. In December, 1895, Mrs. Wilson sold for \$450 a small strip of the property, for which she received the consideration money; her husband joining in the deed. The unincumbered title being in Mrs. Wilson from 1891, she and her husband in June, 1898, executed a mortgage on the property for a loan of \$2,500, which was used by Mrs. Wilson for her own purposes. On November 11, 1903, another mortgage was executed by them for \$5,000, to take up the previous mortgage, and an additional loan of \$2,500, used also by Mrs. Wilson for her own purposes, part of it for the living expenses of herself and husband. This mortgage is still a lien on the property, and no subsequent charges affecting the title were made up to Mrs. Wilson's death, December 29, 1903.

Outside of the testimony of Mr. Wilson himself, the principal evidence of communications after the transfer between the husband and wife, relating to the ownership of the property, are letters of complainant written to his wife in October, 1897. At that time Mrs. Wilson was at the house of her sister Mrs. Smith, in Asbury Park, having gone there in consequence of some quarrel or misunderstanding with her husband. Mr. Smith, the brother-in-law, says that one cause of the difference between them was Wilson's refusal to give Mrs. Wilson the deed for the property now in question. Wilson came to Smith's house to see his wife, and in the interview between them Mrs. Wilson accused her husband of having the deed and of always claiming the hotel wasn't hers, to which Wilson said: "I don't claim the house. I have got no interest in the house. It is your property, and it all belongs to you." Wilson wrote several letters to his wife while she was at Smith's house, urging her to return to their home, and in these letters her ownership of this property, and not his, is also asserted by Wilson, apparently for the purpose of reassuring her against his claims. One of October 8th is especially im-

portant as giving a statement of a bargain in reference to the Laurel House. He asks her to come home and talk things over, and says that it is "annoying for Mrs. Smith to tell you you had no property. It is all yours, and a very fine property. You said, after the Laurel House was out of debt, you were going to let me have so much a month; but, after being here so many years, I have nothing yet." In another letter he tells her that her property is increasing, and after stating he had heard Mrs. Smith had said \$2,000 or \$3,000 were gone, and that he had bought lots with it, he says this was untrue, that the property had been well managed, that he had bought nothing with it except the Allenhurst property, which was in her name, and adds: "The property is all yours, and we have made several thousand. Come home and enjoy it. * * * Mrs. Smith knows she tells what is not so, when she tells you you have no property. No one believes her, and any goose knows better. All yours and all straight." These letters, written at the time when the question seems to have been directly raised between the husband and wife as to the ownership of this property and his alleged claims on it, cannot be reconciled with the view that both the parties intended the title to be taken only as security for debts or obligations, and it must require very clear and decisive evidence to the contrary to outweigh these admissions of the complainant, advisedly made, and made for the purpose of procuring her return. Had complainant's present claim been then set up, Mrs. Wilson would have had the opportunity to defend her ownership, and the husband's direct and unreserved admission of his wife's ownership at that time has an important bearing on his right to contest it after his wife's death and at this lapse of time. Mrs. Wilson returned to her home shortly after these letters were written, and lived with her husband up to the time of her death. After her return Mr. Wilson seems to have again taken charge of the hotel, leasing it, and collecting the rents, and attending to the repairs and management of the property. One of the tenants, Mrs. Kemp, paid the rents by checks to his order, and these were indorsed by him and deposited, as he says, to Mrs. Wilson's account in the bank where Mrs. Wilson kept her account. In all of the other tenancies the checks were made either to Mrs. Wilson alone or jointly to both, and all checks went ultimately to Mrs. Wilson's credit. Mr. Wilson does not appear to have kept any separate bank account after the transfer of title, nor to have had resources of his own. It appears, also, that the expenses for the support of the family were paid from Mrs. Wilson's income, including that received from the hotel, and I think Mr. Wilson's management of the hotel, under these circumstances, is to be considered rather as a management of his wife's proper-

ty than the continued possession and control of the property by a mortgagor, as is now claimed on his behalf.

In addition to the evidence above referred to, complainant relies on oral declarations proved to have been made by Mrs. Wilson subsequent to 1898, when she returned home. In some courts it is held that evidence of subsequent oral admissions by a grantee that an absolute deed was intended as a mortgage is not sufficient without corroborating circumstances to establish this fact. 1 Jones, Mortg. (5th Ed.) p. 241, § 335, and cases cited note 4. And certainly evidence of this character, in order to divest the title to lands and to overcome the effect of the previous conduct of the parties and written admissions of the husband, must be scrutinized with great caution after the death of Mrs. Wilson, and be very clear and convincing. In none of these conversations does it appear clearly that the attention of the wife was distinctly drawn to, or fixed on, the question whether this deed was only a mortgage or whether she had the right to hold the title to the property, if she chose to do so, and many of the declarations are such as may fairly be considered expressions indicating nothing further than that this hotel was an enterprise of Mr. Wilson's, and not of her own, and that she had taken hold of it to save the money he had put in it, and that Wilson was managing the hotel. Harry Looker, a nephew by marriage of Mr. Wilson, says that in 1898, at a visit he made to them in Asbury Park, Mr. Wilson was going over to the hotel, and Mrs. Wilson asked him if he did not wish to go with him and see the hotel. She said: "Uncle Fred takes a great interest in his hotel." This reference to the hotel as Fred's hotel would be just as applicable to a hotel he was thus managing as to one he owned.

Up to the time of Boyce's tenancy the hotel was unfurnished. He occupied it for eight years after Mrs. Pemberton, not having been put in by Wilson, as he says in his letters. After Boyce's dispossession by Mrs. Wilson herself for nonpayment of rent the hotel was afterwards furnished (apparently at Mrs. Wilson's expense), and on the subsequent purchase of furniture in New York Mrs. Wilson, in this witness' presence, spoke of the furniture her husband put in "his hotel," and that he could do as he pleased about it. At a later conversation (in 1902) Mrs. Wilson, talking to witness about a new house she expected to build and the different pieces of property, mentioned the hotel, and said she wished she had never gone into it; she only did it to help Fred out. She said he found he could not meet his payments, and she had taken it as security to help him out. But on cross-examination the witness says that in this conversation she put it in this way: "She thought she could put her money to a better advantage than she put it there. She told me the property was in her name, that she had taken a deed as security for

Mr. Wilson. She would rather have invested the money. She could have made more money in other property." This conversation is entirely consistent with the view that Mrs. Wilson owned the property, and that the money made by the investment was hers. Mrs. Looker, the witness' wife, present at this conversation in 1902, says that Mrs. Wilson, speaking of the hotel, said she had bother enough without that; that "that was Uncle Fred's" and she only took it to secure it for him; that she always spoke of it as "your uncle's hotel." Mrs. Vincent, a niece of Mr. Wilson, says that in 1899 she visited Mr. and Mrs. Wilson at Asbury Park, and in a talk with Mrs. Wilson about the property she said she "had advanced Uncle Fred this security to save his hotel at the time he needed it, and had taken the hotel as security. I asked her if she had had her money back, and she said 'Yes,' and I said, 'From rents of the hotel?' and she said, 'Yes.' She said she took the title as security for the money she advanced, or the security she put up. She told me it was \$6,000."

The evidence which is most strongly relied on in complainant's favor is that of a Mr. Sexton, a disinterested witness. He swears to a reference to the hotel by Mrs. Wilson in a general conversation with him, in which she said that what money she had put in the hotel she put in for Mr. Wilson's benefit, as she wanted him to have something in his old age, and to a special conversation with her in February, 1902, at the funeral of Mr. Wilson's brother, which witness had charge of as undertaker. Mrs. Wilson asked the witness how much Mr. Wilson owed him. He told her, and she said that would be all right, that she was going to help him. "I said: 'What about the hotel down there? Does Mr. Wilson own that, or do you own it?' She said: 'That is Mr. Wilson's. What money I put in that I put in for his benefit.' That what she had put in the hotel, she put in to help Mr. Wilson out, as she wanted him to have something in his old age." Mrs. Kemp, a tenant of the property from 1898 to 1902, who rented the property of Mr. Wilson, under a lease signed by Mrs. Wilson, and paid him the rents by checks to his order, says that "at one time, when, Mr. Wilson not being inclined to make some repairs, I supposed Mrs. Wilson owned the property, she said: 'I have nothing to do with it. I merely took it to save the property.' And I went without the repairs." On a leading question put to her, "Did she say who owned it?" this witness answered, "Oh, yes; she always said Mr. Wilson." Mrs. Regan, who worked for Mrs. Wilson for 12 years from 1890, and was at her house three or four times a week, says that Mrs. Wilson told her a number of times that she paid off the debts on the hotel to save it for Mr. Wilson, and took the hotel as security for her money.

On the assumption that these conversations give in all respects Mrs. Wilson's exact

words, and giving them all fair effect, they are not sufficient, in my judgment, to outweigh the evidence as to the nature of the original transaction which is supplied by the documents themselves, and the conduct and admissions of the parties under them, up to at least the year 1898. Mrs. Wilson's account or explanation of any of them cannot now be heard, and bearing this in mind, in considering the weight to be given to them on the question now to be solved, viz., the agreement at the time of the transfer of title or at the time of Mrs. Wilson's subsequent investment of her money in the property (1) by the payment and cancellation of the Patterson mortgages, and otherwise, I think that, outside of the conversations sworn to by Mr. Sexton and Mrs. Kemp, the scope of statements cannot clearly be held to go further than to give what was then (in 1898 or later) Mrs. Wilson's statement as to her motive in taking the property and an explanation of her investment. The direct statement made to Mr. Sexton that "the property is Mr. Wilson's; what money I have put in it, I have put in for his benefit"—was a statement, not that she had lent money to Wilson which he was to pay back or account for, but that she had put her money in the hotel to help him out, as she wanted him to have something in his old age, and imports rather a gift to Wilson of the money she put in. This may well have, then, been her intention as to the ultimate disposition of the property, but, so long as she held the title in her own name, this gift was still unexecuted and under her own control, and in none of these conversations is there any sufficiently clear indication on her part that the title to the property was not then her own, or that she had no right as between herself and Wilson to hold the title as her own. These conversations all occurred after the reconciliation in 1897, after a separation, during which she was reassured about her title to this very property, and her subsequent declarations as to her husband having this property or the benefit of it are very probably due to a subsequent change in her disposition toward her husband, while living amicably with him, and having the benefit of his management of the property. And, while they may possibly be taken to indicate her intentions in reference to the property, they are not sufficient to divest her title after her death.

Upon the whole evidence I conclude that complainant has failed to make out a case for relief; and the bill must be dismissed.

CAMPBELL v. PERTH AMBOY SHIPBUILDING & ENGINEERING CO. et al.

(Court of Chancery of New Jersey. Nov. 3, 1905.)

1. MORTGAGES—FORECLOSURE—PAYMENT.

In a suit to foreclose certain mortgages given to a bank, evidence held insufficient to establish an agreement between the mortgagor

and the bank that certain notes deposited as collateral for the secured debt should be taken by the bank and credited in payment thereof.

2. CORPORATIONS—ACTION—ESTOPPEL TO DENY CORPORATE EXISTENCE.

Where a bank, prior to its failure, had taken steps to extend its corporate existence under Gen. St. p. 972, § 302, authorizing the extension of the life of corporations, and had thereafter operated and been treated as a banking association legally organized, both by the public and the state government, a borrower was estopped, in an action by the bank's receiver to foreclose certain mortgages securing the debt, to allege that at the time the loans were made the bank had no legal corporate existence.

3. MORTGAGES—DEBTS SECURED—DESCRIPTION.

Where certain mortgages given to a bank recited that the bank was about to loan certain sums of money to the mortgagor, in an amount not to exceed in the whole a specified sum, by discounting his notes payable in three months, such mortgages secured demand notes discounted by the bank for the mortgagor, which referred to the mortgage and were treated by both parties as secured thereby.

4. EVIDENCE—PAROL EVIDENCE—MORTGAGES.

Parol evidence is admissible to show the real object of a mortgage, and that it was given for a purpose not disclosed in the condition.

5. SUBROGATION—VENDOR'S LIEN.

Where an administratrix sold certain mortgaged premises to pay the mortgage debt, and the purchasers paid nothing to the administratrix, but bought for the benefit of a corporation formed by them to operate the property, the administratrix had a vendor's lien on the premises to the extent of the purchase price, to which the creditor for whose benefit the land was sold was entitled to be subrogated.

Suit by Edward S. Campbell, as receiver of the Middlesex County Bank, against the Perth Amboy Shipbuilding & Engineering Company and others. On final hearing. Decree for complainant.

Sherrerd Depue, for complainant. Allan H. Strong, for defendants Sarah J. Ramsay, Nautical Preparatory School, and Newhall. Adrian Lyon, for defendants Perth Amboy Shipbuilding & Engineering Company and Voorhees. Abel I. Smith, for defendant United States Wood Preserving Company. Joseph E. Stricker, for defendants Orin Hooper & Sons. Charles C. Hommann, for defendants city of Perth Amboy and Perth Amboy Trust Company. George L. Record, for defendant Oliver W. Ramsay.

PITNEY, V. C. This is a bill to foreclose three mortgages given by Hugh Ramsay, since deceased, and his wife, upon certain premises in the city of Perth Amboy to the Middlesex County Bank, which, upon the insolvency of that institution in 1899, came into the hands of the complainant Edward S. Campbell, as its receiver. Certain of the defendants, who have various and conflicting interests among themselves, the nature and character of which need not now be stated, join in disputing and defending the complainant's claim on three grounds: First. That the whole transaction on which complainant's right rests is void and unenforceable because in violation of an act of the Legislature with regard to the conduct

of the business of banking. Second. That the mortgages, produced by the complainant, do not, by their terms, cover and secure the indebtedness relied upon by the complainant; in other words, that nothing is due on them. Third. That a large portion, quite one-half of the debt claimed, was paid by Hugh Ramsay in his lifetime in the manner set out in the defendants' answers.

The most important of these defenses is the last, viz., that relating to the amount of complainant's claim, and will be first considered. I say "most important" because Ramsay died seised of the premises covered by the mortgages, besides other property, and almost his entire indebtedness was to the complainant, and his property was ample to pay all his debts, including the complainant's claim at its full amount. Letters of administration on his estate were taken out by his widow. The complainant prepared and verified and presented to the administratrix a sworn claim for the amount he claimed to be due. The administratrix did not dispute it, but applied to the orphans' court of Middlesex county for leave to sell the real estate covered by complainant's mortgages to pay that debt, and actually sold it to the defendant the shipbuilding and engineering company for a sum of money sufficient to pay the claim, upon conditions and under circumstances which will be more minutely referred to later on. Complainant's claim consists of the aggregate of nine several promissory notes made by Hugh Ramsay to the bank, and upon which the undisputed evidence is that the money was advanced to Ramsay at about their several dates, and upon which the interest was paid by Ramsay from time to time up to a short time before the failure of the bank and the appointment of the receiver, which occurred in July, 1899.

The several promissory notes are as follows, all payable on demand:

February 6, 1892.....	\$ 1,500
March 3, 1892.....	10,000
March 14, 1892.....	3,500
March 19, 1892.....	2,000
October 15, 1892.....	2,500
February 6, 1893.....	3,000
December 31, 1894.....	4,000
June 29, 1895.....	3,500
September 18, 1895.....	19,600
	<hr/> \$49,600

This last note is in form what is known as a stock collateral note, as follows:

\$19600/00 Perth Amboy, N. J.,

S Sept. 18, 1895.
T On demand after date I promise to
A pay to the order of MIDDLESEX COUN-
T Y BANK, Perth Amboy, N. J.
E Nineteen thousand Six hundred 00/— Dollars
at said Bank with interest
for value received I having deposited here-
O with as collateral, the undenamed securi-
F ties which I authorize the holder of this
note, upon the non-payment hereof at ma-
turity, to sell either at the Brokers' Board

N or at Public or Private sale without further
E notice and apply the proceeds or as much
W thereof as may be necessary to the payment
of this note and all necessary expenses and
charges holding me responsible for any de-
J ficiency. Securities deposited herewith
E Notes of the Mining Dredging and
R Power Company for a like amount,
S due Sept. 1, 1896.
E Also included and secured in mortgage
Y given by me to said bank.
[Signed] Hugh Ramsay.

The collaterals mentioned in this note were six debt certificates or promissory notes of various sums aggregating \$19,500, made by a corporation known as the Mining & Dredging Power Company, dated in August, 1895, and payable on the 1st day of September 1896, with interest, being part of a series of \$45,000, secured by a mortgage executed by the Mining & Dredging Company to the State Trust Company in the city of New York, which covered a steam floating dredge, which had been built by Mr. Ramsay, who was a shipbuilder. These debt certificates, with one other for \$5,000, had been taken by Mr. Ramsay as part payment for the balance due him for the dredge. The other \$5,000 note at some time was pledged by Mr. Ramsay to the law firm of Sullivan & Cromwell as security for a less amount due them either for professional services or money loaned. The dredging company was a failure and passed into the hands of a receiver, and the dredge in question was subjected to maritime liens, and under them came into the hands of the United States marshal of New Jersey, and early in 1897 was brought to a sale under foreclosure of the mortgage. It was also sold by the receiver in insolvency, and by the United States marshal for New Jersey in enforcement of the maritime liens.

The allegation of the several defendants in support of the claim of part payment is that some time prior to the month of April, 1897, a verbal contract was entered into between Hugh Ramsay and the bank, by which it was agreed that the six notes aggregating \$19,600, held by the bank as collateral to Ramsay's note of that amount, together with the \$5,000 note of the dredging company held by Sullivan & Cromwell, aggregating \$24,500, should be taken and accepted by the bank as an absolute payment of \$25,000 (being \$400 more than the face value, without counting interest) on account of Ramsay's indebtedness to the bank. The avowed object of this transaction was to enable the bank to purchase the dredge at public sale, and use these notes in payment therefor so far as the dividends declared thereon by the receiver would be sufficient therefor. At the time of this alleged agreement the six dredging notes held by the bank had been sent to New York, where they were payable, for collection, and had presumably been presented to the receiver for the purpose of the dividend thereon. This verbal contract is attempted to be proven by the evidence of Mr. Valentine, the cashier of the bank.

and by Oliver W. Ramsay, the son and clerk of Hugh Ramsay. It is alleged to have been made between Hugh Ramsay, on the one part, and U. B. Watson, president of the bank, and Valentine, its cashier, on the other, at two or three interviews at the banking house. Watson denies the making of any such agreement. Each of the directors of the bank swear that they never heard of it. The books of the bank show not the least trace of any such transaction. Neither the \$19,600 note nor either of the smaller notes held by the bank were given up to Mr. Ramsay. Interest on the whole \$49,600 was charged to, and paid by, Ramsay on the 1st day of July, 1897, following the alleged contract, and again on the 1st day of January, 1898. After that date, Valentine, without the knowledge or consent of the president, Watson, or of any director, reduced the interest charges against Ramsay by the amount accruing on \$25,000. Later on, and before the failure of the bank, Watson discovered that Ramsay was not paying interest on his whole indebtedness and swears that he spoke to Ramsay about it, who answered that Valentine, who had become the owner of the dredge, had promised to pay one-half of the interest due by him to the bank. This answer by Hugh Ramsay to Watson is of great importance, as will appear further on.

The complainant, shortly after he was appointed receiver, finding among the valuable assets of the bank the nine notes of Ramsay above set forth, made up a statement of the amount due thereon and mailed it to Hugh Ramsay and urged payment, and had quite a voluminous correspondence with him about it, and one or more interviews with him, in which he urged payment of the whole or part of the indebtedness, and at no time did Ramsay dispute the amount due for principal, but did allege some errors in the amount of interest. Ramsay died the 15th day of April, 1900 (about nine months after the appointment of the receiver) intestate, and on the 4th of May, following, letters of administration were granted to his widow, the defendant Sarah J. L. Ramsay. He left a family of eight children, one of whom is an infant. The complainant made out a sworn claim against the estate, based on the nine promissory notes above mentioned, with interest thereon, amounting to \$52,240.28, and duly served the same on the administratrix. No objection has ever been made to that claim by her, nor has complainant been called upon under the statute to bring an action at law. Four of the heirs at law were sons, most, if not all, of whom lived in Perth Amboy, near or with their mother. All the proceedings by the administratrix in settling the estate were taken by and with the advice of her sons and her and their counsel, Judge Lyon. They were all fully aware of the alleged contract by which a credit of \$25,000 should be made on complainant's claim, but never made it known

to the complainant. In fact, it was studiously concealed from him. He was continually urging payment or arrangement of the claim, and threatening foreclosure. The sons were as continually asking for time. There seems to have been some undefined, supposed defect in the title to some part of the mortgaged premises, which they were taking measures to have removed or cured, and these measures were set up as a reason for delay in foreclosure.

The only debt of the estate besides the complainant's was a large arrearage of taxes due the city of Perth Amboy. Some part of the premises were under a lease to the defendant the Wood Preserving Company, which was bringing in rents which were applied, I believe, in the reduction of the taxes. Finally, the adult sons whom I have mentioned, and who, of course, with all the children are parties defendant, conceived the idea of forming a corporation to conduct the business of shipbuilding on a part of the mortgaged premises, which were well adapted for that purpose, and had been used for that purpose by Hugh Ramsay in his lifetime, and on the 12th of September, 1901, they incorporated a company by the name of the Standard Shipbuilding Company, which name, afterwards, on February 24, 1902, was changed to the Perth Amboy Engineering & Shipbuilding Company, one of the defendants herein. On the 2d of March, 1901, Mrs. Ramsay presented to the orphans' court of Middlesex county a petition praying for the aid of the court and for an order to sell lands. The petition contains a list of all the real estate of which Ramsay died seised, including the mortgaged premises (the value of which latter is stated at \$225,000), and is verified by her affidavit. Annexed to it is a sworn statement of debts and personal assets, of the same date, the substance of which is as follows: The amount of the inventory, \$25,359.18. The debts stated were taxes due, \$7,982. Then follows "claim by Edward S. Campbell, receiver of Middlesex County Bank, with interest to March 1, 1901, \$54,560." Then follows several small items of money actually paid by the administratrix for expenses in care for the property. On that petition the ordinary order to show cause was made on the 16th of April and duly published, and on the 18th of June a decree was made, which, after reciting that the order had been duly published and that the court had determined on full examination that the personal estate was insufficient to pay the debts to the extent of \$41,161.53, ordered that the administratrix should sell the whole of the lands of the decedent. The report of assets and liabilities just mentioned shows conclusively that the deficiency of \$41,161.53 found by the court could not have been arrived at without counting the complainant's claim at its full face.

On the 25th of November, 1901, Mrs. Ramsay made a report to the court under oath

that she had sold at private sale, to the Standard Shipbuilding Company, the part of the mortgaged premises used for a shipbuilding plant, for the sum of \$52,410.28 (which is the amount of the complainant's sworn claim against the estate) "upon the condition that the Standard Shipbuilding Company will assume and pay a mortgage held by Edward S. Campbell, receiver of the Middlesex County Bank, upon the said above-described property, being all the land described as tract No. 1 in said petition, upon which mortgage, with interest, there is claimed to be due by said receiver the sum of \$52,410.28, which assumption and payment of said mortgage shall be considered as the payment for the consideration money for the said tract so sold as aforesaid to the Standard Shipbuilding Company." On that report, the court, on the 29th of November, made an order confirming the sale, inserting in the order that part of the petition above quoted, and directed a deed to be made. The administratrix made her deed dated the 27th of November, 1901, to the Standard Shipbuilding Company for that portion of the mortgaged premises, in consideration of \$52,410.28, which contained a clause of assumption precisely the same as that above quoted. That deed was recorded on the same day, viz., November 29, 1901, in the Middlesex county clerk's office. In February, 1902, the name of the Standard Shipbuilding Company was changed to the Perth Amboy Engineering & Shipbuilding Company, and on the 25th of February the administratrix made a deed to the Perth Amboy Engineering & Shipbuilding Company for all of the mortgaged premises except the shipyard plant, previously conveyed; the consideration named being \$75,000, which deed purported to be based on the same order of the orphans' court made on the 18th of June, 1901. That deed was duly recorded on the 18th of March in the Middlesex county clerk's office. It is here to be observed that the previous sale of November 29th more than paid all the deficiency shown by the statement of debts and credits contained in the administratrix's application to the orphans' court, so that there was no occasion for this conveyance. Moreover, the administratrix valued the mortgaged premises, as we have seen, at \$225,000, and yet she induced the orphans' court to approve these two conveyances which aggregated nearly \$100,000 less than she valued the premises. The fact is that these conveyances were a part of a family arrangement, and the whole object of the proceedings was to cut off the title of one of the heirs who was under age. On the 14th of March the administratrix executed another deed to the Perth Amboy Engineering & Shipbuilding Company, based on the same order of June 18th, in consideration of \$52,410.28 for the same portion of the mortgaged premises conveyed by the deed of November 27, 1901, and that deed (as well as the other two deeds) contained an acknowledgment of the payment of the consideration money, and, after the descrip-

tion, contains this clause, "this conveyance is made subject to a mortgage held by Edward S. Campbell, receiver of the Middlesex County Bank, upon the above-described property, together with other tracts." In point of fact not a dollar of cash was paid for any of these conveyances to the administratrix. Shares of stock in the corporation were allotted to each of the heirs and to the widow, according to their several interests. No other stock was at any time issued to any other person.

It is proper here to state that the reason given by the defendants at the hearing why the deed of November 27, 1901, was, so to speak, abandoned and ignored, was that a New York counselor who was advising the parties objected to it. As no stock was issued outside of the family, and as the parties interested were attempting to float an issue of bonds, I can imagine that counsel who was consulted with regard to that issue may have raised some question as to whether the title which was made to the original Standard Shipbuilding Company would be vested in the same company after its name was changed to the Perth Amboy Engineering & Shipbuilding Company. I said that no stock was issued outside of the Ramsay family. There may have been some shares transferred to other persons for corporate purposes. There were, besides the mortgaged premises, quite a number of building lots, some of which were sold by virtue of the same order. After the title was vested in the shipbuilding company negotiations took place between the directors, who were the sons of the mortgagor and the complainant, with a view to the issue of corporate bonds on the mortgaged premises and the satisfaction of the complainant's mortgage by a portion of these bonds, but the complainant naturally declined and insisted upon the payment of his money, with the result that this bill was filed November 30, 1903. In answer thereto this alleged payment was for the first time set up. Now, without asserting that the failure by Hugh Ramsay and his sons for so long a time to set up the defense in question, the tacit acknowledgment from time to time of the justice of the complainant's claim, the treating it as valid for its full amount in the proceedings in the orphans' court, the insertion of its assumption at its full face in the first conveyance, work an estoppel against these defendants, especially the infant, yet the circumstances stated do amount to an explicit admission on the part of the adult defendants, all of whom were thoroughly familiar with the facts and circumstances, that the whole amount of the complainant's claim was due.

But let us return to the month of April, 1897, and trace the history of the transaction in connection with the dredge from that time. It is quite clear from the evidence of Oliver Ramsay, who is the only reliable witness on defendants' part to this contract, as well as that of Valentine, that nobody sup-

posed that the notes of the dredging company were worth anything, unless the dredge itself could be either bought in cheaply at the sale, or a purchaser hunted up for it and in that way the notes looked after and protected. Oliver Ramsay swears that it cost over \$100,000, and Valentine swears that he had found two gentlemen, whom he named—Messrs. Hussy and Fenton—who were willing to purchase it at \$75,000, and the plan, which seems to have been devised between him and Hugh Ramsay, was that the dredge should be bought in as cheaply as possible, and, as there were some other assets in the hands of the receiver, that the dividends to be declared by the receiver on the \$24,600 of notes owned by Ramsay, including those pledged to the bank, should be used as far as possible in paying for the dredge, and then that it should be sold to the two willing purchasers for the \$75,000, or such other sum as would pay Ramsay in full and enable him to reduce his debt to the bank. But in order to carry out that plan several thousand dollars in cash were necessary in order to pay off the marshal's lien and other expenses. To accomplish all this it was necessary to obtain the consent of the president of the bank (1) for the use of its collateral notes for that purpose, and (2) to induce it to advance the cash necessary to carry the transaction through. This was done. Hugh Ramsay and his son Oliver called on Watson and Valentine at the bank, and laid before Watson the plan which Ramsay and Valentine had devised, and obtained his consent thereto; and it is at the interview in which that consent was obtained that it is alleged that the contract set up by the defendants was agreed to and consummated. Valentine, by the consent of Watson, took some \$6,000 out of the bank, leaving a mere memorandum in its place, and subsequently certified his own check on his account in the bank for about as much more (which was one of his modes of embezzling money) and obtained title to the dredge. This is all that Watson ever consented to, namely, to let Ramsay take away his collateral for the purposes just mentioned, and to allow Valentine to take the money out of the bank (which was really a loan to Ramsay), for temporary use in carrying through the project, and no doubt Watson did consent that the temporary title to the dredge should be taken in Valentine's name. In fact, in order to properly protect the bank's interest in the collateral and to secure the return of the \$6,000 taken, as we have seen, by Valentine, it was entirely proper and simply good business that the title should have been taken in Valentine's name until it could be realized on and the money returned.

I listened with great care and have since read with care the evidence of Oliver Ramsey, and I find nothing in it inconsistent with the transaction as I have just stated it. He was examined and cross-examined at great length, and at first failed to remember that

Mr. Watson, the president of the bank, had ever agreed to make an absolute credit for the collateral. Finally, being pressed by his own counsel, he brought himself to swear that he did so promise. His language was that it was agreed at the interview between Watson, Valentine, his father, and himself: "The substance of it was that it would be right for the bank to protect its interest by purchasing that dredge. I think I have told you all I remember of the conversation. That is the gist of it—was the determination on the part of the bank that it should protect its interest by purchasing the dredge, by buying it in at the marshal's sale." Again, questioned by his own counsel: "Q. Well, what, if anything, was said in reference to these notes, \$19,600 held by the bank as collateral and the other note of \$5,000? A. My father said that all he cared for in the transaction—that undoubtedly there was money in the dredge—and that all he cared for was to be protected to the amount of those notes. Q. Well, what was said on behalf of the bank, that is by Watson and Valentine as to any arrangement with your father as respecting these notes? A. I can't remember, except that their word was the law, and their promise was too, and that was distinctly understood between us." And again, on cross-examination: "Q. Will you give us in a connected way as near as you can what took place at the first of these interviews? A. Simply that the subject was broached that the dredge was about to be sold. Those notes were due. The dredge was worth a very considerable amount of money. That by having the money to purchase this dredge and buy her in, those notes could be protected." Then pressed to give the language: "Q. But give us the conversation as near as you can that took place at the first interview. A. We outlined to them how this dredge was worth a considerable amount of money, and the dredge could be sold, as I stated to you before, and the machinery dismantled and sold for considerable more than the amount of the notes." By "we" he said he meant his father and himself. Further on he says that "Mr. Valentine agreed to purchase the dredge." Thus he repeats again that he and his father stated to Watson and Valentine "what we considered the value in the dredge. They saw it, and Mr. Valentine agreed to purchase the dredge, which he did."

The conclusion I arrive at is that there never was any agreement that the notes should be then and there at once credited against Ramsay's debt. Such a contract was so extremely foolish as to render it on that account highly improbable. Mr. Watson knew the value of the real estate upon which the bank held mortgages. He felt perfectly safe as to Ramsay's debt, and there was no occasion for making such a bargain. Moreover, the collateral given up, as it really was, for the accommodation of Ramsay, was of so

little value in Watson's judgment that it appears that he was entirely indifferent about it, and was perfectly willing that Ramsay should have the use of it, and to assist him in realizing on the notes by lending some more money to enable Ramsay to carry the transaction through, provided the affair could be kept so far under the control of the bank as to make it reasonably secure. Not only was it highly improbable that Watson, or any other officer of the bank not secretly interested personally in the transaction, agreed to give an absolute credit for past due promissory notes of little or no value, held by it as collateral merely, but it reaches the absurd to suppose that he or they would give an additional credit for \$5,000 for a note of the same character held by a third party as collateral for a sum of money which must be paid before the note could be obtained and used by the bank. The result of the transaction in equity was that at the time the title to the dredge was vested in Valentine in April, 1897, he held it as mortgagee, first, to secure the amount of cash furnished by the bank voluntarily and involuntarily to perfect the title, and second, to secure the \$19,600 of notes belonging to Ramsay, but held by the bank as collateral, and as to the balance he held it in trust for Ramsay, and this is the view of the affair most favorable to the defendants.

But here comes in an element entirely unknown to Watson or to any director of the bank. Valentine had other schemes in his mind entirely unknown to anybody, unless it be Ramsay. He swears that the two gentlemen above named, who had agreed to purchase the dredge for \$75,000 finally declined so to do. What the real truth of the situation was is not easily known, as I place little reliance on Valentine's evidence, but it is quite clear that about this time he was informed that a contract was to be let by the United States government to do some dredging in the harbor of Portland, Me., and he took measures and bid on the contract and obtained it and took Mr. Oliver Ramsay in with him as a partner with the two other persons who had declined, as he swears, to buy the dredge for \$75,000, and preceded to execute the contract, and therein spent a great deal of money embezzled from the bank, and entirely failed in the job, and the dredge was sold to pay the debts. The effort of the defendants was to show that this whole affair was the enterprise of the bank. I cannot adopt that theory. In the first place, it was one which the bank had no power to engage in. In the second place, the president and every officer of the bank absolutely deny having anything whatever to do with it and are sustained by an absence of any documentary proof to the contrary. On the other hand, Oliver Ramsay had an interest in the contract which he distinguishes from an interest in the dredge. His father must have known what was going on. In fact his

knowledge of it was not denied, and it may be that Valentine, somewhere in the history of the affair, told the father that he should have credit on the debt to the bank, not only for the \$19,600 of notes pledged to the bank, but also for the \$5,000 which had been pledged with Sullivan & Cromwell, and in reliance upon that promise of Valentine's Ramsay may have tacitly consented to Valentine's going on with the dredging enterprise in Portland Harbor. Certainly it seems to me, under the circumstances of the case, that Ramsay must be held to have consented to and acquiesced in Valentine's dealing with the dredge. It clearly appears from the evidence of President Watson that he understood that Valentine was to buy in the dredge as cheaply as possible and immediately sell it at an advance for the benefit of Ramsay, and that the bank advanced the necessary cash to finance the transaction as an accommodation to Ramsay (who with his son had presented the plan to Watson in plausible terms, as the evidence shows), with the full expectation that the dredge would be promptly resold at a large advance, out of which the bank would be promptly repaid the cash presently advanced, and the additional profits would go to Ramsay and enable him to make a payment on his debt to the bank. Watson had not the least idea that the bank was farther complicated in the affair than the advance of the few thousand dollars necessary to finance the transaction, and he had no notice or suspicion that Valentine intended to retain the title to the dredge and put it to practical use.

And here comes in a matter much relied upon by the defendants, namely, the reduction in the amount of interest charged by the bank to Ramsay. The bank had printed blanks on which statements of the amount of interest due from debtors having demand loans from the bank were made out and sent to the debtors, and several of these were put in evidence by the defendant. One dated June 14, 1897, filled up in the handwriting of Valentine and addressed to H. Ramsay, states that the interest on his demand loan, amounting to \$1,813, will be due July 1, 1897, and prompt payment of the same was requested. Now, \$1,813 was the amount for six months interest on the whole of Ramsay's debt at that time, about \$55,000, without giving any credit for the \$25,000, which, according to defendant's theory, should have been credited in April, 1897. This paper is significant, in that it is entirely inconsistent with Valentine's evidence that there was a contract for the credit for \$25,000 in or before April, 1897. But it is quite consistent with the theory which I have formed of the true facts of the case. The amount of this notice was charged up against Ramsay's account, and a like amount in January, 1898. His son swears that, although the notice was received by Ramsay and produced by defendants at the hearing, yet that Ramsay did not

discover the overcharge of interest until his book was written up and his vouchers returned some time in 1898, and the son further swears that Valentine was spoken to about it and promised to have Ramsay's account credited with the overcharge of interest, but in fact never did have it so credited. But in January, 1898, Valentine commenced, and from thenceforward continued, to make out the semiannual statements of interest for a reduced amount, namely, \$738, being the amount due for six notes on something less than \$25,000 (\$5,000 in cash had been paid by Ramsay in the meantime on his indebtedness to the bank). One of these statements was produced with the receipt for the amount signed "paid" by Watson. Being examined on that subject, Watson stated that he had no personal recollection of that particular payment, but swore in substance that he might have signed it without knowing what it was for or what length of time the interest stated in it covered. When examined especially on the question of his knowledge that the semiannual interest charges were reduced, he swears that he did not know it until very late, meaning shortly before the bank failed, and then he spoke to Valentine about it, and he understood that the whole amount was to be collected. He was then asked by counsel for the defendants if he ever said anything to Ramsay to the effect that the amount of interest he was paying was not right, and he said he did, some time before the failure. He said he met him on the street and said something to him to the effect that the interest was not paid on the right amount, and Ramsay said he had some agreement with Mr. Valentine about it, and he (Watson) said "we, the bank, had no agreement with Valentine. Q. What agreement did he [Ramsay] say he had with Valentine? A. Some agreement in regard to payment of half of it, something of that kind." From this evidence it appears clearly enough that Ramsay knew, both from the fact that after the alleged contract for credit interest was made out and charged up to him on the whole amount of his indebtedness, and from this conversation with Watson, that the bank held and claimed to hold all of his notes without any credit on account of the dredging company's notes, and in the face of that knowledge he refrained from making any demand or taking any other measures to enforce his claim for a credit. Another circumstance is worthy of notice. The bank held a demand note against Ramsay for \$7,500 dated March 30, 1895. This note was paid by Ramsay on January 25, 1898, after he had learned that interest was being demanded from him on over \$50,000. If he at that time understood that he had paid not only \$19,600, but \$25,000 on the account, of his indebtedness, it seems to me that it was a good opportunity to have had the payment actually applied and the note handed up to him. I think this defense wholly fails.

The next defense which I will notice is that the bank had no legislative right to act as a bank, and hence all its transactions as such were void, and no cause of action accrued to it by reason of the loans made to Ramsay or any other borrower. The Middlesex County Bank was incorporated by an act of the Legislature, approved February 1, 1872, with the privilege to continue as such for 20 years. It went immediately into business, performed all the functions of a bank, until the time it failed in July, 1899. In January, 1892, it took proceedings to extend its corporate existence for 50 years, under the act of April 21, 1876 (Gen. St. p. 972, § 302). It is argued that the act cited does not apply to banks, and that proceedings for extension were void, and that the whole proceeding was in violation of section 57, p. 132, of the banking act, which forbids unincorporated persons from conducting a banking business. I shall not consider or discuss these arguments in detail, because I am of the opinion that the defendants are estopped from setting up this defense. It will be observed that section 57 of the banking act does not declare contracts for the loan of money made by a banking company, acting without legal authority, to be void. It simply prescribes a penalty upon the bank's officers. In point of fact, this bank, up to the time of its failure, was recognized by the state government authorities as a lawful institution, and was periodically visited as such by the inspectors of the banking department. Its right to exist and do business as a bank was never challenged by any state officer. No proceedings were ever instituted against it by the Attorney General. It was kept open as a bank, and received deposits from a great number of individuals, and thereby became indebted to them. It loaned those moneys out to a great number of other individuals, including Ramsay. The object of the present proceeding is to recover back from Ramsay that portion of those deposits which he borrowed and never repaid, for the purpose of distributing it, as far as it will go, among these creditors of the bank, and it is known to the court that there will be a deficiency for that object. In short, complainant is to be considered in equity as the official trustee and agent of the depositing creditors of the bank to recover the moneys which the bank, as a trustee for its creditors, loaned to its debtors. The bank as an entity, then, may be left out of view here. In my view it would be a reproach to the administration of justice, if the illegality of the bank's corporate existence could be set up in the defense of this action. I think it does not lie in the mouth of a man who borrows money from a de facto bank to set up, in defense to an action to recover that money, that the bank has no right to exist. The authorities cited by the complainant fully sustain his position in that behalf. *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Camden & Atlantic R. R.*

Co. v. Mays Landing & Egg Harbor City R. R. Co., 48 N. J. Law, 530, 7 Atl. 523; *Steam Navigation Co. v. Weed*, 17 Barb. (N. Y.) 378; *Palmer v. Lawrence*, 3 Sandf. 170; *Chester Glass Co. v. Dewey*, 16 Mass. 94, 102, 8 Am. Dec. 128. A large number of cases to the same effect are collected in the case in 17 Barb., above cited.

The next point made is that the language of the mortgages is insufficient to cover these loans. The consideration of that point necessitates an examination of those instruments and the location of the mortgaged premises. The latter consist of two tracts of land, or, more accurately speaking, one tract of land bisected by a street. Taken as a whole, it may be described as being about 750 feet in length by 460 feet in width, facing for that distance on Staten Island Sound, and lying between Fayette street and Commerce street, which run substantially at right angles with the line of the shore, and is bounded by High street on the west. It is bisected by Rector street, which leaves about three-fifths of the whole lot between it and the sound, and about two-fifths between it and High street. From the north corner of the whole tract is to be deducted a small portion belonging to Mrs. Ramsay and another small portion belonging to St. Peter's Church. The first mortgage was given by Ramsay and wife on the 3d of March, 1892, and covers the block between High and Rector streets, and secures a bond in the penal sum of \$60,000, with this condition: "Whereas the Middlesex County Bank is about to loan certain sums of money to the said Hugh Ramsay to an amount not to exceed in the whole the sum of \$30,000 by discounting his promissory notes drawn to his order payable in three months from the date thereof respectively"—with the usual verbiage that the mortgage was to be void if the notes were paid. The condition provides also for securing any renewal of such notes. The second mortgage was given on the 10th of June, 1895, and covers a parallelogram on the east side of Rector street, bounded on the ends by Liberty and Commerce streets, and on the east side by the remainder of the whole tract. The condition of this mortgage declares that it is given as additional security for the first mortgage. The third mortgage is dated the 4th of December, 1895, and covers the whole tract, and refers to an accompanying bond whose condition is as follows: "Whereas the Middlesex County Bank is about to loan certain sums of money to the said Hugh Ramsay to an amount not to exceed in the whole the sum of seventy-five thousand dollars by discounting his promissory notes drawn to his order, payable in three months from the date thereof respectively"—following precisely the language of the first mortgage, including the mention of renewals. In fact, it is quite plain, by pencil memoranda found on the face of the first mortgage, that

it was handed to the scrivener as a form for the third mortgage.

Now, the argument is that no notes at three months were ever discounted for Ramsay, but that all the loans were made on notes payable on demand, and hence were not secured by these mortgages. I am unable to see the least force in this objection, under the circumstances of this case. In the first place, its enforcement would result in rendering these instruments absolutely valueless, except as to the \$19,600 note, in which, on its face, it is declared that it is secured by a mortgage. In the next place, the evidence is overwhelming that these moneys were loaned on the strength of these mortgages, and Ramsay must have so understood it. It is quite impossible to believe that he could have understood anything else. To have done so he must have supposed that the bank was calling on him year after year to give these mortgages one after the other, and then was willing to loan him \$50,000 or \$60,000 without any security whatever. That it is quite competent for the parties to use the mortgage for a security other than that mentioned in it is entirely clear and authoritatively settled. Our courts have gone so far as to hold that a mortgage given for money loaned, which loan has been repaid and the mortgage delivered up to the mortgagor, may be redelivered for another and distinct loan and be entirely valid between the parties, and as against all other parties, except intervening incumbrancers. It is authoritatively settled in this state that it is competent to prove by parol what the real object of a mortgage is, and that it is given for the purpose not disclosed in the condition. Among the numerous cases cited by counsel I mention the following: *Bell v. Fleming*, 12 N. J. Eq. 13, affirmed Id. 491; *Robinson v. Urquhart*, 12 N. J. Eq. 515; *Flannigan v. Westcott*, 11 N. J. Eq. 264; *Hoy v. Bramhall*, 19 N. J. Eq. 564, 97 Am. Dec. 687; *Farnum v. Burnett*, 21 N. J. Eq. 87; *Griffin v. N. J. Oil Co.*, 11 N. J. Eq. 49; *Silvers v. Potter*, 48 N. J. Eq. 539, 22 Atl. 584; *Underhill v. Atwater*, 22 N. J. Eq. 16; *Atwater v. Underhill*, 22 N. J. Eq. 603; *Lanahan v. Lawton*, 50 N. J. Eq. 276, 23 Atl. 476.

I venture the suggestion, however, that under the circumstances of this case the validity of the mortgages is of little consequence. They were of record and were notice to everybody. The debt of the defendant is thoroughly established and is valid and binding on his heirs at law. The land was sold by the administratrix to pay that debt, and all the parties defendant who claim under the conveyances of the administratrix took, of course, with notice of the debt, and have never paid one cent to the administratrix. She has a vendor's lien on the premises which she can enforce, and, in my judgment, the complainant, as a creditor, is subrogated to the right of the vendor's

lien so held by the administratrix, and a very slight amendment to his bill would enable him to enforce that lien in this suit. The action of the widow and the adult heirs at law in accepting shares of stock in place of their several rights as dowers and heirs, would be binding on them for the purpose of enforcing the vendor's lien, so that the widow's dower, for that purpose is out of the way. The infant heir is, of course, bound by the acts of his ancestor. I will advise a decree in favor of the complainant for the whole amount of his claim, and that it is a first lien on the premises, with one exception. In July, 1897, Ramsay made a lease for 10 years to the defendant the New York Wood Vulcanizing Company, for about one-half of the water front, at the yearly rent of \$4,700, and it now claims that the bank waived its priority over that lease, as a condition to its being made. This claim is thoroughly established and frankly admitted by the counsel for the complainant. The arrangement, however, does not destroy the lien of the mortgage upon the rents as they accrue.

I will advise a decree in accordance with these views. The decree will also be subject to whatever rights the city of Perth Amboy may have with regards to the opening of the street through the premises, which it claims was reserved in the vacation of one which traversed the most valuable tract diagonally.

The contest between the defendants has not been argued, and its consideration will be taken up hereafter.

MOORE v. DURNAN et al.

(Court of Chancery of New Jersey. Nov. 6, 1905.)

1. INTEREST—DECREE—CONSTRUCTION.

Where a decree directed that, on complainants tendering to defendants a certain bond to indemnify defendants from any liability on a lost check, defendants should pay complainants \$450 and taxed costs, the decree required payment only after tender of the security, and therefore did not carry interest until after that date.

2. LOST INSTRUMENTS—DECREE—INDEMNITY.

Where a decree directed payment of a lost check on complainants tendering to "two defendants" a certain bond, a bond given to only one of the defendants was not a compliance with the decree.

Bill by Charles P. Moore against Charles B. Durnan and others. On motion to set aside an execution. Granted.

William J. Backes, for complainant. Martin P. Devlin, for defendants.

MAGIE, Ch. The bill in this cause was for the enforcement of a lost check for \$450. On March 8, 1902, a decree directed that, upon complainants tendering to the two defendants a bond for \$500, with sureties, etc., to indemnify defendants against any liability upon the check, defendants should pay to complainant \$450 and the taxed costs, and,

in default of payment, that the complainant should have execution for said debt and costs. On ———, 1905, complainant issued execution in the cause for \$450, with interest thereon calculated from the date of the decree. A motion is now pending to set aside the execution; the defendants claiming that it is excessive in including interest to a greater amount than the decree justifies.

It is conceded that no bond, with securities, for indemnifying the defendants, was tendered until September 25, 1905. Defendants insist that no interest can be exacted from them, except from that date. If the decree had required an immediate payment of the amount, it would doubtless have had the effect of a judgment at law, and carried interest thereon from its date. Section 44, Chancery Act 1902 (Laws 1902, p. 524); Wilson v. Marsh, 13 N. J. Eq. 289. But the decree required payment, not immediately, but only after the tender of security to indemnify; and, until that had been done, defendant could not be compelled to pay. Considering that indemnity was deemed necessary, it may be said that they could not safely pay. It follows, in my judgment, that the decree did not justify the execution for interest, except for so much as accrued after the tender of the required indemnity. I have not been referred to any authorities on this subject, and I have found no case myself, except Bushnan v. Morgan, 5 Simmons, 635, which seems in point, though the English decisions of that period on the subject of interest sustain doctrines which are not now admitted.

Among the papers submitted on this motion is a bond, which I presume was that which was tendered. If so, it does not conform to the terms of the decree, for it is given to only one of the defendants.

Upon the ground first mentioned, however, viz., that the execution is for an excessive amount, I think the motion must prevail.

TURNER v. KUEHNLE.

(Court of Chancery of New Jersey. Nov. 9, 1905.)

1. DOWER—FORFEITURE—JUDICIAL SALE—EFFECT—FRAUD.

Where a husband, in order to defeat his wife's dower interest, caused a mortgage to be foreclosed against his lands, the wife being a party to the proceedings, and prevented competitive bidding at the sale, so that the land sold for no more than the mortgage, amounting to \$4,300, and by agreement with the purchaser the husband received \$18,000, the sale was not available as against the wife in a suit by her for dower.

2. FRAUD—DEFENSES—DUTY TO INVESTIGATE.

One who has perpetrated a fraud upon another cannot set up as a defense thereto that the defrauded party should have discovered the fraud and protected himself against it at the time.

3. DOWER—VALUATION—TIME—IMPROVEMENTS.

Where a husband conveyed his land in his lifetime, the widow's dower would be measured

as at the date of his alienation, and she could acquire no benefit from subsequent improvements placed on the property or its general advance in price.

Suit by Louisa H. Turner against Louis Kuehnle for dower. Heard on demurrer to the bill. Demurrer overruled.

U. G. Styron, for complainant. John C. Reed and Thomas G. French, for defendant.

PITNEY, V. C. This is a suit for dower. The complainant, as the widow of Richard H. Turner, deceased, demands dower in some valuable real estate in Atlantic City of which her husband was seised in his lifetime, and which came by conveyance, in which she did not join, to the defendant, who is in possession of the same. The defendant claims that her dower is barred by the proceedings of foreclosure and sale under a mortgage which was paramount to her husband's title, and to which proceedings she was made a party. She sets out in her bill and challenges the binding effect upon her of the decree in foreclosure, although she was a party to it, on the ground that the amount of the mortgage was less than one-fourth of the value of the premises and of the actual price which was paid by the defendant to her husband, and that the foreclosure was voluntary upon the part of her husband and the defendant, and that they colluded in procuring the mortgage to be foreclosed and the premises to be sold thereunder for the bare amount of principal due on the mortgage, with interest and costs, and all for the express purpose of cutting off her inchoate right of dower. The question thus raised is an important and interesting one, and its solution requires a setting forth of the facts more at length. They are very well abstracted in the defendant's written argument, which I shall follow in the main.

The complainant was married to her husband in 1871, and lived with him at Atlantic City until 1894, when he deserted her and remained away until 1904, when he came to her house in Atlantic City and died. In August, 1893, he purchased the lands in question and obtained title thereto by a conveyance from one Hoffman, who, on the same day, mortgaged the premises to one Allen to secure \$4,000, who afterwards assigned the mortgage to one Fitton. This is the mortgage which was subsequently foreclosed. In 1895 her husband leased the premises for 10 years, from March 25, 1895, to one Wheeler, for a yearly rent of \$1,200. The lease contained a covenant upon the part of the husband to convey the premises at any time within one year for the sum of \$18,000, free and clear of all incumbrances. Wheeler assigned the lease and covenant to a brewing company, and Wheeler and the brewing company, or one of them, made extensive improvements upon the premises, and incurred indebtedness therein which was not paid, and lien judgments were recovered, and the prem-

ises brought to sale in January, 1896, and purchased by the defendant, to whom the lease and contract of sale were subsequently assigned, so that the defendant became entitled to demand the conveyance of the premises from the husband at the sum and price of \$18,000. The defendant filed a bill against complainant's husband in this court for the specific performance of that contract on the 11th of March, 1896, and also filed a lis pendens under that bill. Prior to the filing of that bill the defendant and the complainant's husband caused a deed of conveyance for the premises to be prepared from the husband and the complainant to the defendant for the consideration of \$18,000, and asked the complainant to execute it, but she declined. No further proceedings were had in the suit for specific performance, but in October, 1896, Fitton, the holder of the paramount mortgage, filed a bill to foreclose the same, making the complainant and her husband parties. No defense was put in by either herself or her husband. Final decree was obtained and execution issued to the sheriff of Atlantic county, and the property brought to sale on the 6th of February, 1897, and sold to the solicitor of Fitton for the amount due on the mortgage, with costs and interest. The solicitor assigned his bid to the defendant, and the sheriff made his deed to the defendant, and under that deed the defendant claims that he holds title free and clear of the complainant's dower. The description of the land shows that they consist of two lots which are apparently separate from each other.

The facts relied upon to nullify the effects of this conveyance against the complainant are as follows, which the complainant has learned since the death of her husband in 1904: The premises sold for \$4,300, the amount due on the mortgage, and were worth a great deal more than the \$18,000 mentioned in the contract of the husband, and were worth at least \$30,000 by reason of the improvements put thereon by Wheeler and the brewing company, and one Irving, shortly before the sheriff's sale, actually offered complainant's husband \$20,000 for the same, and the defendant actually paid or secured, coincident with the delivery of the sheriff's deed to him, to the complainant's husband the sum of \$18,000, including the amount paid for the sheriff's deed. Upon the refusal of complainant to join with her husband in a conveyance to the defendant, her husband, and the defendant, in order to procure a transfer of the title of the land to the defendant, discharged of the incumbrance of the inchoate right of dower of the complainant, entered into an agreement to procure the mortgage in question to be foreclosed and the premises purchased from the sheriff by the defendant, at a price sufficient only to pay the amount due on the mortgage and the costs, which costs the husband agreed to pay out of the purchase money, and it was part of

the agreement to provide against any surplus arising from the sale by discouraging and preventing competitive bidding at the sale, and it was understood between the husband and the defendant that at the delivery of the sheriff's deed to the defendant he should pay to the husband the whole \$18,000 purchase money provided for in the covenant, and that the husband and the defendant induced the holder of the mortgage to allow the same to be foreclosed and the proceedings carried through to sale in accordance with the agreement. The mortgage was not foreclosed with the honest purpose of collecting the money due thereon, but with the fraudulent intent, to use the language of the bill, "of securing an unfair and unjust advantage of your oratrix by obtaining from such proceedings the decree of this court barring the rights and interest of your oratrix in the said lands * * * by means of a sale of the lands and a deed of conveyance to the defendant." At that time the complainant's husband was the owner of real estate in Atlantic City worth at least \$30,000, and possessed of money and securities to a large amount. The sale was conducted at a hotel of which the defendant was the proprietor. The defendant is a man of reputed wealth, of extensive influence in the community, and of wide popularity. Both he and the complainant's husband were present at the sale, and caused it to be made known to those in attendance thereat, for the purpose of discouraging competition in the bidding, "that the premises were to be sold only for the purpose of making title thereto, and that the said Turner and the said Kuehnle were the only ones interested in said sale and said premises and in the objects of said sale." Those in attendance at the sale were largely the friends of defendant and the complainant's husband, and for that reason declined to bid, and only one bid was in fact made, and that was by the solicitor of the mortgagee, who was the personal counsel of the defendant and the husband, and known as such by the persons attending the sale. After the sale the solicitor, without any consideration, assigned the bid to the defendant, and the sheriff executed and delivered a deed to the defendant. The amount actually paid at its delivery by the defendant to the husband, by cash and mortgage, was \$18,650. The additional \$650 represented interest on the purchase price of \$18,000. Complainant learned of these facts after the death of her husband, and immediately employed counsel to bring suit, and instructed him to take proceedings to establish her rights in the lands. Counsel so employed failed to proceed at once, and after waiting on him a reasonable time, the exact time is not stated, she employed her present solicitor, who filed this bill on the 17th day of May, 1905, about 14 months after the death of her husband.

The demurrer charges generally a want of equity, and that her remedy is at law, if at

all, that any defense which she has to the decree should have been set up in the foreclosure suit, and that the bill is multifarious and lacking in parties. The complainant's bill does, in fact, attack the priority over the conveyance to her husband of the Fitton mortgage, but I think that that part of the bill does not set up a cause of action. She also alleges that her husband was entirely able financially to pay off and discharge the mortgage in fulfillment of his covenant to convey, and that the mortgage was in fact and in effect paid by her husband out of the purchase money, and such payment was known to the defendant, so that she is in equity dowable of the whole premises without any deduction for the mortgage. Without expressing any final opinion on that question, I shall assume, for the purposes of the demurrer, that the defendant is at least entitled to occupy the position of assignee of the mortgage and to set it up in equity against the complainant's demand by way of reducing the amount of her dower, if any she has.

The important question in the cause is whether, from the facts above displayed, the defendant can set up the benefit of the decree of foreclosure against the complainant. The language of the decree, as set out in the bill, is that the "defendant [singular] be forever barred," etc. I shall treat it as if it was in the plural, "defendants," and that it includes the complainant. It seems to be entirely settled that the machinery of a court of justice is capable of being made use of to promote injustice and to perpetrate a fraud. In other words, there is nothing so peculiarly sacred about a judgment or decree of a court of justice as, on the one hand, to prevent their being used for fraudulent purposes, and, on the other hand, to prevent this court from limiting their force and effect accordingly. *Metropolitan Bank v. Durant*, 22 N. J. Eq. 35, at page 42, affirmed 24 N. J. Eq. 556. *Mechanics' National Bank v. Burnet Mfg. Co.*, 33 N. J. Eq. 486 affirmed on appeal *Squier v. Mechanics' Nat. Bank*, 35 N. J. Eq. 344.

The bill was there filed to set aside a sale of property under a judgment and execution, on the ground that the judgment, which was for an honest debt, was recovered and the property brought to sale under it for the purpose of having the property sacrificed and bought in for the benefit of the defendant, and for the purpose of defeating the other creditors of the defendant. The last two headnotes are as follows: "Fraud perpetrated by means of a judgment is entitled to no more immunity than a fraud perpetrated by any other means. If a judgment, founded upon a just debt, is entered, not for the purpose of securing or collecting the debt, but for the purpose of being used for a cover to protect the defendant's property from his other creditors, the court will denounce it as a fraud and set it aside, as it would any other fraudulent contrivance."

To the same effect is *Kirkpatrick v. Corning*, 38 N. J. Eq. 234, in the Court of Appeals, and the same case subsequently before the same court in 40 N. J. Eq. 241. At page 257 of 40 N. J. Eq., Mr. Justice Scudder says: "While, therefore, the decree of foreclosure is conclusive as to the parties who were interested at the time in the lands foreclosed, so that they cannot attack it for informalities or want of proper parties [these were some of the grounds on which it was attacked], yet the sale of the real and personal estate may be set aside and the decree opened, if fraud be shown, and the prices paid for the land and personal estate will be inquired into to ascertain how much is equitably due from one party to the other. * * *" Further on he quotes, with approval, the language of *Kerr on Fraud and Mistake*, which I will again quote: "The strong language applied to cases of fraud is that deeds, obligations, contracts, awards, judgments, or decrees may be instruments to which parties may resort to cover fraud, and through which they may obtain the most unrighteous advantages, but none of such devices or instruments will be permitted, by a court of equity, to obstruct the requisitions of justice. If a case of fraud be established, a court of equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them. It is immaterial whether such machinery and contrivance consisted of a decree in equity and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud." *Kerr on Fraud and Mistake*, 43, 44. The peculiar fraud perpetrated in the cases just cited was the use of the judgment in the one case and the decree of foreclosure in the other for the purpose of acquiring title to property for a sum less than it was worth, and thus cutting off, in the one case, the other creditors of the defendant in the judgment, and, in the other case, the parties interested in the equity of redemption.

Such was the object of the sale under the foreclosure in the present case, and of the contrivance by which the property was sold at a price less than one quarter of the real contract price between the parties, and one-sixth of the actual value of the property. What the complainant asks is, indeed, not the setting aside the decree of sale, but that of foreclosure, which is that the defendants stand absolutely forever barred and foreclosed in the equity of redemption in so much of the mortgaged premises as shall be sold by virtue of the decree. Now, a sale fraudulently contrived and conducted in such manner as to reduce the amount bid to less than one quarter of the actual price paid for the premises, for the purpose of

defeating the just and lawful right of the complainant in the actual surplus money, ought not, in equity, to be considered and treated as such a sale as will fulfill the condition of the decree barring redemption. The decree itself consists of two parts: First, the ascertainment of the amount due and the declaration that the complainant is entitled to have the premises sold to pay the same; and second, the decree of foreclosure against all the defendants when the premises are sold, so that the actual foreclosure depends entirely upon the sale, and, in order to give effect to the foreclosure in a court of equity, it must not be a fraudulent sale, conducted in such a manner as to injure the parties affected by it.

But it is argued that complainant was guilty of a lack of proper attention to her own interests in not taking at the time positive action in asserting her rights, and that by her silence she measurably acquiesced in what was done and is estopped from now asserting them. Let us consider this aspect of the case; and in so doing we must bear in mind that she was under all the ordinary disadvantages of a woman, inexperienced in legal matters, and presumably unadvised as to her rights and how to assert them. She did, indeed, have notice that the property was proposed to be sold about a year previous to the sheriff's sale by her husband to the defendant for the sum of \$18,000, but she is not chargeable with notice that the foreclosure which took place several months later was part of a scheme to carry through that sale without her signature to the deed. Moreover, I do not feel disposed to apply to her, with full force, the maxim that ignorance of the law does not excuse. I doubt very much whether it ought to be applied under the circumstances of this case. Be that as it may, she had a right to presume that the property would bring at the sale its full value, and she was not called upon to suspect, much less presume, that the sale of property worth to her husband \$18,000, and to the person holding the contract many thousand more, could be so managed as to be sold at a sum not more than one-sixth of its real value, and such sale receive the approval of this court. She was not only not chargeable with notice, but the demurrer admits that she did not have actual knowledge of the fraudulent means by which that unlawful result was obtained. She had the right to expect that the surplus, over and above the amount of the mortgage, would be paid into this court, and that before it was paid out she would receive notice thereof, according to the rules and practice of this court, and have the opportunity to assert her rights. She is not chargeable with notice that a fraud was being practiced upon her. These considerations of themselves are, in my judgment, a sufficient answer to this objection.

But there is another consideration, and it is this: In my judgment a party who has perpetrated a fraud upon another through the forms of law, or otherwise, cannot be permitted to set up, as a defense to his fraud, that the defrauded party ought to have discovered the fraud and protected himself or herself against it at the time. It does not alter the character or effect of the fraud that it was successful, and that the defrauded party might have protected himself or herself against it, and failed, either through oversight, positive neglect, or otherwise, to do so, and in my judgment no estoppel arises out of such failure. It is not necessary at this time to determine definitively what remedy the complainant would have had against the \$14,000 surplus, if the property had been bid up to the actual amount paid, nor the remedy which she will have in this cause at the final hearing. But there seems to be little doubt as to what her remedy was at the time of the sale. The question was dealt with and decided by Chancellor Zabrieskie in *Vreeland v. Jacobus*, 19 N. J. Eq. 231, and in *Denton v. Nanny*, 8 Barb. (N. Y.) 618, where the subject is discussed and the authorities cited in an elaborate and able opinion. It may be inferred that the decision in *Vreeland v. Jacobus* led to the adoption of the 159th rule, found in the first edition of *Dickenson's Chancery Precedents*, at page 40, and the elaborate scheme for ascertaining the value of the widow's inchoate right of dower, found on pages 64, 65, of the same book. That rule, 159, was abrogated in 1886 (see 41 N. J. Eq. 1, 6 Atl. 111), for what reason I am not at present informed. But its abrogation cannot affect the right of the complainant under the doctrine laid down by Chancellor Zabrieskie in *Vreeland v. Jacobus*, which I do not find has ever been doubted or overruled.

There is as little doubt as to the remedy of the complainant herein, if the bar of the decree of foreclosure is removed as to her. As her husband did not die seised of the premises, her dower will be measured as of the date of his alienation, and she will derive no benefit from the subsequent improvements put upon the property, or its general advance in price. So, as to damages for the detention of her dower, they will commence from the date of her demand, and not from the date of the death of her husband.

Objection was taken that Mr. Flitton, the mortgagee, should have been made a party. I am unable to see the least interest that he has in this controversy. No relief is prayed against him, and no decree that the court can make can affect him in the least, either directly or indirectly.

I will advise that the demurrer be overruled, with costs, and leave to the defendant to answer within 20 days after service upon him of a copy of the order and of payment of costs.

BELLEVILLE TP., ESSEX COUNTY, v. CITY OF ORANGE et al.

(Court of Chancery of New Jersey. Nov. 13, 1905.)

1. NUISANCE — PUBLIC NUISANCE — ABATEMENT—ACTION BY TOWN.

Where a town was not charged with duties relating to the public health, it was not entitled, independent of contract, to file a bill for protection against a public nuisance common to all its citizens; such power being vested in the Attorney General.

2. MUNICIPAL CORPORATIONS—UNAUTHORIZED CONTRACTS—ENFORCEMENT.

Where complainant town contracted with defendant city, without legislative authority, that defendant, as a part of the construction of a sewer to tide water through the streets of the town, should maintain in another municipality a tidal collection chamber, to be operated in a certain manner, the town did not thereby acquire the right to compel specific performance of that portion of the contract regulating the use of such chamber for the protection of the public interests of the town.

3. SAME—CONTRACTS—SEWERS.

Gen. St. p. 622, § 4, authorizing a town to make such regulations for the laying of a sewer through its territory to tide water as might be imposed for laying its own sewers therein, did not authorize a contract between a town and a city, constructing a tidal sewer through the streets of the town, regulating the use of a tidal collection chamber in another municipality when constructed.

4. SAME—ULTRA VIRES.

A city being authorized by Gen. St. p. 622, § 4, to construct a tidal sewer and a tidal collection chamber in connection therewith, and to control the operation of such chamber, an agreement relating to its operation, if made with a person or municipal authority having property or public rights to protect, is not ultra vires.

Bill by the township of Belleville, in Essex county, against the city of Orange and others. On demurrer to the bill. Sustained.

Mr. Tamblyn and Oliver H. Perry, for complainant. William A. Lord, Edwin B. Goodell, and Mr. Halfpenny, for defendants.

EMERY, V. C. The city of Orange, by the act of April 7, 1890, entitled "An act to provide for drainage and sewerage in cities of this state" (Gen. St. p. 622), was authorized (section 4) to construct a sewer to tide water, and for this purpose, if necessary, to lay its sewer through the streets of any other township or municipality, "under such reasonable regulations, if any, as may be imposed by such township or municipality with respect to like work done therein by itself, and such street or highway shall be, as far as possible, restored to its original condition, at the proper cost of the city for whose benefit the work is done." On April 29, 1892, the city of Orange and the township of Belleville entered into a contract (annexed to the bill) by which the township consented to the construction through part of its territory by the city of Orange of a sewer to tide water; the sewer (in the language of the recital) "to be an outlet for other sewers already constructed and in the course of construction, within its

[the city's] limits." The consent of the township was given upon certain terms and conditions, all of which, except two, related to the places in the streets where the sewer pipes were to be located, the protection of public travel during the construction, the restoration of the streets, and the payment of the expense of inspection of the construction. These terms and conditions were all regulations of a character which might be imposed by the township with respect to the construction of its own sewers. Another of these "terms and conditions" related to the location of the outlet at tide water, and the fourth, the only one now in question, was as follows: "(4) A tidal chamber shall be constructed in connection with said sewer, into which all the sewage shall be carried. Said tidal chamber shall be air-tight and water-tight, and shall be emptied only during the first two hours of the ebb tide." The city of Orange expressly agreed to observe and fulfill the terms and conditions. The sewer was constructed according to the agreement, the outlet being within the boundaries of the city of Newark, and a tidal chamber, also within the city of Newark, was constructed in connection with it, and, as the bill alleges, for a considerable period after the agreement the sewage was collected in the tidal chamber and discharged within the hours specified in the agreement. The city of Orange, as the bill further alleges, subsequent to the construction of the outlet allowed other municipalities, the townships of Bloomfield and Montclair, to discharge sewage into the outlet sewer, by reason of which the sewer is overcharged, and the tidal chamber is inadequate to hold the sewage for the term required by the agreement. The agreement with Montclair for the use of the sewer was made before the contract, and the agreement with Bloomfield in the following year (1895). Both of these agreements were made under the authority of a previous act of March 26, 1890, entitled "An act to provide for drainage and sewerage in townships." Gen. St. p. 3649. The bill charges that for more than a year past the sewage has been allowed to pass through the tidal chamber into the river at all hours of the day and night; that the city of Orange refuses to collect and discharge it according to the agreement. By reason of this breach of the agreement the sewage discharged into the Passaic river accumulates at the mouth of the sewer, and is carried by the tide up the Passaic river, "to and along the property of complainant and the citizens of the township of Belleville, to the injury and damage of the property of your orator and the citizens of the said township of Belleville, and that the same is a menace to the health of the said citizens and inhabitants of the said township of Belleville." Injunction is sought compelling the specific performance of this article of the agreement, and defendant demurs to the bill for want of equity.

The bill is not filed for the protection from

an alleged nuisance of property owned by complainant, and the ownership of any property entitled to such protection is not alleged by the bill. As mere riparian owners of property situate on the tide water, it is doubtful, under the decision in *Marcus Sayre Co. v. Newark* (1899) 60 N. J. Eq. 361, 45 Atl. 985, whether the township is entitled to such protection. Nor is the complainant charged by law with any such duties relating to the public health as to entitle it, independent of any contract, to file a bill for protection against a public nuisance common to all its citizens. The Attorney General alone has this right. *Newark Aqueduct Board v. Passaic* (1899) 45 N. J. Eq. 393, 401, 18 Atl. 106.

The question in the case, therefore, is whether the township, having no property or public rights to be protected against the nuisance alleged, is entitled to the substantial relief of enjoining the alleged nuisance by a specific performance of the terms of the contract relating to the manner of the use of the sewer. This equitable remedy is usually given for the purpose of protecting rights of a complainant, or, in case of public bodies, for the protection of public rights with which they are charged by law, and relating to which there are contracts authorized by law. The township cannot, in my judgment, by a mere contract with another municipality, and in the absence of legislative authority, invest itself with the rights which belong to the Attorney General or other public authorities for the protection of public interests; nor, in the absence of like authority, could the city of Orange, by contract, give such public rights against itself to the township. The statutory authority to make regulations as to laying the sewer through the territory of the township, such as might be imposed for laying its own sewers therein, did not, either expressly or by implication, authorize a contract relating to the use of the sewer in another municipality when constructed, on breach of which the township would be entitled, as representing the common public rights, to enjoin a violation of the contract, for the sole reason that the violation resulted in a public nuisance. The remedy against the alleged public nuisance, if any remedy exists, is with the Attorney General, and the township cannot, in my judgment, acquire the right to enjoin a public nuisance on the ground of breach of contract, unless the Legislature has authorized the township to make a contract for that purpose.

It was claimed by defendant that this clause of the contract was *ultra vires*; but, as the city had power under the act to construct the tidal chamber and to control its operation, an agreement relating to this operation, if made with a person or municipal authority who had property or public rights to protect, would not, I think, have been *ultra vires*; and, not being necessarily *ultra vires*, it is possible that an action at law for nominal damages might be maintained in favor even of a contractee not having any property or public rights to protect. I do not pass

on this question, for the equitable remedy of specific performance is given, not for the mere enforcement of contracts, but because specific performance is necessary to give complainant the full benefit of the property or other rights which he is entitled to receive by the contract.

The demurrer will be sustained.

GRAF v. WEST JERSEY & S. R. CO.
(Supreme Court of New Jersey. Nov. 13, 1905.)
CARRIERS — INJURY TO PASSENGER — NEGLIGENCE — JOLTING OF CAR.

Where a train, just as it stopped, gave a lurch to one side, which caused the door of a car to shut upon the fingers of a passenger who stood in an open doorway, the facts did not warrant an inference of negligence; the motion of the car appearing to have been no more than the usual motion incident to stopping.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1205, 1223.]

Appeal from District Court of Camden. Action by Richard E. Graf against the West Jersey & Seashore Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued June term, 1905, before DIXON and SWAYZE, JJ.

Gaskill & Gaskill, for appellant. Clarence T. Atkinson and Spencer Simpson, for respondent.

SWAYZE, J. The only question necessary to be considered is whether there was negligence on the part of the defendant. The only testimony of negligence is that of the plaintiff. He was a passenger, and when the conductor called the name of the station "got up and went to the forward end of the car, and in order to avoid the final jerk of the train, as it always gives a little kind of jerk, held his hand up and steadied himself on the jamb of the door; the door was open, and all of a sudden the train gave a kind of a lurch to one side, just the second that it stopped, and the door shut down on his fingers." He subsequently testified that the car went too far, and he naturally thought there would be a jerk. The motion of the car which caused the door to close seems to have been no more than the usual motion which the plaintiff himself anticipated, and we think fails to warrant an inference of negligence. In this respect the case differs from *Field v. D., L. & W. R. R. Co.*, 69 N. J. Law, 433, 55 Atl. 241, where there was a jerk of sufficient violence to throw the plaintiff from a position inside the car over the chain on the opposite side of the rear platform, and from *Burr v. Pennsylvania R. R. Co.*, 64 N. J. Law, 30, 44 Atl. 845, where there was a very violent and unusual lurch of the car backward and forward. The trial judge should have granted the motion to nonsuit.

The judgment must be reversed, and there must be a new trial.

PEOPLE'S NAT. BANK OF NEW BRUNSWICK v. SCHEPFLIN.

(Supreme Court of New Jersey. Nov. 13, 1905.)

1. HUSBAND AND WIFE—CONTRACTS OF WIFE—SURETYSHIP.

Where, in a suit on a note, defendant claimed that at the time the note was given she was a married woman, and that it was given for her husband's accommodation to be discounted at plaintiff bank, whether the note was payable to her own order and by her indorsed before delivery to her husband, or whether it was payable to his order, was immaterial.

2. EVIDENCE—PAROL—NOTES—NATURE OF LIABILITY.

As between the immediate parties to a note, it may be proved that it was really given by the maker for the accommodation of her husband.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1962.]

3. HUSBAND AND WIFE—NOTE BY MARRIED WOMAN—LAW MERCHANT—APPLICATION.

Where a married woman executed a note for the accommodation of her husband which she was disabled by law from making, it never became her note, and the law merchant was inapplicable thereto.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Husband and Wife, § 629.]

4. SAME—STATUTORY PROVISIONS.

Defendant's husband applied to plaintiff bank for a loan, which was refused; but the bank offered to discount defendant's notes indorsed by the husband, and for this purpose defendant executed notes, of which the note sued on was a renewal, which the husband indorsed and delivered to the bank, but before the discount was made defendant was required to sign a "proceeds check" for the amount of the discount, which was charged to her to offset the discount as a part of the same transaction, and the money was then placed to the husband's credit; defendant having no bank account or other transactions with complainant bank. *Held*, that the note was given by defendant for the accommodation of her husband, and was unenforceable as against her, under Gen. St. p. 2017, § 5, providing that a married woman shall not be liable to answer on any promise for the default or liability of any other person.

5. SAME—NEGOTIABLE INSTRUMENTS LAW.

A note executed by a married woman for the accommodation of her husband, which is unenforceable under Gen. St. p. 2017, § 5, prohibiting her from becoming surety or agreeing to answer for the default or liability of any other person, is not made valid by the negotiable instruments law (P. L. 1902, p. 583), providing that every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value, etc.

Action by the People's National Bank of New Brunswick, N. J., against Louisa Schepflin. Judgment for plaintiff. On rule against plaintiff to show cause why a new trial should not be granted. Rule absolute.

Argued June term, 1905, before GUMMERE, C. J., and FORT, PITNEY, and REED, JJ.

Theodore B. Booraem, for plaintiff. Craig A. Marsh, for defendant.

PITNEY, J. This action was brought to recover the amount due upon a promissory note dated June 11, 1903, payable to the order of the plaintiff, for \$3,866.57, signed by the

defendant and her husband, Christian Schepflin, who died before the commencement of suit. The making and delivery of the note were not disputed. The defense was that it was made without consideration moving to the defendant; that at the time of the making thereof she was a married woman and gave the note as surety for her husband; and that she neither directly nor indirectly obtained any money, property, or other thing of value, for her own use or for the benefit of her separate estate, on the faith of the note. Motions for nonsuit and for direction of a verdict in defendant's favor were made upon grounds that properly raised the questions presently to be dealt with. These motions were overruled, and the learned trial justice, against objection, directed a verdict in favor of the plaintiff for the full amount of the note. A new trial is now asked, because the verdict is contrary to the evidence, and contrary to law, and because the trial justice erred in refusing defendant's motions and in directing a verdict for the plaintiff.

The evidence showed that the note in suit was the last renewal of a series of notes that had been discounted by the plaintiff bank under the following circumstances. On September 16, 1899, Mrs. Schepflin gave to her husband for his accommodation her promissory note for \$2,500, payable 4 months after date at plaintiff bank. Whether the note was payable to her own order and by her indorsed before delivery to her husband, or whether it was payable to his order, does not clearly appear, and in our view makes no difference. The note was given for the purpose of enabling the husband to procure a loan from the bank for his own benefit. He indorsed it, and presented it to the cashier for discount. The cashier testified that upon being applied to by the husband, he explained to him that the bank could not loan the money to him, but would loan it to Mrs. Schepflin. The cashier thereupon filled out what is called in the case a "proceeds check," handed it to Mr. Schepflin, and told him that if he would get the check signed by his wife the bank would discount the note. The check was in the following form:

\$2,500.00	New Brunswick, N. J.,
51.33	September 19, 1899.
\$2,448.67	

The People's National Bank pay to the order of Proceeds of Note twenty-four hundred forty-eight and 67/100 dollars.

Mrs. Schepflin signed this check, and the husband turned it over to the bank on September 21st. Whether the cashier of the bank was present at the signing of the check, or whether the husband alone was present with Mrs. Schepflin at that time, was in dispute, but in our view, the difference is immaterial. Upon the presentation of the proceeds check, bearing Mrs. Schepflin's signature, to the bank, on September 21st, the note was discounted, and the amount of the note, less discount, to

wit, \$2,448.67, was placed to the credit of Mrs. Schepflin's name upon the discount book, and carried into the ledger to the credit of her name under the heading "Sundry Accounts." At the same time, or at least on the same day, and as a part of the same transaction, the account in her name was debited with precisely the same sum on account of the proceeds check, and that sum was carried to the credit of her husband, and thereby placed subject to his disbursement, and was disbursed and used by him. On January 5, 1900, Mrs. Schepflin made another note in like form for the further sum of \$2,500, and delivered it to her husband for his accommodation and benefit. He applied to the bank to discount this note, and again was met with a refusal unless he would first procure a proceeds check from his wife. A check was thereupon filled up by the cashier dated January 4, 1900, and reading: "The People's National Bank pay to Proceeds of Note twenty-four hundred forty-eight and 67/100 dollars," and delivered to Mr. Schepflin in order that the wife's signature might be procured. It was procured, the check was returned to the bank on January 6th, and the second note was thereupon discounted, the proceeds thereof (\$2,448.67) being entered as in the former instance to the credit of her name upon the discount book and upon the ledger of "Sundry Accounts." At the same time her name was debited upon this ledger with the like amount on account of the proceeds check, and the amount was carried over to the credit of the husband. These two notes of \$2,500 each were renewed from time to time thereafter in whole or in part, the successive renewal notes being signed by Mrs. Schepflin, indorsed by her husband, and delivered to the bank. On each occasion her name seems to have been credited on the ledger with the proceeds of the renewal note and debited at the same time with the like amount, the debits being represented by the maturing notes, although these did not always agree in amount with the renewals by reason of the fact that partial payments were at different times made by the husband. This series of discounts and renewals finally eventuated in the giving of the note in suit, which represented the balance at that time due to the bank.

The evidence renders it clear beyond dispute that unless Mrs. Schepflin can be deemed to have received the proceeds of the original discounts, she did not, either at the time of the making of the original notes, or at any other time, receive any consideration of value for her own use or for the benefit of her separate estate. She had no other banking transactions with the plaintiff, kept no funds on deposit there, drew none, and gave no checks saving the "Proceeds Checks" above mentioned. Section 5 of our revised married woman's act of 1874, as amended in 1895 (P. L. 1895, p. 821; Gen. St. p. 2017), declares that any married woman shall have the right to bind herself by contract in the same man-

ner and to the same extent as though she were unmarried, "provided, that nothing here-in shall enable such married woman to become an accommodation indorser, guarantor or surety, nor shall she be liable on any promise to pay the debt, or answer for the default or liability of any other person; provided, further, however, that if on faith of any indorsement, contract or guaranty or suretyship, promise to pay the debt or answer for the default or liability of any other person, any married woman obtains, directly or indirectly, any money, property or other thing of value, for her own use, or for the use, benefit or advantage of her separate estate, she shall be liable thereon as though she were unmarried."

Under the facts of the present case the second proviso has no applicancy, and the question is whether the note in suit can have legal efficacy in view of the first proviso. The validity of the note in suit manifestly depends upon the validity of the original notes for \$2,500 each, dated September 16, 1899, and January 6, 1900. If Mrs. Schepflin did not in a legal sense receive the proceeds of the discount of those notes she was an accommodation maker. Since the notes were intended to be and were in fact indorsed by the husband she was his surety if the money was in fact borrowed by him from the bank. In *Van Deventer v. Van Deventer*, 46 N. J. Law, 460, 464, where the wife was joint maker with the husband of a note given to secure moneys borrowed by him, she was held to be a surety. If it had not been in contemplation that Mr. Schepflin should become a party to the instrument, still the wife's note made to secure a loan advanced to him would be a promise to pay his debt. Contracts of suretyship and promises to pay the debt of another person are equally within the ban of the first proviso of section 5 of the married woman's act. And as pointed out by Justice Collins in this court in *Villet v. Eastburn*, 63 N. J. Law, 450, 453, 43 Atl. 741, it is not significant that the proviso in terms prohibits the making by a married woman of an accommodation indorsement, and is silent with respect to her becoming an accommodation maker of a promissory note; the form of suretyship is immaterial. Upon a review of this decision by the Court of Errors and Appeals, the judges were divided in opinion upon another question, but there was almost unanimity upon this point. The present Chief Justice, who wrote the opinion of a plurality of the court, said (64 N. J. Law at page 645, 46 Atl. at page 736): "Although in form Mrs. Eastburn became an original debtor by signing the note in suit, she was in fact merely a surety for Cowenhoven, 'having put her name to the paper for his accommodation.'" And the opinion of Justice Van Syckel shows that he entertained a like view.

Prior to the enactment of the negotiable instruments law (P. L. 1902, p. 583), it was

held by our courts that in an action at law upon a promissory note made by two persons, one of them could not set up as a defense that he was, to the knowledge of the payee, an accommodation maker, and therefore entitled to the privileges of a surety, on the ground that his right to the status of surety was an equity not enforceable in the courts of common law. *Anthony v. Fritts*, 45 N. J. Law, 1; *Shute v. Taylor*, 61 N. J. Law, 256, 39 Atl. 663. It was pointed out by Chief Justice Beasley in *Mount v. Zlsken*, 7 N. J. Law J. 71, that evidence to show suretyship is admissible when it is offered not to vary the terms of the contract but to show the status of the party and a fact which taken in connection with the status would render the contract void, and that he had intended to say in the opinion in *Anthony v. Fritts* that this distinction must be made. As between the immediate parties to a promissory note its real character may always be shown. If the payee sues upon it it may be proved that the note was really given for his accommodation. *Messmore v. Meyer*, 56 N. J. Law, 31, 27 Atl. 938. Save for the law merchant, the real character of a note might be shown even as against a holder in due course. But if a contract, although made in fact by a married woman, is one that she is disabled by law from making, it never becomes her promissory note, and the rule of the law merchant can have no applicancy to it. *Woolverton v. Van Syckel*, 57 N. J. Law, 393, 31 Atl. 603; *Villet v. Eastburn*, 63 N. J. Law at page 454, 43 Atl. at page 742; *Id.*, 64 N. J. Law at pages 646, 650, 46 Atl. at pages 736, 737. Even with respect to parties capable of contracting, it is well settled that the rule against varying the terms of a written instrument by parol evidence does not apply at all to evidence tending to show, as between the parties, that the contract was void for want of consideration or the like. *Metler's Adm'r's v. Metler*, 18 N. J. Eq. 270, 273; *Metler v. Metler's Adm'r's*, 19 N. J. Eq. 457; *Chaddock v. Vanness*, 35 N. J. Law, 517, at pages 520, 522, 10 Am. Rep. 256; *Johnson v. Ramsey*, 43 N. J. Law, 279, at page 282, 39 Am. Rep. 580; *Middleton v. Griffith*, 57 N. J. Law, 442, at page 448, 31 Atl. 405, at page 407, 51 Am. St. Rep. 617. And this is still the case under the negotiable instruments act of 1902 (P. L. 1902, pp. 583, 587, 589, 596, 615, §§ 16, 24, 28, 29, 68, 196).

The fundamental inquiry, therefore, upon which the present case turns, is whether the loans resulting from the discount of the two notes of \$2,500 each were made to Mrs. Schepflin or to her husband; and this is a question of substance, not of form. So treating it, in our opinion the question admits of but one answer. In each instance (for the evidence renders it clear that the circumstances of the two transactions were indistinguishable), while the cashier of the bank professed an unwillingness to lend the money to Mr. Schepflin, and a willingness to lend

it to the wife, the parties proceeded to take effective measures to prevent her from having at any time the least control of the proceeds of the notes or either of them, by procuring from her, in advance of the discount, an assignment of the total proceeds by means of the two "proceeds checks" above referred to. These checks were intended to have efficacy at the very instant the note was discounted. Each note and its corresponding check, and the bookkeeping entries by which in form the proceeds of the discount were placed to the wife's credit, and in form were transferred from her credit to that of her husband by means of the check, were parts of one and the same transaction, the practical and intended effect of which was to pass to her husband immediately the proceeds of the discount, precisely the same as if the discount had been directly credited to him in the first instance and the proceeds check had been dispensed with. The bookkeeping entries, like the "proceeds checks," were pure fictions so far as they purported to evidence any transaction between the wife and the bank. Notwithstanding the fictions, the fact is clear that the bank's money remained in its own control at all times until it was placed by it within the control of Christian Schepflin. The loans, therefore, were in fact made by the bank to him.

The present case is thus clearly distinguishable from those cases in which it has been held that if the loan is made in fact to the wife she is a principal debtor and not a surety, although it be her purpose at the time to afterwards lend the money to her husband, and she proceeds to carry out that purpose when she is placed in control of the fund. Such were the cases of *First National Bank of Elizabeth v. Craig*, 1 N. J. Law J. 153, where the note in suit was discounted for the wife, the proceeds placed to her credit on the books of the bank and in her own bank book, and she drew them afterwards by her own checks payable to her husband's order; *Todd v. Bally*, 58 N. J. Law, 10, 32 Atl. 696, where there was evidence (believed by the jury) showing plainly that the loan was made to the wife, and the trial judge instructed the jury that if this was the true version of the transaction the plaintiff was entitled to recover the moneys in question, but that if the loan was made to the husband, the wife standing as surety, the defendant was entitled to a verdict, and that if the wife was the real borrower it was no consequence, whether it was her purpose to turn over the money so obtained to her husband for his use; and *Hackettstown National Bank v. Ming*, 52 N. J. Eq. 156, 27 Atl. 920, where the husband discounted the note ostensibly for his wife's benefit, received a check for the proceeds payable to her order, and afterwards took this check to her and persuaded her to in-

dorse it over to him. It was held by Vice Chancellor Pitney (52 N. J. Eq. at page 163. 27 Atl. at page 923) that the drawing of the check to the order of the wife and handing it to the husband was a mere offer of a loan to her on the note, that until she accepted that offer and used the check by indorsing it the contract of lending was merely executory, and that her action in indorsing the check completed a contract of lending between the bank and her, so that she became the borrower. In those cases the wife at the time of the discount became the actual recipient of the money, or its equivalent, which thereupon became her separate property and subject to her own disposition by virtue of the married woman's act. In the case before us, there was no instant of time during which the defendant had possession or control of the proceeds of the discounts. The loans were not made, nor was any credit entered in her name at the bank, until after the "proceeds checks" had been lodged with the cashier. In form—in fiction—those checks operated to assign in advance the proceeds of a loan made to her; in substance and in fact they prevented, as they were intended to prevent, the loan from reaching her.

To attribute any binding force to her promissory notes given under such circumstances would be running counter not only to the spirit but to the letter of section 5 of the married woman's act. It may be suggested that if a married woman is to be permitted, as in the cases just cited, to lend to her husband, or to another, moneys borrowed by her as soon as she receives them, there is little more mischief in permitting her to assign the proceeds of the loan in advance of receiving it. But this is a question of policy that it is the province of the Legislature to deal with, not of the courts. Moneys once received by the wife, although they be borrowed, become her property, which the statute permits her to give away or lend as she pleases. So she may pledge or mortgage her separate property to secure the debt of her husband or any third party. But the statute disables her from mortgaging her future to secure the debt of another, which is the effect of a contract of suretyship or the like. The original notes in question here, and most of the renewals, were given prior to the negotiable instruments act of 1902. The note in suit was given after the passage of that act. In our view this makes no difference. This statute gives no validity to the contract of a married woman, made by way of surety or promise to pay the debt of another person.

It follows that the learned trial justice erred in refusing defendant's motions for nonsuit, and for direction of a verdict, and the rule to show cause should be made absolute.

GRILLEY v. ATKINS.

(Supreme Court of Errors of Connecticut. Dec. 15, 1906.)

1. DEEDS—DEPOSIT FOR DELIVERY ON GRANTOR'S DEATH—EFFECT.

Plaintiff's mother executed a deed to plaintiff and delivered the same to P., who, though he drew the deed, was not the grantor's general attorney or agent, directing him to deliver the deed to plaintiff on the grantor's death. P. inclosed the deed in an envelope, on which the grantor signed and sealed an indorsement that she placed the deed in escrow in the hands of P., to deliver to the grantee or his heirs at her death. Held that, by delivering the deed to P., the grantor parted with all right of dominion or control over it, and that such delivery was a present delivery of the deed.

2. SAME—TIME OF TAKING EFFECT.

Where a grantor delivered a deed to a third person, to be delivered by the depository to the grantee on the grantor's death, the grantee took an immediate estate, subject to a life use of the grantor.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 298.]

3. SAME—REVOCATION.

A voluntary deed, delivered to a third person, to be delivered by him to the grantee on the grantor's death, cannot be revoked by the grantor.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 549.]

Appeal from Superior Court, New Haven County; George W. Wheeler, Judge.

Suit by William F. Grilley against Homer L. Atkins for the cancellation of a deed. From a decree in favor of complainant, defendant appeals. Affirmed.

Edward F. Cole, for appellant. Charles G. Root, for appellee.

TORRANCE, C. J. The plaintiff and the defendant are half-brothers, sons of the same mother, Eunice A. Atkins. She died in September, 1899, aged 86 years. The dispute between the brothers relates to the ownership of land lying in the town of Waterbury, and described in the first paragraph of the complaint. The plaintiff claims the land under a deed from his mother made in April, 1898, hereinafter for brevity called "deed A," while the defendant claims it, or a portion of it, under a deed from her made in June, 1899, hereinafter called "deed B." The controlling facts in the case are in substance as follows:

On April 14, 1898, Mrs. Atkins, accompanied by the plaintiff, went to the office of Wilson H. Pierce, Esq., a practicing attorney in Waterbury, and Mrs. Atkins then requested him to draw a deed, to be executed by her, conveying to the plaintiff, subject to her life use, a certain piece of land situated in Waterbury, with a dwelling house thereon, described in the first paragraph of the complaint. Pierce drew said deed, and the same was then and there duly executed by Mrs. Atkins; and thereupon, at her request and by her direction, he placed said deed in an envelope and sealed it up. The deed in said envelope was then delivered to Pierce by Mrs. Atkins, with instruction to keep and hold the

same as an escrow, and to deliver the same upon her death to the plaintiff; and at the request of Mrs. Atkins Pierce then and there wrote the following words upon said envelope: "I hereby place the within deed as an escrow in the hands of Wilson H. Pierce, my attorney, to deliver the said deed upon my death to my son William F. Grilley of Waterbury, or his heirs, to be recorded." Mrs. Atkins then placed her name and seal on said envelope under said words, as follows: "Eunice Atkins. [L. S.]"—and Pierce then wrote upon said envelope: "April 14, 1898. Deed in my hands as an escrow, to be delivered to William F. Grilley, of Waterbury, upon the death of Eunice A. Atkins. W. H. P." Pierce had never before this time, and never thereafter, acted as the attorney of Mrs. Atkins. All that Pierce did for Mrs. Atkins on this occasion was to draw the deed and take the acknowledgment, make the indorsement upon the envelope, and place the same in his safe. At the time of the delivery of said deed to Pierce there was no intent upon the part of Mrs. Atkins to keep control of said deed, and she never in fact kept or retained control of the same. The delivery to Pierce was made by Mrs. Atkins with the intention that it should be a delivery in escrow. Said deed was left with Pierce with the knowledge and consent of the plaintiff. On or about February 20, 1899, Mrs. Atkins went to Pierce's office and demanded of him said deed left by her with him April 14, 1898, but he refused to give it to her upon the ground that he had no legal right to do so without the consent of the grantee therein. On June 29, 1899, Mrs. Atkins, accompanied by the defendant, went to an attorney in Waterbury, who drew up a deed which was duly executed by Mrs. Atkins and which purported to convey to the defendant certain lands, including the house and a portion of the lot described in paragraph 1 of the complaint. Neither of said deeds was given upon a valuable consideration.

Mrs. Atkins died at Wolcott early in the morning of September 29, 1899. In the forenoon of said day the plaintiff and defendant were at the home of the defendant where Mrs. Atkins lay dead, and the defendant pretended to the plaintiff that he was going to Bristol, leaving the plaintiff to come to Waterbury to make some arrangements for the funeral. The plaintiff came to Waterbury, and, after making some arrangements for the funeral, went to the office of Pierce about 3:30 p. m. on said day, demanded and received from him the deed left in escrow, and took the same to the office of the town clerk of the town of Waterbury, where he left it to be recorded at 3:30 p. m., and the same was duly recorded. Instead of going to Bristol, the defendant on said day came to Waterbury and left at the town clerk's office for record said deed of June 29th, at 3:15 p. m. The defendant, before June 29, 1899, knew of the existence of said deed left in escrow, and

knew that it was to be delivered to the plaintiff upon the death of Mrs. Atkins. The plaintiff had no knowledge of the defendant's deed of June 29th until after said September 29th. When Pierce delivered said deed left in escrow to the plaintiff, he wrote on the envelope containing the deed: "Received the within deed this 29th day of September, 1899, 3:30 p. m."

Upon these facts the trial court set aside deed B, and ordered the defendant to execute and deliver to the plaintiff a release deed of the land described in deed A; and this appeal is based upon alleged errors made by the court in so doing.

Where a deed is placed in the hands of a depositary for conditional future delivery to the grantee, a distinction has by some courts been recognized between cases where the future delivery depends upon the performance of some condition, and those where it depends upon the death of the grantor. In the former case the deed does not become operative until rightfully delivered by the depositary to the grantee, while in the latter, upon delivery to the depositary, it is deemed to be the grantor's deed presently, taking effect for many, if not for most purposes, from the time of its delivery to the depositary. The deed in either of these cases is usually called an "escrow," but perhaps more frequently and more properly that word is used to designate the deed in the former, rather than in the latter, case. In *Foster v. Mansfield*, 3 Metc. (Mass.) 412, 37 Am. Dec. 154, Chief Justice Shaw states the distinction in this way: "Where the future delivery is made to depend on the payment of money, or the performance of some other condition, it will be deemed an escrow. Where it is merely to wait the lapse of time, or the happening of some contingency, and not the performance of a condition, it will be deemed the grantee's deed presently. Still it will not take effect as a deed until the second delivery; but when thus delivered it will take effect by relation from the first delivery." This distinction between a deed placed in the hands of a depositary to be "delivered" by him upon the performance of some condition, and a deed "delivered" to the depositary to be by him handed over to the grantee at the death of the grantor, is recognized quite generally throughout the United States (2 Amer. & Eng. Ency. of Law, 342; 16 Cyc. 566, and cases there cited); but the courts are not agreed either as to the complete effect to be given to the "delivery" to the depositary, or as to the time when the title passes to the grantee. Some courts seem to hold that for many purposes the deed becomes operative and title passes when the deed is delivered to the depositary; others, that it does not become operative till the death of the grantor, and then by relation takes effect from the "delivery" to the depositary; while still others seem to hold that the "delivery" to the depositary conveys title immediately to the grantee, subject to the

life interest of the grantor. *Foster v. Mansfield*, 3 Metc. (Mass.) 412, 37 Am. Dec. 154; *Hathaway v. Payne*, 34 N. Y. 92; *Haeg v. Haeg*, 53 Minn. 33, 55 N. W. 1114; *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; *Baker v. Baker*, 159 Ill. 394, 42 N. E. 867; *Brown v. Westerfield*, 47 Neb. 399, 66 N. W. 439, 53 Am. St. Rep. 532; *Arnegard v. Arnegard*, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258.

To a certain extent such a distinction is recognized in our own reports. In *Belden v. Carter*, 4 Day, 66, 4 Am. Dec. 185, the deeds were left with a third party with directions to keep them, and, if the grantor never called for them, to deliver them after the grantor's death to the grantees, but, if the grantor called for the deeds, to deliver them to him. The grantor died without recalling the deeds. It was held that the delivery to the third person was a delivery of the grantor's deeds presently; that the depositary held them in trust for the grantees; that the title became consummate in the grantees upon the death of the grantor; and that the deeds took effect by relation from the time of the first delivery. The placing of the deeds with the depositary was held to be a delivery of the grantor's deed presently, although the grantor during his life retained full control of the deeds and could recall them at pleasure. The ruling upon this last point in the above case is opposed to the overwhelming weight of authority (see note to the case of *Munro v. Bowles*, 54 L. R. A. 872, and cases there cited), and it would not probably be followed in this state today. *Porter v. Woodhouse*, 59 Conn. 568, 22 Atl. 299, 18 L. R. A. 64, 21 Am. St. Rep. 131. In *Stewart v. Stewart*, 5 Conn. 316, James Stewart made a deed of land to his children, and delivered it to a third party to hold till the grantor's death and then to deliver it to the grantees. After his death the deed was duly delivered to the grantees. It was held, following *Belden v. Carter*, that the deed when placed in the depositary's hands was the grantor's deed presently, consummate upon his death, and "efficacious to the passing of the interest conveyed, from the delivery to the trustee or agent." The instrument was held not to be a devise, "but a deed taking effect from the first and only delivery, and consummated by the death of the grantor." In *Jones v. Jones*, 6 Conn. 111, 113, 16 Am. Dec. 35, Chief Justice Hosmer says, in effect, that the delivery of a deed to a third party to the use of the grantees, to be delivered to them after the death of the grantor, is by legal operation a delivery to the grantees themselves; and, although this was an obiter dictum, it is worthy of note "as the opinion of an eminent judge." *Walte, J.*, in *Woodward v. Camp*, 22 Conn. 458, 461. In the last-named case a married woman united with her husband in the execution of a deed of land, and gave it to her husband with directions to deliver it to the grantee at her death. It was held in effect

that the delivery to the husband was a delivery in present, vesting the title in the grantee, to become effectual and consummated upon the death of the grantor. On the other hand, in the cases cited below, the deeds and other instruments delivered to third parties for future conditional delivery were held to be escrows, having no operative force until the second delivery. *Wolcott v. Coleman*, 1 Conn. 375; *Huntington v. Smith*, 4 Conn. 235; *Turner v. Coe*, 5 Conn. 94; *Sparrow v. Smith*, 5 Conn. 113; *Raymond v. Smith*, 5 Conn. 555; *White v. Bailey*, 14 Conn. 271.

Whether in a given case the delivery of a deed to a third party, to be delivered by him to the grantee after the grantor's death, is to be deemed a delivery in present or not, is generally a question of fact depending upon the conduct and intention of the parties to such a transaction. Two of the essential features of such a delivery are these: (1) The grantor must deliver the deed to a third person for the benefit of the grantee ultimately, and in some way express his intention to that effect; and (2) by the very great weight of authority the grantor must, at the time of such delivery to the third person, part both with the possession of the deed and with all dominion and control over it. See the cases cited to this effect in the note to the case of *Munro v. Bowles*, 54 L. R. A. 871, 872; *Porter v. Woodhouse*, 59 Conn. 568, 22 Atl. 299, 13 L. R. A. 64, 21 Am. St. Rep. 181. A delivery so made and accepted by the grantee is irrevocable by the grantor, and cannot by him be recalled, or revoked, or modified, without the consent of the grantee. *Arnegard v. Arnegard*, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258; *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; *Issitt v. Dewey*, 47 Neb. 196, 66 N. W. 288; *Everett v. Everett*, 48 N. Y. 218; 16 Cyc. 568, and cases there cited. We think the facts found in the case at bar clearly show that the delivery of deed A to Mr. Pierce was in effect a present delivery of it, to be held by him for the benefit of the grantee and subject to the life use of the grantor, and at her death to be surrendered by him to such grantee. As shown by her request to Pierce, the grantor fully intended to pass the fee of the property to the plaintiff at the date of the deed, subject only to her life use; and the transaction into which she then entered with Pierce and the plaintiff was well adapted to carry out her intent. She intended to and did, in delivering the deed to Pierce, part with the possession of the deed, and with all her dominion and control over it.

The defendant claims that the delivery to Pierce was of no effect because he was the agent and attorney of the grantor, and consequently that the deed in his hands was in her hands. If the facts found supported the above claim, the claimed consequence would undoubtedly follow; but they do not; on the

contrary, they clearly show that, in taking delivery of deed A, Pierce was not the agent of the grantor in any respect. The defendant further claims that, as deed A was made without consideration, the delivery of it to Pierce could be revoked by the grantor at will; and in support of this claim he cites the cases of *Belden v. Carter*, 4 Day, 66, 4 Am. Dec. 185, and that of *Hoig v. Adrian College*, 83 Ill. 267. These cases do not support his claim. In *Belden v. Carter* the grantor expressly retained control of the deed during his life; and in the Illinois case cited it was held, merely, that a deed of land intended as a gift may be withdrawn before delivery of it is complete. In the case at bar the gift was accepted and complete before the grantor attempted to revoke the delivery of the deed, and then it was too late, as is held even in cases where the deed was made without consideration. *Brown v. Austen*, 35 Barb. 341; *Issitt v. Dewey*, 47 Neb. 196, 66 N. W. 288; *Brown v. Westfield*, 47 Neb. 399, 66 N. W. 439, 53 Am. St. Rep. 532.

Upon the facts found in this case we think that the delivery to Pierce was irrevocable by the grantor, without the consent of the grantee; that by such delivery the title to the fee of the land described in deed A immediately passed to the plaintiff, subject to the grantor's life use; and that such title, as against the grantor, and as against the defendant, her subsequent grantee without consideration and with knowledge of the existence and delivery of deed A, is a good and valid superior title.

There is no error. In this opinion the other Judges concurred.

BOARDMAN v. BOARDMAN et al.

(Supreme Court of Errors of Connecticut. Dec. 15, 1905.)

TRUSTS — CAPITAL AND INCOME — DIVIDENDS ON STOCK.

Testator's will created a trust fund, the income to go to his widow for life, and on her death the corpus to certain remaindermen. Shares of bank stock were set apart to such fund, and thereafter the bank absorbed another, and the transaction by which the absorption was brought about resulted in the declaration of an extra dividend. The funds out of which the dividends were paid could not be traced to their source, but after payment the price of the stock was greater than at the institution of the trust, and the capital of the bank was unimpaired. *Held*, that the dividend was income, and did not belong to the corpus of the fund.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 383-385.]

Case Reserved from Superior Court, New Haven County; William S. Case, Judge.

Suit by William J. Boardman, as trustee under the will of William W. Boardman, deceased, against Lucy H. Boardman and others, to determine rights to a fund in the hands of the trustee. Questions of law arising upon an agreed statement of facts re-

served for the advice of the Supreme Court. Rights determined.

Henry C. White and John Q. Tilson, for plaintiff. Burton Mansfield, for defendants.

PRENTICE, J. William W. Boardman, who died in 1871, left a will by which he created a trust fund of \$200,000. His widow, Lucy J. Boardman, and his nephew, William J. Boardman, are the trustees of this fund. By the terms of the will, "the dividends, rents and profits" of the fund were to go to his said wife during her natural life. The remainder over passed into the residue of the estate, which was given to a sister and the testator's nephews and nieces named in the will. May 7, 1872, certain securities belonging to the estate were distributed and set apart to this fund. Among them were 100 shares of the capital stock of the National Bank of Commerce of New York, of the par value of \$100 each, and 200 shares of the capital stock of the Mechanics' National Bank of New York, of the par value of \$25 each. The former stock was then appraised at \$118 a share and the latter at \$33.75, or \$135 for each \$100 of stock. In 1877 the capital stock of the National Bank of Commerce was reduced one-half by the payment back to the stockholders of the par value of the surrendered stock. This left the holding of the trust fund in this stock at 50 shares. The balance of the original holding was represented by the cash paid, as aforesaid, in the reduction process. In 1903 the Bank of Commerce took over the assets, business, and liabilities of the Western National Bank of New York. This merger or absorption was accomplished by the following process: It was agreed by the parties that the Bank of Commerce should become the purchaser of the assets and business of the Western and assume its liabilities, and that the latter bank should liquidate; that to this end the capital stock of each bank should be increased, that of the Bank of Commerce from \$10,000,000 to \$25,000,000, of which sum, however, \$12,500,000 should not be issued, except to consummate the purchase, and that of the Western to \$12,500,000; that each bank should have a surplus of \$5,000,000; that the assets of each over and above those required to create such capital and surplus might be declared to its stockholders in dividends; and that, when this was accomplished, the Bank of Commerce should issue \$12,500,000 of its authorized increase in payment for the assets and business of the Western, which should thereupon be transferred to the former bank. This course was pursued, whereupon the Bank of Commerce became one with \$25,000,000 of capital and \$10,000,000 of surplus, and the Western Bank ceased to exist. In the process thus outlined the Bank of Commerce increased its capital stock by \$15,000,000. Of this amount \$12,500,000 was

retained, and \$2,500,000 was at once issued so as to raise its existing capital, in anticipation of the merger, to \$12,500,000. The right to subscribe for this issue was given to stockholders at the rate of \$140 a share; each owner of four shares having the right to take one new share. This right attaching to the stock held by the trustees was exercised by them, and the stock thus acquired added to the corpus of the fund. Upon the completion of the preparations for the merger the bank found itself possessed of assets in excess of its capital of \$12,500,000 and of the \$5,000,000 of surplus agreed to be retained, and the directors thereupon declared a cash dividend of 57½ per cent. for the purpose of surrendering this excess to the stockholders. Pursuant to this declaration there was paid to the trustees the sum of \$2,875, which they now hold. In the communication to the shareholders, in which the board of directors first made known the proposed plan of merger, it was stated, in connection with the provision for a large dividend, that, "of course, the payment of such a dividend is conditional upon, and can be made only as a part of, the consummation of the plan in its entirety." For 10 years prior to the events last recited the Bank of Commerce had paid regular dividends of 8 per cent. per annum. In April, 1900, and again in July, 1903, special dividends of small amounts had been declared. Following the payment of said dividend of 57½ per cent., the market value of the stock of said bank did not fall below \$215 a share. In 1904 the Mechanics' National Bank of New York absorbed the Leather Manufacturers' National Bank of New York by a process precisely similar in all pertinent particulars to that already described. The capital stock of the Mechanics' was increased from \$2,000,000 to \$3,000,000, of which amount \$310,000 was issued to its shareholders at par, and \$690,000 retained and finally issued in payment for the assets and business of the Leather Manufacturers'. The Mechanics' was to have at the time of the merger and had \$2,310,000 of capital and \$3,092,174 of surplus, the Leather Manufacturers' \$600,000 of capital and \$1,017,600 of surplus. The Mechanics' after the transaction was completed, and its \$690,000 of new stock issued in payment, thus had \$3,000,000 of capital and \$4,409,000 of surplus. The dividend declared by the Mechanics' was at the rate of 89 per cent., yielding \$1,950 to the trustees. For 10 years prior to the merger the Mechanics' had paid 10 per cent. in dividends regularly. Subsequent thereto the market price of said stock did not fall below \$235 a share. The trustees availed themselves of the opportunity offered to subscribe at par for their pro rata share of the \$310,000 issue of stock, and thus took 30 shares. The source of the funds out of which the dividends were paid cannot be traced.

Mrs. Boardman, the life beneficiary, claims that she is entitled to have the whole amount of the two cash dividends paid as above stated. Those representing the remainder interest claim that their amount less only \$125, being the equivalent of a regular quarterly dividend on the Bank of Commerce stock, should be added to the corpus of the trust fund. The conflicting claims thus made are the same as those which were under discussion in *Smith v. Dana*, 77 Conn. 543, 60 Atl. 117, 69 L. R. A. 76, and the conclusions then reached are controlling of the rights of the parties in this case. In that case we reaffirmed the so-called Massachusetts rule that ordinarily cash dividends upon corporate stock are to be regarded as income and stock dividends as capital. It was not claimed for this rule that it was one whose application would accomplish exact justice in all cases. What was claimed was that some clear, intelligible, and workable rule was a necessity, and that the difficulties in the way of stating any other practical rule were so insurmountable as to render the chosen one, if employed with a due regard for the substance and intent of the vote of declaration, the fairest and best for general use, all things considered, which could be devised. The application of this rule would confessedly bar the claim here made on behalf of the remainder interest. But the opinion in *Smith v. Dana* recognized the possibility that there might be exceptional situations which would call for exceptional treatment; and the remaindermen here rest their claim upon the assertion that the circumstances of this case reveal such a situation. In the former case we stated our conclusion that the adopted rule, when interpreted and applied as there indicated, was such a judicious one for general application that few, if any, exceptions to it should be admitted. But whether more or less exceptions are to be recognized, it is clear that no appeal can be successfully made for any which does not find its justification in a demonstration clearly made, that the general rule would under the conditions work inequity, and that some other determination of the conflicting claims would lead to results more in consonance with the strict rights of the parties. In *Smith v. Dana* we recognized, and whether by way of an exception or not we had no occasion to determine, that where any part of the capital of a corporation was being surrendered and paid back to the share owners, although through the form of a cash dividend, the benefit of that dividend should accrue to the capital interest. The reason and justice of this as according to the parties their clear rights are evident. It cannot be claimed that there is anything in the circumstances of the present declarations of dividends to make them the means whereby capital was sought to be returned to stockholders. If the case presents any situation which deserves to be regarded as exceptional, it must be found in other condi-

tions. It is claimed to be found in the fact that the dividends were declared as incidents of the merger of two corporations and for the immediate purpose of so adjusting the capital and assets of the merging institutions that the merger could be accomplished. It is not suggested, nor do we discover, how this bears upon the rights of the parties before us. It matters not whether the transactions of which the declarations were incidents are, from the point of view of the surviving banks, to be regarded as mergers, or as expansions through acquisition, or as something else. The ultimate purpose which the stockholders had in view can of itself have no significance in our present inquiry. The pertinent question is, what was in fact done in the matter of the declarations, what were the resources drawn upon in the payment of the dividends, and what was their effect upon the assets of the corporations and the stock, as bearing upon the conflicting capital and income interests? The investigation to be made is one which looks beneath the surface to discover what there was in the operation or effect of the present dividend declarations which justifies these remaindermen in asserting that they ought in equity and right to have the benefit of them, and that to permit a different result would be to suffer a palpable injustice to be done.

We find the facts to be that the capital of each of the banks in which the trust fund owned stock was increased, the capital interest in the trust stock receiving all the benefit resulting therefrom; that the funds out of which the dividends were paid cannot be traced to their source; that after they were paid each bank had an unimpaired capital, the full amount required to be retained by national banks as a surplus fund, any amount, as in the case of the Bank of Commerce, received as contributions from shareholders through the premium paid upon new issues of stock, and a considerable amount of assets besides; and that, following the dividend payments, the market value of each stock remained at more than \$2 for each \$1 of capital, and nearly twice as high as it was at the institution of the trust. Rev. St. U. S. § 5199 [U. S. Comp. St. 1901, p. 3494]. These facts clearly disclose that there was no surrender of capital in the case of either corporation. The dividends having been paid out of funds which cannot be traced specifically, and their payment having left an unimpaired capital and a net surplus as described, they were paid out of surplus. Having been paid out of surplus, the presumption is that they were paid out of profits. *Smith v. Dana*, 77 Conn. 543, 555, 60 Atl. 117, 69 L. R. A. 76. There is nothing whatever in the agreed facts to rebut this presumption. On the contrary, as the corporations were both national banks, there is much to indicate that the presumption is one supported by the fact. Rev. St. U. S. §§ 5136, 5137 [U. S. Comp. St. 1901, pp. 3455, 3460]. The remaindermen

have therefore failed to show, and the burden is upon them to do so, that the operation of the rule of general application would be to take from the corporation aught which was not the direct contribution of profits, or to otherwise wrongfully injure the capital interest, either by its improper depreciation or by a diversion therefrom of anything to which it is rightfully entitled, or in any other manner. Their contention, when analyzed, resolves itself into one whose sole foundation is the mistaken notion, which so frequently appears in arguments in support of the claims of remaindermen, that in some unexplained way profits which are not promptly declared in dividends, but are for some reason or other, influencing the exercise of that large discretionary power which is vested in directors, permitted to accumulate in the form of surplus, acquire some sort of character which deprives the income interest of any equitable claim upon them, even if they later chance to follow the course they might have originally followed and go out in cash dividends, and entitles the capital interest to the benefit of them as an accretion thereto, whatever course may be thereafter pursued in respect to them. It was one of the aims of the opinion in *Smith v. Dana* to combat that fallacy. In reaching our conclusion, we have given to the language of the will creating the trust which gave to Mrs. Boardman "the dividends, rents and profits" of the fund no peculiar significance favorable to her, but have treated the quoted words as synonymous with "use and income," as the remaindermen urged that we should.

The superior court is advised that Mrs. Lucy H. Boardman is entitled to receive from said trustees the full amount of said two dividends received by them. Costs in this court will be taxed in favor of Mrs. Boardman and against the other defendants. In this opinion the other Judges concurred.

CLARK et al. v. FITZSIMMONS.

(Supreme Court of Errors of Connecticut. Dec. 15, 1905.)

1. APPEAL—FINDINGS—REVIEW.

Where there was evidence from which the court might lawfully draw the inferences of fact which supported the judgment, and it did not appear that the court omitted to find any admitted or undisputed fact material to any question of law, the court's findings would not be interfered with on appeal.

Appeal from Superior Court, New Haven County; William S. Case, Judge.

Action by George L. Clark and others against Fannie Fitzsimmons to set aside an alleged voluntary conveyance of land for mistake, fraud, undue influence, and incapacity on the part of the grantor. A judgment was rendered in favor of defendant, and plaintiffs appeal. Affirmed.

William B. Stoddard, for appellants. William H. Comley, Jr., for appellee.

HAMERSLEY, J. This appeal is not advisedly taken. It presents no contested question of law. The judgment rendered is clearly the true legal conclusion from the facts found by the trial court. It is not assigned as error that the court was controlled or influenced by any erroneous view of the law in reaching its conclusions of fact. The appellants in their brief confess that, if the facts are true as found by the trial court, they have no case in court, but claim that certain material facts found by the court and upon which its judgment was based were found without any evidence, and ask that the finding may be corrected. It is manifest from an inspection of the evidence certified that this claim and request are made without reasonable foundation. There plainly was evidence from which the court might lawfully draw the inferences of fact which support its judgment, and it does not appear that the court has omitted from the finding any admitted or undisputed fact material to any question of law. There is no occasion for a correction of the finding. *Hourigan v. Norwich*, 77 Conn. 358, 368, 59 Atl. 487.

There is no error in the judgment of the superior court. The other Judges concurred.

HARRISON et al. v. INTERNATIONAL SILVER CO.

(Supreme Court of Errors of Connecticut. Dec. 15, 1905.)

1. PARTITION—ACTIONS—TENANTS IN COMMON—POSSESSION—NECESSITY—STATUTES.

Gen. St. 1888, § 1307 (Gen. St. 1902, § 1037), provides that courts of equity may, on the petition of any person interested, order the sale of any estate, real or personal, owned by two or more persons, when in the opinion of the court a sale will better promote the interests of the owners. As first passed in 1848 (Laws 1848, p. 49, c. 59), the first section of the act provided that the superior court, as a court of equity, might order the partition of any real estate held in joint tenancy, tenancy in common, or coparcenary, and section 2 (page 50) that the court might, on the petition of any person interested, order the sale of any real estate so held, whenever in its opinion a sale would better promote the interests of all parties than a partition. Comp. St. 1854, p. 480. The section, as modified in 1852, 1853, and 1858, appeared in Revision 1873, p. 481, as it now stands. *Held*, that under the statute a person actually ousted of possession by his alleged tenant in common cannot seek a court of equity for the purpose of establishing his title and regaining possession and thereupon obtaining a decree of partition and sale; the statute introducing no new principle into the common-law rule.

2. SAME.

One claiming to own land as tenant in common with others and actually ousted must establish a unity of possession before asking partition.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, § 60.]

3. DISMISSAL—DEFECT OF PARTIES.

Where, in an action for sale of land by tenants in common, defendants couple with their defense a counterclaim, asking affirmative relief confirming and establishing the title to

the land, and it appears that parties necessary to an adjudication are not parties to the action, it should be dismissed.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dismissal and Nonsuit, § 127.]

Case Reserved from Superior Court, New Haven County; Ralph Wheeler, Judge.

Action by Alexander Harrison and others against the International Silver Company for sale of land owned by tenants in common, brought to the superior court in New Haven county on the first Tuesday of March, 1900. After answer by the defendant the court found the facts and reserved the question as to what judgment shall be rendered by the superior court upon said facts for the advice of this court. Judgment advised for defendant.

The plaintiffs are sons of Apollos W. Harrison and Margaret L., his wife. Prior to 1873 Apollos W. Harrison and wife and his children, namely, the plaintiffs Margaret A. Harrison and Apollos Butler Harrison, who is since deceased, and whose interest passed in equal shares to his sister and the plaintiffs, claimed to be owners of the land described in the complaint by force of provisions of the will of Thomas Belden, deceased, whose estate was settled as a testate estate in 1842; Harrison and wife claiming a life estate in the wife and the children the remainder. In 1873 the land was purchased by and conveyed to one Tobias Kohn, under whom the defendant now claims title. At that time the plaintiffs were minors, being, respectively, 18 and 20 years of age and their sister was of full age. Mrs. Harrison was then insane, and one H. H. Fitch was her conservator, and as such in charge and possession of the land. Apollos W. Harrison and his daughter, Margaret A., conveyed their interest in the land to Kohn by warranty deed. Fitch, as conservator of Mrs. Harrison and guardian of her minor children, conveyed the land to Kohn by deed reciting that he was duly authorized to make such conveyance as guardian and conservator by an order of a court of probate passed on June 28, 1873. Kohn paid to Fitch, for the interests of Harrison and wife and their children, about \$3,500, which was the fair value of the land conveyed. Fitch charged himself as conservator with the proceeds of the sale, and remitted said proceeds to Apollos W. Harrison, husband of Margaret L. and father of the plaintiffs. Since the conveyance to Kohn the land has been conveyed by Kohn and his successors in title, has been mortgaged and the mortgages thereon foreclosed, and through a series of mesne conveyances was finally sold to the defendant in April, 1899. In 1874 buildings and improvements were erected on the land by the defendant's predecessor in title at a cost of \$45,000, and said improvements have since been maintained by the defendant and its predecessors in title. Apollos W. Harrison died in 1886, and the same year his sons, the

plaintiffs, first learned of the conveyances of said land, and became advised of certain defects in the appointment of Fitch as their guardian, which, as was claimed, rendered his conveyance of their interest in the land to Kohn absolutely void, and were advised that they could not commence any action against the parties in possession of and claiming to own the land until after the death of their mother, which occurred December 28, 1898. The plaintiffs gave no notice of their claim to the persons occupying and claiming to own the land until shortly before the commencement of this suit. In February, 1900, the plaintiffs brought this complaint, alleging themselves and the defendant to be in possession as tenants in common of the land in question, and that they own an undivided two-thirds and the defendant an undivided one-third thereof, and claiming a sale of the land. The defendant in its answer denied each allegation of the complaint, and set up a second defense, coupled with a counterclaim. The finding of the court shows that at the commencement of this action, and for more than 26 years prior thereto, the defendant and its predecessors in title have had the actual, exclusive, and uninterrupted possession and use of the land in question under the claim of title in fee simple thereto. The finding also states a number of facts bearing upon questions arising upon the defendant's second defense and counterclaim, and including the will of Thomas Belden. The case was reserved for the advice of the Supreme Court of Errors as to what judgment should be rendered upon the facts found by the superior court. It was argued by the parties in full, and two supplemental briefs have been filed at the suggestion of the court. The last argument was limited to the following questions: (1) The plaintiffs not being in possession, can they maintain this action? (2) If the land in question was intestate estate of Thomas Belden, what are the rights of the parties? (3) Are there sufficient parties to the record? And any other questions that counsel may think proper to raise not already argued.

Lynde Harrison, for plaintiffs. John R. Buck, for defendant.

HAMERSLEY, J. (after stating the facts). It appears from the finding that at the commencement of this action the plaintiffs were not in possession of the land described, and that for some time before there had been a constant actual ouster of the plaintiffs by the defendant and its predecessors in title. The defendant, therefore, upon the facts put in issue by the first defense and found by the superior court, is entitled to judgment, and it is needless to consider the second defense. The action is brought under section 1907 of the General Statutes of 1888 (Gen. St. 1902, § 1037). This section was first passed in 1848. Laws 1848, p. 49, c. 59. The

first section of that act provided that the superior court, as a court of equity, might order the partition of any real estate held in joint tenancy, tenancy in common, or coparcenary, and the second section (page 50), provided that the court might "upon the petition of any person interested order the sale of any real estate held in joint tenancy, tenancy in common or co-parcenary whenever in the opinion of the court a sale will better promote the interests of all parties than a partition." Comp. St. 1854, p. 480. The second section was modified in 1852, 1853, and 1858, and in the Revision of 1875 (page 481) appears as follows: "Courts of equity may upon the petition of any person interested order the sale of any estate, real or personal, owned by two or more persons, when in the opinion of the court a sale will better promote the interests of the owners," and this section appears unaltered as section 1307 in the General Statutes of 1888. The meaning of this legislation, in so far as it affects the sale of land owned by two or more persons, has been settled. In *Johnson v. Olmsted*, 49 Conn. 509, 517, it was held that the power to order a sale in such case rested on the same ground as the power to order a partition, and was an alternative mode of relief in cases where an owner was entitled to partition and partition was not practicable. An owner applying for a sale assumed the burden of proving partition impossible, and, if upon such application the impossibility of partition is proven, the court is as much bound to order a sale as it would have been to order a partition upon prayer for it and proof that it could have been conveniently and equitably made. The statute giving the power of sale introduces no new principle into the law regulating partition of estates held in common. *Richardson v. Monson*, 23 Conn. 94; *Vail v. Hammond*, 60 Conn. 374, 379, 22 Atl. 954, 25 Am. St. Rep. 330.

The complaint alleges: (1) The plaintiffs and defendant are in possession of the locus as tenants in common. (2) The plaintiffs are owners of an undivided two-thirds and the defendant of an undivided one-third. (3) Sale would better promote the interests of the parties than partition. The first defense denies each of these allegations. The third allegation is immaterial unless the first two are proved. The second allegation is immaterial unless the first is proved. In other words, a person actually ousted of possession by one he claims to be tenant in common with him of land cannot under this statute seek a court of equity for the purpose of establishing his title and regaining his possession and thereupon obtaining a decree of partition and sale. This was clearly the rule at common law, and our statute in enlarging the jurisdiction of the court of equity for the purpose of partition and sale introduced no new principle. Partition now, as heretofore, affords equitable relief against a

compulsory common ownership, and cannot be used to supplant the remedy at law against an actual disseisor. A person claiming to own land as tenant in common with others, and who has been actually ousted, must establish a unity of possession before he can ask a dissolution of that unity by partition. 1 Sw. Dig. side p. 103. This was settled in *Adams v. Ames Iron Co.*, 24 Conn. 230, and has never since been questioned. Partition of land belonging to two or more owners, whether as joint tenants, parceners, or tenants in common, is a mode provided by law for disuniting or dissolving the unity of possession in such owners (2 Blackstone's Comm. side p. 191), and the remedy cannot be invoked by one claiming to be owner, but who has been dispossessed, against his alleged cotenant, who is in sole possession of the land, claiming as sole owner thereof. This rule rests, also, on the settled and salutary principle that a person dispossessed of land he claims to own should not be permitted while thus dispossessed to exercise the rights belonging only to an owner in possession.

The plaintiffs refer to other statutes providing for a sale under other circumstances upon the application of one who may not be in actual possession. These statutes are not enacted for the purpose of partition, are based upon grounds entirely different from those upon which section 1307 is based, and do not apply to the facts in this case. It is unnecessary to consider whether the changes in procedure following the enactment of the practice act may authorize the joinder of an action for partition by sale, under section 1307, with an action of ejectment or with an action for other equitable relief, as the action set forth in the plaintiffs' complaint is simply and solely an action for partition by sale.

It is suggested that the defendant has coupled with its second defense a counterclaim, asking affirmative relief through a decree confirming and establishing the title to the land in question in the defendant. If this prayer for relief can properly be considered as asking an adjudication of the persons entitled to the land or any interest therein under the will of Thomas Belden and the other facts set forth in the second defense, and if the defendant can lawfully plead such a counterclaim in answer to the action set forth in the complaint, it nevertheless appears that persons necessary to such an adjudication are not parties to this action, and for this reason the action should be dismissed. The plaintiffs suggest that it is within the lawful discretion of this court to remand the cause to the superior court in order that the pleadings may be amended, other persons made parties to the action, and the various questions affecting the title to the land, suggested by the defendant's second defense and counterclaim, be adjudicated. Such a discretion ought not to be exercised in this case, inasmuch as we think

it clear, from the facts appearing in the record, that such a course would not serve the ends of justice.

The superior court is advised to render judgment that the complaint be dismissed and the defendant recover its costs from the plaintiffs. Costs in this court will be taxed in favor of the defendant. The other Judges concurred.

BETTS, Ins. Com'r, v. CONNECTICUT LIFE INS. CO.

(Supreme Court of Errors of Connecticut. Dec. 15, 1905.)

1. INSURANCE — INSOLVENCY — PAYMENT OF POLICY HOLDERS.

Under Gen. St. 1902, §§ 3607, 3611, providing that securities deposited by an insurance company shall be held in trust by the State Treasurer for the policy holders, with the right in the company to collect and receive the interest and dividends thereon, and directing that the receiver shall administer the trust fund invested in such securities for the benefit of the policy holders under orders of the court, on the application of the receiver of an insolvent insurance company, a direction by the court that the accrued interest on the funds received from the State Treasurer and the principal be applied as a trust fund for the policy holders was proper.

2. SAME—WORKING CAPITAL—APPLICATION.

10 Sp. Laws, p. 616, provides that an insurance company shall have a working capital, which shall be liable for the payment of mortuary claims when the mortuary or other fund for the payment of such claims is insufficient, and any assets or property of the association may be taken for the payment of the same. The constitution and by-laws of the association provided for separate funds derived from different sources, each having its separate treasurer, and each chargeable with certain liabilities, and that the secretary of the company shall pay to the treasurers of the respective funds the money belonging to such fund, and shall pay the expenses from the expense fund of the association. *Held*, that where the receiver of an insolvent insurance company has received, in addition to the state treasury fund, moneys derived from judgments against stockholders for the amounts due on their stock subscriptions, such sums belong to the working capital, and, it having been reduced below the required amount, the policy claimants have the exclusive right thereto.

3. SAME—APPLICATION OF ASSETS—STATUTES.

Gen. St. 1902, §§ 3546, 3554, providing that the superior court may direct the application of avails of certain assets and property equitably in satisfaction of claims proved against an insolvent company, and directing the insurance commissioner, after payment of expenses, to apply the avails of assets to the payment of claims allowed against the company, do not authorize the court or commissioner, in applying such assets, to disregard the equities created by statute and the charter and by-laws of the company.

4. SAME — POLICY HOLDERS — LIABILITY TO CREDITORS.

The policy holders of an insurance company are not liable as partners to the creditors; it being a stock company, and the management of its affairs being in the hands of directors and officers chosen by the stockholders.

5. JUDGMENT—SET-OFF.

The failure of a judgment debtor to file a complaint under Gen. St. 1902, § 654, asking a set-off against a judgment for a tort by the court in which it was rendered, did not deprive

the court, which had taken jurisdiction of the settlement of the affairs of the judgment creditor by receivership proceedings, from allowing the set-off by directing an equitable application of the assets in the hands of the receiver in satisfaction of claims proved.

Appeal from Superior Court, New Haven County; Silas A. Robinson, Judge.

Action by Frederick A. Betts, Insurance Commissioner, against the Connecticut Life Insurance Company. From an order directing the order of payment of claims by a receiver, and disallowing an application for a set-off, certain claimants appeal. Reversed.

William H. Ely and Lucien F. Burpee, for appellants Lewis A. Platt and others. Henry C. White, for the receiver. Charles H. Lovett, for certain mortuary and policy claimants.

HALL, J. The appellants from the order of the superior court are Lewis A. Platt, Henry L. Wade, and the executors of the will of C. M. Platt; said named persons having been directors, and said Lewis A. Platt president, of said insolvent company. In April, 1903, the appellant Lewis A. Platt filed an application in the superior court, alleging that the New Haven Trust Company, which in 1899 had been appointed by said court receiver of the defendant company in the above-entitled proceeding, had, in 1903, obtained a judgment against said applicant and one John B. Doherty for the sum of \$14,280.83 (New Haven Trust Co. v. Doherty, 75 Conn. 555, 54 Atl. 209, 96 Am. St. Rep. 239, is an appeal from said judgment); that said Doherty had no property from which any part of said judgment could be satisfied; that a claim of the applicant against said company had been allowed by the court to the amount of \$9,203; that the assets in the hands of the receiver were insufficient to pay his claim in full—and asking that the receiver be restrained from collecting said judgment, and that said claim of the applicant be set off against said judgment. Upon the demurrer of said Lewis A. Platt to the receiver's answer to said application, the court held that said claim might be set off against said judgment, unless it should appear that the sum due on said judgment was needed to pay claims entitled to a preference over said applicant's claim.

Upon a hearing upon the receiver's application concerning the marshaling of assets and the preferring of claims, these facts were found by the court:

The defendant insurance company, to wind up the affairs of which a receiver was appointed, upon the application of the insurance commissioner, has for more than 10 years been engaged, under a charter from the Legislature of this state, in the business of life insurance on the assessment plan. The assets in the hands of the receiver and the claims allowed by the court are:

Assets.

Proceeds of the sale of bonds deposited by the company with the State Treasurer and surrendered to the receiver under sections 3607 and 3611 of the General Statutes of 1902, with interest to December 28, 1904.....	\$15,858 74
Money derived from judgments against stockholders for amounts due on stock subscriptions, and judgments against officers and directors for negligence in management, and disposition of moneys belonging to expense fund, estimated at...	80,000 00
Judgment against L. A. Platt for a tort unaccompanied by force (against which said Platt claims a set-off of his claim below stated of \$9,203).....	14,280 88
	<u>\$80,140 57</u>

Claims Allowed.

Preferred claims for taxes, costs, etc.....	\$ 173 05
Mortuary claims.....	44,502 78
Claims on accident policies for accidents occurring prior to receivership.....	852 99
Claims on policies without an assessment clause.....	2,032 22
Claims on policies in force at commencement of receivership and containing an assessment clause.....	2,919 17
	<u>\$50,479 21</u>
General claims on, for money loaned on contracts, for service of officers, agents, etc.,	93,320 34
	<u>\$143,799 55</u>

The following are included among the general claims so allowed:

Lewis P. Platt, for salary and amount due on contract.....	\$ 9,203 00
Henry L. Wade, for money loaned and due on contract.....	3,456 83
C. M. Platt, for money loaned and due on note and contract.....	48,381 24
	<u>\$61,041 07</u>

Of the money so loaned to the company by C. M. Platt, \$14,108 was used for the payment of death claims, and was secured by collateral, \$12,823 of the proceeds of which have been applied in payment of the sum so used, and the value of the remainder of said collateral is estimated to be sufficient to pay the balance of the sum so used. The remainder of the sum so loaned by the appellants was used in the payment of obligations of the company chargeable to the expense fund.

Upon said application of the receiver the court upon these facts directed (1) that from the assets in the hands of the receiver there be first deducted the sum of \$2,500 for administration expenses; (2) that the accrued interest upon the fund received from the State Treasurer, as well as the principal, be applied as a trust fund for the policy holders; (3) that after deducting said amount allowed for administration expenses all the assets remaining in the hands of the receiver be first applied to the payment pro rata of all valid mortuary, accident, and policy claims; (4) that after said deduction, and the payment of said claims, the remainder of the assets, if any, be applied to the payment pro rata of all other valid claims against the company; (5) that none of the appellants, as to claims against the company, be subrogated to the rights of mortuary claimants; (6) that said L. A. Platt be not allowed to set off his claim of \$9,203 for salary, etc., against the judgment recovered against him by the

receiver. No question is made regarding that part of the order which directs the \$2,500 allowed for administration expenses to be first deducted from the fund in the hands of the receiver.

The direction regarding the application of the fund received from the State Treasurer, and including as a part of it the income therefrom while it was in the hands of the receiver, is correct. By statute (section 3607) the securities deposited by the company were held by the State Treasurer in trust for the policy holders, with the right in the company, while they were so held, "to collect and receive the interest and dividends thereon." By section 3611 they were delivered to the receiver "to administer the trust fund invested in such securities for the benefit of the policy holders * * * under the orders of the court." By the order made, and the facts found by the superior court, the fund has, in legal effect, been applied to the payment of the claims of policy holders as of as early a date as when it was delivered to the receiver; and he is to be regarded as having since that time held the securities as belonging to the policy holders, and the proceeds and income therefrom as having been derived from the property of the policy holders.

There is error in that part of the order which directs that all the remaining assets in the hands of the receiver be first applied to the payment of mortuary, accident, and policy claims. Section 8 of the charter (10 Sp. Laws, p. 616) provides that "said corporation shall have a working capital to an amount not exceeding \$100,000, divided into shares of \$100 each, with power to increase the same to an amount not exceeding \$250,000, and may commence business under this charter when \$50,000 shall have been subscribed for and paid into said working capital, which shall be in lieu of a reserve, and said working capital shall not be reduced below the sum of \$50,000 by dividends, expenses or in any other manner, except for payments under policies, or certificates, in case of death or otherwise; and if said working capital shall at any time be reduced below said amount of \$50,000 then the right to issue new policies under this charter shall cease, unless said working capital shall be made up to that amount within ninety days thereafter, * * * and should a valid claim at any time exist against said association for indemnity in case of sickness, accident, old age, or death, by virtue of a certificate of membership or policy issued by said association, and the funds collected by assessment and set apart as a mortuary or other fund for the payment of such claim be insufficient therefor, then said working capital shall be liable for the payment of such claim, and any assets or property of said association may be taken or applied for the payment of the same." The constitution

and by-laws of the company, adopted under the authority of its charter, provides that there shall be certain separate funds derived from different sources, as the mortuary, the old age benefit fund, and the dividend fund, each having its separate treasurer, and each chargeable with the payment of certain liabilities, and that the secretary of the company shall pay over to the treasurers of the respective funds the money belonging to such fund, and shall pay the salaries of officers, compensation of agents, and various other expenses from the expense fund of the association.

The relative rights of the policy claimants and of these appellants are to be determined with reference to these provisions of the charter, constitution, and by-laws, and of the statute referred to, all of which form a part of the contract between the company and the policy holders. *Matter of E. R. F. L. Association*, 131 N. Y. 354, 30 N. E. 114. In so far as such provisions subject certain assets to the payment of particular liabilities, the prior equities which may be thereby created should be considered in the application and distribution of the assets of the company under the receivership, as suggested in *Barrett's Appeal*, 75 Conn. 280, 53 Atl. 591, and neither section 3546 of the General Statutes of 1902, which provides that the superior court "may direct the application of the avails of such assets and property equitably in satisfaction of the claims proved against such company," etc., nor section 3554, directing the insurance commissioner, after payment of expenses, taxes, etc., to apply the avails of the assets of a company whose charter has been repealed "to the payment of the debts and claims allowed against such company, and the surrender value of its policies in proportion to their respective amounts," are to be construed as authorizing the court or insurance commissioner, in applying such assets, to disregard the equities so created by statute, and by the charter and by-laws of the company.

While the appellants do not so much question that by statute and by the charter provisions the State Treasurer fund, the mortuary fund, and, upon failure of the latter, the working capital to the amount of \$50,000, are impressed with trusts in favor of the policy holders, which must be regarded in winding up the affairs of the company, they claim that none of the assets in the hands of the receiver belong to either the mortuary fund or the working capital, but that both of these funds have been exhausted, and that the remaining assets, excepting those received from the State Treasurer, belong to the expense fund. It is true that upon his appointment no fund came into the hands of the receiver to which the policy claimants have the right of exclusive resort. Such funds, excepting the State Treasurer fund, had presumably been exhausted in the payment of claims under policies, since they could not

properly have been used in the payment of expenses. Since his appointment, however, in addition to the State Treasurer fund, the receiver has obtained about \$30,000, a part of which is derived from judgments against stockholders for the amounts due on their stock subscriptions. The sum so received from stock subscriptions was as much a part of the working capital, and subject to its liabilities, as if paid in when the company commenced business; and, as the working capital had already been reduced below \$50,000, it could not become a part of the expense fund, nor be used for any other purpose than payments under policies. To that part of said sum so derived from stock subscriptions, as well as to the fund received from the State Treasurer, the policy claimants have the exclusive right. It does not appear that any part of the original capital enters into the other assets. The right to apply any property of the company to the payment of a death or accident claim, upon failure of the mortuary fund, gives to policy claimants only the right to demand payment from funds other than the State Treasurer fund, the mortuary fund, and the working capital to the amount of \$50,000 in common with other creditors.

No exception is taken to the order of the superior court in giving to the claims of living policy holders, amounting to about \$5,000, the same preference as that given to the mortuary claims, which amount to over \$44,000. None of the appellants were entitled, on account of money loaned by them to the company, to be subrogated to the rights of mortuary claimants. The only part of such money, used for the payment of death claims, has either been repaid or its payment secured by collateral. The provisions of the charter and by-laws do not render the policy holders liable, as partners, to the creditors of the company, as claimed by the appellants. The insurance company was a stock company, the entire control and management of the affairs of which was in the hands of these appellants and the other officers chosen by the shareholders only.

The appellant Lewis A. Platt is entitled to set off his allowance claim of \$9,203 against the receiver's claim of \$14,280.83. In sustaining the demurrer to the answer to the application for the allowance of such set-off, the court (Shumway, J.) decided that the applicant was entitled to the set-off, unless the amount due from him was needed to pay preferred claims, and no exception has been taken to that ruling. The later ruling of the court (Robinson, J.), disallowing the set-off because the amount due upon the judgment was needed for the payment of preferred claims, did not conflict with the first, but applied the law as laid down by Judge Shumway. But, irrespective of the absence of any exception to such first ruling, the set-off should be allowed. The court before which the receivership proceedings were pending

had the power to allow it. By the failure of L. A. Platt to file a complaint in accordance with the provisions of section 654, asking such set-off to be made against said judgment by the court in which it was rendered in 1902, he was deprived of the right to have his set-off allowed in the proceedings incident to that cause. But such failure did not deprive the court which had already taken jurisdiction of the settlement of affairs of the company by the receivership proceedings, which had itself directed the bringing of the action against Platt, and before which the question of the amount to be allowed upon the claims now sought to be set off was then pending, from allowing such set-off, by directing, as the statute empowered it to, an equitable application of the assets in the hands of the receiver "in satisfaction of the claims proved against such company." The insolvency of the company raises an equity which, under the circumstances of this case and in a proceeding of this character, calls for the allowance of the set-off. *Goodwin v. Keney*, 49 Conn. 563-569; *Carroll v. Weaver*, 65 Conn. 76-81, 31 Atl. 489.

There is error, and the case is remanded, with directions that after deducting the administration expenses the fund, including principal and interest, derived from the securities received from the State Treasurer, and so much of the remaining assets as are derived from judgments against stockholders for amounts due on stock subscriptions, be applied to the payment of the said mortuary, accident, and policy claims as preferred claims against said particular assets; that said allowed claim of Lewis A. Platt, of \$9,203, be set off against the receiver's judgment against him of \$14,280.83; and that the remaining assets, after such deduction, application, and set-off, be applied to the payment pro rata of the remaining claims against the company, including the balance of said preferred claims remaining after said particular assets have been so applied to their payment. The other judges concurred.

McLAUGHLIN v. JOY.

(Supreme Judicial Court of Maine. Nov. 29, 1905.)

1. BASTARDY—EVIDENCE.

While perhaps not necessary, the original complaint and magistrate's record in a bastardy process may be put in evidence before the jury, upon the trial of the issue whether the defendant begot the child, for the purpose of showing compliance with the preliminary statutory requirements.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bastards, §§ 155, 156.]

2. APPEAL AND ERROR—INSTRUCTIONS.

If a party in a jury trial is apprehensive that evidence admitted upon one proposition only may be applied by the jury to other propositions, he should request instructions to the jury to disregard that evidence in considering such other propositions. Without such request, he

has no cause for complaint as to the effect of the evidence upon these propositions.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 682.]

(Official.)

Exceptions from Supreme Judicial Court, Kennebec County.

Complaint by Annette M. McLaughlin against Alton Joy, under Rev. St. c. 99. Plaintiff offered in evidence an original accusation and examination and the magistrate's record in the matter, and defendant excepted. Exceptions overruled.

Argued before EMERY, WHITEHOUSE, STROUT, POWERS, PEABODY, and SPEAR, JJ.

Williamson & Burleigh, for complainant. Sheldon & Sawtelle and A. M. Goddard, for defendant.

EMERY, J. This was a case of bastardy, tried in the superior court for Kennebec county before a jury, in which the defendant pleaded not guilty, and made no other defense than a denial of the paternity of the child. At the trial the plaintiff offered in evidence her original accusation and examination before the magistrate, and also the magistrate's record in the matter. Upon the defendant objecting to the papers, the plaintiff's counsel stated that they were not offered as evidence of anything stated in them, but to show that the plaintiff had complied with the statute requiring such proceedings. They were by the court "admitted to show that the preliminary statutory requirements are complied with." These statements of counsel and court were made in the presence and hearing of the jury, but the court did not give any further instructions to the jury as to the use to be made of the papers, and no further instructions regarding them were requested.

While, perhaps, the question of compliance with the statute, so far as preliminary papers were concerned, was for the court, rather than for the jury, it has been the practice to permit them to go to the jury. *Sidelinger v. Bucklin*, 64 Me. 371.

The defendant urges, nevertheless, that he was in fact prejudiced by these papers going to the jury. He argues that, inasmuch as self-serving oral statements made by the plaintiff out of court would not be admissible in support of her testimony in court, her written statement on oath made out of court should not be allowed to go to the jury; that the latter is even more prejudicial than the former.

We do not see, in this case, at least, that the admission of the papers named was prejudicial to the defendant. It must be assumed that the jury knew the law, knew that such papers must have been made before the case could have been lawfully opened for trial before them, and also that the accusation and examination must have been in substantial harmony with the declaration al-

ready read to them. The actual production of the papers added nothing to the knowledge they must be assumed to have had.

Again, in this case it was stated before the jury by counsel and court that the papers were offered and admitted, not as evidence of anything stated in them, but to show that the preliminary statutory proceedings were complied with. It must be assumed, upon exceptions, that the jury heeded the statement and the ruling, and gave the papers no other effect. If the defendant feared that the matter had not been made sufficiently plain to the jury, he should have requested the court to make it more plain. Not having done so, he has no legal ground for complaint on that score.

Exceptions overruled.

POWERS et al. v. SAWYER.

(Supreme Judicial Court of Maine. Dec. 9, 1905.)

TAXATION—SALE FOR NONPAYMENT—TAX DEED—DESCRIPTION—CLOUD ON TITLE.

A description in a deed from the State Treasurer, whereby a portion of land in a township containing 22,000 acres was attempted to be sold for the nonpayment of taxes, as follows: "4,520 acres in 13, range 7, W. E. L. S.," is utterly insufficient to pass any title to any portion of the township, and is insufficient to create any cloud upon the title of a tenant in common, who seeks partition of the township, either in equity or by petition for partition.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1519–1521.] (Official.)

Exceptions from Supreme Judicial Court, Aroostook County.

Petition by Frederick A. Powers and others against Louise J. Sawyer for partition. Judgment for petitioner, and defendant excepts. Exceptions overruled.

The following was the petition:

"To the honorable justice of the Supreme Judicial Court next to be holden at Caribou, in and for the county of Aroostook, on the 1st Tuesday of December next.

"Respectfully represents Frederick A. Powers, Simon Friedman, and Jennie Wilson, all of Houlton, and John P. Donworth, of Caribou, all in said county of Aroostook, and Elaine Wilson, also of said Houlton, an infant under the age of 21 years, who joins in this petition by said Jennie Wilson, her guardian, that they are seised in fee simple and as tenants in common of and in certain real estate situated in said county of Aroostook, to wit: Township No. thirteen (13), in the seventh range of townships west of the east line of the state of Maine, excepting the public lots; the township containing twenty-two thousand forty acres exclusive of the public lots, which have been set out, and are described as follows:

"Commencing at a cedar stake on the north line of the township one mile and a

half east from the northwest corner, and running south, one mile, to a cedar stake; thence east, five hundred rods, to a hemlock tree marked 'Public Lot'; thence north, one mile, to a cedar stake and stones on the north line of the township; thence west on said north line, five hundred rods, to the point begun at, according to plan of said township designated as plan No. 17, and recorded in the land office of the state of Maine. That your petitioners are the owners of four hundred fifty-one undivided five hundred fifty-first (451-551) parts thereof with Louise J. Sawyer of Bangor, in the county of Penobscot, and said state, who is seised of one hundred undivided five hundred fifty-first (100-551) parts thereof, and who also owns the pine and spruce timber which was standing on said township December 3, A. D. 1850, and that your petitioners desire to hold their undivided interests in severalty; that is, they desire to hold their undivided interests separately from, and independently of, the said Louise J. Sawyer.

"Wherefore, they pray that notice to all persons interested, to wit, the said Louise J. Sawyer, may be ordered; that commissioners may be appointed; that the interests of your petitioners may be set out to them to be held in fee and in severalty—that is, in common and undivided as among themselves, but separately from, and independently of, the interest of the said Louise J. Sawyer.

"Houlton, Maine, October 1, A. D. 1903.

"Frederick A. Powers.

"Simon Friedman.

"Jennie Wilson.

"John P. Donworth.

"Elaine Wilson,

"By Jennie Wilson, Guardian."

The following was the deed from the state of Maine to Milton S. Clifford: "To all Persons to whom These Presents may come, I, F. M. Simpson, Treasurer of the State of Maine, send greeting: Whereas, in obedience to the provisions of chapter 6, section 73, of the Revised Statutes in relation to the collection of taxes in unincorporated places, the said treasurer caused to be published a notice containing a list of all tracts of land lying in unincorporated places which have been forfeited to the state for state taxes or county taxes, which have been certified according to law to the Treasurer of State, together with the amount of such unpaid taxes, interest, and costs on each parcel, and that the same would be sold at the treasury office in Augusta on the twenty-eighth day of September, A. D. 1899, at eleven o'clock a. m., in the state paper and in a paper in the county where said lands are situated (where any such was published) three weeks successively before the day of sale and within three months thereof. And whereas said list contains the following described parcel of land so forfeited, situate in the county of Aroostook, viz.: 4,520 acres in 13, range 7, W. E. L.

L. S., upon which there was due and payable for taxes, interest, and cost the sum of thirty-eight and 6-100 dollars, including its proportion of the state tax for 1897 and of the county tax for the same year, certified to the Treasurer of State according to law. And whereas, on said twenty-eighth day of September, 1899, at eleven o'clock a. m., at the treasury office in Augusta, said treasurer did sell all the interest of the state in said premises to Milton S. Clifford at auction for the sum of forty-one 0-100 dollars, he being the highest bidder therefor, and his bid being a price not less than the full amount due thereon for such unpaid state and county taxes, interest, and cost of advertising, as required by law. Now know ye that I, F. M. Simpson, in my said capacity, in consideration of the premises and of the payment of the said sum of forty-one 0-100 dollars, the receipt whereof is hereby acknowledged, do hereby sell and convey to him, the said Milton S. Clifford, his heirs and assigns forever, all the interest of the state by virtue of said forfeiture in and to said premises so sold, as aforesaid, to have and to hold the same, with all the privileges thereof, to him, the said Milton S. Clifford, his heirs and assigns, forever, subject to all taxes assessed thereon subsequent to the year eighteen hundred and ninety-seven: provided, however, that any owner or part owner thereof shall have the right to redeem his proportion of the same at any time within one year, by paying or tendering to the purchaser or Treasurer of State his proportional part of what the said Milton S. Clifford paid for the same, with interest at the rate of twenty per cent. per annum, and the cost of conveyance, as provided in chapter 6, section 75, of the Revised Statutes.

"In witness whereof, I, the said F. M. Simpson, in my said capacity, have hereunto set my hand and seal this twenty-eighth day of September, in the year of our Lord one thousand eight hundred and ninety-nine.

"F. M. Simpson, State Treasurer. [L. S.]

"Signed, sealed, and delivered in presence of D. W. Emery. [L. S.]"

"Kennebec—ss.: Oct. 25, A. D. 1899. Personally appeared the above-named F. M. Simpson, and acknowledged the foregoing instrument by him signed as Treasurer of State, as aforesaid, to be his free act and deed.

"Before me.

D. W. Emery,

"Justice of the Peace."

The following was the deed from Milton S. Clifford to Louise J. Sawyer:

"Know all men by these presents that I, Milton S. Clifford, of Bangor, county of Penobscot, state of Maine, in consideration of one dollar and other considerations paid by Louise J. Sawyer, of said Bangor, the receipt whereof is hereby acknowledged, do hereby remise, release, sell, and forever quitclaim unto the said Louise J. Sawyer, her

heirs and assigns forever, all my right, title, and interest in and to a certain parcel of land situated in the county of Aroostook, and known as township thirteen (13), range seven (7), W. E. L. S.; said parcel being 4,520 acres, as per deed of F. M. Simpson, Land Agent, to me dated Sept. 28, 1899.

"To have and to hold the above-described premises, with all the privileges and appurtenances thereof, to the said Louise J. Sawyer, her heirs and assigns, forever.

"In witness whereof, I, Milton S. Clifford, have hereunto set my hand and seal, this 29th day of March in the year of our Lord one thousand nine hundred.

"Signed, sealed, and delivered in presence of Milton S. Clifford. [L. S.]

"Penobscot—ss.: March 29, 1900. Personally appeared the above-named Milton S. Clifford, and acknowledged the above instrument to be his free act and deed.

"Before me. Samuel F. Humphrey,

"Justice of the Peace."

Both of the above deeds were duly recorded.

The following exceptions were allowed:

"And now at the hearing for partition in the above-entitled action, and before judgment, the defendant comes and files this bill of exception, and prays that the same may be allowed.

"This is a petition for partition of certain real estate in the county of Aroostook, to wit, township No. 13, in the seventh range of townships, west of the east line of the state of Maine, excepting the public lots.

"To entitle the claimants for partition, they must show a clear legal title.

"The defendant offered to show that the complainants did not have a clear legal title to the demanded premises by reason of a cloud on the title by reason of an existing sale of this land for taxes, and in support of this contention produced a deed from the state of Maine to M. S. Clifford, and from said M. S. Clifford to the defendant, Louise J. Sawyer.

"The court ruled that these deeds were not sufficient to show any cloud on the title of petitioners, and to this ruling the defendant, being aggrieved, asked, and the court allowed, an exception thereto.

"To the foregoing ruling the defendant excepts, and prays that the exception may be allowed."

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and PEABODY, JJ.

E. C. Ryder, for plaintiffs. H. L. Fairbanks, for defendant.

WISWELL, C. J. This is a petition for partition of a township of land in Aroostook county, described in the petition as follows:

"Township No. thirteen (13), in the seventh range of townships west of the east line of the state of Maine, excepting the public lots; the township containing twenty-two thousand forty acres exclusive of the public lots, which have been set out," and which are described in the petition.

At the hearing before the court *anisi prius*, judgment for partition was ordered, and commissioners were appointed. The only question raised by the exceptions upon which the case comes to the law court is as to the effect of two deeds offered by the respondent—one from the State Treasurer, attempting to convey land claimed to have been forfeited by the nonpayment of taxes, and the other a quitclaim deed to the respondent from the grantee in the first deed.

The position of the respondent is that the petitioners are not entitled to a judgment for partition unless they can show a clear legal title to the proportion of the premises claimed to be owned by them, invoking the rule established where a partition is sought in equity (*Nash v. Simpson*, 78 Me. 142, 3 Atl. 53; *Pierce v. Rollins*, 83 Me. 172, 22 Atl. 110); although this is, as we have seen, a petition for partition, and not a bill in equity brought for partition, and that the deed from the State Treasurer is at least sufficient to raise a doubt as to the title of the petitioners, or to create a cloud upon their title.

A sufficient answer to this position of the respondent is a reference to the description of the premises attempted to be sold and conveyed as forfeited from nonpayment of taxes. The only description contained in this deed is as follows: "4,520 acres in 13, range 7, W. E. L. S.," the township containing, as we have seen, over 22,000 acres exclusive of the public lots. It has been uniformly held in numerous decisions of this court that such a description in a deed is utterly ineffectual to pass any title to any specific tract or acre in the township, or to convey any title whatever. *Larrabee v. Hodgkins*, 58 Me. 412; *Griffin v. Creppin*, 60 Me. 270; *Moulton v. Egery*, 75 Me. 485; *Skowhegan Sav. Bank v. Parsons*, 86 Me. 514, 30 Atl. 110; *Millett v. Mullen*, 95 Me. 400, 49 Atl. 871. A deed with such a description is insufficient to create any doubt or cast any cloud upon the petitioner's title, since a mere inspection of it shows upon its face that it conveyed no title. *Briggs v. Johnson*, 71 Me. 235. The deed from the grantee in this last deed to the respondent contains a similar description, and is equally insufficient to pass any title. The ruling of the judge *anisi prius*, that these deeds were ineffectual to pass any title and insufficient to create any cloud upon the petitioners' title, was correct.

Exceptions overruled.

WESTERN MARYLAND R. CO. v. BLUE RIDGE HOTEL CO. OF WASHINGTON COUNTY.

(Court of Appeals of Maryland. Dec. 8, 1905.)

1. RAILROADS—POWERS—ULTRA VIRES CONTRACT.

Where the charter of a railroad company (Acts 1852, c. 304, §§ 14, 15, 18; Acts 1872, p. 102, c. 71; Acts 1884, p. 209, c. 153) conferred power to operate a railroad, to erect warehouses and other works necessary to the road, to erect all buildings, stations, other works, and accommodations necessary or convenient for the operation of the road, to aid any other company "in the construction of its road," to consolidate with any other corporation owning a railroad, or a railroad and any other property, and to guarantee the obligations of other railroad companies, a contract by which it contracted to pay out of certain of its earnings such "commissions" on its receipts as would make good to a hotel company a deficit in the hotel company's earnings sufficient to enable the hotel company to pay dividends on its stock and interest on its bonds was ultra vires and void.

2. SAME—EXECUTED CONTRACT.

Where a railroad company made an ultra vires contract by which it guaranteed the payment of interest and dividends on the bonds and stock of a hotel company to aid in the improvement of the latter's property, and thereafter received nothing of benefit from the hotel company except increased earnings for transportation of passengers and freight over its road, it was not precluded from subsequently claiming that the contract was ultra vires and void.

Appeal from Baltimore City Court; Henry Stockbridge, Judge.

Action by the Blue Ridge Hotel Company of Washington County against the Western Maryland Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Leon E. Greenbaum and Benjamin A. Richmond, for appellant. William S. Thomas, for appellee.

PEARCE, J. This is an action of covenant, brought by the Blue Ridge Hotel Company of Washington County, a corporation organized under the general incorporation laws of Maryland, against the Western Maryland Railroad Company, a corporation created by an act of the General Assembly of Maryland (chapter 304, Acts 1852) under the name of the "Baltimore, Carroll, and Frederick Railroad Company"; the name being changed by chapter 37 of the Acts of 1853 to the "Western Maryland Railroad Company." The covenant sued upon is contained in a sealed agreement between the parties, made October 23, 1883. This agreement recites the making of a previous agreement between the parties on April 2, 1883, whereby the said railroad company, in consideration of anticipated advantages to it from the construction by said hotel company of a summer hotel near Pen Mar Station on the line of said railroad, had agreed to secure the payment of a dividend

not exceeding 5 per cent. per annum on the capital stock of said hotel company of \$100,000. The agreement sued on then further set forth that, since the erection of said hotel, the railroad company had in fact derived large receipts from travel and traffic to and from the station used for said hotel, known as the "Blue Mountain Station," and that its receipts from travel and traffic to and from an adjoining station, known as "Pen Mar Station," had, by reason of the attractions of said hotel and its neighboring property, increased to an amount exceeding the utmost liability to be assumed by it under the contract then made, and that it was believed these receipts would be largely augmented by increasing the capacity of the hotel, and by the improvement of the grounds of the hotel company, and of its other property near Pen Mar Station; that the hotel company had already expended in the undertaking more than its whole capital, and an additional amount, not less than \$125,000, was necessary to complete improvements begun, and others contemplated, which could not be procured without the assistance to the credit of the hotel company as thereafter stipulated in said agreement; that the hotel company was about to issue its bonds to an amount not exceeding \$125,000, bearing interest at the rate of 6 per cent. per annum and to be secured by a first mortgage upon the said hotel and its revenues, and such other of its property as should be described in said mortgage. The agreement then further set forth that in consideration of the advantages expected to accrue to the railroad company from the said improvements to the hotel and its other property, and of certain privileges secured to the railroad company by the terms of said agreement for the benefit of its excursionists, the said railroad company covenanted with the said hotel company, as follows: "That if in any one year the actual net earnings of said hotel company from said hotel and other sources shall not suffice to pay 5 per cent. dividend upon its capital stock of \$100,000, and the interest at the rate of 6 per cent. semiannually upon such amount of said first mortgage bonds as may be issued for the purposes herein stated, not exceeding \$125,000, the said railroad company will in that event allow and pay to said hotel company, for its stockholders and the holders of said bonds, such commissions upon its receipts for traffic to and from Blue Mountain and Pen Mar Stations, or any other station or stations which may be hereafter substituted for either or both of the above, at which the business hereby contemplated may be done, as will be sufficient to make up said deficit to 5 per cent. upon its capital stock, and 6 per cent. per annum upon its bonded debt"; and the hotel company upon its part entered into a covenant designed to protect the railroad company in the proper application of the revenues of the hotel company to its economical and successful management, and of the net

earnings to the dividends and interest due to its stockholders and bondholders. The declaration averred that, in reliance upon this covenant of the railroad company, it issued its bonds to the amount of \$125,000, of which \$122,000 were still outstanding, which sum was expended in the improvements contemplated by the agreement, and that at the close of the fiscal year of the hotel company ending October 1, 1903, the net earnings of the hotel company were not sufficient to pay the interest then due on said bonds, by the sum of \$3,660, and there was nothing available for payment of the \$5,000 dividend then due to its stockholders; that demand had been duly made on defendant for said sums; and that payment had been refused.

It will only be necessary to consider the defendant's fourth plea, which averred that the agreement sued on was ultra vires on the part of the railroad company, and void, and could not be enforced by suit such as was brought against it. To this plea the plaintiff demurred, and, the demurrer being sustained, the case went to trial on issues joined on the other pleadings, resulting in a verdict for the plaintiff for \$9,433.68, and judgment thereon. The defendant offered six prayers, of which the first and second raised the same question raised by the demurrer, and were refused by the court; no prayers being offered by the plaintiff. The question raised by the demurrer, and by the defendant's first and second prayers, is the vital question in the case, and will now be considered.

The agreement was drawn with much care and skill, and evidently with a view to the avoidance of the question raised, as is suggested by the phraseology of the covenant "to allow and pay such commissions upon its receipts to and from" the stations named as would make good the deficit which was the subject of the covenant; but we do not think the use of this language can disguise the real character of the transaction, or control the validity of the obligation assumed by the railroad company. If the contract would be declared ultra vires if the deficit were to be made good from the general receipts of the company, it could not be rescued from invalidity by calling the payments to be made commissions from traffic receipts from the particular stations named. There is no limit to the rate of commission to be paid. The full amount of the gross receipts from these two stations was pledged by that covenant, if required to make good this deficit. This appears not only from the language of the covenant, but even more explicitly from the recital of the mortgage from the hotel company to the trustees of its bondholders, which assigns to said trustees "the benefit of the contract between the hotel company and the railroad company, dated October 23, 1883, by which the payment of the interest on the said bonds is guaranteed by the said railroad company to be paid of the receipts

from the traffic at Blue Mountain and Pen Mar Stations." A contract, which in effect pledges the total gross receipts from any source, cannot be regarded as a contract for commissions on, or a rebate from, those gross receipts, and this contract must be regarded as an absolute guaranty to the stockholders and bondholders of the hotel company of their dividends and interest, to the extent to which the receipts from the stations named should be adequate for that purpose, since in the language of the contract the payment was to be made "to the hotel company for its stockholders and bondholders." The promise thus made was a promise "to answer for the payment of some debt, or the performance of some duty, in case of the failure of another, who is himself, in the first instance, liable to such payment or performance." 14 Amer. & Eng. Enc. of Law (2d Ed.) 1128. Its object, as declared in the recitals of the agreement, was to furnish to the hotel company "assistance to its credit," and it was at least twice designated in said agreement as a "traffic guaranty," and we think it could not be accurately otherwise designated. It is therefore necessarily a collateral contract, but there is no question here of the statute of frauds, and it would make no difference so far as its validity is here concerned, if it had been an original contract to pay the hotel company a lump sum upon the consideration stated. The question of ultra vires would still remain for consideration.

Corporations, being mere creatures of law, possess only such powers as are expressly granted, together with such incidental and implied powers as are necessary to carry into effect those expressly granted. "An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has only a slight or remote relation to it. . . . It can in no case avail to enlarge the express powers, and thereby warrant the corporation to devote its efforts or its capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises not directly but only remotely connected with its specific corporate purposes." 10 Cyc. 1097, 198. And it is equally well settled that "a corporation has no power to enter into a contract of suretyship or guaranty, or otherwise lend its credit to another, unless the power is expressly conferred by its charter, or unless such a contract is reasonably necessary, or usual in the conduct of its business." 7 Amer. & Eng. of Law (2d Ed.) 788.

The original charter powers of the Western Maryland Railroad Company are found in sections 14, 15, and 18 of chapter 304 of the Acts of 1852. In addition to the mere power to construct a railroad from Baltimore to Westminster and thence to some point on the Monocacy river in the direction of Hagerstown, the additional powers given are

to erect warehouses or other works necessary to said road and to contract with the Susquehanna Railroad for intersecting its road, to carry the mail, and to borrow money not exceeding \$200,000. Chapter 71, p. 102, Acts 1872, gave the power to construct a railroad from the western end of the tunnel of the Baltimore & Potomac Railroad to Williamsport or to Cumberland, together with all buildings, stations, other works, and accommodations necessary or convenient for the operation of said road, and to execute mortgages upon its property for building the road. Section 8, p. 107, of that act, which is specially referred to by the court below in the ruling upon the demurrer, set out in the record, gives power to aid any other company in the construction of its railroad, by means of subscription to its capital stock, or otherwise, for forming a connection therewith, and to consolidate with any other corporation owning a railroad, or a railroad and any other property; and chapter 153, p. 209, of the Acts of 1884, gives the only power of guaranty it possesses, and limits this power to the obligations of other railroad companies.

In none of these acts do we find any power, express or implied, either to engage directly in the construction and operation of a summer hotel, or to lend its credit to any other corporation engaged therein, while the acts of 1872 and 1884, supra, seem to us, by their express limitation of the powers granted to dealing with railroad companies, or companies "owning a railroad and other property," to exclude the power to engage in any other business than that of a railroad, or to guaranty the obligations of any other corporation than a railroad corporation. However, the strict rules which we have cited above may have been relaxed or evaded elsewhere under the influence of competition in trade and commerce, and of the modern theories of expansion of power in every direction, they are still approved by text writers of the highest authority and have been always observed and enforced by the court in this state.

Judge Seymour D. Thompson, in 10 Cyc. 1146, says: "Perhaps the most general statement which can be made of the doctrine of ultra vires is to say that the contract of a corporation which is unauthorized by, or in violation of, its charter or other governing statute, or entirely outside the scope of the purposes of its creation, is void, in the sense of being no contract at all, because of a total want of power to enter into it"; and Mr. France, in his recent excellent work on the Elements of Corporation Law (section 72) says "The transaction may be beyond the powers of the corporation, simply because it is foreign to the purposes expressed or implied in the charter; it may invoke the exercise of a power, not forbidden, but simply ungranted, as, for example, where a railroad company undertakes to guaranty the

expenses of a public festival. In the better usage, the term 'ultra vires' is limited to acts of the latter class, and many of the courts make a distinction between transactions which are illegal, because forbidden, and those which are simply in excess of the granted powers."

In *Steam Navigation Company v. Dandridge*, 8 Gill & J. 318, 29 Am. Dec. 543, the court said: "In *Angell & Ames on Corporations* it is justly observed that a corporation and an individual stand upon very different footing. The latter, existing for the general good of society, may do all acts and make all contracts which are not, in the eye of the law, inconsistent with the great purpose of his creation; whereas, the former, having been created for a specific purpose, can not only make no contract forbidden by its charter, which is, as it were, the law of its nature, but in general can make no contract which is not necessary, either directly or incidentally, to enable it to answer that purpose. In deciding, therefore, whether a corporation can make a particular contract, we are to consider, in the first place, whether its charter or some statute binding upon it forbids or permits it to make such a contract; and, if the charter and valid statutory law are silent upon the subject, then, in the second place, whether a power to make such a contract may not be implied on the part of the corporation as directly or incidentally necessary to enable it to fulfill the purpose of its existence, or whether the contract is entirely foreign to that purpose." It was accordingly there held that the navigation company, being incorporated only for the purpose of conveyance of passengers and freight, could not lawfully enter into a contract for breaking ice upon the waters navigated by its vessels, and towing other vessels through the track so made. And in *Abbott v. Baltimore & Rappahannock Steamboat Company*, 1 Md. Ch. 542, where the company was incorporated solely for the same purpose between Baltimore and Fredericksburg, but entered into an obligation in aid of an enterprise to improve the navigation of the river near Fredericksburg upon its own route, which would result to the great advantage of the company, it was held that the contract was not within its express or implied powers, and could not be enforced against it, though the obligee had incurred large expenses upon the faith of the contract. In the latter case the Chancellor followed the decision in the *Dandridge* Case, supra, and that case has been repeatedly approved in this court, upon the point here involved; the latest instance being in *Boyce v. Trustees M. E. Church*, 46 Md. 373. In *State v. B. & O. R. R.*, 48 Md. 49, one of the questions was whether the receipts from certain hotels built and owned by the railroad company were subject to the gross receipts tax imposed by the act of 1872 upon such railroad companies, and the court, in construing the language employed in the

power granted "to erect warehouses and other works necessary and expedient for the completion and operation of the road," said, on pages 76 and 77: "Hotels, or buildings for the accommodation of passengers over the road, are, we think, necessary to its business and therefore within its charter. * * * The gross receipts, therefore, from these hotels are exempt from taxation. The Oakland and Deer Park Hotels, however, appear to have been built and are now used primarily as places of summer resort, and, although as such they may attract travel over the road, they are not in any sense necessary to its operation. But the receipts from these hotels are not liable to the tax imposed by the act of 1872, because they are not derived from the exercise of any franchise granted by the state, and they must be taxed according to valuation as other property." The court had previously said upon the same page: "It is hardly necessary to say that the original charter does not authorize the appellee to build and conduct hotels in the usual and ordinary manner in which hotels are kept—that is for the accommodation of the public generally." The power to build and conduct such hotels was not actually before the court under any of the pleadings in that case, and the language last cited therefore may perhaps be regarded as obiter, but the application of the gross receipts tax to such hotels was before the court, and it was held not to apply to them, because "the receipts were not derived from the exercise of any franchise granted by the state"—in other words, because the charter did not, either expressly or by implication, grant the power to engage in that business.

The cases we have cited from our own courts sufficiently show how the law has been held in this state, and they are in accord with the best considered cases elsewhere in this country, and in England. Thus, in *Davis v. Old Colony R. R.*, 131 Mass. 238, 41 Am. Rep. 221, in which the subject was exhaustively considered by Judge Gray, it was held beyond the power of a railroad corporation chartered by the Legislature, or of a corporation organized under the general law for the manufacture and sale of musical instruments, to guaranty the expenses of a musical jubilee and festival, and that no action could be maintained against either corporation upon such a guaranty, though made with reasonable belief that the holding of such festival would be of great pecuniary advantage to such corporations by increasing their proper business, and though the festival had been held and expenses incurred in reliance upon the guaranty. In *Elevator Co. v. Memphis & Charleston R. R. Co.*, 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798, the charter of the railroad gave it power "to do all lawful acts properly incident to a corporation, and to the transaction of the business for which it was incorporated, and also such additional powers as may be convenient for

the due and successful execution of the powers granted in the charter." The railroad company guaranteed 8 per cent. dividends upon the stock of an elevator company which built a grain elevator upon the line of the railroad, but the court held the guaranty could not be enforced, saying: "In no part of the grant of power is that of guarantying the success of another institution, person, or corporation to be found, either in expression or implication." In *Pearce v. Madison & Indianapolis R. R. Co.*, 21 How. 441, 16 L. Ed. 184, the Supreme Court of the United States held that two corporations created to construct distinct lines of railroad leading to Indianapolis had no right, without authority from the Legislature, to consolidate into one corporation, and thereby to subject the capital of the one to answer for the liabilities of the other. The managers had also established a steamboat line to run in connection with these railroads, and the court held this to be "a departure from the business they were authorized to conduct, thereby diverting their capital from the objects contemplated by their charters, and exposing it to perils for which they afforded no sanction." In *Coleman v. Eastern Counties Railway*, 10 Beavan, 1, where the railway company proposed to guaranty the profits of a steam packet company to run in connection with the railway, Lord Langdale, Master of the Rolls, restrained the company by injunction, saying: "To look upon a railway company in the light of a common partnership, and as subject to no greater vigilance than these, would be greatly to mistake the functions they perform and the powers which they exercise, which are given by act of Parliament, and which extend no farther than is expressly stated in the act, or is necessarily and properly required for carrying into effect the undertaking and works which the act has expressly sanctioned. * * * But it has been contended that they have a right to pledge without limit the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. There is, however, no authority for anything of that kind." And in *East Anglian Railways v. Eastern Counties Railway Co.*, 11 C. B. 775, where a similar guaranty was under consideration, it was held *ultra vires*; the court declaring the question to be one exclusively of power, and asking the unanswerable question: "What additional power do they acquire from the fact that the undertaking may in some way benefit their line? For whatever be their object or prospect of success, they are still but a corporation for the purpose of making and maintaining their railway." These cases, which we have selected from the many that could be cited, sufficiently illustrate the principle which requires us to

hold, as we do, that the agreement in this case is *ultra vires*.

But it is contended for the appellee that, as the contract has been partly executed by both parties, the railroad company is estopped to set up that defense. Let us see how far this contention can be justified. Judge Seymour D. Thompson, in continuation of the passage from which we have quoted above (10 Cyc. 1146), says: "Such a contract will not be enforced by any species of action in a court of justice; being void *ab initio*, it cannot be made good by ratification, or by any succession of renewals, and no performance on either side can give validity to the unlawful contract, or form the foundation of any right of action upon it." It is true that the same distinguished author says, on page 1156 of 10 Cyc: "The great mass of judicial authority seems to be to the effect that, where a private corporation has entered into a contract in excess of its granted powers, and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make the contract." This must be understood to mean, however, that the fruits or benefits of the contract must have been received from the other contracting party, and not from outside parties. That this is the true meaning of the passage appears from the language of the same writer on page 1155 of 10 Cyc., where he says: "If the contract of a corporation is *ultra vires*, but not immoral or otherwise *malum in se*, and either party disaffirms it on the ground that it is *ultra vires*, and refuses further execution of it, then, while the other party cannot sue to recover damages or compensation in respect of the unexecuted portion of the contract, yet the law will afford him remedies for procuring from the other party a restoration of what he has lost under it. The governing principle is that, where money has been paid or property transferred to a corporation under a contract which is not *malum in se*, the party receiving may be made to refund to the party from whom it has received the value of that which it has actually received, and to this end he may maintain against the corporation the equitable common-law action for money had and received." In *Johnson v. Hines*, 61 Md. 131, where the question under consideration was what title passed to mortgagees under a mortgagor, from one whose title was derived from an unauthorized conveyance by a trustee, Judge Yellott, speaking for this court, said: "That nothing can emanate from nonentity, or, as more tersely enunciated, '*de nihilo, nil*,' is an axiom in the physical sciences which might be appropriately transferred to a judicial investigation of this nature." This is certainly sound logic, and a void contract can no more give rise to a right of action upon such contract than a void deed can create title in the grantee. In *Thomas v. West Jersey R. R.*, 101 U. S. 71,

25 L. Ed. 950, the railroad company made a 20-year lease of its road, which was acted under for five years and was then repudiated by the railroad, and the other party brought suit upon the contract. It was held void as ultra vires, but the doctrine of estoppel was invoked by the plaintiff on the ground that the contract had been partly performed. The court said: "It was the duty of the company to rescind or abandon the contract. Though they delayed this for several years, it was nevertheless a rightful act when done. Can this performance of a legal duty, a duty both to the stockholders and the public, give the plaintiff a right of action? To hold that this can be done is in our opinion to hold that any act done under a void contract makes all its parts valid, and that the more you do under a contract forbidden by law, the stronger the claim to its enforcement in the courts." In *Central Transportation Co. v. Pullman Palace Co.*, 139 U. S. 62, 11 Sup. Ct. 488, 35 L. Ed. 55, under a contract held ultra vires, the Supreme Court again held that part performance was no ground for enforcing further performance of an unlawful contract, though the Pullman Company was required to account in an independent proceeding for the value of what it had received from the plaintiff under the contract, saying: "In such case the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract to return, or, failing to do that, to make compensation for the property or money which it had no right to retain. To maintain such an action was not to affirm, but to disaffirm, the unlawful contract." This is the doctrine of the majority of the state courts of highest repute. In *Morville v. American Tract Society*, 123 Mass. 137, 25 Am. Rep. 40, the court said: "The plaintiff's money was taken and is still held by defendant under an agreement which it is contended it had no power to make. * * * The plaintiff is not seeking to enforce the contract, but only to recover his own money and prevent the defendant from unjustly retaining the benefit of his own illegal act." In *Day v. Spiral Springs Buggy Co.*, 57 Mich. 147, 23 N. W. 628, 58 Am. Rep. 352, in a suit upon a speculative contract which was held ultra vires, the defendant pleaded in estoppel on the ground of part performance, but the court, through Judge Cooley, said: "There are some decisions which give plausibility to the position of the defendant, but we know of none that is adequate to the exigencies of this case. * * * The power on the part of such a corporation to enter into contracts of speculation, being withheld on reasons of public policy, for the protection of shareholders and the general good of the community, the act neither of one party nor of both in entering into it can work an estoppel against setting up the invalidity. A rule of law established for the public good cannot be thus defeated. A corporation cannot, by the mere act of individuals, be given a power

which the state for general reasons has withheld from it. *Steam Navigation Co. v. Dandridge*, 8 Gill & J. 248, 819, 29 Am. Dec. 543. Parties may be estopped in some cases from disputing the validity of a corporate contract, when it has been fully performed on one side, and when nothing short of enforcement will do justice. To quote the language of *Comstock, C. J.*, in *Parish v. Wheeler*, 22 N. Y. 508, "The executed dealings of corporations must be allowed to stand for and against both the parties when the plainest rules of good faith so require." But this is not such a case. The contract has only been performed in part. * * * No valid ground for estoppel is therefore found to exist in the case."

Our own decisions have distinctly recognized the principle of the cases we have cited above. In *Maryland Hospital v. Foreman*, 29 Md. 524, the hospital had received money from Foreman under a contract which the court said was not authorized by the powers conferred in its charter, and was therefore "simply ultra vires and not binding upon the parties"; and Judge Bartol said: "The contract in all such cases will be regarded as void, and the party who delivered the property or advanced the money to the corporation will be entitled to his legal remedy, not founded upon, but in repudiation of, the contract, to recover the property or the money from the corporation, upon the principle that it had acquired no right or title to either under the contract." So, in *Lester v. Bank*, 33 Md. 563, 3 Am. Rep. 211, the appeal was from an order ratifying an auditor's account and allowing a claim for a debt due upon a loan made by the bank in violation of its charter, and the order was affirmed; the court saying that, "In cases arising under contracts made in violation of a statute, it has been repeatedly held that an action would lie against a party receiving money under such a contract upon a promise implied by law to refund it." In *Weckler v. First Nat. Bank*, 42 Md. 582, 20 Am. Rep. 95, the bank sold bonds on commission in violation of its charter powers, but paid over the proceeds to the owners of the bonds, and it was held that, not having any of the plaintiff's money obtained by means of the sale of the bonds, the defense of ultra vires was open to it. In *United German Bank v. Katz*, 57 Md. 141, where the bank discounted a note in excess of its charter powers, a recovery was allowed upon the note, though the plea of ultra vires was made, but the principle upon which it is allowed was stated to be "that it is inequitable to permit one who has received the benefit of the contract to repudiate it on the ground that the corporation from which he received the benefit had no power to make the contract"; so that the form of recovery, and not the substantial right of recovery, was the thing in question there. This is the only case in Maryland to which we have been referred in which a recovery directly upon the void contract has been allowed at law. The case

of *Heironimus v. Sweeney*, 83 Md. 146, 34 Atl. 823, 33 L. R. A. 90, 55 Am. St. Rep. 333, like *Lester v. Howard Bank*, was an equity case, and, where the defendant has retained the fruits of the void contract, the plaintiff may either resort to the common-law action for money had and received, or to an accounting in equity. The case of *Bank v. Katz*, supra, was cited in *Black v. Bank of Westminster*, 96 Md. 429, 54 Atl. 88, but in the latter case the declaration contained the common counts as well as a special count on the note, and the recovery of the bank might be properly attributed to those counts, even if the note had been held to be purchased instead of discounted as it was held to be; and both those cases were cases of fully executed contracts in which the defendant sought to retain the fruits of the contract.

In this case, there is but one count in the declaration, and that is upon the void contract, and the proof is clear that the railroad company never received from the hotel company, either directly or indirectly, any money or property whatever under this contract. The only money it has received as a result of the contract is that paid by passengers for transportation over its own road, or for freight carried over the road. The hotel company has paid nothing and parted with nothing under this contract, and is therefore, under all the authorities, without any right of action.

It follows from what we have said that the demurrer to the defendant's fourth plea should have been overruled and the defendant's first and second prayers should have been granted; and, for the error in sustaining the demurrer and refusing those prayers, the judgment must be reversed. As there can be no recovery under our view of this case, it is unnecessary to consider the other rejected prayers of the defendant.

Judgment reversed without a new trial. Costs above and below to be paid by the appellee.

WATERS v. AMERICAN FINANCE CO.

(Court of Appeals of Maryland. Nov. 23, 1905.)

1. CORPORATIONS — OFFICERS — AUTHORITY TO CONTRACT — PRESUMPTIONS.

There is no presumption of law that one who is the secretary, treasurer, and general manager of a corporation, whose principal business is selling or attempting to sell the stock of another corporation on commission, has authority to make a contract with its vice president under which he was to have one-half the commissions accruing from the sales of stock, whether made by him or by the secretary and treasurer.

2. SAME — SUFFICIENCY OF EVIDENCE.

In an action by the vice president of a corporation, whose principal business was selling or attempting to sell the stock of another company for commissions on sales, evidence held insufficient to show authority of one who was secretary, treasurer, and general manager of the corporation, to contract to pay plaintiff one-half the commissions accruing from sales,

whether made by plaintiff or by the secretary and treasurer.

3. SAME — DIRECTION OF VERDICT.

Where, in an action for commissions by the vice president of a corporation, whose principal business was selling or attempting to sell stock of another company on commission, against the corporation, there was evidence that plaintiff did sell at least 2,500 shares, and that defendant actually had in hand a considerable portion of the money received on such sales, plaintiff was entitled to recover reasonable compensation for his services.

Appeal from Baltimore City Court; Daniel Girard Wright, Judge.

Action by Thomas S. Waters, Jr., against the American Finance Company. From the direction of a verdict for defendant, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Frank V. Rhodes, for appellant. D. Eldridge Monroe, for appellee.

BOYD, J. This is an appeal from the judgment in the short note case in an attachment proceeding instituted by the appellant against the appellee. The short note contains the common counts, and the account filed is for "12½ per cent. commissions on the sale of 3,500 shares of the Gironx Consolidated Mines Company's stock to Mr. and Mrs. F. P. Center, Brooklyn, N. Y., at \$5 per share, \$2,187.50, less amount paid \$135," leaving a balance of \$2,052.50 alleged to be due. The appellee is sued as "a body corporate," but it is not stated where it was incorporated or what powers it possessed, although the appellant testified it was organized to sell coal and timber lands and unlisted stocks and bonds. He said that a Mr. Maegher, of Richmond, Va., was president, he (the appellant) vice president, and Mr. Beveridge, secretary and treasurer, and he added, "but Mr. Beveridge was the man behind the gun of the company." Those three officers and Mr. Berner, of Mt. Washington, were directors, and each of the three had 3,000 shares of preferred and 3,000 of common stock, of the par value of \$1 per share. Mr. Berner and a Mr. Lawrence, of Dakota, also held some stock. The Gironx Company agreed to pay 25 per cent. commissions to the appellee for sale of its stock at \$5 per share. The appellant claims that he made an agreement with Mr. Beveridge by which he "was to receive one-half of the commissions accruing from the sales of all Gironx stock either sold by Mr. Beveridge, as secretary and treasurer of the American Finance Company, or myself as its agent." That was in Baltimore, but after the fire there in February, 1904, he went to New York and was to be paid his expenses, in addition to his commissions. Before he went to New York he sold 10 shares to one person, and there was a sale by Beveridge of 100 shares to Mrs. Center—the commissions upon which he said he received one-half, and "Mr. Bev-

eridge got half." On March 21, 1904, he claims to have sold to Mr. and Mrs. Center, who were then in Boston, 3,500 shares for \$17,500—\$3,000 cash and the balance to be paid in 90 days. He admits that their subscription included 1,000 shares which Mrs. Center had ordered through the appellee. On the face of the subscription, which was in writing, addressed to the Giroux Company, there was an indorsement that it included all previous subscriptions made through the American Finance Company during the month of March, 1904. The \$3,000 was drawn from some savings institutions by the appellant for Mrs. Center, and paid over to the Giroux Company, and afterwards \$6,500 was paid to that company through him, and the balance to the appellee (through Beveridge), for the Giroux Company. At the conclusion of the plaintiff's testimony the court below granted a prayer "that there is no evidence legally sufficient to show that the plaintiff was employed by the defendant to act as the agent or servant of the defendant in procuring purchasers for the stock mentioned in the evidence, and the verdict of the jury must be for the defendant." An exception to that ruling is the only one presented by the record.

This case is certainly a peculiar one. Apparently the principal business actually done by the appellee was the sale or attempted sale of Giroux stock—of which it seems to have been authorized to sell 30,000 shares; but, so far as shown by the record, it sold less than 4,000 shares, including those to Mr. and Mrs. Center. Yet we find the appellant, who was the vice president, a director, and a large stockholder, demanding more than one-half the appellee was to receive, as he was to get one-half the commissions and his expenses. If we take his statement literally, Mr. Beveridge, the secretary and treasurer, was to receive the balance, but assuming that he meant that Mr. Beveridge was to receive it for the appellee, does the record show such facts as would entitle the appellant to recover against the appellee? The appellant cited a number of authorities concerning the powers of officers and agents of corporations, ratification by the corporations of their acts, etc., but here we have a vice president and director (not to refer to his being a large stockholder) who presumably knew, and certainly ought to have known, the powers of the officer of the company with whom he was dealing. There is no excuse for his not knowing, and, if he did, he was surely under obligation to furnish more evidence of the powers of Mr. Beveridge than appears in the record. Without some affirmative proof that the secretary and treasurer of the company was authorized to give him, not only one-half of the commissions on sales of this stock made by him, but according to his testimony one-half of the commissions on all sales of this stock, whether made by him or not, in addition

to his expenses, he should not be permitted to recover from the company on such a promise. There is no presumption of law that one who is secretary and treasurer of a corporation has such power, and merely because the appellant spoke of Mr. Beveridge as "the man behind the gun," or even as "general manager," is not sufficient unless there be more than we have in this record to inform us of the nature of his duties and the extent and character of the business of the company he was representing. The office of general manager in many corporations is one of very large powers, but so far as we are informed Mr. Beveridge seemed to have had but little to manage. The appellant testified "there were no other agents in the employ of the American Finance Company but myself," and up to the time he went into the employ of the company no timber or coal lands had been sold, and it is not shown that any were afterwards sold. There is nothing to inform us what the president did, or was supposed to do, and there is no intimation that he ever approved of, or even knew of, the alleged arrangement between the appellant and Beveridge. Nor is there the slightest suggestion that the board of directors had authorized it, or that any member thereof, excepting Waters and Beveridge, knew that they were thus entering into an agreement by which one of them was to get more than one-half of the profits coming to the company from the sale of this stock, which, as we have already said, seems to have been its principal business—certainly up to the time Waters claims to have been employed. He was in the employ of the appellee according to his claim for less than three months, yet, if they had succeeded in selling the 30,000 shares of stock he would have been entitled to one-half of \$37,500, as his share of the commissions. Well might Beveridge say to him in one of the letters, offered by appellant: "You know that 30,000 shares means \$37,500 for us, and we don't want to lose this great opportunity."

One circumstance disclosed by the testimony is very remarkable, in view of the fact that the appellant seemed desirous of giving the impression that Beveridge was "the company practically." The subscription to the stock of the Giroux Company by Mr. and Mrs. Center is dated March 21, 1904, yet on March 22d, he got from the Giroux Company what is spoken of as a duebill, which reads: "Due to Mr. Thos. S. Waters, Jr., as vice president of the American Finance Company, of Baltimore, Maryland, \$4,375 as commission on the sale of thirty-five hundred (3,500) shares of stock of this company, upon the payment by the subscriber, Mrs. Helen C. Center, of the balance of \$14,500 due upon the said subscription, \$3,000 having been paid by the subscriber to apply on the subscription as an incentive for this company to hold the same." If Beveridge had such powers as the appellant would have us believe, and he, as vice

president, had none, upon what possible theory could he justify his conduct in taking the duebill in that form? Under no circumstances was he entitled to more than one-half of the commissions (in addition to his expenses), and the treasurer was entitled to collect all of them. The Giroux Company owed the appellee whatever commissions were due by the former, and it had no right to pay them to the appellant. He did collect \$135 when he turned over the \$3,000 for Mrs. Center, and when asked whether he had any authority to collect any money for the appellee he replied: "I had no absolute authority in writing, but as vice president of the American Finance Company I drew this \$135 and reported it to the American Finance Company at the time I inclosed the report of sale." It is not shown just when it was, but apparently some time after Waters had ceased his connection with the appellee as agent, Mr. Kennedy, treasurer of the Giroux Company, got the duebill from him, and turned it over to Beveridge. In a letter written to the Giroux Company by Beveridge on March 23, 1904, which was offered in evidence by the appellant, Beveridge said that appellant was sent to New York "by the writer at the writer's personal expense to sell the stock of your company. He failed to sell the stock and was requested to come home two weeks ago." He stated in that letter that appellant had not sold one dollar's worth of the stock, and that "Mr. Waters was employed temporarily as an agent only, and he is not authorized to receive the company's money. He was not requested to spend my money to go to Boston, and he has been acting contrary to my wishes for the past 10 days." He indignantly denied the right of the Giroux Company to give Waters "any duebills issued by you or by your company for any so-called commissions on account of this company." Just why that letter was offered by the appellant is not clear, but he admits that he saw it the day it was received by Mr. Giroux, and then went into the employ of the Giroux Company. He also admits that Beveridge had notified him, before he visited the Centers at Boston, that he thought it would be well for him to come back to Baltimore. It is therefore, to say the least, very doubtful whether the appellant had not been discharged by Beveridge before the subscription of stock was made by the Centers.

But, without regard to that, is the plaintiff entitled to recover on this express contract, as it is alleged to be? To permit two officers, who were also directors of the corporation, to make an arrangement or contract so questionable, if not manifestly inequitable as this, without clear and unquestioned authority on the part of the one undertaking to bind the company, would establish a precedent which would be most dangerous. It is true that in this state an officer or director of a corporation can recover for services rendered his corporation, even if the services for

which he claims compensation are within the line and scope of his duties, as such officer or director, provided he proves an express contract, and that, if he renders services which are not within the scope of, and are not required of him by, his duties as such officer or director, but such as are properly to be performed by an agent, broker, or attorney, he may recover compensation for such services upon an implied promise. *Santa Clara Mining Ass'n v. Meredith*, 49 Md. 380, 33 Am. Rep. 264. But in this case there is no evidence or pretense that any one connected with the company had any knowledge or intimation that such an arrangement had been made, excepting Beveridge, and his powers to employ agents or fix their compensation, or bind the company in other ways, are left utterly uncertain and indefinite in the evidence—too much so to justify recovery by one connected with the company, as appellant was, on such a remarkable agreement as the one relied on. It might require less evidence to sustain a claim by a stranger, but the appellant's connection with the company was such as to give him full information as to the powers of Beveridge, and he could not be imposed on or deceived by an apparent authority, even if it be conceded there was such, which cannot be done. There is nothing to show a ratification by the company of the alleged contract, for whatever was done was by Beveridge, and of course he could not ratify his own acts—if he had power to ratify them he had power to act in the first place, and there would then be no necessity for ratification. We are therefore of the opinion that the appellant failed to show such authority in Beveridge as was necessary to support the action on the alleged express contract.

But, although we so find as to the alleged contract set out in the account, we are of opinion that there was error in granting this prayer. There was evidence tending to show that the appellant did sell at least 2,500 of the 3,500 shares of stock to Mr. and Mrs. Center—included in the subscription we have spoken of. It is further shown that the appellee actually had in hand at least \$5,000 of the money of the Giroux Company for stock sold Mrs. Center, and in a statement written on the back of a check of the American Finance Company, dated April 11, 1904, payable to the Giroux Company, it credited itself with the commissions on the sale of the 3,500 shares of stock. If then the appellant did sell part of that stock, as he claims he did, and the appellee has in hand the fruits of the labors of the appellant, it would seem to be just that he should receive such compensation as may be found to be reasonable for any services thus rendered by him outside of his duties as vice president or director. There is nothing in the record to show that the sale of the stock was a part of his duties in either of those capacities, and it certainly could not have been required of him to go to Boston

for such purpose. He received no compensation as vice president or director, and these services were such as an agent, attorney, or broker might perform. He would therefore be entitled to recover compensation on the implied promise to pay for these services, which resulted in the appellee's receiving commissions on the sales of at least 2,500 shares of this stock, provided, of course, the jury believed his statement to be correct, *Meredith's Case*, supra.

The court ought to have submitted these questions, including the value of appellant's services, to the jury; for, although we are of opinion that there was not sufficient evidence of the authority of Beveridge to make such a contract as that spoken of in the first part of this opinion, that would not preclude the appellant from recovering for services actually rendered and accepted by the appellee by the receipt of the commissions on stock sold by the appellant—not in the line of his duties as vice president or director. As the granting of the prayer prevented the jury from passing on those questions, the judgment will be reversed.

Judgment reversed, and new trial awarded; the appellee to pay the costs.

SHIPLEY v. FINK.

(Court of Appeals of Maryland. Nov. 23, 1905.)

1. PLEADING—BILL—SUFFICIENCY ON DEMURRER.

A bill should not be dismissed on demurrer, if by any reasonable construction of its averments a case is stated entitling plaintiff to the relief sought.

2. SPECIFIC PERFORMANCE—BILL—SUFFICIENCY.

A bill for specific performance of a contract for the conveyance of land, which alleges that defendant "offered to give" plaintiff certain land, provided plaintiff would not erect a building in a certain place and manner, and that plaintiff accepted the offer, changed the plan of the building, took possession of the land, and erected the building in accordance with the agreement, states a cause of action as against a demurrer; the allegation of an agreement "to give" being construed as an agreement to convey.

3. SAME—CONTRACT TO CONVEY LAND—EVIDENCE—SUFFICIENCY.

Evidence in a suit to compel the specific performance of a contract to convey land examined, and *held* insufficient to establish a contract with clearness essential to justify a decree for the conveyance of the land.

4. LICENSES—RIGHTS IN REAL PROPERTY.

Where an owner orally offered to give land to another, provided the latter would not construct a building in such a way as to cut off the light to a window in the owner's house, and the offer was accepted and a building erected according to the plans agreed on, the owner merely gave a parol license for the erection of the building, which license was revocable, so far as any future enjoyment of the land was concerned.

5. SAME—REVOCATION—REMEDY OF LICENSEE.

An owner, revoking a parol license for the construction of a building after the construction

thereof, must make compensation to the owner of the building.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, § 122.]

6. EQUITY—RETENTION OF JURISDICTION.

Where, in a suit for specific performance of a contract for the sale of land, the evidence fails to prove the contract, but shows that defendant granted to plaintiff a parol license for the construction of a building on defendant's land, and the building was erected, equity should retain the bill and award to plaintiff proper compensation on defendant preventing the future use of the building.

7. LICENSES—RIGHTS IN REAL ESTATE—PURCHASE OF REAL ESTATE—REVOCATION—REMEDIES AGAINST PURCHASER.

An owner granted to another a parol license for the construction of a building on his land. The building was erected, and the land was sold under a judicial decree, without reference to the license. *Held*, that the purchaser, on preventing the future use of the building by the owner thereof, could not be compelled to compensate him; but he could be compelled to give him a reasonable time in which to remove the building without unnecessary injury.

Appeal from Circuit Court, Carroll County; Wm. H. Thomas, Judge.

Suit by Charles E. Fink against Grove A. Shipley. From a decree for plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Jas. A. C. Bond, for appellant. Charles E. Fink, for appellee.

PEARCE, J. This appeal is from a decree of the circuit court for Carroll county, enforcing specific performance of an alleged contract for the conveyance of real estate.

Charles E. Fink and Henry B. Reigel in the year 1899 were owners of adjoining properties in the town of Westminster; the property of Mr. Fink being then in the tenancy of John T. Thompson, since deceased. Both these properties were improved by brick dwellings; that of Mr. Reigel being three feet and three inches south of the dividing line between the two properties, which line ran at right angles to Pennsylvania avenue, upon which the lots fronted, and the dwelling upon Mr. Fink's property being about five feet from said dividing line. Thompson, desiring to go into business as a butcher, arranged with his landlord for the erection of a meat shop upon the space between his dwelling and the said dividing line, to stand upon said line, and to run back to the rear of Thompson's dwelling, where it was to be widened, so as to give additional room and convenience for the business. This would have darkened the dining room window of Reigel's property, and upon discovering this fact Reigel, as the plaintiff alleges in his bill, "earnestly solicited the plaintiff not to extend said building so far back as to interfere with the light to his said window, and offered to give the plaintiff the land between Reigel's house and the dividing line, from the west side of said dining room window to Pennsylvania avenue, and

the use of the wall on the north side of his said house for the same distance, * * * provided the plaintiff would not erect a building on said line of division opposite said window, so as to cut off or interfere with the light to said window, which offer was accepted by the plaintiff," who in consequence changed the plan of said building accordingly, "and the plaintiff took immediate possession of said strip of land, and said building was immediately erected, in accordance with said agreement, upon the space between the two said houses and against the wall of said Reigel's house; the dimensions of said building being about $8\frac{1}{2}$ feet wide by $21\frac{1}{2}$ feet deep, and not extending further back than the western edge of said dining room window." Reigel died in November, 1900, and his said house and lot was sold in February, 1903, under a decree of the circuit court for Carroll county, and was conveyed by the trustees under said decree to the purchaser, the defendant, being described in the advertisement as containing one-fourth of an acre, more or less, without giving the lines, though at the sale it was stated to front on Pennsylvania avenue 60 feet, with a depth of 188 feet, and being conveyed to the defendant by metes and bounds conforming to said statement, and being designated in said deed as lot No. 3 of Hopper's addition to Westminster; the plaintiff's lot being lot No. 4 of Hopper's addition. No reference was made in the advertisement, or at the sale, to the said meat shop, or to any agreement or understanding under which the same was built partly upon Reigel's land.

The defendant demurred to the plaintiff's bill, and the court overruled the demurrer. We think this ruling was correct. Upon demurrer a bill should not be dismissed, if by any reasonable construction of the language of its averments a case is stated entitling the plaintiff to the relief sought; and we think the allegation of an agreement "to give the land" may be construed as an allegation of an agreement "to convey the land," under which proof may be offered of such an agreement. Upon the overruling of the demurrer the defendant answered, denying the alleged agreement between plaintiff and Reigel, and averring that he was a bona fide purchaser for value, without notice of any claim of the plaintiff, and that plaintiff stood by and saw said property sold, without setting up any claim. He also relied upon the statute of limitations and the absence of any written contract or deed, and admitted that after giving notice to plaintiff to remove that part of said building which was erected upon his land, and plaintiff's failure to comply with said notice, he began to tear down and remove said part of said building, as alleged in plaintiff's bill, until stopped by the injunction issued thereunder.

We have carefully examined the testimony to determine if it will warrant us in finding an agreement to convey the land, and will

briefly state the substance of the evidence upon this question. Mrs. Thompson, the widow of the tenant of Mr. Fink's property, says: That her husband went to Reigel and told him in her presence that he was too ill to keep up his trade. That he was going to put up a meat shop on the demised premises, with his landlord's consent, and stated how the building would be located, and that he did not want Reigel to think hard of him. That Reigel said: "Don't do that. If you pass my dining room window, it will darken my room. Take my ground, John. I will give it to you, but don't run it past my window." That her husband said he would see Mr. Fink about it, and afterwards told Reigel Mr. Fink said it was all right, and he should go ahead and build the shop, which he did, and that Mr. Fink allowed him for the labor and material out of his rent. That nothing was said as to when Thompson was to remove the shop, or for what period of time he was to have the land. James H. Thompson, a son of John T. Thompson, said his father told Reigel he was going to put the building on the line and run it back, and Reigel said: "Don't do that. Put it on my land, but don't run it back further than my dining room window." There was nothing said as to the time his father should have the land, only, "I will give you this land for your shop, but don't run it past my window." His father said he would see Mr. Fink, and later told Reigel Mr. Fink said: "All right. Go ahead and build your shop." Mrs. Sheeler, who lived next to Reigel, says Reigel told her they were going to build a butcher shop on the avenue, and it would be handy, and that "he gave him the right of way, the privilege to put the building partly on his land." Mr. Whitmore, who lived opposite to Reigel, says that, while the shop was being erected, Reigel told him that he told Thompson, if he would not go past his dining room window, "he might have that space," but he did not say how long he was to have it. Mr. Bankert, a near neighbor, says Thompson told him he was going to have an opposition to Whitmore, and just then Reigel came up and said the ground was no use to him, and he would rather have Thompson build there; but there was nothing said about deeding the land, or how long Thompson was to have its use. Mr. Wynert, another neighbor, says that, when the lumber was on the ground, Reigel said he had told Thompson that, if he would not go past his window, "he could use his wall as one of his side walls. He could put up the building there, and he would never give him any trouble." Mr. Fink testified that Thompson informed him "that Reigel said he would give the entire space between his brick house and the southern line of my lot, and the use of the wall of his brick house, if the building was not extended further back from the avenue than the nearest window to said avenue, which was his dining room window,"

and that he accepted the proposition, and the building was erected accordingly. He did not state there was any offer to convey the land, or any reference by any one to a conveyance, and there is nothing in the record to show that there was any personal communication upon this subject at any time between Reigel and Mr. Fink. There was no other testimony relating to the agreement or understanding as to the erection of the building upon Reigel's land, and we do not think that which we have stated affords the character or degree of proof required to justify a decree for the conveyance of the land in question, which is the specific relief sought by the bill.

"Specific performance is never a matter of right, and always rests in sound judicial discretion, controlled by established principles of equity. The contract sought to be enforced must be so clearly proven as to satisfy the court that it constitutes the actual agreement between the parties." *Horner v. Woodland*, 88 Md. 512, 41 Atl. 1080. "Its terms must not be ambiguous. They must be accurately stated in the bill, and the proof must correspond therewith, so as to have no room for reasonable doubt." *O'Brien v. Pentz*, 48 Md. 577. And in contracts for the conveyance of land the contract alleged must be established by clear, satisfactory, and convincing proof. 28 Enc. of Law (2d Ed.) 181. So far as appears from the record, Mr. Fink never exchanged a word with Reigel on this subject, and he does not say that Thompson, in reporting to him Reigel's proposition, represented any agreement for a conveyance. No one of the five witnesses who testified to the arrangement between Thompson and Reigel referred to any such agreement. Bankert says there was nothing in the conversation he heard about deeding the land. Mrs. Sheeler says Reigel told her he gave Thompson "the right of way, the privilege to put the building on his land," and Wymert says Reigel told him he told Thompson he would never give him (Thompson) any trouble. There is a very material difference between an agreement to allow the erection of a building by another upon one's land and a contract to convey the land to that other, or, as in this case, to a third party; between a parol license for an easement in land and an agreement to convey the land in which the easement is to be enjoyed. If Reigel intended to bind himself to execute a deed to Mr. Fink for this land, it was unnecessary and meaningless for him to assure Thompson he would never give him any trouble. But this assurance was entirely consistent with the purpose of allowing the use of the land to Thompson so long as he continued the tenant of Mr. Fink, and his declaration that he had given Thompson the right of way, the privilege, was consistent with the same purpose; but both were inconsistent with a purpose or obligation to convey the land to Mr. Fink. Such evidence, whatever may have been Mr.

Fink's understanding of the proposition, as reported by Thompson, cannot be accepted by the court as clear and convincing proof of an actual agreement on Reigel's part for a conveyance of the land, without which understanding on Reigel's part the alleged contract lacks the essential element of mutuality, and is marked by an ambiguity as to the subject of the agreement, from all shade or color of which, as was said in *Dixon v. Dixon*, 92 Md. 438, 48 Atl. 152, the contract must be free.

Nor is there a word of evidence from any one that Reigel required of Mr. Fink a "covenant not to erect any building or buildings on his land opposite the dining room or kitchen windows of the defendant's house, which could or might darken either of said windows or obstruct the light thereof." Reigel's only requirement was that the particular building which Thompson was about to erect for his own use and convenience should not go beyond his dining room window, and the requirement by the decree of the covenant on Mr. Fink's part, to be inserted in the deed, goes beyond the specific performance of any term of the contract established by the evidence, and is the introduction of a new term not agreed upon by the parties. All that we find to be established by the evidence in this case is a parol license from Reigel to Thompson to enjoy an easement in his land and the wall of his house. In *Cook v. Stearns*, 11 Mass. 533, the court said: "A license is, technically, an authority given to do some one act or series of acts on the land of another without passing any estate in the land. But licenses which in their nature amount to granting of an estate, for ever so short a time, are not good without deed. The distinction is obvious. Licenses to do a particular act do not in any degree trench upon the policy of the law [which is the same in Maryland as in Massachusetts in this respect] which requires the bargains respecting title or interest in real estate shall be by deed or in writing. They amount to nothing more than an excuse for the act, which would otherwise be a trespass. But a permanent right to hold another's land for a particular purpose is an important interest, which ought not to pass without writing, and is the very object provided for by our statute." In *Houston v. Laffee*, 46 N. H. 507, where a lead pipe to convey water had been laid in defendant's land, under a verbal license from a former owner, and defendant cut the pipe, the court said: "A parol license to do a certain act, or a series or succession of acts, on the land of another, does not convey any interest in the land, but simply a privilege to be exercised on the land. It has been held that, where a license like the one in this case has been given to plaintiff to enter upon defendant's land and do acts which involved expenditure of money, and the license becomes executed by an expenditure incurred, it is irrevocable, on the ground

that a revocation under such circumstances would be fraudulent or unconscionable.

But we think the later decisions sustain the doctrine that the license is in all cases revocable, so far as it remains unexecuted, or so far as any future enjoyment of the easement is concerned; for, to hold otherwise, would be giving to a parol license the force of a conveyance of a permanent easement in real estate, and no such right or interest in real estate can be created by parol." In *Hays v. Richardson*, 1 Gill & J. 383, 384, it was decided that an easement to be used in the land of another (in that case a road and bridge) can only pass by a deed acknowledged and recorded, and the court referred with approval to *Thompson v. Gregory*, 4 Johns. 81, 4 Am. Dec. 255, in which the Supreme Court of New York (of which Kent and Spencer were judges) held that a right to overflow the land of another by the erection of a milldam was an incorporeal hereditament, which could be transferred by deed only, and not by parol permission to use it, and that, if it were otherwise, the assignment of such an interest, since the statute of frauds, must be in writing. The same was decided in *Carter v. Harlan*, 6 Md. 27-28, where Judge Legrand cited *Cook v. Stearns*, supra, and *Wallis v. Harrison*, 4 Mees. & Wels. 543, and said: "When Harris, who was then the owner of the land now belonging to the plaintiff, disposed of and conveyed it away, such disposal and conveyance, ipso facto, by mere operation of law amounted to a revocation of the license; and so, likewise, with all the subsequent sales of it, until the plaintiff in this action became seised of it."

It is true, as contended by the appellee, that the fact of the possession of a party whose rights are involved in a purchase is a sufficient intimation of his right to put the purchaser upon inquiry into the nature of those rights, and that, failing to make it, he is in equity vested with all the consequences of a knowledge of the plaintiff's rights. *Baynard v. Norris*, 5 Gill, 483, 46 Am. Dec. 647; *Duval v. Wilmer*, 88 Md. 66, 41 Atl. 122. But this doctrine is only applicable to a case where the possession is under a claim of right or title to some estate in the land, which is established by proof, and not where there is a mere easement under a parol license which is subject to revocation at the will of the licensor, and which, as declared in *Carter v. Harlan*, supra, is in fact revoked by sale and conveyance, as in this case. It follows from what we have said that the decree appealed from, which requires a conveyance by the appellant of the strip of land in question, and which makes perpetual the preliminary injunction restraining the appellant from destroying or interfering with said building, must be reversed. It does not follow, however, upon the facts of this case, that the in-

junction should have been dissolved at once. When a court of equity has once acquired jurisdiction of a cause, it will retain such cause in order to do full and complete justice between the parties as far as possible, with respect to the subject-matter. *Pomeroy on Contracts*, § 474. Accordingly, if Reigel, the licensor, were still the owner of the land and the defendant in this suit, he would not be allowed to withdraw his consent and prevent the future use of the building, erected for the enjoyment of the easement, without making compensation to Mr. Fink, and the court would retain the bill to enable it to ascertain and decree a just compensation, in order that he should not be put to the trouble and expense of a second suit in another tribunal. *Carter v. Harlan*, supra; *Green v. Drummond*, 31 Md. 84, 1 Am. Rep. 14; *Addison on Torts* (6th Ed.) § 310. This relief, however, cannot be granted against the appellant under the circumstances of this case.

But we think the evidence shows that the appellant acted with undue haste, in view of all the circumstances, in starting to tear down and destroy that part of the building on his land at the time he did so. The testimony of both parties shows that at that time the removal of the building was a subject of negotiation between them; Mr. Shipley requiring, either that it be removed or an agreement made for payment of rent for the land on which it stood. While this discussion was in progress, Mr. Shipley served a written notice on Mr. Fink, November 28, 1903, requiring him to remove the building on or before December 3, 1903. Mr. Fink testifies that they had previously agreed to meet on the premises on December 5, 1903, at 4 p. m., to adjust the matter, an earlier meeting being impracticable, owing to the pressure of his professional engagements, and that he went there at 4 p. m., and found that Mr. Shipley had begun to tear the building down before 2 o'clock, but was not then there. Mr. Shipley denies this agreement. Without, however, undertaking to reconcile their testimony, we are of opinion that, under all the circumstances of the case, Mr. Fink was entitled to a reasonable opportunity to remove the building without unnecessary injury to it, and that the notice given, in view of all the facts, was not such reasonable notice. The proper course, in our opinion, would have been to retain the bill and continue the injunction for such period as would, in the judgment of the court enable Mr. Fink to remove the building from Mr. Shipley's ground without unnecessary injury thereto; and we are of opinion that 10 days will be a sufficient period therefor.

Decree reversed, and cause remanded, that a new decree may be passed in conformity with this opinion. The costs above and below to be paid equally by the appellant and the appellee.

JONES v. DAY et al.

(Court of Appeals of Maryland. Nov. 16, 1905.)

1. TRUSTS—SALE OF PROPERTY—DISTRIBUTION OF PROCEEDS—CONSTRUCTION OF DEED.

Where a deed conveyed property to the grantor's son, in trust for the grantor's use during her life, and provided that after her death the property should go to the grantee for life, with power to sell the same and divide the proceeds "equally between himself and each of his children, share and share alike," but, in case he failed to sell, the power of sale was on his death to vest in his wife, the proceeds of sale to be divided "equally between herself and each of her children share and share alike," the grantee was not entitled to one-half, but he and his four children were each entitled to one-fifth of the proceeds arising on a sale by him.

2. SAME—COMPENSATION OF TRUSTEE—ALLOWANCE OF COMMISSION—AMOUNT OF.

The property having been sold for \$4,000, it was not error to allow the trustee a commission of 2½ per cent. as compensation.

Appeal from Circuit Court, Baltimore County, in Equity; N. Charles Burke, Judge.

Controversy between Owen D. Jones and Annie B. Day and another as to the proper construction of a deed. From the decree, said Owen D. Jones appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

John P. Poe and Edwin Higgins, for appellant. D. G. McIntosh, Jr., for appellees.

PAGE, J. In 1885 Sarah Jones conveyed by deed to her son, Owen D. Jones, certain property, in trust for the grantor's own use during her life, with power reserved to herself to sell and dispose of the same, or any part thereof, as she might see proper, and apply the proceeds thereof to her own use and benefit, and from and after her death the said property, or so much thereof as had not been disposed of by her, should go to her son, Owen, for life, with power to him to sell the same or any part thereof and to divide the proceeds of the same "equally between himself and each of his children, share and share alike." Should he, however, not sell as authorized by the deed, upon his death, the power of sale was vested in his wife, Annie Jones, with directions to divide the proceeds of sale "equally between herself and each of her children, by the said Owen D. Jones, share and share alike." And should neither Owen D. Jones nor Annie E. Jones sell the property or only a part of it, then it and the remaining part, upon their deaths, shall pass to their children, to be "equally divided between them, share and share alike," etc. Annie, the wife of Owen, died four years ago, leaving four children, all of whom are still living. Sarah Ann Jones, the mother of Owen, died many years ago. Owen Jones in December, 1904, made sale of the property for the sum of \$4,000, and the same is now in court for distribution among those entitled thereto. Two of the children it appears have assigned their respective interests in the

fund to the appellant. The lower court decreed that by a proper construction of the deed Owen Jones and his four children each take one-fifth of the proceeds of sale, and that the trustee was entitled to a commission of 2½ per cent. as compensation. From this decree this appeal was taken.

The terms of the deed indicate a purpose on the part of the grantor to devote the property, first, to the use and enjoyment of her son during his life, and, afterwards, to that of his wife, if she should survive. But such use was limited only to the property itself or that part of it that remained unsold. So soon as the property was sold, either by the son Owen or by his wife, under and by virtue of the powers conferred by the deed, then a rule of distribution of a different character was imposed. In that event, the person invested with the power of sale was not to be entitled to the entire proceeds, but to only a share. He or she (as the case might be) was to share "equally" with "each of the children, share and share alike." This seems to be the clear meaning of the words of the deed; and, if that be correct, and if it be correct, the decree of the lower court must be affirmed. *Larmour v. Rich*, 71 Md. 369, 18 Atl. 702.

There was some stress laid at the argument upon the use of the word "between." The deed provides that the proceeds of sale shall be divided "equally between himself [the appellant] and each of his children," and it was contended that by the employment of this word there was indicated the purpose to require the fund to be divided into two parts, one of which to go to the appellant, the other to be equally divided among his children. But we cannot accept this view. It has been held that the word "between" ordinarily refers to two only and not more, though, as was said in *Leary's Appeal*, 162 Pa. 372, 29 Atl. 750, "it is not unfrequently used, especially by the uneducated and colloquially, in the sense of among, as referring to more than two objects." To construe it here as indicating that the grantor in the deed intended to be understood as meaning there were to be only two parties to the distribution, one of them being the appellant and the other his children, does violence to the proper import of all the words when taken together. It absolutely ignores the word "each," as used by the grantor more than once. Her direction is explicit, and so clear as to leave no room for doubt that the division is to be made "equally" between himself and each of his children, "share and share alike." Thus the division is to be "equal," and each child and the appellant should take, "share and share alike." Where the language is so clear as in this case, grammatical construction of a particular word and even the authorities applicable to cases not exactly similar to the one under consideration are not important.

The counsel for the appellee has referred to several cases in Maryland, but we do not deem it necessary to discuss them. *Brittain v. Carson*, 46 Md. 189; *Brown v. Ramsey*, 7 Gill, 352.

There was no error in the allowance of commissions as compensation.

Decree affirmed.

BERNEI et al. v. SAPPINGTON et al.
(Court of Appeals of Maryland. Nov. 23, 1905.)

1. EASEMENTS—GROUNDS—OBSTRUCTING ALLEY—IRREPARABLE INJURY.

A party seeking the aid and protection of a court of equity to enjoin the obstruction of an alley must show a clear title, or at least a fair prima facie case in support of the title he asserts, and in addition thereto he must show that irreparable or serious injury will result from the invasion of his legal rights.

2. SAME—OBSTRUCTION OF WAY—ESTABLISHMENT OF TITLE AT LAW.

Where the evidence in a suit to enjoin the obstruction of a way discloses a real dispute as to plaintiffs' title to the easement claimed by them, and tends strongly to support the grounds of defense asserted by defendants, so that the question of title to the way, as dependent upon the construction of title deeds and upon asserted adverse holding and user, is drawn in controversy, an injunction will not be granted until the question of title is settled in an action at law.

3. SAME—PROTECTION PENDING LITIGATION.

A temporary injunction restraining the obstruction of a way, the title to which is involved in great doubt, will not be granted pending proceedings at law to establish the title, unless the mischief threatened or impending from such obstruction is likely to be ruinous or irreparable.

4. SAME.

Where a way alleged to exist in plaintiffs' favor had been completely closed for 50 years, and during that time had been in the uninterrupted and exclusive control of defendants and their predecessors in title, and plaintiffs had allowed defendants to make valuable improvements which obstructed the way without making any objection thereto, an injunction would not be granted to restrain the making of further improvements obstructing the way, which were practically completed before any protest was made by plaintiffs.

Appeal from Circuit Court No. 2 of Baltimore City; George M. Sharp, Judge.

Suit by Ferdinand Bernel and others against Lizzie C. Sappington and others. From an order dismissing the bill, plaintiffs appeal. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Louis B. Bernel, and Geo. R. Willis, for appellants. Charles J. Bonaparte and Paul N. Burnett, for appellees.

BURKE, J. This is an appeal from an order of the circuit court No. 2 of Baltimore city, dismissing the bill of complaint without prejudice to the right of the plaintiffs to institute appropriate proceedings at law respecting the subject-matter of this contro-

versy. The bill sought to procure an injunction restraining the defendants from obstructing and closing the alley therein mentioned, and to require them to reopen the alley to the extent to which it may have been closed by them. A somewhat detailed statement of the issue raised by the pleadings will make more evident the grounds upon which we rest the decision of the case.

The bill alleges: That the plaintiffs are possessed of a certain lot of ground with improvements thereon situated in the city of Baltimore at the southeast corner of Eutaw and Lexington streets. That said lot was devised to the complainants' ancestor, Seligman Bernel, in 1881, by H. Marcus Denison. That in said conveyance the lot was described as follows: Beginning for the same at the southeast corner or intersection of Eutaw street and Lexington street, and running thence east, binding on Lexington street, 63 feet, to a 3-foot alley, running from Lexington street, parallel with Eutaw street, of the depth of 78 feet, laid out and left open by Christian Miller for the benefit of the purchasers of his lots; thence south, parallel with Eutaw street and binding on said alley, 38 feet; thence west, parallel with Lexington street, 63 feet, to Eutaw street; and thence north, binding on Eutaw street, 38 feet, to the place of beginning—with the right and privilege of said alley, in common with said Miller and his assigns, but subject to the right and privilege heretofore granted by Hezekiah Claggett to a certain John Daly and his assigns, by indenture bearing date the 25th of March, 1824, of the use of said alley, and also the right of building over the same, so far as the said Hezekiah Claggett then had the right thereto, against, in, and upon the wall of the house then owned by him adjoining said alley. That the defendants Lizzie C. Sappington and Coale S. Brennan, are seised in fee of a certain lot of ground, with improvements thereon, adjoining the plaintiffs' property, known as 323 West Lexington street, and that as such owners they have the right to the use and privilege of the alley as now laid out and used on the west side of the property, and the right of building over the same so far as a certain Hezekiah Claggett has a right thereto, against, in, and upon the wall of the house once owned by him adjoining said alley, so as not to injure said wall. The bill then alleges that on February 14, 1901, the defendants Lizzie C. Sappington and Coale S. Brennan leased their said property to Benjamin F. Spink for a term of 15 years, with the understanding that said lessee should tear down the improvements on the lot and erect a new three-story house, to cost not less than \$4,500, and that said Spink recently proceeded to have the old buildings torn down, and for that purpose employed the defendant Jones, who is also under contract with said lessee, to erect a three-story house in place of the old building; that the work of erection of

said house is now progressing, and that, although they have warned the defendants not to encroach upon said alley, to the common use and privilege of which the plaintiffs have a right, they, the said defendants, have nevertheless begun to close up and build upon said space of three feet covered by said alley, and, unless restrained, will completely close the same and appropriate said alley to their own use; that the deprivation by the defendants of the plaintiffs' use and privilege of said alley is not susceptible of adequate compensation in damages at law, and will work irreparable injury to the plaintiffs' property, unless the defendants be restrained by the court, and be directed to remove the obstructions from the alley and restore said alley to its original condition as an alley. The prayer of the bill is that the defendants or their agents may be enjoined from placing any brick, stone, or other building material in or upon said alley, and from closing the same as an alley, and that an order may be passed commanding the defendants to remove any such building material therefrom, and to reopen the same to the extent to which it may have been closed by them.

To this bill the defendants filed separate answers. The answer of the defendant Jones alleges that on the 28th of March, 1901, he entered into a contract with Benjamin F. Spink to tear down an old, and erect a new, building, on the lot No. 323 West Lexington street, and that on July 2, 1901, he had completed said improvements; he denied that he ever received any notice from the plaintiffs as alleged in the bill. The answer of Benjamin F. Spink avers that he originally leased the premises No. 323 West Lexington street in February, 1881; that he has occupied the premises continuously since that date; that on February 14, 1901, he entered into a new lease with the present owners; that pursuant to the provisions of said lease he has since the date thereof torn down the old improvements on said lot and has erected a new building thereon, the new building covering the same part of the lot upon which the old building stood; that on June 7, 1901, after the building was under roof and practically completed, he received a notice from Louis B. Bernel to desist from further obstructing the said alley. The answer denies the existence of the alley claimed by the plaintiffs, and avers that since he has been a tenant of the property the improvements thereon have covered the entire front of the lot, and that a hallway or entrance way of the width of about three feet on the west side of said lot has, during his occupancy of said premises, been entirely closed by a door under lock and key in the front, and a stairway of the entire width of said entrance way leading to the second floor of said building. It avers that during the time he has occupied said property—that is, since February, 1881—no easement in any part thereof has been enjoyed by the plaintiffs or any one else; that, if the alley mentioned in

the bill ever existed, the same has been completely closed; and that the same has been continuous, complete, uninterrupted, visible, adverse, notorious, and hostile to any rights the plaintiffs may have had therein. The answers of Lizzie C. Sappington and Coale S. Brennan deny the existence of the alley asserted by the plaintiffs, and claim title to the strip of land which the plaintiffs claim to be an alley. They deny the receipt of any notice from the plaintiffs until after the improvements of their said lot had been practically completed. They aver title by adverse possession to said strip of land claimed by plaintiffs to be an alleyway, and further allege that any easement which the owners of the lot described in paragraph 1 of the bill have as grantees of George Smith and Thomas Mummey has long since been abandoned and extinguished.

The circumstances under which a court of equity may be invoked to aid or protect a legal right have been fixed by numerous decisions in this state. The party seeking the protection of the court must be able to show a clear title, or at least a fair *prima facie* case in support of the title he asserts; and, in addition thereto, he must show that irreparable or serious injury will result from the invasion of his legal rights; the irreparable or serious nature of the injury to which the property in question is subject, and will likely sustain, before the legal right can be fully vindicated in the proper forum, being the equity on which the application for injunction is founded. *Whalen v. Dalashmutt*, 59 Md. 250; *Gulick v. Fisher*, 92 Md. 353, 48 Atl. 375. In the case of *Clayton v. Shoemaker et al*, 67 Md. 216, 9 Atl. 635, it is said that when an application is made for an injunction to prevent waste or trespass, it is incumbent on the plaintiff to make out a *prima facie* title to the property; but if his title to the extent it is set up by him is denied and contested by the respondent, and evidence enough is offered to show some ground for the denial, the injunction will not be granted till the disputed title between the parties is first settled on appropriate pleadings and full testimony. In cases where the legal title to the property is in dispute, and it appears by the pleadings and proof that serious loss or injury will result, or is likely to result, to the plaintiff before the disputed title could be established at law, the court will grant a temporary injunction preserving the present status until the title has been decided in a court of law. *Lanahan v. Gagan*, 37 Md. 105; *Amelung v. Seekamp*, 9 Gil & J. 468.

The record contains quite a large amount of testimony introduced to support the contentions of the respective parties; but, in the view we take of the case, we do not feel called upon to enter upon an extended discussion or analysis of the evidence. It is sufficient to say that the testimony dis-

closes a case in which there is a real dispute as to the plaintiffs' title to the easement claimed by them, and that the evidence produced by the defendants tends strongly to support the grounds of defense relied on in the respective answers. Upon the state of pleadings and proof disclosed by the record, has a court of equity jurisdiction to grant the relief prayed for in the bill? It is apparent from the pleadings and evidence that the determination of the title to the strip of ground in controversy, and of the rights of the parties therein, depend largely upon the true construction of the title deeds under which the respective parties claim, and upon the question of adverse holding and uses of the owners of the respective premises. These are all purely legal questions, not appropriate to a court of equity. The plaintiffs' title to the easement being denied and involved in great doubt, the question arises whether the record presents a case in which a temporary injunction should have been granted pending proceedings at law to establish the title. Such an injunction will not be granted in cases like the one under consideration, unless the court can see that the mischief threatened or impending is likely to be ruinous or irreparable. We do not find anything in the evidence in this case to take it out of the general rule.

The plaintiffs claimed that the easement which they seek to establish as appurtenant to their property was created in 1804, under the assignment from Christian Miller to George Smith and Thomas Mummey under whom they claim. The leasehold title to the lot described in said assignment (being the lot now owned by the plaintiffs) was acquired by Hezekiah Claggett in 1818. Claggett, in 1824, being then the owner of the leasehold estate in the property now owned by the plaintiffs, conveyed to John Daly, the ancestor of the defendants Sappington and Coale S. Brennan, lot No. 6 shown on the plat filed in this case. This deed in its granting clause contains the following words: "And particularly the use and privilege of the alley as now laid out on the west side of the above described ground, and the right of building over the same, so far as the said Claggett has a right thereto, against, in, and upon the wall of the house now owned by him adjoining said alley, so as not to injure said wall." Whether at the date of said deed lot No. 6 was improved or unimproved does not appear from the testimony. But, in 1881, when Spink took possession of said property, 57 years after the date of said deed, the entire front of said property was found to be improved by a building which indicated that it has been erected many years, the joists of which ran into the Bernel wall on the west, and the stairway and west door of which completely closed said alley and street to all

access thereto. It is apparent from the evidence that this condition must have existed for many years before Seligman Bernel, the plaintiffs' ancestor, acquired possession in 1871 of the property now owned by them. The testimony indicates that the strip of ground, called an "alley" in the bill, has been completely closed for 50 years, and that during that time has been in the uninterrupted and exclusive control of the defendants Lizzie C. Sappington and Coale S. Brennan, and their predecessors in title. It is shown that Seligman Bernel allowed valuable improvements, which obstructed the alleged alley, to be made upon the property in 1881, without objection, and that the plaintiffs, with full knowledge, permitted Spink to expend a large sum in the erection of buildings mentioned in the evidence, by which the alley in question was entirely closed without a word of protest until the improvements were practically completed. Under these circumstances, to grant the prayer of the plaintiffs' bill would be to do an act of injustice and oppression. We are of the opinion that the decree of the court below should be affirmed.

Decree affirmed, with the costs to the appellees.

DONORA SOUTHERN R. CO. v. PENNSYLVANIA R. CO. et al.

(Supreme Court of Pennsylvania. Nov. 4, 1905.)

INJUNCTION—TRESPASS—RAILROADS—INTERFERENCE WITH TRACKS.

Where a railroad company, organized under the general laws, has entered upon a certain land and laid its tracks thereon with the consent of one who had long been in possession under a claim of title, and thereafter takes a deed from the person in possession, another railroad company which has acquired an adverse title to the land will be enjoined from entering on the land and tearing up the tracks of the first company.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 100, 104.]

Appeal from Court of Common Pleas, Washington County.

Bill by the Donora Southern Railroad Company against the Pennsylvania Railroad Company and others. Decree for plaintiff, and defendants appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

A. M. Todd and Jas. A. Wiley, for appellants. Samuel McClay, J. H. Murdoch, T. F. Birch, and Reed, Smith, Shaw & Beal, for appellee.

PER CURIAM. This was a bill for injunction against a threatened repetition of the action of defendant in tearing up the tracks of the plaintiff, and incidentally for assess-

ment of the damages for the acts already committed. The title to the land was in dispute. In 1902 plaintiff, a Pennsylvania corporation, located its route and constructed a portion of it on this land by agreement with one Bamford, who was then, and had been for many years, in possession under claim of title. On May 21, 1904, Bamford conveyed the land to plaintiff, which had previously constructed additional tracks to those built in 1902. In 1903 the defendants' lessor acquired an adverse title to the land, but, as found by the court below, with knowledge of Bamford's possession. And the defendants made no claim to title prior to 1903, and no effort to take possession until May 16, 1904, when it entered and tore up complainant's rails.

On these facts the court found as conclusions of law: "(1) That in 1902 the plaintiff company had power to take and condemn a right of way across the land, without regard to who owned it, and, having found Bamford in long possession, it had entered and built part of its tracks with his consent. (2) That defendants' lessor, when it acquired title in 1903, took subject to a visible easement thereon, 'and cannot now call in question the legality of the plaintiff's previous entry and appropriation.' (3) That this is not an ejectment suit, and that it is not necessary for the court to adjudicate the title to the land. (4) That the plaintiff company was in possession of its right of way under permission from one who was in possession under color of title, and who made a claim of title that had such a reasonable basis as would put the defendant companies who never were in possession, at least so far as the ground covered by the right of way was concerned, to an action at law to test their rights. The defendant companies took the law into their own hands and undertook by force to redress what they claimed was an invasion of their rights, and, in addition, they threaten a repetition of this force if the plaintiff company should attempt to restore the tracks destroyed. In doing so they committed a wrong, the repetition of which should be restrained. (5) That an injunction should issue, and damages should be assessed at \$1,000, but that the injunction granted and the findings of fact and conclusions of law, which are held to justify it being granted, are not to prejudice the right of either of the parties hereto to establish, maintain, or defend in a court of law its title and right of possession to the said 6.73 acres of land described in the fourth paragraph of the plaintiff's bill, or any part thereof, or its legal or equitable right of possession to the strip of land over and across said tract of land covered by the location of the plaintiff company's main line and branch B."

On these findings and conclusions the decree is affirmed.

In re HOLBROOK'S ESTATE.

(Supreme Court of Pennsylvania. Oct. 30, 1905.)

WILLS — CONSTRUCTION — VALIDITY OF CONDITION.

Testator by his will gave the income of a fund during the beneficiary's life, or so long as she remained unmarried, with a gift over in case of her death or marriage. *Held*, that the gift was upon a limitation in favor of the beneficiary while she remained unmarried, and was not invalid as an unlawful restraint of marriage.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Wills, § 1533.]

Appeal from Court of Common Pleas, Philadelphia County.

In the matter of the estate of Margaretta R. Holbrook. From a decree sustaining exceptions to adjudication, Helen Morton Bunker appeals. *Affirmed*.

The testatrix by will directed as follows: "I give and bequeath to my niece Helen Morton, the interest on the sum of \$30,000, the said \$30,000 to be held in trust by the Philadelphia Trust, Safe Deposit & Insurance Company for her use, she to receive the net income arising therefrom paid semiannually during the term of her natural life, or so long as she remains unmarried. In case of her death or marriage I direct that half of the principal be given to the Society for the Prevention of Cruelty to Animals, and the other half to the Society for the Prevention of Cruelty to Children." The niece married in 1904. The adjudicating judge (Penrose, J.) held that the bequest was for life, upon condition of forfeiture in case of marriage; that the condition was void, because against the policy of law; and that the niece, notwithstanding the marriage, continued entitled to the income. The court in banc held that there was a limitation in favor of the niece during the period of her nonmarriage, which was valid.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

John G. Johnson, for appellant. N. Dubois Miller, John J. Wilkinson, and Joseph Mellors, for appellees.

MITCHELL, C. J. In Pennsylvania the right of a man to do as he will with his own has always been liberally construed. Accordingly a donor, not under any obligation to give, may give with such conditions as he pleases, subject only to the restriction that the conditions shall not be clearly illegal. Thus a man may not settle his own property on himself, so as to keep it out of the reach of his creditors, for that would lead directly to fraud. But a parent or other person, not bound to give at all, may give on a spendthrift trust, though the gift is thus placed beyond the reach of the donee's creditors. In considering any restriction, there is no presumption of illegality. On the

contrary, the presumption is in favor of innocence and validity. The particular restriction which we have in this case belongs to the class known in general terms as in restraint of marriage, and is claimed to be void as against the policy of the law. The general rule must be conceded. But it has no sound basis, either historically or logically, as is apparent from the various origins assigned to it and the refinements, subtleties, and inconsistencies in its application. The old lawyers used to say there were three favorites in the law, life, liberty, and marriage, and Coke attributes the origin of the rule to this favor. Other authorities find its origin in the civil law; others again in the canon law; and finally, in some of the more modern cases, it is based on the policy of the law for the promotion of morality, which is certainly a far-fetched and unsubstantial reason in view of the admitted exceptions. Thus, for example, it is difficult to see why such a restriction tends to immorality in a gift of personality, but does not in a gift of realty, or, if the divestiture of an estate by marriage has the same tendency, why a limitation of the estate to a continuance unmarried should not. Yet these distinctions are as firmly settled as any in the law. *Lancaster v. Flowers*, 198 Pa. 614, 48 Atl. 896; *Hotz's Estate*, 38 Pa. 422, 80 Am. Dec. 490. The curious will find this subject learnedly discussed in the argument of Mr. Hare and the opinion of Kennedy, J., in *McIlvaine v. Gethen*, 3 Whart. 575, and the opinion of Chief Justice Gibson in *Com. v. Stauffer*, 10 Pa. 350, 51 Am. Dec. 489.

Nor does the rule stand any better considered logically. It started apparently with a prohibition of all restrictions against liberty of marriage. *McIlvaine v. Gethen*, 3 Whart. 575. Distinctions and exceptions one after another sustained prohibitions which went merely against time or place, or particular persons, conditions with a gift over on breach, conditions in a gift of land, and finally the distinction between conditions subsequent, working a divestiture, and conditions limiting the estate given. This last distinction is logical enough, for where there is an estate given, and the condition is held void, there is still the estate which may continue; while, where the estate itself is to last only so long as the condition is fulfilled, there is nothing left after the breach. But, while this distinction is logical, it is dry, technical logic, with no basis of substantial reason for application in the affairs of life. It is a reproach to the law that, of two donors intending to do exactly the same thing, one shall succeed and the other fail, as a violator of law, merely because one scrivener knew what he was about, and wrote "so long as the donee remains unmarried" and the other was ignorant or careless, and wrote "for life, if so long the donee remains unmarried." *Hoopes v. Dundas*, 10 Pa. 75. So strongly have the courts of Penn-

sylvania felt the undesirability of interference with the right of free disposition of property by the rule invoked in this case that the steady tendency has been to recognize and encourage exceptions which substantially eat out the rule itself. We share the views which have produced this result, and, while we will recognize and follow the adjudicated cases which may be properly regarded as having settled rules of property, yet we are not disposed to enlarge the scope of the principle, or to apply it to new and questionable cases.

The present controversy arises over the legacy of the testatrix to the appellant of the income of a fund "during the term of her natural life, or so long as she remains unmarried," with a gift over "in case of her death or marriage." The primary rule is to give effect to the intention of the testatrix and the presumption is that the intent was lawful. The form in which she expressed her will is unimportant, except as indicating her intent. There is nothing in this will clearly indicating an intent to prohibit marriage. The words are equally appropriate to express an intent to supply an income to the legatee so long as she was unmarried and presumably dependent on her own exertions for her maintenance. This is a perfectly lawful intent, though its practical effect may be to discourage marriage. Even regarding the language of the gift as ambiguous in being equally capable of two constructions, we must give it the one that will preserve the testatrix's right to dispose as she pleased of her property. There was a gift over on the happening of death or marriage. In *Cornell v. Lovett's Ex'r*, 35 Pa. 100, and *Mickey's Appeal*, 46 Pa. 337, restrictions much more clearly conditions subsequent divesting the legacies than that in the present case were expressly held to be valid.

The decree is affirmed.

COMMONWEALTH v. HINE.

(Supreme Court of Pennsylvania. Oct. 30, 1905.)

1. HOMICIDE—NEW TRIAL.

Defendant, who had been convicted of murder in the first degree, moved for a new trial, on the ground that he had been induced to go to trial without having made proper preparations, because the district attorney represented to defendant's counsel his willingness to accept a plea of guilty of murder in the second degree. *Held*, that the new trial was properly denied, on a finding by the trial judge that there had been no misunderstanding as to the plea which was to be entered, and the defendant had been allowed at his own request a week to prepare for trial.

2. SAME—NEWLY DISCOVERED EVIDENCE.

A new trial, on conviction of murder, for newly discovered evidence merely cumulative as to the mental and physical condition of the prisoner before the homicide, was properly refused.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2328; vol. 20, Cent. Dig. Homicide, § 687.]

Appeal from Court of Oyer and Terminer, Philadelphia County.

Louis O. Hine was convicted of murder in the first degree, and appeals. Affirmed.

The following is a portion of the opinion of Audenried, J., in the court below:

"The second reason advanced for a new trial is the allegation that the assistant to the district attorney who tried the case, by representing to defendant's counsel his willingness to accept a plea of guilty of murder of the second degree, induced him to go to trial without having made proper preparations. By the report of the trial judge it appears that when this case was first called for trial, defendant's counsel offered at side bar to enter a plea of guilty of murder of the second degree; that to the acceptance of this plea the assistant district attorney in charge of the case objected, saying that he had evidence which made it seem to him that the defendant was guilty of murder of the first degree; that thereupon defendant's counsel stated that if the question of murder of the first degree was to be tried out, he was not prepared to go on with the trial, and, being asked by the trial judge how long a time he would require for his preparation, replied, 'One week;' that thereupon, with the consent of the assistant district attorney, the trial of the cause was postponed for a week; that when the case was called the second time for trial, defendant's counsel made no objection to proceeding; that it was understood by counsel on both sides that the case was to be tried on the day when the trial took place, and that the question of the degree of the defendant's guilt would be left to the jury. With the negotiations in relation to the change of plea which went on before the day when the case was first called for trial, we have nothing to do, nor have we anything to do with what may have gone on between the assistant to the district attorney, who had charge of the case, and defendant's counsel after the arrangement had been made which is reported by the trial judge. That arrangement contemplated a careful trial of the case and was assented to by both parties. Counsel for the defendant was well aware that the court, in view of what had been said by the assistant district attorney, would not receive a plea of guilty of murder of the second degree, and intended to throw the responsibility of deciding the question of fact in the case on the jury. It is fair, however, to observe that the assertions of counsel for the defense in relation to the arrangements alleged by him to have been made between him and the assistant district attorney are denied by the latter.

"At the argument of the motion for a new trial the only point advanced with seriousness on behalf of the defendant was that the possession of after-discovered evidence throwing light upon the issue tried by the jury, which he could not have obtained at

the time the trial took place, entitles him to have the case tried over again, so that this evidence may be presented to the jury. The evidence referred to is the testimony of Victor J. Hamilton, the proprietor of a saloon at No. 1603 Lombard street, Philadelphia. By his affidavit, which has been presented to us, it appears that Hamilton saw Hine between 3 and 4 o'clock in the afternoon of August 3, 1903. This was about eight hours before the shooting took place. Hamilton swears that although the defendant's condition did not seem so much that of one who had had too much liquor, it appeared to be that of one 'who was getting the rams, or was under the influence of both drugs and liquors.' In our view of the matter, this testimony is merely cumulative. It relates to the mental condition of the accused at a point of time appreciably antecedent to the shooting of his wife. That condition was testified to by Thomas O'Toole and Elizabeth R. Dougherty, and their testimony is to the same practical effect as Hamilton's. The trial judge properly told the jury that the important question for them to determine related to the condition of the defendant's mind at the moment when the shooting took place. Upon that question the testimony of Hamilton bears only remotely. A man may be so benumbed mentally by drink in the afternoon as to talk vaguely and incoherently, but be quite himself again within eight hours.

"We are of the opinion that the defendant was fairly tried, and that the verdict of the jury is supported by the evidence in the case; and we accordingly refuse to grant the motion for a new trial."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas Raeburn White and Walter Thomas, for appellant. John C. Bell, Dist. Atty., and Joseph H. Taulane, Asst. Dist. Atty., for the Commonwealth.

PER CURIAM. The single assignment of error is that the court below abused its discretion in refusing a new trial. There is nothing in the case that justifies such a charge or that even requires discussion.

The judgment is affirmed, and the record remitted that the sentence may be executed in accordance with law.

Rule for new trial under Act April 22, 1903 (P. L. 245), refused.

In re MACE'S ESTATE.

(Supreme Court of Pennsylvania. Oct. 30, 1905.)

APPEAL—REVIEW—AUDITOR'S FINDINGS.

Where the questions of fact as to the correctness of the trustee's accounts in the matter of the settlement of an estate of a decedent were considered by the auditor, and his findings were

approved by the court, the decree will be affirmed.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, §§ 4015-4018.]

Appeal from Orphans' Court, Westmoreland County.

In the matter of the estate of Laura C. Mace. From a decree dismissing exceptions to auditor's report, the Safe Deposit & Trust Company and others appeal. Affirmed.

The following is the opinion of Steel, P. J., in the court below:

"A careful examination of the testimony, exceptions, papers, and report in the case convinces us that all the interest that could fairly have accrued on the money and securities in the hands of the accountant has been charged against him, and that the proper amount of premium on the bonds sold has been accounted for. There is no proof that he improperly received anything for transferring the \$10,000 of 4 per cent. government bonds for the longer term 5 per cent. school bonds. And there can be no doubt but that the trade was of advantage to the estate, both in the amount of interest to be received and the ultimate value of the bond. The contestants had their day in court, and, as the time for the review of the original account had expired, they were not entitled to have that decree opened. And now, to wit, May 6, 1905, the exceptions are dismissed, and the auditor's report is confirmed absolutely."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John E. Kunkle and Edward E. Robbins, for appellants. James S. Moorhead and John B. Head, for appellee.

PER CURIAM. The questions of fact as to the correctness of the trustee's accounts, and the claims to surcharge him, were carefully considered in detail by the auditor, and his findings have been approved by the court. We have not been shown any valid ground for differing from the conclusions, and there is nothing else in the case. The decree is affirmed on the opinion of the court below.

Decree affirmed, at the costs of the appellant.

STARK v. BYERS.

(Supreme Court of Pennsylvania. Oct. 30, 1905.)

1. WILLS—CONSTRUCTION—CHARGE ON LAND.

Testator gave all his estate to his wife for life, with remainder to his executor, and charged the remainder with certain legacies, and directed a monument to be erected on his grave, not to exceed a sum stated. *Held*, that the cost of the monument was not a charge on the land.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 2114-2116.]

2. LIFE ESTATES — INCUMBRANCES — FORECLOSURE.

Testator devised certain mortgaged real estate to his widow for life. The widow before testator's death had acquired by assignment a part of the mortgage, but neglected during her life tenancy to pay the interest on the other portion. *Held*, on foreclosure, that such interest could be deducted from her share of a fund created by the sale.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Life Estates, § 36.]

Appeal from Court of Common Pleas, Westmoreland County.

Action by Mrs. C. H. Stark, assignee of W. R. Barnhart and others, against W. S. Byers. From an order dismissing exceptions to auditor's report, the executor of Mrs. C. H. Stark appeals. Affirmed.

From the record it appeared that the fund for distribution before the auditor was raised in foreclosure proceedings under a mortgage created by Caleb H. Stark in his lifetime. The mortgage originally amounted to \$20,000, and \$4,000 of this had been assigned by Barnhart to Mrs. C. H. Stark in her husband's lifetime. Stark by his will gave his wife a life interest in his real and personal property. Other facts appear by the auditor's report which was in part as follows:

"In the verdict fixing the amount due Mrs. C. H. Stark, the court refused to allow any interest to her, except up to the time her life estate began, and it further decided that she was liable for the payment of the interest accumulated on this mortgage during her life tenancy. That portion of the opinion of his honor Judge McConnell, which bears on this question, and was filed at that time, is as follows: 'There is no dispute between the parties about the fact that Mrs. C. H. Stark, through these assignments, became possessed of the right to \$4,000 of the mortgage debt, and is yet the owner of it. The verdict ascertains that she is the widow of C. H. Stark, deceased, and through his will is possessed of a life estate in the mortgaged premises. It also ascertains that this life estate vested in her by the death of her husband on January 1, 1899. There is but one question of law involved in this special state of facts, and that is, whether Mrs. C. H. Stark can collect interest on her share of the mortgage since the time she became tenant for life of the mortgaged premises through her husband's will. It is the duty of a life tenant to pay the interest falling due on incumbrances; interest on a mortgage is payable by the life tenant whether the mortgage was created by the testator who devised the life estate or by a former owner. *Derr's Estate*, 13 Phila. 224; *Pennock v. Imbrie*, 3 Phila. 140; *Gross' Estate*, 18 Phila. 154; *Fidelity Ins., etc., Co. v. Dietz*, 132 Pa. 36, 18 Atl. 1090; *Stoops' Estate*, 31 Pittsb. Leg. J. (O. S.) 34; *Lang's Estate*, 31 Pittsb. Leg. J. (O. S.) 173; *School's Estate*, 1 Pittsb. R. 358; *McDonald v. Heylin*, 4 Phila. 73; *Jewell's Estate*, 1 Wkly. Notes Cas. 404; *Schurr's*

Estate, 13 Phila. 353. Mrs. Stark was therefore liable for the payment of the interest that has accumulated on this mortgage during her life tenancy of the mortgaged premises. The original mortgagee and his assignees, other than Mrs. Stark, are not compelled to regard the existence of this duty which had its inception since the making of the mortgage, but may enforce the mortgage against the entire title as it existed in the mortgagor when the mortgage was given. A widow, tenant for life, is bound to keep down incumbrances, pay taxes, water rent and repairs in exoneration of those entitled in remainder. *Schurr's Estate*, 13 Phila. 353. When a life tenant neglects to pay the taxes and the remainderman pays the taxes, the latter may recover the amount of such payments from the estate of the deceased life tenant. *Shue's Estate*, 5 York Leg. Rec. 25. There is no apparent reason why this would not be true of interest which it was the duty of the life tenant to pay. The law does not favor such circuity of action.

"The question arises whether, if Mrs. Stark, the life tenant, neglected to pay the interest due during her life estate on that part of the mortgage assigned to Mrs. Mary M. Barnhart, to wit, the sum of \$1,277.20, and the interest on that part of the mortgage assigned to W. R. Barnhart to wit, the sum of \$3,057.89, for the same period, under the law and the direction of the court at the time of the rendition of the verdict aforesaid the auditor can deduct this amount of interest from the sum coming to the estate of Mrs. C. H. Stark out of this fund. The estate of Mrs. C. H. Stark is liable to the remainderman for these amounts of interest, and they could be collected by him out of her estate, if they had been collected from him. It is from the estate of Mrs. C. H. Stark as represented in this distribution that the auditor proposes to deduct these amounts of interest. It is simply having her estate do that which the law compels her to do. If her executor had paid it he would be entitled to repayment from the funds of the estate afterwards coming into his hands. *Gross' Estate*, 18 Phila. 154; *McKerrahan v. Crawford*, 59 Pa. 390."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

H. Clay Belstel and James E. Keenan, for appellant. James S. Moorhead and C. E. Heller, for appellee Jacob Byers. Paul H. Gaither and Cyrus E. Woods, for appellee William S. Byers.

PER CURIAM. Two questions are raised by the amended assignments of error. As to the first, the auditor reported:

"As to the claim for \$1,500 for the erection of monuments at the graves of C. H. Stark and his wife. The claim is made that it was

the intention of the testator, C. H. Stark, to give to W. S. Byers only what was left after paying all legacies and performing all duties in the will. The testator is very careful to designate the legacies that are charged on the land. He uses the following language: 'I give, devise and bequeath unto my beloved wife, Ann Lavina Stark, all my estate, real, personal and mixed, of what nature or kind soever and wheresoever the same may be at the time of my decease for and during the term of her natural life, and at her death I give, devise and bequeath all of my estate as aforesaid, unto my friend William S. Byers, attorney at law, of Greensburg, Pa., to him, his heirs and assigns forever, subject, however, to and charged with the payment of the following legacies and bequests.' There can be no doubt that the legacies which follow are charges on the land. But the direction as to the above claim of \$1,500 is not in this list. Before making the explicit charges on the land, the testator uses the following language as to this claim: 'I direct that my executor hereinafter named shall erect or cause to be erected at my grave and at that of my wife when she shall depart this life, suitable monuments, the costs of which shall not exceed the sum of \$1,500. He, my said executor, shall use his discretion and best judgment in regard to the erection of the monuments for myself and wife. * * * he having an intimate knowledge of my wishes and desires in regard thereto. I further direct that in the settlement of his accounts he shall have credit for all moneys expended by him in the carrying out of my wishes and desires.'

"There is no specific amount mentioned. The will seems to fix only an amount which is to be determined by the executor, not to exceed \$1,500. How much could be impounded for this purpose? One hundred dollars? Five hundred dollars? One thousand dollars? Or fifteen hundred dollars? In the brief submitted by the learned counsel for this claim the law does not exactly fit the facts of the present case before us. The words used after certain directions are "rest, residue and remainder," clearly showing that what was left was given under the will. In this case the testator, C. H. Stark, gives to his wife all his estate, real, personal and mixed, and at her death to W. S. Byers all his estate as aforesaid, charged with certain specific legacies. The auditor is of the opinion that this claim is not a charge on the land and should not be allowed out of the fund here for distribution."

On the other question the auditor quoted the opinion of the learned judge below filed at an earlier stage of the case.

On that opinion and the portion of the auditor's report quoted the decree is affirmed.

BEGGS v. JAMES HANLEY BREWING CO.

(Supreme Court of Rhode Island. Nov. 22, 1905.)

1. CONTRACTS—OFFER AND ACCEPTANCE.

Where plaintiffs by letter offered to install certain grates and blowers under defendant's boilers, and defendant wired acceptance, there was an express contract, excluding any contract by implication.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 119, 120.]

2. SALES—WARRANTIES.

Where plaintiffs by letter offered to install certain grates and blowers under defendant's boilers, saying that prompt acceptance would be necessary so that the apparatus could be installed the next Sunday, and that part of the work might have to go over till the next Sunday, but that there would be no delay in the operation of the plant, there was no warranty that after the apparatus was installed it would so operate that there would never be any delay in the operation of the plant because of it.

3. SAME.

Where a letter in which plaintiff offered to install certain grates and blowers under defendant's boilers stated that the apparatus was "adapted to the burning of fine anthracite fuel," there was no warranty that the apparatus would, with the use of such fuel, produce as much steam as the boilers previously produced, or enough steam to run defendant's plant; and hence in an action for the price of the apparatus, evidence that plaintiff knew that defendant desired the apparatus to produce as much steam as was produced before was not admissible.

4. SAME—IMPLIED WARRANTIES.

Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, defined, and described thing be actually supplied, there is no implied warranty that it shall answer the particular purpose intended by the purchaser.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 773.]

5. SAME—ACTION FOR PRICE—TRUTH OF REPRESENTATIONS—EVIDENCE.

In an action for the price of certain grates and blowers installed by plaintiff under defendant's boilers, evidence held to show that the apparatus was "adapted to the burning of fine anthracite fuel," as represented.

Action by James Beggs against the James Hanley Brewing Company. On plaintiff's petition for a new trial after judgment for defendant. Petition granted.

Argued before DOUGLAS, C. J., and BLODGETT, JOHNSON, and PARKHURST, JJ.

Cooke & Angell, for plaintiff. Gorman, Egan & Gorman, for defendant.

JOHNSON, J. The plaintiff delivered and installed in the defendant's brewery certain grates and blowers on the contract made by the following proposition and acceptance:

"New York, May 25, 1903.

"James Hanley Brewing Co., 33 Jackson St., Providence, R. I.—Gentlemen: We have received communication from Mr. D. N. Roth-
ermel stating that you desire a proposition for the installation of the McClave apparatus

under your three boilers. We have also received communication from our Mr. Reyhner giving us definite furnace measurements, and we herewith submit you proposition for the above installation. We will furnish and place in position ready for use, exclusive of mason work, the McClave apparatus, consisting of the McClave Improved twin-lever grate and the McClave Argand blower, under each of your boilers, for the sum of \$766.75—seven hundred sixty-six & 75/100 dollars net. The McClave system is adapted for the burning of fine anthracite fuel; workmanship and material first class in every particular. Should you wire us the acceptance of the above proposition, we will have the apparatus shipped the latter part of this week, so that same can be installed on Sunday. We must, however, have your prompt acceptance in order to do this, and it might be possible that part of the work would have to go over until the following Sunday; but there will be no delay in the operation of your plant. Hoping to receive your confirmation, which shall have our prompt attention, we are, Yours very truly, James Beggs & Co. [Signed] per Ellis."

"Providence, R. I., May 26, 1903.

"To James Beggs and Co., 9 Dey St., New York: Will accept your proposition for the McClave apparatus for our boilers according to your letter of the twenty-fifth. Ship at once. The James Hanley Brewing Co."

The apparatus was put in on May 31, June 7, and June 14, 1903, said dates falling on Sunday, and one set being installed on each date. Each set was used from the time it was installed, and several trials were made with fine anthracite coal, in mixtures of various proportions with soft coal. The apparatus remained under the boilers until about October 20, 1903, when it was taken out by the defendant on the ground that the contract had not been fulfilled by the plaintiff, because with the grates and burners in use, and burning fine anthracite coal, the boilers did not produce enough steam for the successful operation of the brewery. Suit was brought, and, jury trial being waived, the case was tried before a single justice in the Appellate Division of the Supreme Court, and a decision was rendered for the defendant.

The plaintiff petitioned for a new trial on the grounds: (1) That the decision was against the law and the evidence and the weight thereof; (2) that the presiding justice erred in the admission of certain testimony; and (3) that he erred in certain rulings and decisions upon the construction of the contract. The presiding justice ruled at the trial, and embodied the same ruling in his decision, that the proposition and acceptance constitute an express contract, and that the contract thus being express, no contract is raised by implication. This ruling was correct.

1. He then proceeds, however, to say: "The proposition is to furnish and place in position ready for use under each of the three boilers of a brewing plant in active operation, without delay in the operation of the plant, the McClave apparatus, consisting of the McClave twin-lever grate and the McClave Argand blower, adapted for the burning of fine anthracite fuel, for a certain sum of money. This fairly may be said to mean that the new grates and blowers were to displace grates already burning fuel under said boilers in the operation of the plant, and that they were to continue such operation by the burning of fine anthracite fuel for which they are adapted; and furthermore, that there will be no delay in the operation of the plant. This assumes that when the McClave system is introduced, installed, and burning fine anthracite fuel under the boilers, there will be no delay in the operation of the plant, by the proper use of such apparatus and fuel. If it does not mean that, it simply means that they will not delay the operation of the plant while they are taking out the old system and installing the new one; but what advantage would that be if the new system itself proved to be a perpetual hindrance to the successful operation of the plant?" We think this construction is erroneous. The portion of the plaintiff's proposition to which the above language of the decision applies is as follows: "Should you wire us the acceptance of the above proposition, we will have the apparatus shipped the latter part of this week, so that same can be installed on Sunday. We must, however, have your prompt acceptance in order to do this, and it might be possible that part of the work would have to go over until the following Sunday, but there will be no delay in the operation of your plant." This clearly applies to the work of installing the apparatus, which it is proposed shall be done on Sunday, in order that the operation of the plant may not be delayed thereby. To construe this language as applying to the operation of the plant after the completion of the work of installing the McClave apparatus is, in our opinion, to give to the words in question a meaning which the context forbids. The presiding justice in his decision construed the statement in the proposition that "the McClave system is adapted for the burning of fine anthracite fuel" as follows: "I am of the opinion that the words 'adapted for the burning of fine anthracite fuel' in the contract is a warranty that the McClave system is suitable and fit to successfully burn such fuel under such boilers; that is, that it is capable of doing the work for which and in the place where it was installed." He made the same ruling at the trial. At the first glance this construction does not seem to give any added meaning to the words in question, as it may be said that, if the apparatus was adapted for the

burning of fine anthracite fuel, it would be so adapted wherever it might be placed. In one sense this is true, as the apparatus could not lose its adaptability for the burning of the fuel named simply from the fact of being moved. It might, however, be placed in such a position and subjected to such conditions as to reduce or destroy its power of operation. It certainly might be placed under boilers where, although it did operate so as to successfully burn fine anthracite coal, the boilers might not produce a given amount of steam, to say nothing of producing the amount required for the successful operation of a brewery. If the decision in this regard does not so construe the words in question as to make the apparatus practically responsible for failure on the part of the boilers under which it was installed to produce the amount of steam required by the brewery, then it does not mean anything. Under this ruling, however, the presiding justice admitted evidence tending to prove that the contract between the parties was that, with the McClave apparatus installed under the boilers in the defendant's brewery, and burning fine anthracite fuel, such boilers would produce the amount of steam required for the successful operation of the brewery. James Hanley, a witness for the defendant, referring to an interview with George Ellis, general manager of plaintiff, testified: "Q. 25. I will ask you if, as a matter of fact, Mr. Hanley, you didn't communicate to him a knowledge of the horse power of your then boilers; did you not communicate that fact? A. I did. Q. 26. Did you not also inform him that the demands of your business at the brewery demanded all of the steam that you were then producing? A. I did. Q. 27. Did you make any statement to him that you were unwilling to change the grates that you were then using unless you were assured that the same results by the grate and blowers he proposed to sell you would produce a similar result? A. I did." He further testified: "Q. 58. Was there any reason for you not to continue the McClave system except for its incapacity to continue the results you anticipated? A. No, sir." The prospectus of the plaintiff was also admitted in evidence.

2. The admission of this line of testimony illustrates the construction given to the words in question by the presiding justice more clearly than the language of the decision. The admission of this testimony appears to rest upon the rule that, where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied. The apparatus contracted for in this case, however, was shown by the evidence, without contradiction, to be well known and in use in

other places. It was defined and described in the contract, and it is the rule that where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, defined, and described thing be actually supplied, there is no implied warranty that it shall answer the particular purpose intended by the purchaser. *Benj. on Sales*, § 657; 1 *Parsons on Contracts*, 589; *Chanter v. Hopkins*, 4 M. & W. 899; *Seltz v. Brewer's Refrigerating Machine Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; *Grand Avenue Hotel Co. v. Wharton*, 79 Fed. 43, 24 C. C. A. 441. In *Parsons on Contracts*, supra, the rule is stated as follows: "If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. This principle has been carried very far. It must, however, be limited to cases where a thing is ordered for a special purpose, and not applied to those where a special thing is ordered, although this be intended for a special purpose. For if the thing is itself specifically selected and ordered, then the purchaser takes upon himself the risk of its effecting its purpose. Nor can he rely upon statements and assertions made by the maker in circulars and advertisements concerning the article as a warranty that it will do what is stated." In *Chanter v. Hopkins*, supra, which is a leading case on the subject, the defendant wrote to the plaintiff, the patentee of an invention known as "Chanter's smoke-consuming furnace," the following order: "Send me your patent hopper and apparatus, to fit up my brewing copper with your smoke-consuming furnace. Patent right £15 15s., ironwork not to exceed £5 5s.; engineer's time fixing 7s. 6d. per day." The plaintiff accordingly put up on the defendant's premises one of his patent furnaces, but it was found not to be of any use for the purposes of the brewery, and was returned to the plaintiff. It was held (no fraud being imputed to the plaintiff) that there was not an implied warranty on his part that the furnace supplied should be fit for the purposes of the brewery, but that, the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine.

The construction given to the words "adapted for the burning of fine anthracite fuel" was erroneous, and it follows that the line of testimony admitted under that construction was erroneously admitted. The plaintiff took numerous exceptions to the admission of this testimony, but, as they were only pressed generally, it is not necessary to consider them in detail. It is not disputed that the apparatus was the identical thing ordered, and was first-class in workmanship and material.

There remains for consideration the ques-

tion of fact: Was the McClave apparatus adapted for the burning of fine anthracite fuel, as stated in the contract? The evidence showed that the McClave apparatus had been on the market for several years prior to the making of this contract, and that it was in use in several plants in Providence, one in Phillipdale, and one in Worcester, Mass.; that there were six sets at the Nicholson File Company, on which fine anthracite coal was burned exclusively for three or four weeks, and afterwards mixtures of said coal with soft coal were used, because such mixtures were found to be more economical, and produced more steam; that there were eight sets at the Glenlyon Dye Works, on which No. 3 buckwheat coal was used, and that the apparatus was satisfactory.

Alexander Ogg, a machinist there, testified: "Q. 12. Has the work been satisfactory that you obtain in the use of those grates and blowers, the time when you refer to when you were using this fine anthracite coal? A. It is satisfactory to us. When we started in with one, then went to three, then to five, and then to eight. That suited us." It appeared in evidence that at these works the Argand blower was removed about eight months after it was put in, and a system of exhausting from the dyehouse substituted for it. Mr. Ogg testifies in regard to the change: "X. Q. 20. Why did you substitute this system you speak of for the McClave Argand blower? A. There was a double object. These fans had to blow to exhaust the steam, and the only place to put it was under the boiler, and we didn't want to use the live steam for that purpose." It was shown that the apparatus was started at the pumping station at the Hope reservoir in Providence June 22, 1903, and was tried first with No. 3 buckwheat, then with Nos. 2 and 3 and a little pea coal, and finally used with No. 2 buckwheat exclusively. Witnesses both for the plaintiff and defendant testified that fine anthracite coal mixed in various proportions with soft coal was used with the apparatus in defendant's brewery, and that fair steam was maintained in the morning in each case, but that it receded in the afternoon. The load at the brewery was shown to be very uneven. The evidence for the defendant showed that there was a particularly heavy draft on the steam when the brewer was boiling his beer.

Warren B. Lewis, an expert witness for the defendant, testified that he had made tests of the McClave apparatus in the Manufacturers' Building in Providence. On the question of the adaptability of the apparatus, he testified: "Q. 21. I will ask you whether the McClave system as installed and operated in the Manufacturers' Building is adapted to burn fine anthracite coal? A. Any grate will burn coal; any grate might burn fine anthracite coal. I should say that question would be limited entirely by the conditions imposed." As to the conditions in

defendant's brewery, the same witness testified: "Q. 49. What were the conditions existing at the Hanley brewery which militated against the adaptability of the McClave system to this plant? A. What conditions did I ever find? Q. Yes. A. Why, I found on a test made there that the maximum demand upon the boilers was about 430 horse power, the boilers being rated at 320, and that would be, in my mind, a sufficient reason for saying that a steam blower could not maintain a high enough air pressure in the air pit to consume sufficient anthracite coal to give any such overload of capacity in the boiler." He further testified: "X. Q. 87. Suppose that the James Hanley brewing plant commenced in the morning with a certain variety of coal—fine anthracite coal, for instance—and was operated right through until say one or two o'clock in the afternoon, with a pressure of 80 or 85 pounds, from six in the morning until two in the afternoon, and then suddenly, within a few minutes, it dropped to 40 pounds; how would you explain that? A. If the violent pressure [depression?] was very sudden, I should think first that it was a sudden draft of steam from the boiler that caused it."

The testimony of the defendant's witnesses that, with the apparatus in use and burning mixtures of fine anthracite and soft coal, the boilers in the defendant's brewery did not maintain sufficient steam to meet all the demands of the brewery, does not militate against the adaptability of the apparatus for the burning of fine anthracite fuel. The defendant did not exact a warranty that, with the apparatus in use under the boilers at its brewery, the boilers would produce sufficient steam for the operation of the brewery. That the apparatus was adapted for the burning of fine anthracite fuel is shown, not simply by a preponderance of the evidence, but without contradiction. In fact, the evidence for the plaintiff on this question is corroborated by that introduced by the defendant. There was no testimony in the case that the combustion of coal in the apparatus was imperfect.

The decision was against the law and the evidence. Petition for new trial granted. Case remitted to the superior court, with directions to enter judgment for the plaintiff for \$766.75, with interest from August 18, 1903, date of demand, and costs.

GALLIGAN v. WOONSOCKET ST. RY. CO. (two cases).

(Supreme Court of Rhode Island. Nov. 6, 1905.)

1. APPEAL — VERDICT — SUFFICIENCY OF EVIDENCE.

Where plaintiff's evidence, if believed, is sufficient to support the verdict, it cannot be interfered with on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3923-3934.]

2. DAMAGES—PERSONAL INJURIES—FRACTURED KNEECAP.

Twelve hundred dollars is not excessive damages for a fractured kneecap.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 359, 377.]

3. PARENT AND CHILD—EARNINGS OF INFANT.

A father is presumptively entitled to the earnings of an infant son.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, § 70.]

4. SAME—LOSS OF SERVICES—DAMAGES.

In an action by a father for injuries to his child, the measure of damages is the son's full earning capacity, and not merely the "net result" of his earnings.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 240.]

5. NEW TRIAL—EXCESSIVE DAMAGES.

In an action by a father for injuries to his son, the fact that the verdict for \$400 was \$1.50 in excess of the damage proven did not require the granting of a new trial on the ground of excessiveness of the verdict.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 153.]

6. SAME—DISREGARD OF INSTRUCTIONS.

The fact that in estimating damages the jury disregarded an erroneous instruction is not ground for a new trial, the verdict being justified by the evidence.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 133.]

Separate actions by Peter Galligan and Peter A. Galligan against the Woonsocket Street Railway Company. On defendant's petition for a new trial after judgments for plaintiff in each case. Petitions denied.

Argued before DOUGLAS, C. J., and DUBOIS, JOHNSON, and PARKHURST, JJ.

George W. Greene, for plaintiff. John J. Heffernan and James H. Rickard, Jr., for defendant.

PARKHURST, J. These are two actions of trespass on the case for negligence, which were tried together at Woonsocket before a jury in February, 1905. The plaintiff Peter A. Galligan was a passenger on a car of the defendant which ran off the rails, and he was thrown from the running board, and struck upon a macadam roadway upon his hands and knees. He claimed to have fractured his right kneecap, and for that injury he brought suit. The plaintiff Peter Galligan, the father of Peter A. Galligan, who was a minor, sued for loss of his son's services and for the expenses of his son's illness. The jury returned a verdict for the plaintiff in each case, with damages of \$1,200 for the son and \$400 for the father. The defendant has petitioned for a new trial in each case, alleging in each that the verdict is contrary to the evidence, contrary to the law, and that the damages are excessive. In the father's case an additional ground is alleged, namely, that the court erred in refusing to instruct the jury as requested by the defendant. At the trial no defense was made upon the issues of negligence of the defendant and due care on the part of Peter A. Galligan, so these questions are not before the court.

We find in the record sufficient evidence, if believed by the jury, to support the verdicts in both cases.

1. In the case of Peter A. Galligan, the son, while there is a sharp conflict of testimony between plaintiff's and defendant's experts as to the nature and extent of the plaintiff's injuries, we cannot say, as a matter of law, that the verdict is against the evidence, or contrary to law or excessive. It is not disputed that the plaintiff was injured, and there is sufficient evidence adduced by the plaintiff as to the nature and extent of the injury to warrant the jury in believing that he was injured substantially as he claims. Both of the plaintiff's experts testify as to the facts as they saw or found them immediately after the accident. Only one of the defendant's experts testifies as to such facts as he saw or found them immediately after the accident. The other two experts for defendant testify only as to matters of opinion founded upon the history of the case and an examination made December 30, 1904, more than three and a half months after the accident. No attempt is made to impeach the plaintiff's physicians in the usual way, but counsel argue that they are unworthy of belief. This argument might well be addressed to the jury, whose peculiar province it is to judge of the credibility of witnesses; and the jury having, after hearing all this testimony, found a verdict for the plaintiff, this court cannot disturb it. If the jury believed (as they evidently did believe) that the plaintiff was injured to the extent claimed by him and his physicians, then the sum of \$1,200 was not excessive.

In the case of Peter Galligan, the father, we find sufficient evidence to support the verdict of the jury for the plaintiff for the sum of \$400. The plaintiff sues for the loss of services of his minor son.

2. The record shows affirmatively that the plaintiff is the father of Peter A. Galligan, and that Peter A. Galligan was a minor at the date of the accident, September 13, 1904, and that he became of full age July 11, 1905. Presumptively, the father was entitled to the wages of the son during his minority; and, if the defendant had intended to contest the right of the father to recover, it should have done so by evidence in defense, which it has not seen fit to offer. The record shows that the son, by reason of the injury which he sustained, would be unable to work for 258 working days, between September 13, 1904, and July 11, 1905, when he became of age, and was earning \$1.25 per day when injured. There would be then a loss to the father of the sum of \$322.50 in actual wages. Doctor's bills to the amount of \$76 were proved to have been incurred, and although they appear to have been incurred at the request of the mother, we are of the opinion that she was presumptively acting as the agent of the father, and that he (the father)

would be legally liable to pay them. This makes the damage proved \$398.50. The jury gave a verdict for the plaintiff for the sum of \$400. It is true that the trial judge instructed the jury that the father was entitled to recover only the net result of the son's labor, and appears to have charged further that, as proof was wanting as to this net result, the jury would "have to leave it absolutely out." This instruction was erroneous, because the father is not only entitled to the son's earnings, but he is bound also to support the son during minority. He was just as much bound to support the son after the accident as before, and there is no evidence that he did not. The measure of damages is therefore the total earning capacity of the son, which, as has been shown, was \$322.50, plus the doctor's bills (\$76), making a total of \$398.50. As the verdict only exceeds this by the sum of \$1.50, we cannot say that a new trial should be granted on the ground of excessive damages.

3. The fact that the jury disregarded an erroneous instruction, provided they found a verdict which was justified by the evidence, furnishes no ground for a new trial.

The petitions for new trials are denied, and the cases are remanded to the superior court, with instructions to enter judgments upon the verdicts.

OLDHAM v. HUSSEY.

(Supreme Court of Rhode Island. Nov. 10, 1905.)

ANIMALS—INJURY BY DOG—LIABILITY.

Gen. Laws 1896, c. 111, § 5, makes one harboring a dog liable for all damages done by the dog as if he were the owner, and section 3 makes the owner or keeper liable for all injuries to a person on the highway, irrespective of any knowledge of the owner or keeper. *Held*, that section 5 does not impose a liability for acts of a dog committed within the inclosure of the owner or keeper beyond his common-law liability, upon proof of knowledge of a vicious propensity.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, § 233.]

Action by John T. Oldham against Catherine Hussey. Heard on petition of defendant for a new trial. Petition granted.

Argued before DOUGLAS, C. J., and DU-BOIS, BLODGETT, JOHNSON, and PARK-HURST, JJ.

Lellan J. Tuck, for plaintiff. Hugh J. Carroll and Thomas F. Vance, for defendant.

PER CURIAM. The defendant's first, fifth, and sixth requests to charge were as follows: "(1) The court is requested to instruct the jury that the words of section 5 of chapter 111 of the General Laws of 1896, making persons keeping or harboring dogs liable in the same manner as the owners of, is to be construed as referring to section 8 of said chapter 111, and that such person keeping or harboring a dog that does damage is

only liable under our statutes when the injury or damage is done outside of the premises or inclosure of such person; and further, that if the injury complained of was done in this case within the inclosure of the defendant, the plaintiff cannot recover unless the jury is satisfied that the defendant had knowledge or reasonable grounds to believe that the dog was vicious or liable to bite." "(5) The court is requested to charge the jury that if the defendant had no ground to apprehend that her dog would bite a person peacefully approaching or stepping out of the door of her home, within her inclosure, then the verdict must be for the defendant. (6) The court is requested to instruct the jury that the gravamen and essence of this case is that the defendant knowingly kept a vicious dog, and, if they are not satisfied that the defendant had such knowledge, the verdict must be for the defendant."

Sections 3 and 5 of chapter 111, referred to in the first request, are as follows:

"Sec. 3. If any dog shall kill, wound or worry, or assist in killing, wounding or worrying, any sheep, lamb, cattle, horse, hog, swine, fowl, or other domestic animal, belonging to or in the possession of any person, or shall assault or bite, or otherwise injure, any person while traveling the highway or out of the inclosure of the owner or keeper of such dog, the owner or keeper of such dog shall be liable to the person aggrieved as aforesaid, for all damage sustained, to be recovered in an action of trespass on the case, or in an action of trespass, with costs of suit; and if afterwards any such damage be done by such dog as aforesaid, the owner or keeper of such dog shall pay to the party aggrieved double the damage, to be recovered in manner as aforesaid; and an order shall be made by the court before whom such second recovery shall be had, for killing such dog, which order shall be executed by the officer who shall be charged with the execution thereof; and it shall not be necessary, in order to sustain any such action, to prove that the owner or keeper of such dog knew that such dog was accustomed to do such damage."

"Sec. 5. Every person keeping or harboring in his house or on his lands any dog, or knowingly suffering the same to be done by any other person, shall be liable for all damages done by said dog in the same manner as if he were the owner thereof."

These requests the court refused to grant, and the defendant's exceptions thereto must be sustained. The error of the trial justice seems to have been based upon his construction of section 5, c. 111, supra, which he instructed the jury imposed liability irrespective of such knowledge, as follows: "Our law says, gentlemen, that any party owning a dog. * * * 'Every person keeping or harboring in his house or on his lands any dog.' Then it goes on to say, 'or knowingly suffering the same to be done by any other person, shall be

liable for all damages done by said dog in the same manner as if he were the owner thereof.' So it does not make any difference. If he keeps a dog, harbors it, or permits some other person to do it on his premises, he is responsible for whatever damage the dog commits." In *Kelly v. Alderson*, 19 R. I. 545, 37 Atl. 12, the court says: "The evident purpose of the statute is to give a remedy to a person who is bitten by a dog upon a highway, without reference to the defendant's knowledge of the viciousness of the dog; in other words, if the dog gets upon the highway, the owner is liable for whatever damage he may do. It is the risk which he takes from the fact that the dog is on the highway. The statute plainly extends the liability of an owner beyond his liability at common law, which was only for habits of which he had reason to know." And see, also, *Peck v. Williams*, 24 R. I. 583, 54 Atl. 381, 61 L. R. A. 351. This section of the statute imposes upon the keeper or harbinger of a dog the same liability as theretofore imposed upon the owner, without, however, further defining that liability, and does not impose a liability for acts of the dog committed within the inclosure of the owner or keeper of such dog beyond his common-law liability; that is to say, except upon proof of knowledge of a vicious propensity.

Petition for new trial granted, and case remitted to superior court for further proceedings.

BROWN v. CUMMINGS.

(Supreme Court of Rhode Island. Nov. 10, 1905.)

1. WORK AND LABOR—SERVICES BETWEEN PERSONS IN SUNDRY RELATIONS.

Services rendered by a stepdaughter to her stepfather, in whose family she was not living, are not presumed to be gratuitous.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Work and Labor, § 19.]

2. SAME—ACTION FOR SERVICES—EVIDENCE—QUESTIONS FOR JURY.

Where a stepdaughter sued for services rendered to her stepfather at his request, the question whether the circumstances were such as to show a reasonable expectation that the services would be paid for should have been submitted to the jury; though the stepdaughter was a member of the stepfather's family at the time the services were rendered.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Work and Labor, § 61.]

Action by Hortense M. Brown against Eugene D. Cummings, as administrator. On plaintiff's petition for new trial. Petition granted.

Argued before DOUGLAS, C. J., and DU-BOIS, JOHNSON, and PARKHURST, JJ.

Samuel W. K. Allen, for plaintiff. Albert D. Bean, for defendant.

PER CURIAM. The plaintiff brought suit to recover compensation for services render-

ed in nursing her stepfather, the defendant's intestate, during his last sickness, at his special request, when she was not a member of his family, but without any express promise to pay for the same. At the conclusion of the testimony for the plaintiff, the court granted the defendant's motion for a nonsuit, upon the ground that the relationship of the plaintiff to the deceased precluded her recovery in the action, without proof of an express and definite promise of the deceased to pay for her service.

In the absence of any evidence, the presumption arises that services rendered between members of the same family are gratuitous, but this presumption yields to evidence; so that, "if the circumstances in which the services are rendered are such as to show a reasonable and proper expectation that compensation is to be made, the plaintiff will be entitled to recover." Fuller v. Mowry, 18 R. I. 426, 28 Atl. 607. But the doctrine of the presumption is, by its terms, limited to services rendered between members of the same family. If the persons are related, but not living together, this doctrine has no application. Page, Contracts, § 783; Williams v. Williams, 114 Wis. 79, 89 N. W. 835. If the plaintiff was not a member of the family of the defendant's intestate during the time the services in suit were being rendered, she was not subject to the rule invoked by the court, and if she was a member of his family at that time, then the circumstances in which the services were rendered should have been submitted to the consideration of the jury, for their determination as to whether they do or do not show a reasonable and proper expectation that compensation was to be made. It follows that the court erred in granting the nonsuit.

Plaintiff's petition for a new trial granted, and case remitted to the superior court for further proceedings.

DAME v. WOODS.

(Supreme Court of New Hampshire. Belknap. Nov. 7, 1905.)

1. SUBMISSION OF CONTROVERSY — APPEAL — AGREED CASE — AMENDMENT — JURISDICTION.

Where a case is submitted on appeal on an agreed statement of facts, the court has no jurisdiction to amend the agreed case to prevent ambiguity, but can only decline to consider the questions of law involved until the facts are clearly presented.

2. SAME.

Where the Supreme Court considered an appeal, believing that it was based on facts found and not on an agreed case, so that the facts could not be made more explicit without a further agreement, the only remedy of the defeated party was to apply to the superior court to be relieved from his agreement and for a trial of the questions of fact, of which the superior court had sole jurisdiction.

3. SAME — AGREED CASE — SETTING ASIDE.

An application to the trial court of a party to an agreed case submitted to the Supreme

Court to be relieved from his agreement and for a trial of the questions of fact is to be considered under the rules of law applicable to petitions for a new trial.

On rehearing, after an amendment of the case showing that the parties agreed on the facts without a hearing on the merits. Motion denied.

For former opinion, see 73 N. H. 222, 60 Atl. 744.

George B. Cox and Walter S. Peaslee, for plaintiff. Jewett & Plummer, for defendant.

CHASE, J. The original case purported to be transferred upon a finding of facts by the superior court; and this court, so understanding it, made the suggestion in the opinion relating to an amendment of the case (73 N. H. 224, 60 Atl. 744), in accordance with the well-established practice when there is ambiguity in the record, which can be readily cured without a new trial. It now appears that the facts were not found by the court, but were agreed to by the parties. This change in the case renders the suggestion relating to an amendment inappropriate, as the court does not have authority to amend an agreed case. Bell v. Twilight, 17 N. H. 528. The only course open to the court for removing ambiguity in such a case is to decline to consider the questions of law until the facts involved in them are fully and clearly presented. Kaulbach v. Kaulbach, 63 N. H. 615; Preston v. Cutter, 63 N. H. 616; Sargent Invalid Furniture Co. v. Sargent, 65 N. H. 672, 23 Atl. 630; State v. Lewis, 66 N. H. 623, 32 Atl. 151; Adams v. Varney, 67 N. H. 596, 29 Atl. 406; Martin v. Livingston, 68 N. H. 562, 39 Atl. 432; Laton v. Balcom, 70 N. H. 635, 50 Atl. 100; Morse v. Morse, 71 N. H. 622, 53 Atl. 1124. If the court had understood that the facts were agreed to by the parties, and consequently could not be made fuller and more explicit without a further agreement, they might have thought that justice required them to avail themselves of this privilege. But having considered and decided the questions, this course is not now open. The only course left to the plaintiff is to apply to the superior court to be relieved from his agreement and for a trial of the questions of fact (Heywood v. Wingate, 14 N. H. 73; Bell v. Twilight, 17 N. H. 528; Wells v. Iron Co., 48 N. H. 491, 526; Id., 50 N. H. 85, 89; Beals v. Hill, 58 N. H. 61), a matter of which that court alone has jurisdiction. If such application is made, it is to be considered, of course, under the rules of law applicable to petitions for a new trial. The case emphasizes the necessity of a definite statement in transferred cases of the manner in which the facts are settled. The court are still divided upon the main question in the case, as stated in 73 N. H. 224, 60 Atl. 744.

Motion denied. All concurred.

LAMPREY v. H. P. HOOD & SONS.

(Supreme Court of New Hampshire. Rockingham. Nov. 7, 1905.)

1. MALICIOUS PROSECUTION—TERMINATION OF PROSECUTION—MODE—NOLLE PROSEQUI—DEFENDANT'S CONSENT.

Where the entry of a nolle prosequi was procured by accused, or made in consequence of a compromise to which he was a party, it was not such a termination as to enable him to maintain an action for malicious prosecution.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, § 74.]

2. SAME—EVIDENCE—SUFFICIENCY.

In an action for malicious prosecution, evidence held to warrant a finding that the entry of a nolle prosequi in the prosecution was the act of the state solicitor, induced solely by the advice of the court as to the law.

3. SAME—ADMISSIBILITY—DOCKET ENTRIES IN PROSECUTION.

In an action for malicious prosecution, the docket entries in the prosecution are admissible in evidence.

Transferred from Superior Court.

Action for malicious prosecution. Verdict for plaintiff, and case transferred to the Supreme Court on exceptions. Exceptions overruled.

The malicious prosecution alleged was an indictment found by the grand jury against the plaintiff for the use of milk cans belonging to the defendants and duly registered by them, in violation of the provisions of chapter 120, p. 120, Laws 1903. A jury was impaneled to try the indictment. After the state had introduced some evidence, a conference was had between the presiding justice and the solicitor concerning the law under which the indictment was found, as a result of which the solicitor entered a nolle prosequi in the case. The plaintiff's counsel was present at the conference, and did not object to the entry or say anything in reference to it. The solicitor testified that "the trial got to the point where the presiding judge announced his interpretation of what the law meant, and his interpretation of it was such that I told him that the state could not prove a condition of things that he said must be shown under the law." The defendants' motions for a nonsuit and for an order directing a verdict in their favor were denied, subject to exception. In the absence of an extended record of the state case, the docket entries of the clerk were received in evidence, subject to the defendants' exception.

Page & Bartlett and Ernest L. Guptill, for plaintiff. G. K. & B. T. Bartlett and Samuel W. Emery, for defendants.

CHASE, J. The exceptions to the denials of the defendants' motions for an order of nonsuit and an order directing a verdict in their favor raise the question whether the entry by the solicitor of a nolle prosequi in the state case was, under the circumstances,

a sufficient termination of the case in the plaintiff's favor to enable him to maintain this action. The answer to this question depends upon the answer to the further question whether the entry was procured by the plaintiff or was made in consequence of a compromise to which he was a party. If it was caused in either of these ways, it was not such a termination of the case as will support this action; but, if it was not so caused, it will support the action. *Woodman v. Prescott*, 66 N. H. 375, 22 Atl. 456. The latter is a pure question of fact. The circumstances under which the entry was made do not conclusively show that it was procured by the plaintiff, or was occasioned by a compromise to which he was a party. There was evidence from which the jury could find that the entry was the act of the solicitor, induced solely by the advice of the court as to the law governing the case. The defendants' motions were properly denied.

The exception to the admission of the docket entries in the former case as evidence is not insisted upon. *State v. Cox*, 69 N. H. 246, 41 Atl. 862.

Exceptions overruled. All concurred.

HALLWOOD CASH REGISTER CO. v. ROLLINS.

(Supreme Court of New Hampshire. Strafford. Nov. 7, 1905.)

1. TRIAL—RECEPTION OF EVIDENCE—REBUTTAL.

Where, in an action for the price of a cash register, defendant proved a conversation with plaintiff's agent in regard to the machine before defendant opened his place of business, as bearing on the question of fraud and rescission, whereupon the agent testified that the conversation occurred after the saloon was opened, and stated that there was money in the register and that a customer bought a cigar at the time, defendant could not, either in rebuttal or sur-rebuttal, testify that there was no money in the register at that time and that no customer bought a cigar there.

2. SAME.

Where, in an action for the price of a cash register, after defendant had rested, plaintiff introduced evidence that a certain conversation with plaintiff's agent occurred in the afternoon, defendant could not, as of right, show in rebuttal the time of day such conversation occurred; the witness having already testified on cross-examination that it was early in the morning.

3. SAME—MISCONDUCT OF COUNSEL.

Where, in an action for the price of a cash register, defendant claimed that it had been sold under fraudulent representations, it was not error for plaintiff's counsel in argument to operate the machine and to comment on the manner in which defendant tried to operate it.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 283.]

Exceptions from Superior Court.

Action by the Hallwood Cash Register Company against Cyrus Rollins. A verdict was rendered in favor of plaintiff, and the

case was transferred to the Supreme Court on defendant's exceptions. Exceptions overruled.

The plaintiff introduced evidence of a written contract of sale, and rested. The defendant introduced evidence tending to show that he had certain talks with the plaintiff's agent in regard to the machine before he opened his place of business, as bearing upon the question of fraud and rescission. In rebuttal, the agent testified that the talks were after the saloon was opened, that there was money in the register, and that a customer bought a cigar. The defendant then offered evidence that there was no money in the register at the time or times referred to, and that no one bought a cigar there as the agent testified. The evidence was excluded, subject to exception. After the defendant rested, the plaintiff introduced evidence tending to prove that the conversation with the plaintiff's agent occurred in the afternoon. The defendant then offered to show the time of day it occurred, by a witness who had already testified on cross-examination that it was early in the morning. The evidence was excluded, and the defendant excepted. During the trial the machine was operated by the plaintiff's agent and by the defendant. In his argument to the jury the plaintiff's counsel operated the machine and commented upon the manner in which the defendant tried to operate it. To this the defendant excepted.

Mitchell & Foster, John Kivel, and George T. Hughes, for plaintiff. William S. Pierce and Orrin R. Fairfield, for defendant.

WALKER, J. It appears that at the trial it was material to determine whether the defendant had begun doing business in his saloon when the plaintiff's agent called on him, and whether he was then using the cash register. Evidence of the existence of these facts had some tendency to show that the defendant was satisfied with his purchase of the register and had not been defrauded by the plaintiff, as he claimed, and it was received in answer to the defendant's evidence upon the issue of fraud. It did not constitute a new substantive position on the part of the plaintiff, but merely tended to deny the defendant's claim of fraud. The proffered evidence of the defendant, in denial of the plaintiff's evidence was not, therefore, strictly in rebuttal or surrebuttal, and the defendant had no absolute right to its reception at that stage of the trial. Supreme Court Rule No. 50, 56 N. H. 589; Supreme Court Rule No. 45, 71 N. H. 683; *Gerrish v. Whitfield*, 72 N. H. 222, 55 Atl. 551. The exclusion of the evidence under the circumstances presents no error of law. *King v. Bates*, 57 N. H. 446, 448. For similar reasons the defendant was not entitled as a matter of legal right to introduce further evidence

to show the time of day the plaintiff's agent called on him.

The remarks of the plaintiff's counsel in his argument to the jury and his operation of the machine, authorizing the conclusion that the plaintiff did not defraud defendant, were, so far as appears from the case, based upon the evidence, and were legitimate.

Exceptions overruled. All concurred.

KING v. AMERICAN ELECTRIC VEHICLE CO.

(Court of Chancery of New Jersey. Dec. 12, 1905.)

TAXATION—CORPORATIONS—FRANCHISE TAX—EXEMPTION.

Under P. L. 1901, p. 31, making every corporation liable to the franchise tax unless its annual return shows that it is within the exempted class, payment of such a tax must be made, no return having been made, though prior to the year for which it was assessed all the property of the corporation, which was insolvent, had been converted into cash by its receiver, and no business was thereafter carried on by it.

Suit by George F. King against the American Electric Vehicle Company. Heard on petition of the receivers of defendant for directions as to payment of franchise tax. Payment directed.

John R. Hardin, for petitioner. Robert H. McCarter, Atty. Gen., for the State.

BERGEN, V. C. The defendant company was organized under the laws of this state, and from the date of its incorporation was a manufacturing company with at least 50 per cent. of its capital stock invested in a manufacturing business carried on within this state. It was incorporated in 1899, and each year thereafter, to and including the year 1902, having made to the state board of assessors a proper return, no franchise tax was assessed against the corporation. On the 23d day of September, 1902, the corporation, under proceedings taken in this cause, was adjudged to be insolvent, and Charles J. Roe, the petitioner, was appointed receiver in the manner provided by the general corporation act of this state. Before the close of the year 1902, the petitioner, as receiver, had converted all of the property of the insolvent corporation into cash, and thereafter no business of any kind was carried on by said corporation or by the petitioner as its receiver in its behalf, yet no steps have been taken to procure the legal dissolution of the company, so that its corporate existence is still preserved. No return for the purposes of assessment for the franchise tax was made either by the corporation or by the receiver for it, for the year 1903, in the absence of which the state board of assessors levied an annual license fee or franchise tax against the corporation for that year, and, the state now demanding

its payment, the petitioner requests the direction of this court as to his duty in the premises. It is admitted that the funds in the receiver's hands are insufficient to pay the debts of the corporation; the amount of the fund being \$14,042.97, which will be reduced to the extent of \$4,000 if the franchise tax be directed paid, while the amount of the debts proven, including preferred claims, is \$28,076.56. The customary blank form for the making of a return for the purposes of assessing the state franchise tax for the year 1903 was mailed by the state board to the registered New Jersey agent of the defendant corporation; the form was mailed to him in March, 1903, at which time he was absent from the country and did not return until the month of June of that year; and for that, or some reason not known, the blank return never came under his notice. No form for a return for the purposes of such an assessment was sent to the petitioner, nor did one reach him from any source, and no appeal from such assessment was ever taken by the receiver or the corporation.

The claim which the receiver now makes on behalf of the creditors of this insolvent corporation is that, as it was a manufacturing corporation, the assessment would not have been made if a proper return of the character of the business of the corporation, and the fact of its insolvency, had been made to the state board; that the policy of the lawmaking power of the state is in favor of fostering manufacturing companies; and that the omission to make the return, upon which the state board allows the exemption, should not be permitted to overthrow this beneficent policy. With a desire to give effect to this liberal intention, I have sought for some logical reason upon which to rest a conclusion favorable to the claim of the petitioner, but have not been able to do so. The act under which franchise taxes are levied, as amended (P. L. 1901, p. 31), enacts that all corporations, other than those which are subject to the payment of a state franchise tax based upon gross receipts, shall make an annual return to the state board, which shall contain the amount of the capital stock of such corporation issued and outstanding on the 1st day of January preceding the making of said return; which shall be made on or before the first Tuesday in May in each year, and then declares that all corporations shall pay an annual license fee or franchise tax on such capital stock, in the manner and to the extent stated in the act. The act further provides that it shall not apply to certain corporations, of which a manufacturing company is one, where at least 50 per cent. of its capital stock issued and outstanding is invested in that business carried on within this state, provided that the corporation entitled to the exemption shall have stated in its return where the manufacturing establishment is

located, the character of the goods manufactured, the total amount of its capital stock, and the amount of capital stock actually employed in New Jersey in carrying on such manufacturing business. It thus appears that all corporations are liable to the tax, unless its annual return shall disclose that it is within the exempted class.

It has been determined by our Court of Errors and Appeals that the assessment to be made against the franchise of a company incorporated under the laws of this state is an arbitrary imposition laid without regard to the value of its property, or its franchises, or whether it exercises the latter or not, and is imposed solely as a condition of its continued existence, and that without regard to solvency or insolvency. In *re U. S. Car. Co.*, 60 N. J. Eq. 514, 43 Atl. 673. The defendant company had a corporate existence in 1903, it made no return and took no steps to put itself in a position to have the benefit of the proviso contained in the act of 1901, and, so far as the state board of assessors had knowledge, it fell within the class described in the act as "all corporations incorporated under the laws of this state." In *Hardin v. Morgan et al.* (N. J. Sup.) 57 Atl. 155, and affirmed by the court of last resort, 71 N. J. Law, 342, 61 Atl. 1118, it was adjudged that: "Four things at least are now necessary to secure exemption from the state franchise tax: First, that at least 50 per cent. of the capital stock of the company issued and outstanding on January 1st next, preceding the annual return, shall be invested in manufacturing carried on within this state; second, that the annual return to the state board of assessors shall state where the manufacturing is located, and the character of the goods manufactured. * * * The right to exemption is a matter of grace which the statute confers upon the compliance with its requirements. It is essential to secure the exemption that it shall be applied for within the time and in the manner pointed out by the statute; otherwise the exemption is lost." In the case just cited, the company was a manufacturing corporation and would have been entitled to the exemption if the proper return had been made.

As in the *U. S. Car. Co. Case*, *supra*, it was held that neither the levying of the assessment after the appointment of the receiver, nor the fact of insolvency, in any way affected the right of the state to the franchise tax so long as the company continued in existence, and as it has also been determined in *Hardin v. Morgan et al.*, *supra*, that the making of the return is a prerequisite to exemption, I am of the opinion that the cases last cited must control the one under consideration, and that, as this corporation was subject to a franchise tax or license fee unless it made the return required by law, the assessment was properly levied, and the receiver will be so advised.

DICK v. McPHERSON et al.

(Supreme Court of New Jersey. Nov. 16, 1905.)

1. PLEADING—COPY OF INSTRUMENT ANNEXED—VARIANCE.

Where, in an action for breach of covenants in a deed, there is a variance between the allegations in the declaration and a copy of the deed annexed thereto and made a part thereof as to what covenants the deed contains, the court will, on determining what the covenants are, consider the copy of the deed as setting them forth correctly; Prac. Act, § 119 (P. L. 1903, p. 570), providing that a copy of a writing annexed to a pleading shall cure any defect therein.

2. COVENANTS — WARRANTY — ACTIONS FOR BREACH—DECLARATION—SUFFICIENCY.

A declaration, in an action for breach of a covenant in a deed, which alleges the eviction of the grantee by a person unnamed who claimed a right of possession under a decree adjudging void a deed to the grantor and on which the grantee's title rests, and which shows that the grantor covenanted to defend title against the claims of the grantor, his heirs, and all persons "lawfully claiming * * * under him," states no cause of action.

Action by Walter B. Dick against Jane D. McPherson and another, as executors of John McPherson, deceased. On demurrer to declaration. Judgment for defendant.

Argued June Term, 1905, before GUMMERE, C. J., and FORT, PITNEY, and REED, JJ.

Thompson & Cole, for demurrant.

GUMMERE, C. J. The plaintiff brought an action on contract against the defendants, as executors of John McPherson, deceased, to recover damages for breach of certain covenants alleged to be contained in a deed of conveyance made by McPherson to the plaintiff, and which relate to the possession and use by the plaintiff of the premises embraced in the conveyance. The breach assigned is the eviction of the plaintiff by some person unnamed, who claimed a right of possession under a decree of the Court of Chancery which adjudged to be void and of no effect a deed made by the riparian commissioners to McPherson for the premises in question, and upon which the latter's title rested. The declaration recites the covenants alleged to have been broken, and then refers to and makes a part of the pleading a copy of the deed from McPherson to the plaintiff, which is thereto annexed.

An inspection of the recitals in the declaration and of the instrument annexed discloses a variance in the language of the covenants. In ascertaining, therefore, what covenants were actually entered into by the grantor named in the conveyance, the copy of the deed must be considered as accurately setting them forth. Prac. Act (Revision of 1903, P. L. 1903, p. 570) § 119. The only covenant in the deed relating to the possession and use of the premises by the plaintiff, which is found in the copy annexed to the declaration, is in these words: "And the

said John McPherson, for himself, his heirs, executors, and administrators, doth covenant, grant, and agree to and with the party of the second part [the plaintiff], his heirs and assigns, that he, the said John McPherson, his heirs, all and singular the hereditaments and premises, hereinabove described and granted, with the appurtenances, unto the said party of the second part, his heirs and assigns, against him, the said John McPherson, his heirs, and against all and every other person or persons whomsoever lawfully claiming or to claim the same, or any part thereof, by, from, through, or under him, shall and will warrant and forever defend." It is obvious that the eviction of which the plaintiff complains was not necessarily an eviction either by McPherson himself, or his heirs, or any one claiming by, from, through, or under him. For aught that appears to the contrary, it may have been by a person claiming possession under a paramount title. In fact, this is the fair inference to be drawn from the averment of the declaration, irrespective of the elementary rule that upon a demurrer every allegation in a pleading is to be taken most strongly against him who makes it. An eviction under a paramount title does not constitute a breach of a covenant such as that contained in the plaintiff's deed. *Woodhouse v. Jenkins*, 9 Bing. 431.

The defendant is entitled to judgment on the demurrer.

FARR v. HAUENSTEIN et al.

(Court of Chancery of New Jersey. Nov. 16, 1905.)

FRAUDULENT CONVEYANCE — OWNERSHIP OF PROPERTY.

Money used by a husband in paying taxes, interest on mortgage, and other incumbrances on the property of his wife *held*, under the evidence, his money, and not intrusted to him by another for that purpose, so that his creditors have a lien on such property to the extent of payments made.

Action by John C. Farr, Jr., against Theresa Hauenstein and another. Heard on application to settle decree. Decree for plaintiff.

Leon Abbett, for complainant. Jas. F. Minturn, for defendants.

GARRISON, V. C. The issues made by the pleadings in this suit were determined on the 29th of June, 1905, and the views of the court concerning the same will be found reported in 61 Atl. 147. It was decided that "with respect to the expenditures made by the husband of his own money in the payment of taxes, interest on the mortgage, and other incumbrances on this property * * * the complainant, as a creditor, has a right to have a charge against the property for such sums." The case was referred to a master to ascertain the moneys of the husband expended to pay taxes, interest on mortgage, etc., on this property. The mas-

ter took the testimony, and has returned the same. The master did not definitely report with respect to the ownership of the moneys found by him to have been paid by Louis C. Hauenstein, the husband, on account of the interest, taxes, etc., due upon the property. A further order was then made referring the cause back to the master for a definite finding upon this point. The master was unable to make such definite finding because the testimony before him was mainly with respect to the fact of payment, while the testimony which had been previously taken before the court concerned the source of the moneys. The master properly did not consider the testimony which had been taken before the court, and was not able, from the testimony taken before him, to definitely report upon the ownership of the moneys. The matter was then brought before the court for final determination upon an application to settle the decree upon the pleadings and proofs, including the proofs taken before the master.

From such proofs I find the facts to be that since the date of the judgment Louis C. Hauenstein, Sr., has paid interest on the mortgage upon the property in question aggregating \$1,475, and taxes and assessments upon the same property within the same period aggregating \$697.29. The amount due upon the judgment held by the complainant is \$1,292.22, with interest thereon from the 7th day of August, 1890. In the testimony of the defendant Louis C. Hauenstein it clearly appears that he obtained the money to make these payments either from his own funds—that is to say, money earned by himself—or from moneys borrowed by him from his son Louis. This is corroborated by the testimony of his son Louis, who testifies that he helped his father out by loaning him money, and that he advanced money to his father. The moneys which Louis C. Hauenstein, Sr., the husband, paid on account of his wife's property for taxes and interest were either his own moneys, earned by himself, or were moneys borrowed by him. He seeks to create the impression that these moneys were either moneys of a partnership composed of himself and his son Louis or were moneys of his son Louis, Jr., directly contributed by his son, through him, as a mere agent, for the purpose of paying these liens or incumbrances against the property, the title to which was in the name of Theresa Hauenstein. With respect to the alleged partnership between the father and son, the proofs show that, while the father carried on business under the name of Louis C. Hauenstein & Co., it was, as he termed it, a mere family arrangement, there being no shares, and was, I think it clearly appears, a mere guise under which the father did business. The son's testimony is that his father wanted to start in the business, and he set him up in it. He clearly states that he was not to get any salary or draw anything

from the business; and while, as between him and his father, he may have some rights as a partner, it nowhere appears that the moneys which were used to pay the taxes and the interest were moneys of this alleged partnership. In fact, the son directly testifies that he has advanced his father, by way of loan, money in the neighborhood of \$1,700, and negatives any idea that he was himself paying any taxes or other items through his father as an agent.

I therefore reach the conclusion that the moneys which Louis C. Hauenstein, Sr., paid for interest on the mortgage and for taxes and assessments upon the property were his moneys, and that to the extent of the aggregate of such payments the complainant has a lien against the property standing in the name of Theresa Hauenstein; and that, unless within 30 days after the service upon the defendants of a copy of the decree made in this suit they pay to the complainant the amount specified in said decree, the property in question may be sold to raise and pay the said sum.

HARPER v. ESSEX COUNTY PARK COMMISSION.

(Supreme Court of New Jersey. Nov. 16, 1905.)

1. PLEADING—ACTION ON CONTRACT—PROFEET.

Formal profeit of the contract, in an action thereon, is not necessary, where a copy thereof is annexed to the declaration, and referred to therein as so annexed; Prac. Act, § 119 (P. L. 1903, p. 570), making this part of the declaration.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 914.]

2. SAME—INDEFINITENESS—DEMURRER.

It is not ground for demurrer, but for motion to strike out, that a count of a declaration does not specify with sufficient particularity the alleged breaches of contract.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 409, 504.]

Action by Andrew Harper against the Essex County Park Commission. Heard on demurrer to first count of declaration. Judgment for plaintiff.

Argued June term, 1905, before GUMMERE, C. J., and FORT, PITNEY, and REED, JJ.

Hugh B. Reed, for plaintiff. Alonzo Church, for defendant.

GUMMERE, C. J. This is an action upon contract. The first ground of demurrer is that the count attacked is in assumpsit when it should be in covenant, for the reason that the agreement sued upon (a copy of which is annexed to the declaration, and referred to in the body of the pleading as so annexed) is under seal. An inspection of the copy, however, shows that this ground of demurrer is based upon a misapprehension. Although the agreement recites, in its conclusion, that the Essex County Park Com-

mission has caused its corporate seal to be thereto affixed, and that the plaintiff has thereunto set his seal, this recital is not borne out by the fact. Neither the seal of the commission nor of the plaintiff is attached to the agreement.

The second ground of demurrer is that the plaintiff has failed to make profert of the contract sued upon. But formal profert is not necessary, even in an action upon a contract under seal, when a copy of the writing is annexed to the declaration, and referred to in the body of the pleading as so annexed. By force of section 119 of the practice act (P. L. 1903, p. 570) the effect of such annexation and reference is to make the writing just as much a part of the declaration as if it had been precisely set forth therein. *Mershon v. Williams*, 63 N. J. Law, 402, 44 Atl. 211.

The third ground of demurrer is that the count does not specify, with sufficient particularity, the breaches of the agreement alleged to have been committed by the defendant. But, assuming this to be so, such a defect is not within the reach of a general demurrer. It could only be taken advantage of, under the old practice, by special demurrer; and since the abolition of that pleading by statute it can only be dealt with on a motion to strike out the count.

The plaintiff is entitled to judgment on the demurrer.

HILL et al. v. HILL et al.

(Court of Chancery of New Jersey. Nov. 17, 1905.)

EXECUTORS — ACCOUNTING — NEGLIGENCE — LACHES.

Complainants, as legatees of their father, charged defendants, as executors of his will, as if both defendants were alive, with having received \$3,000 as the proceeds of his estate, and showed where in the ordinary course of business they ought to have received \$400 from another source, and called on them to account. One of the defendants answered by showing that his coexecutor received all the money from the proceeds of the estate proper, and died a year thereafter, and with regard to the \$400 disavowed all knowledge thereof, and stated that he paid no attention to the management of the estate and executing the will, either in the lifetime of his coexecutor, who, complainants knew, handled the money, and who had been dead 17 years, or afterwards, and that he was never called on to do anything in the premises till the filing of the bill, 17 years after the right of complainants to an accounting accrued. *Held* that, while the answer admitted culpable negligence, the cause of action was for mere nonfeasance, and was barred by laches.

Suit by Rhoda Hill and others against Samuel Hill, executor of James Hill, deceased, and others. Final hearing on bill and the answer of said Samuel Hill. Bill dismissed.

Freeman Woodbridge, for complainants. Frederick P. Pearse, for answering defendant.

PITNEY, V. C. The object of the suit is to hold the answering defendant liable as surviving executor of the will of the father of all the parties except Hoffman. The ground of the complainants' (who are legatees under a will) claim as finally developed is negligence on the part of the defendant. One of the answers to that claim is acquiescence and laches on the part of the complainants of such a character and degree as to bar them in their relief. The cause being heard on bill and answer, the statements of fact in the answer must be taken as true. I feel constrained to say that the case is not presented in a satisfactory shape. One cannot avoid the suspicion that the complainants may have a much better case than is stated by their bill, and that the defendant may have a much better case than is stated in his answer. No answer has been put in by Hoffman, who is charged as administrator cum testamento annexo of Samuel Hill, deceased, who was the grandfather of all the parties except Hoffman. The estate which is sought to be recovered consists (1) of the estate proper of James Hill, the father, which came to the hands of Jehu Hill, now deceased, as coexecutor with the defendant Samuel of James Hill, deceased, and (2) the share which James Hill was entitled to in the estate of his father, Samuel Hill, deceased, which came into the possession of the defendant Hoffman.

The facts are that James Hill, of Middlesex county, died December 23, 1885, testate of a will which, after giving several small legacies and providing for his widow, directed the residue of his estate to be equally divided between his five children, namely, the three complainants and the defendants Samuel and Jehu Hill. He appointed his brother Jehu (since deceased) and his son Samuel, the answering defendant, his executors. Those executors, in January, 1886, filed an inventory of personal estate amounting to \$1,107.10. Subsequently, in March of the same year, they sold two parcels of real estate under a power in the will. One parcel sold for \$1,575.55 and the other for \$718.72. The defendant Samuel joined in these deeds, but never received any of the proceeds; the whole having been taken by his coexecutor, Jehu Hill, the brother of the testator. No accounting was ever made by either Jehu Hill, the executor, or by the defendant Samuel Hill. The bill alleges that one of the complainants has received \$100 on account of a legacy of \$150 given to her by her father's will, and that another one has received a like sum on account of her legacy of an equal amount. The bill makes no allegation as to the character of the dealings of the executors with the money of the estate as aforesaid received, but assumes that upon mere joining in the inventory by the answering defendant and by a like joining in the conveyances of real estate, he became absolutely at once bound to account for the

whole, and prays such an accounting. In fact, the bill proceeds against Samuel Hill and his uncle, Jehu, as executors, as if each were alive, and takes no notice of the death of Jehu, which occurred, according to the answer, on the 14th of April, 1887, a little more than a year after the sale of the lands. It alleges no waste of the estate by either executor, nor any special neglect by either. It does not anticipate any defense which may be set up by the defendants, nor does it state the least reason why the complainants have rested for so many years without calling the defendants to account.

The executors were liable to account early in the year 1887. The bill was filed July 6, 1904, at least 17 years after the right accrued. The only indication of the respective ages of the children, found in the bill, is the order in which they are named, as follows: Mrs. Hayward, named as such; Mrs. Reed, named as Mary C. Hill; Rhoda Hill (the complainants); Samuel Hill; and Jehu Hill. The answer of Samuel shows that at the death of his father he was a little over 21 years old. Then, after stating the death of his uncle, Jehu, the defendant says: "Possibly by virtue of the extreme youth of this defendant" he never had anything to do with the actual control and management of said estate, and never had any of the moneys of said estate, which was wholly controlled by the said Jehu Hill, "all of which was fully known, and has been fully known for years, to the three above-named complainants." The answer proceeds to state that, since the death of Jehu, he (Samuel) never has had any of the moneys of the estate of said deceased; none ever having come to the defendant's hands, the defendant not knowing there was any estate to settle, supposing the said estate had long ago been settled and disposed of by his coexecutor.

I feel constrained to say that this section of the answer, which I have paraphrased, seems to me to admit gross negligence on the part of the answering defendant. His coexecutor died about 13 months after over \$3,000 of the estate had come to his hands, in which he, the answering defendant, was interested, to the extent of a legacy of \$200 and a share in the residue equal with his sisters and brother. In admitting in his answer the joining in the deeds for the two parcels of land, he says as to both that he knew nothing of the circumstances of the sale and received none of the moneys, except that he received \$100 on account of his legacy, and (after dealing with the interest of his father in the estate of his grandfather, presently to be mentioned) he closes his answer with this allegation: "In conclusion, he says that he knows nothing whatever concerning the estate of his father, never having managed or directed the same, or any of the moneys, with the exception of \$100, a part of his legacy; but this defendant believes, charges and insists that upon a settlement of the estate of Jehu Hill,

his coexecutor, by his executors, it will be shown that there are no moneys in the hands of Jehu Hill, deceased, which have not been paid out in the settlement and distribution of the estate of James Hill, deceased." Upon this closing allegation I remark that it is quite insufficient to be treated by the court as a statement of fact which must be taken as true on a hearing on bill and answer.

The same remark applies to another statement in the answer, arising out of the provisions of the will for the testator's widow. It would seem that he had a second wife, and provided in his will that she should have "over and above her dower right of one-third of my property after my debts and expenses are paid, the interest of said one-third only to be paid to her as long as she shall remain my widow, one bedstead, one bed and bedding, one set of chairs, one table, one carpet, one looking glass, and the double picture of our photograph." The effect of this bequest is to give her outright the specific articles of furniture mentioned and the interest of one-third of his estate as long as she should remain his widow. The allegation of the will is that the widow married on April 18, 1889, a little more than three years after her first husband's death, and thereby her interest under the will ceased. It does not appear whether she accepted the bequest to her in lieu of dower. It may be supposed that she joined with the executors in the conveyance of the real estate. There is no allegation either in the bill or answer on that subject. The answer states that the answering defendant knows nothing concerning the remarriage of the widow, "but supposes the same to be true," by which I infer that he means to say that the allegation in the bill in that respect is true. The answering defendant further says that he "understands that the widow received the sum of \$500." This allegation of the answer is subject to the same criticism as that with regard to the result of an accounting by the personal representative of Jehu Hill. It is altogether too vague and uncertain to be treated as an allegation of a fact, to be taken to be true on bill and answer. But it may well be supposed that, under the language of the will, the widow, when called upon within two months after the decease of her husband to join in the conveyance of his real estate, demanded and received the sum of \$500 as her share of the proceeds, and perhaps in settlement of all demands against the estate, and that such a settlement would be approved by this court.

So much for the facts relating to the estate actually received by one or both of these defendants. With regard to the interest of the testator in the estate of his father, Samuel Hill, the allegations of the bill are that the grandfather died January 26, 1885, (about 11 months before the testator), and by his will appointed the testator and one Vanderipe executors, and that these executors proved the will in February, 1885 (but

the bill does not allege that any of the funds of said estate came to their hands); that afterwards, in January, 1887, letters of administration cum testamento annexo de bonis non were issued to the defendant Hoffman; that in May, 1887, after the death of Jehu, Hoffman filed his account in the Middlesex county orphans' court, showing a balance of \$1,279.53 in his hands, one-fourth of which, by the express terms of the will of Samuel Hill, set forth in the bill herein, was given to the testator, James Hill. The bill alleges in substance that Hoffman has never paid any part of that one-fourth share to either the executors of James Hill nor to the complainants, and that he has never been called upon by the defendant Samuel, or by his co-executor, Jehu, to pay the same. The defendant admits these allegations with regard to the death, will, and estate of their grandfather, Samuel; but he says he knows nothing about the accounting of Hoffman or the amount found by the accounting in his hands, and he asserts that he has never received any money from Hoffman, and says "that he has never been called upon to call the said Thomas H. Hoffman to account, and that he is as desirous of an accounting as the complainants, if the complainants' statements are true."

Here again I feel constrained to say that the defendant admits the utter neglect of his duty as executor. His co-executor, Jehu, died, as we have seen, in April, 1887. The final account of Hoffman as executor of their ancestor was filed in May, 1887, and allowed by the orphans' court on the 17th of July in that year. It does seem to me that, however the defendant may have been justified in leaving the execution of the will of his father and the administration of his estate to his co-executor and uncle during the latter's lifetime, surely upon his death it was his duty to look after it, and especially after the interest of his father in the estate of his grandfather. The case, then, may be briefly stated thus: The complainants, as legatees under the will of their father, charge the defendants, executors thereof, as if both were alive, with having received upwards of \$3,000 as the proceeds of his estate, and showing where, in the ordinary course of business, they ought to have received over \$400 from another source, and calls on them to account. One of the defendant executors answers by showing that his co-executor received all of the moneys from the proceeds of the estate proper, and died about one year after such receipt, and with regard to the \$400 from the other source he disavows all knowledge of such money, and states in substance that he never paid the least attention to the business of managing the estate and executing the will, either in the lifetime of his co-executor or afterwards, and sets up that he was never called upon to do anything in the premises until the filing of this bill, 17 years after

the right of the complainants to an account accrued. This answer admits, in my judgment, culpable negligence, and leaves the defendant liable to account, unless the mere lapse of time is sufficient to excuse him and bar the complainants' right.

The defendant, in his answer, does not specifically set up the lapse of time as a bar. He does not show specifically how he has lost anything in the way of evidence; nor, on the other hand, do the complainants anticipate the defense of lapse of time or give any excuse for their laches. They rest on their right to an account as if both executors were living and the transactions were of recent date. The defendant does not set up in his answer either the statute of limitations or, as before remarked, the delay of the complainants in bringing their suit, but rests himself solely on the ground that he never received any of the money of the estate, and in so doing admits a cause of action, namely, negligence on his part, which the complainants have not alleged. But, although the real question in the cause does not arise on the pleadings, yet it was dealt with by counsel in their arguments precisely as if it did so arise, and was treated by them as controlling the decision of the cause. I have therefore felt it to be my duty to consider it and act upon it precisely as if it did arise on the pleadings. It will be perceived that the cause of action does not arise out of an ordinary breach of trust by the trustees of an express continuing trust, such as making an improper investment whereby money is lost to the cestui que trust, or a misappropriation of the trust funds, and the like, where it has been held that the statute of limitations does not apply, and the court is lenient with the cestui que trust in dealing with the question of laches in bringing suit. The cause of action, as already remarked, arises out of the neglect of the defendant to give proper attention to the management of the estate, and to call the estate of his co-executor to account promptly after his decease, and in failing himself, after the death of his co-executor, in calling for and demanding his father's share in the estate of his grandfather. It is plainly a case of nonfeasance, and not misfeasance. Now all these causes of action arose at once. Complainants' right to an account arose within a reasonable time after the sale of the property. They are chargeable with notice of the amount of the inventory, with the amount of the proceeds of the sale of the real estate, and with the fact that their father was entitled to an interest in the estate of their grandfather. They are chargeable with notice that they were entitled to a prompt accounting, which is precisely the remedy which they are here asking. Not only do they not allege their ignorance in these matters, but it is quite impossible to believe that they were so far indifferent to their pecuniary rights as not to

be informed that the time had arrived when they were entitled to receive from their father's estate more than they did actually receive, unless the same was absorbed in the payment of debts. Moreover, it is distinctly alleged by the answer that they knew that the moneys were handled by Jehu, and at his death it is impossible to suppose that they did not think that if there was anything coming to them from the estate they ought to look after it. The complainants, then, are chargeable with resting on their rights for about 17 years without the least excuse whatever. In the meantime it is fair, I think, to infer that the vouchers and papers relating to the estate, which must have been in the hands of their uncle, Jehu, have been lost or mislaid, and are not now available to the answering defendant. Under these circumstances it seems to me it would be a great hardship to call on the defendant to account for the moneys actually received by his coexecutor and which it is quite possible to believe may have been entirely and properly paid out by him for debts of the testator in the due course of the administration of the estate.

With regard to the claim against the defendant Hoffman, there can be no presumption of any money having come to the hands of the deceased executor from him; for he died before the account was settled and the balance determined. The complainants were chargeable with notice of their rights under the will of their grandfather, and that the money was in the hands of Hoffman, and it seems to me they should have taken some measures years ago to enforce them. Moreover, if the statute of limitations had been pleaded or distinctly set up in this case, I am inclined to the opinion that it should have prevailed by what is called analogy. As before remarked, there was here no continuing or express trust. Complainants' right to an account arose at least 17 years before bill filed. It was reasonable for the answering defendant to allow his uncle, Jehu, to have exclusive possession of the proceeds of the estate for the purpose of settling the same. No liability was incurred by him in that respect, unless there were facts brought to his attention, of which there is no proof, showing that he ought not to have trusted him. This is entirely clear under the course of decisions in this state. His liability, if any, must, as before remarked, rest solely upon his negligence in not calling his uncle's personal representatives to account and procuring from them the necessary materials for rendering an account of his uncle's dealings with the estate, and his negligence in failing, on his own motion, to demand from the defendant Hoffman his father's share of the estate of his grandfather. The complainants are chargeable with knowledge of this neglect and that any cause of action they had arising thereout accrued at once,

and the principles which protect cestui que trust against the operation of the statute of limitations does not apply.

Upon consideration of the whole case I think that the bill should be dismissed as against the answering defendant, without costs; but it may be retained for the purpose of reaching the defendant Hoffman, if the complainants shall so desire.

STATE v. HUMMER.

(Supreme Court of New Jersey. Nov. 21, 1905.)

1. CRIMINAL LAW—EVIDENCE OF OTHER OFFENSES.

Where, on a prosecution for the carnal abuse of a female child, the chief of police testified on cross-examination that he had not reduced to writing the statement of the child, that it was the practice to reduce to writing statements of persons making grave charges, and that he did not reduce to writing more than a third of the statements of other girls making similar charges against other men, it was proper, to show whether his failure to reduce to writing the child's statement was due to his lack of belief in its truth or whether he was following his usual course under similar circumstances, to permit him to testify on redirect examination that there were other girls at the police headquarters making charges against accused, whose statements he did not reduce to writing.

2. CRIMINAL LAW—EVIDENCE—INSTRUCTIONS.

Where evidence on a trial for crime was competent for one purpose, it should not be excluded because it impressed the jury with the idea that the accused had a propensity to commit the crime charged; but the court should instruct the jury to consider it only for the purpose for which it was admitted.

3. WITNESSES—IMPEACHMENT.

It is not competent to impeach a witness by proof of prior statements, the making of which he does not deny when testifying.

4. CRIMINAL LAW—DECLARATIONS BY PERSON INJURED—ADMISSIBILITY.

On a trial for the carnal abuse of a female child, admissions made by the child are inadmissible; there being no privity between her and the state sufficient to render her admissions evidence for the accused.

5. SAME—APPEAL—PREJUDICIAL ERROR.

Where, on a trial for the carnal abuse of a female child, the evidence only proved that accused had unsuccessfully attempted to insert his penis into her private parts, causing her pain, the error, if any, in an instruction that carnal abuse means any abuse of the female child's genital organs, either by defendant's private parts or by rough handling of or use of her private parts by him in any way, was not reversible error; Criminal Procedure Act, § 136 (P. L. 1898, p. 915), declaring that no judgment shall be reversed for error, except such as may have been prejudicial to defendant.

Error to Court of Quarter Sessions, Hudson County.

William A. Hummer was convicted of crime, and he brings error. Affirmed.

Argued June term, 1905, before GUMMERE, C. J., and FORT, PITNEY, and REED, JJ.

Joseph M. Noonan, for plaintiff in error.
William H. Speer, for the State.

GUMMERE, C. J. The writ in this case brings up for review the conviction of the defendant upon an indictment charging him with the carnal abuse of one Ella Dennison, a female child under the age of 16 years.

The first assignment of error is directed at the ruling of the trial judge in permitting the chief of police to testify, in response to a question put by the prosecutor, that upon a certain occasion there were other girls at police headquarters making charges against the plaintiff in error. In order to make plain the reason upon which our conclusion upon this assignment rests, a recital of the circumstances under which the challenged evidence was admitted becomes necessary. The witness had been called by the state for the apparent purpose of proving the excited mental condition of the prosecuting witness, when before the chief for the purpose of examination with relation to the alleged criminal act of the plaintiff in error. On his cross-examination he was asked whether he had taken down the girl's statement in writing, and answered that he had not. He was then asked whether it was not the practice of his department to take statements in writing when the charges made were of a grave character, and admitted that it was. He was then asked if he could remember any other case of this kind of crime where he did not take a written statement of the prosecuting witness. His answer to this question was as follows: "Well, there were such few cases where there was such abundance of evidence that I don't suppose it is likely." He was then asked whether there were not other girls at police headquarters making charges against other men, and answered that there were, and, being then asked whether he took all their statements down in writing, he answered, "No," that he did not take down more than one-third of them. The obvious purpose of this line of cross-examination was to impress the minds of the jurors with the idea that, from the fact that the witness had not taken down the Dennison girl's statement in writing, he had given little credence to her story. His answer to the last of the questions which have been recited showed that the inference sought to be drawn from his nonaction lost much of its force where a number of such complaints were lodged by different girls against the same man. In this situation of the case it was manifestly proper that the jury should be able to determine whether the failure of the witness to take down the girl's statement in writing was due to his lack of belief in its truth or whether, in not doing so, he was following his usual course under circumstances similar to those which were present in the matter which he was then investigating. The prosecutor, therefore, at the close of the cross-examination, which followed immediately after the asking

and answering of this last question, put the question which it is now argued was erroneously admitted. The basis of the argument is that it is incompetent on the trial of an indictment to prove that the defendant has been guilty of other crimes similar in character to that charged against him in the indictment, or even that he has a propensity to commit such crimes, and that the challenged testimony had this effect. That proof offered for the purpose indicated in this argument ought not to be received, and that its admission constitutes legal error must be at once conceded. But evidence which is incompetent if offered for one purpose is very frequently admissible when offered for another. A very common instance of this condition in a criminal trial is found in the admission of proof that the defendant (when he has offered himself as a witness in the case) has been convicted of other crimes, whether like or unlike that under which he is being then tried. Such proof is admitted solely for the purpose of affecting the credibility of the defendant, and the fact that it may leave upon the jury the impression that the defendant has a criminal propensity does not justify its exclusion. The evidence now under consideration was, in our opinion, competent for the purpose for which it was offered, and which has been already indicated, namely, to preclude the inference that the failure of the chief of police to take down in writing the statement of the prosecuting witness was due to a want of belief on his part of its truthfulness. This being so, it would have been an error, injurious to the state, to have excluded it because of its tendency to impress the jury with the idea that the defendant had a propensity to commit the crime for which he was then upon trial. The protection of the defendant against such a result was to request the court to instruct the jury as to the limitations of the evidence and of the purposes for which alone it could be considered by them.

The next assignment of error relates to the exclusion of certain testimony sought to be given by Mr. Doherty, the attorney of the defendant, while on the witness stand. The testimony excluded was a conversation had by the witness with the Dennison girl at an interview had some time before the trial. The object for which the excluded testimony was offered was not stated. It was not competent for the purpose of impeaching her credibility, for she had not denied, while upon the witness stand, making any of the statements which Mr. Doherty was asked to repeat. It was not competent to prove the statements as admissions made by her, for, as was pointed out by this court in *State v. Brady*, 71 N. J. Law, 300, 59 Atl. 6, there is no such privity between the victim of a criminal act and the state as to render admissions made by the former competent evidence in

behalf of the party charged with the commission of the crime. This testimony therefore was properly excluded.

Another assignment of error is directed at the charge of the court as to what constitutes the carnal abuse of a female child. The instruction complained of was as follows: "Carnal abuse means any abuse of the female child's genital organs, either by the defendant's private parts, or by rough handling of or use of her private parts by him in any way." The contention made on behalf of the defendant is that there may be a rough handling of the private parts of a female child under such circumstances as to disprove that the person so doing was guilty of the crime of carnal abuse, and that therefore this instruction was erroneous. But, assuming that this contention is well founded, it affords no ground for reversing the conviction. By virtue of the 136th section of the criminal procedure act (P. L. 1898, p. 915), no judgment given upon any indictment shall be reversed for any error, except such as shall or may have prejudiced the defendant in maintaining his defense upon the merits. In the case before us the proof submitted by the state, in support of the charge laid against the defendant, was that he had unsuccessfully attempted to insert his penis into the private parts of this girl, causing her some pain by doing so. No evidence was introduced showing any rough handling of her parts, except this attempted entrance of her person. The abstract proposition complained of might possibly have been considered by the jury as an instruction that, in order to justify a conviction, there must have been a rough handling of the girl's private parts while attempting to effect an entrance into her person. It is not possible, it seems to us, that they should have based their verdict of guilty upon a conclusion that there had been no attempt on the part of the plaintiff to enter the girl's person, but that he had roughly handled her private parts, in the absence of any evidence whatever upon which to found such a conclusion.

Other errors have been assigned and have received due consideration. We do not, however, find them to be of sufficient merit to justify discussion.

The conviction under review should be affirmed.

BOROUGH OF WASHINGTON v. WASHINGTON WATER CO.

(Court of Chancery of New Jersey. Nov. 22, 1905.)

1. WATERS—PUBLIC SUPPLY—CORPORATIONS—DUTIES.

A water company, which is the sole source of water supply for a borough, is a quasi public corporation bound to supply water to the borough at a reasonable price, to be fixed by a competent tribunal in case no agreement between the parties can be reached.

2. SAME—CUTTING OFF SUPPLY—INJUNCTION.

Where a water company, which was the sole source of supply of a borough, threatened to cut off the supply in case the borough refused to pay a sum for past service, which it claimed was unreasonable, the borough was entitled to a preliminary injunction restraining the cutting off of the supply *pendente lite*.

3. SAME—EQUITY JURISDICTION.

Where a water company which was the sole source of supply of a borough, threatened to cut off the supply unless the borough paid certain charges, which it alleged were unreasonable, for past service, the jurisdiction of a court of equity in a suit to restrain the cutting off of the supply and to fix a reasonable charge extended only to the determination of whether the price demanded was unreasonable, and, if so, to enjoin the cutting off of the supply for its nonpayment, but did not include the recovery by the water company of a reasonable sum for past service.

4. INJUNCTION—PRELIMINARY INJUNCTION—CONDITIONS.

Where, in a suit to restrain a water company, which was the sole source of a borough's supply, from cutting off the same because of the borough's refusal to pay a charge for past service which it claimed was unreasonable, the affidavits on an application for a preliminary injunction as to the reasonableness of the sum charged were conflicting, a preliminary injunction should be granted on condition that the borough should pay into court or secure three-fourths of the sum paid under the last contract with the company for water supplied pending suit, and stipulate to pay such further sum as the court should direct by final decree.

5. SAME.

The water company was not entitled to payment of any portion of the supply furnished prior to the filing of the bill as a further condition to such injunction.

Suit by the borough of Washington against the Washington Water Company. On application for a preliminary injunction to restrain defendant from shutting off complainant's water supply. Granted.

Oscar Jeffrey, for complainant. William A. Stryker and William H. Morrow, for defendant.

EMERY, V. C. Defendant has for over 20 years furnished a water supply to complainant for fire hydrants and other public purposes under 10-year contracts. Under the first contract, the annual sum paid was \$1,000 a year, and under the second (expiring July 1, 1903), \$800 a year. On the expiration of this contract, and during the last two years, the parties had negotiations for the continuance of the supply for another term of years, but have failed to agree on the sum to be paid. In the meantime the service has been continued as heretofore, but without any payment, and on August 17, 1905, the water company notified the borough that from July 1, 1903, to July 1, 1905, the water had been supplied under the original contract for \$800 a year, that the borough was now indebted to the company for \$1,600, which it had refused to pay, and that unless this indebtedness of \$1,600 was paid by August 25, 1905, the public water supply would be cut off. The supply includes street hy-

drants, the only source of supply for extinguishing fires. The borough thereupon filed this bill for an injunction against cutting off this supply, claiming that the price demanded was unreasonable, and praying also that this court fix the reasonable price to be paid. Defendant, on the other hand, insists that the price demanded is reasonable, and by its answer denies jurisdiction of this court for any purpose. Complainant is entitled to a preliminary injunction restraining this cutting off of its water supply pending the final hearing, for the following reasons:

The defendant, in respect to the rights and duties now involved, is a quasi public company, and is bound to make a reasonable price for the water supply to the borough. And the borough, on the other hand, is bound to pay a reasonable sum. Public Service Corporation v. American Lighting Co. (Pitney, V. Ch.; 1904) 57 Atl. 482, 485. The public duty of the officials controlling each of the parties is to agree on a reasonable price for this public service, but if they fail to agree on any price, the reasonable price must be fixed by a competent tribunal. The claim for water heretofore supplied is altogether legal in its nature, and an action brought solely for the purpose of recovering a reasonable sum for past services, or of determining what is such reasonable sum, is not within the equity jurisdiction. But such jurisdiction exists to maintain the status quo, and require the continuance of the supply pending the settlement of the question of reasonable price for past supply. If the water company demands an unreasonable price and threatens to cut off the public supply unless this unreasonable price is paid, the municipality has the right to enjoin the company from cutting off the supply, because of failure to pay such sum. Ordinarily, the scope of the decree in such equity suit would be the determination of whether the price demanded was unreasonable, and if so found, then to enjoin the cutting off of the supply for its nonpayment. The equitable jurisdiction in such suit would not extend to fixing either the reasonable sum to be paid for the past supply, or for the future. Such being the scope of the final decree, the complainant, if it can show on application for preliminary injunction, a fair case for trial on final hearing, of the unreasonableness of the price demanded, is, under proper conditions, entitled to a continuance of the supply pending hearing. In the present case, the water company demanded \$1,600, the price of two years service under the last contract with the borough, which expired over two years before the suit. The affidavits show a case where the complainant is entitled to have the question as to the unreasonableness of this sum tried, and they further show that the decision of this question cannot be satisfactorily made on ex

parte affidavits, but only upon full hearing and proofs. On proper conditions, complainant is therefore entitled to the preliminary injunction. The conditions to be imposed depend on the scope of the issues to be finally tried in the suit and the situation disclosed by the affidavits presented. As to water service or supply pending the suit, they should include payment into court (or securing payment) of at least a fair proportion of the amount previously paid, this amount, if taken out or recovered by the defendant, to be applied and credited as payment on account by defendant, for water supplied pending suit, without prejudice to either party. Three-fourths of the sum paid under the last contract should be thus paid or secured. As to water service or supply pending suit, the further condition should be imposed, that the complainant should stipulate to pay (or secure) such further sum as the court may by final decree, and as a condition, or otherwise, direct to be paid for such service or supply pending suit. Complainant's bill in terms offers only to pay a price fixed by a standard referred to, viz., the rate charged to private consumers for water actually supplied. Defendant on its answer and affidavits fairly contests the reasonableness of this standard as applied to public water service, and as it may establish its case on this point at final hearing, it has a right to be secured by this further condition for its supply pending suit.

The conditions in the present case should not require payment for any portion of the supply previous to filing the bill, for three reasons: First, under the present pleadings, this question of the amount to be paid as a reasonable price for the water supplied or ready to be supplied previous to the suit cannot be tried in this court, unless defendant consents. It has clearly the right to bring its action at law for past services or supply and cannot be restrained from so doing, and has in its answer objected to the jurisdiction of the court for any purpose. The objection is clearly valid as to the past supply. Second, so far as relates to past due bills, the company could at any time after the expiration of the contract have sued for the value of its supply, and its omission for two years to sue and test the question of reasonable price in this way, must, in the absence of any facts showing the defendant's financial irresponsibility, disentitle defendant to having payment of any portion now enforced by way of condition to supplying water pending the suit. As to the supply pending suit, the equity to payment rests on the fact that this court virtually orders this supply, and in equity it is therefore bound also to assure the payment for this service, by the exercise of its powers, i. e., by making the supply pending suit conditional on payment. In the third place, to

make such condition, would require the borough to pay at once a considerable sum of money, and it does not appear that the money is in hand, or that the statutes regulating the borough would authorize the payment. Payment of the rate now fixed for the pending supply can be provided for by taxation, along with other annual burdens. Unless some money for the purpose of the past water supply has been already raised by taxation and is in hand, the amount finally recovered by decree or judgment must probably be met as such obligation. The order for payment of the past-due bills in the Long Branch Case, 62 Atl. 474, referred to by counsel, was, as I find, made by consent, and the money was in hand ready for payment. In that case, also, the pleadings were by consent so framed that the court of equity undertook the settlement of what was a reasonable price to be paid both for the past and future supply. Vice Chancellor Pitney in this case, in his opinion not yet filed, but which I have seen, proceeds upon the views of the power of the court of equity which I have indicated.

The terms of the order will be settled on notice, unless agreed on.

HEGEMAN'S EX'RS v. ROOME et al.

(Court of Chancery of New Jersey. Nov. 23, 1905.)

1. CHARITIES—CHARITABLE BEQUEST—INDEFINITENESS.

A bequest to a trustee for the purpose of making such distribution among religious, benevolent, and charitable objects as he may select is void as vague and indefinite.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Charities, § 45.]

2. WILLS—TRUSTS—FAILURE—EFFECT—TRUSTEE'S TESTAMENTARY DISPOSITION—VALIDITY.

A wife bequeathed property to her husband, who was directed to distribute it among such religious, benevolent, or charitable objects as he might select, which bequest was void for indefiniteness. The husband inherited the property as intestate property, but his will recited the conditions of the wife's will, and provided that for the purpose of carrying out the provisions thereof his executors should keep apart from his estate the property belonging to the estate of his wife and divide it among certain institutions. *Held*, that such provision was not operative, as the husband did not receive any property under his wife's will to which it would apply.

3. ADMINISTRATORS—SALES—STATUTES.

P. L. 1888, p. 395, vesting administrators with the same powers in respect to sales of land as executors named in the will, does not give a substituted administrator a grant of power to sell lands which are the subject of an express devise to the executor as trustee.

Bill by Benjamin A. Hegeman, Jr., and another, as substituted administrators with the will annexed of Catherine E. Hegeman, deceased, and as executors of the will of Benjamin A. Hegeman, deceased, for direc-

tions as to the execution of a trust created by the will of Catherine E. Hegeman. Decree advised.

Charles A. Reed, for complainants. Craig A. Marsh, for defendants Muhlenberg Hospital & Children's Home Ass'n et al. Hugh B. Reed, for defendants Roome and Harbough. John H. Van Winkle, for defendants Roome's executors.

BERGEN, V. C. The bill in this cause was filed by Benjamin A. Hegeman, Jr., and William J. R. Hegeman, substituted administrators, with the will annexed of Catherine E. Hegeman, deceased, and also as executors of the last will and testament of Benjamin A. Hegeman, deceased, for the purpose, among other things, of obtaining the direction of the court as to the proper execution of a trust which it is alleged was created by the last will and testament of Catherine E. Hegeman, in which, after numerous bequests of portions of her property, she ordered and directed as follows: "Thirteenth. I hereby give and bequeath to my husband, Benjamin A. Hegeman, for his own personal use and benefit during his life, all the net income, interest or revenue of my estate both personal and real, of which I may die seized or possessed, or which I may hereafter acquire, or to which I may be entitled at the time of my decease, giving him full power to manage and control my said estate both personal and real, the same as I might or could do if living. He to have full power to sell my real estate or personal property, and reinvest the proceeds for the benefit of my estate, or as he may deem for its best interest, and to give good and sufficient deeds and conveyances therefor to the purchaser or purchasers thereof. Fourteenth. At the death of my husband, Benjamin A. Hegeman, I hereby direct that the residue or remainder of my estate shall be divided as follows: [Succeeding this are eight different bequests, which it is not necessary here to recite.] Twenty-third. Should there be any residue or remainder of my estate left after providing for the payment of the legatees hereinbefore named, I hereby give and bequeath the same to my husband, Benjamin A. Hegeman, for the purpose of making such distribution among religious, benevolent or charitable objects, as he may select."

The important controversy arises over this last paragraph. Benjamin A. Hegeman, the husband of Catherine E. Hegeman, having been appointed the executor of her last will and testament, duly qualified as such, and retained in his possession until his death the property and estate, the income of which was devised to him for life, holding, as a part of such trust fund, certain real estate particularly described in the bill of complaint, as well as a considerable amount of personal property. The husband left a last will and testament, in which, after repeating the eight bequests as set out in paragraphs 15 to 22

inclusive of his wife's will, he devised as follows: "I give and bequeath to my executors hereinafter named, all the property which I shall receive, or which may come to my estate after my decease, under the twenty-third article of the will of my deceased wife, Catherine E. Hegeman, bearing date July 23, 1904, in trust, nevertheless, to take the same and divide such property into two equal parts or shares, and to transfer and pay over one of such parts or shares to the Muhlenberg Hospital, in the city of Plainfield, state of New Jersey, and the other of such parts or shares to the children's home association of said city; each of said parts to be known as the 'Catherine E. Hegeman Fund' of the respective beneficiaries above named, and to be held by them in trust to invest and receive the income therefrom, to use and apply such income only to and for the respective charitable objects for which they are organized." The persons entitled to the estate of Catherine E. Hegeman, had she died intestate, insist that the twenty-third section of her will, which authorizes her husband to distribute the residue of her estate, after providing for the payment to the legatees named in her will, the sums bequeathed to each, among such religious, benevolent, or charitable objects he may select, is void, and that they are entitled to such residue. After the death of the husband the complainants were appointed substituted administrators with the will annexed of Catherine E. Hegeman, and, having in possession such residue and remainder of her estate, now seek the direction of this court in the premises.

While in my judgment the appointment of the complainants as substituted administrators does not create them trustees under the will of the testatrix, still, as all of the parties in interest are before the court, and no objection has been raised by any of them, I will, in view of the fact that if the trust exists it would be the duty of this court to appoint a trustee, consider these complainants as occupying that position, and, if necessary, make an order appointing them thereto; and I feel justified in adopting this court, because the life tenant, to whom the power of disposition was given, has in and by his last will and testament bequeathed to the same parties the fund in question, in trust to divide and pay over to the beneficiaries named in his will. A careful consideration of the twenty-third paragraph of the will of Catherine E. Hegeman leads me to the conclusion that the bequest contained in that paragraph is void. A bequest to benevolent, religious, or charitable institutions, without qualification, has been so often held to be void by the courts of this state, as to place the question beyond successful argument. In the case of *Thompson's Executors v. Norris*, 19 N. J. Eq. 575, a bequest to "such benevolent, religious, or charitable institutions as she may think proper" was held void, because it was so vague and indefinite that it

could not be enforced, and the case was affirmed on appeal after a most extensive and elaborate argument; Chief Justice Beasley, who wrote the opinion, saying: "That bequest is to 'benevolent, religious, or charitable institutions.' This is too broad. 'Benevolent' is wider than 'charitable' in its legal signification." The rule thus laid down has since then been repeatedly subjected to judicial consideration, and has always been maintained. *De Camp v. Dobbins*, 31 N. J. Eq. 671; *Hyde v. Hyde*, 64 N. J. Eq. 6, 53 Atl. 598. In the latter case the bequest was "for such religious, charitable, educational or other purposes as they may deem advisable, provided, nevertheless, that no portion thereof shall be given to, or distributed among, my wife or children, individually or collectively," and the bequest was declared void because it contained the words "or other purposes," and this, in spite of the fact that in declaring the bequest void the fund would be distributed among the wife and children of the testator, in direct opposition to a contrary proviso contained in the disputed paragraph.

On the argument it was strenuously urged that, as the testatrix had in and by her last will disposed of a large portion of the trust fund, to take effect after her husband's death, to eight recognized charitable purposes, such bequests ought to be taken as indicating and controlling the character of the objects which the husband must select in making distribution. I have carefully considered this insistence, but I can find no way to give it effect, because in the paragraph under consideration the residue is given and bequeathed to the husband, not for the purpose of carrying out the intentions of the testatrix as to the objects of her bounty, but for distribution by the husband in such manner as he may select, subject to the direction that the distribution shall be to benevolent as well as religious or charitable objects. My conclusion therefore is that, as to the property of Catherine E. Hegeman sought to be disposed of by the twenty-third section of her will, she died intestate, and it descended to the persons who would inherit the same under such conditions.

As Catherine E. Hegeman never had any children, the personal property which she sought to dispose of by this twenty-third paragraph would become the absolute estate of her husband, he having survived her; and the next question presented is, do the two beneficiaries of this fund, under the husband's will, take the personal property as a bequest from him? I can find nothing in the husband's will to support such a theory. All that the will contains on this subject is to be found in the eighth paragraph, which opened with a recital of the directions contained in the will of his wife with regard to this fund, and then continues as follows: "Now for the purpose of better carrying out the provision of the will of my deceased

wife, since the whole of her estate will be in my hands as her executor, I direct my executors hereinafter named to keep separate and apart from my estate all the property which shall be in my hands and under my control at the time of my decease and belonging to the estate of my said deceased wife, and to make the division thereof as provided in her will." And then, after repeating, in the form contained in the will of the wife, the eight distinct legacies she had given to take effect after her death, he continued: "I give and bequeath to my executors all the property which I shall receive, or which may come to my estate after my decease, under the twenty-third article of the will of my deceased wife, * * * in trust, nevertheless, to take the same and divide such property into two equal parts or shares, and to transfer and pay over," etc. It does not seem to me that under this bequest the husband had any intention of doing more than what he supposed he was required to do under the will of his wife, and it cannot be said that he was bequeathing any property which he supposed belonged to him, for he distinctly limits it to such property as he may receive under the twenty-third paragraph of his wife's will. As he did not receive this property under the will of his wife, and only took because she died intestate, to hold that he intended to pass over to those worthy charities property coming to him from a source other than that described in his will would amount to the making of a testamentary disposition for the testator which he had not authorized, and which the law would neither support nor justify. My conclusion on this branch of the case is that, as to the personal property of which Catherine E. Hegeman died intestate, the husband did not dispose of it under the eighth paragraph of his will, and that the trustees are accountable to his estate therefor.

Another question presented is whether the trustees are vested with a power of sale of the real estate which constituted a part of the fund. This question arises under the thirteenth paragraph of the will of Catherine E. Hegeman, in which, after bequeathing to her husband for life the income of her estate both real and personal, and giving him full power to manage and control the same as she could if living, she preferred a power of sale as follows: "He to have full power to sell my real estate or personal property and reinvest the proceeds for the benefit of my estate, or as he may deem for its best interest." It will be observed that, while she appoints her husband executor of her will, she confers no power of sale on him as such; the power is limited to him as trustee. Under these conditions, in my opinion, the power of sale was a personal trust and confidence, and is not transmissible, for, where there is a direction to convert, coupled with a trust or confidence in one who is to sell "as he may deem best," it is a personal

trust, which can only be exercised by the person in whom it is reposed. *Chambers v. Tulane*, 9 N. J. Eq. 146; *Brush v. Young*, 28 N. J. Law, 237; *Lanning v. Sisters of St. Francis, etc.*, 35 N. J. Eq. 392, 400. The substituted administrator has not, under P. L. 1888, p. 395, any grant of power to sell lands which are the subject of an express devise in trust. The devise under consideration was to the husband, with a power vested in him alone to sell the lands if he deemed it advisable. He did not exercise a power, which was only given in connection with a trust which I have held to be void. The power of a substituted administrator to sell lands has been fully considered and defined by Chancellor Magie, in *Varick et al. v. Smith* (N. J. Ch.) 58 Atl. 168. The other matters set out in the bill of complaint, and as to which instructions were prayed, relate entirely to directions as to the administration of the estate, and fall within the rule laid down by the chancellor in *Hoagland v. Cooper*, 65 N. J. Eq. 407, 58 Atl. 705.

I will advise a decree in accordance with the views here expressed.

MANSON v. JACK et al.

(Court of Chancery of New Jersey. Nov. 23, 1905.)

1. WILLS—CONSTRUCTION—INTEREST CREATED—ABSOLUTE GIFT.

Where the residuary clause of testatrix's will gave the executor, who was an old friend of hers, the residue of the estate, to be disposed of as he should think expedient, it amounted to an absolute gift.

2. SAME—SUIT FOR CONSTRUCTION—ISSUES.

In a suit for the construction of a will, the question whether a trust had been created by directions of testatrix to the executor was not open to consideration.

3. SAME—PARTIES.

A contention that a clause of a will, together with certain directions by testatrix to the executor, created a trust for certain persons, and that, the same being void for uncertainty, the estate was distributable among the heirs, cannot be considered in a suit to which such alleged beneficiaries are not parties.

Suit by John E. Manson, as executor of May Dalling, deceased, against John Bruce Jack and others, for the construction of the will of testatrix. Decree advised.

Vivian M. Lewis, for complainant. Charles C. Scott and Daniel L. Campbell, for defendants.

STEVENSON, V. C. The will of Mrs. May Dalling, deceased, contains the following residuary clause: "The balance of my estate, after paying all expenses and making such improvements on my burying lot as my executor deems advisable, erecting additional headstones or footstone, I leave to my executor to be disposed of as he shall think expedient. I appoint my friend John E. Manson, of Paterson, N. J., executor under this my last will and testament."

1. The complainant, the executor of this will, asks for a construction of the clause above set forth, in order that he may be instructed as to the disposition of the residue of the estate now in his hands. The testatrix made a very extensive and minute distribution of portions of her estate among nearly 40 legatees, including her own heirs and next of kin and the next of kin of her deceased husband, and a large number of other relatives and friends. There are 24 pecuniary legacies, ranging in amount from \$100 to \$1,000 each, and aggregating over \$9,000. There are also 15 specific legacies of clothing, jewelry, watches, etc. All the legacies have been paid, and the fund now remaining in the hands of the executor, out of which considerable counsel fees and other expenses must be paid, amounts to about \$3,800. This residuary clause is in sharp contrast with that large class of residuary clauses which have been before the courts, in which the intention is disclosed that the devisee or legatee named shall dispose of the property given to him as the testator has directed or will direct, or in accordance with the wishes of the testator in some way expressed or to be expressed. The executor is left free to dispose of the residue which may be left in his hands for his own benefit, or for the benefit of any other person or persons. The complainant was an old friend of the testatrix. He had managed her business affairs for many years, and had received no compensation. The testatrix was 80 years of age when she made her will, and was a widow with no living descendants. She was intimate with the complainant's family. It was very natural, under the circumstances, that the testatrix should desire to make a testamentary gift to the complainant, and the form of that gift, so far as the words by which it is manifested call for consideration, may have resulted from the fact that the legatee in this case was to be the executor of the will. The testatrix is contemplating that she is leaving her estate in the hands of her old friend, whom she makes her executor, to be disposed of to a large extent by him according to her directions among 40 different persons, and with this idea in her mind she passes on immediately to say that she leaves the residue to this friend, to be disposed of as he shall think expedient. When a man is put in possession of property, with the right of applying it to his own use or to any other use as he may think expedient, he is the owner of the property. The gift of the unqualified power to dispose of the property is a gift of the property. 30 Am. & Eng. Ency. p. 376 (b), and cases cited in notes; *Knight v. Knight* (1894) 162 Mass. 460, 38 N. E. 1181. Even if the complainant were not shown to be a very natural object of the bounty of the testatrix, if the complainant had been a stranger to her, I think there would be difficulty in construing this

residuary clause so as to find an intention of the testatrix that she should die intestate as to about a quarter of her estate, and that the executor to whom she "left" this residue was not to take the same beneficially, but was to exercise what would practically be a delegated testamentary power of distributing this residue among beneficiaries to be selected by him. The only witness sworn on either side was the complainant, who was called on behalf of the defendants, the next of kin, and testified without objection to certain conversations which he had with the testatrix, in which she undertook to give directions or suggestions in regard to the disposition which he should make of the residue of the estate when he should receive the same, or of some part thereof. This testimony plainly is irrelevant to the question under examination—the question how this residuary clause is to be construed. The residuary clause, when construed in the light of the circumstances which surrounded the testatrix when she made her will, in my opinion makes an absolute gift to the complainant.

2. Counsel for the defendants, who are the heirs and next of kin of the testatrix, argue in their brief that the testimony of the complainant shows that an attempt was made by the testatrix to create a trust by a verbal communication to the executor, and that such trust is void for uncertainty and indefiniteness, and that therefore the residuary estate is distributable "among the heirs at law and next of kin according to the nature of the estate." The court cannot entertain such a claim on behalf of these heirs and next of kin in this cause. No such claim is suggested by the pleadings, and the parties are not before the court who are essential in order that a final disposition of such a claim could be made. The bill sets forth the entire will and the circumstances under which it was executed, and prays that the court "may make such construction" of the residuary clause "that the said residue of the said estate may be distributed." The only parties brought in as defendants are the heirs and next of kin of the testatrix. The bill does not contain the faintest suggestion that the testatrix gave the executor any instructions in regard to the disposition of the residue, or that the executor expressly or impliedly received the residue charged with a secret trust. The complainant does not ask the court for any instructions in regard to his duty in view of an alleged secret trust. The bill merely asks for a construction of the will according to rules which govern the construction of such instruments. Neither of the answers bases any claim to the residue upon the existence of a resulting trust. One of the answers merely submits to the court the construction of the residuary clause, precisely as such construction is submitted in the bill of complaint. The other answer alleges that the testatrix

made no disposition of the residue of her estate, and that the residuary clause is "entirely inoperative," and that therefore this answering defendant is entitled to her share of the residue "as one of the heirs at law and next of kin" of the testatrix. Neither answer suggests that the residuary clause operated to pass the residue to the complainant, but that on account of conversations or agreements between the complainant and the testatrix he (the complainant) holds the residuary estate, which under the "operation" of the will passed to him, charged with a trust. In order to found any such claim on behalf of these defendants as the one under consideration, it is necessary to consider and decide a case which is altogether beyond the scope of the bill, and not in any way injected into this cause, or even suggested until the final hearing. The bill is merely for the construction of the will and for such directions to the complainant, the executor engaged in the work of carrying out the provisions of the will, as are proper in view of the construction which the court may place upon those provisions. Whether a legatee or devisee takes under a will for his own benefit, or upon some trust which is not in any way disclosed in or suggested by the will, is not a question of the construction of the will. It is a question whether or not a trust has been created by a transaction which is altogether independent of the will, or by a series of transactions of which the making of the will was merely a part. It is true that the conversations between the testatrix and the complainant disclose three possible beneficiaries of a secret trust, if there was such secret trust. Whether, however, the talk which is thus testified to between the testatrix and the complainant amounted merely to more or less vague advice or suggestions in regard to what the complainant should do with the benefaction which the testatrix intended to confer upon him, or whether such talk, while not defeating the beneficial interest of the complainant as residuary legatee, operated to charge his legacy to a certain extent with benefactions to these three parties named, or any of them, or whether such talk charged the entire residuary estate with a definite trust for the benefit of these three parties, or in default of such definite trust with a resulting trust for the benefit of the heirs and next of kin, are questions which are entirely beyond the scope of this present suit. The testimony of the complainant was offered in order to aid the court in construing the will, and it was so understood by the counsel for the complainant, who justly claims in his brief that such testimony is entirely incompetent for such a purpose.

If, however, under the allegations of this bill and in view of the fact that the testimony of the complainant, which was entirely incompetent on the question of construc-

tion, was admitted without objection, there are grounds for urging that as between these litigating parties an adjudication might be made in this cause in regard to this alleged secret trust, the insurmountable difficulty still remains that there are necessary parties to such a controversy who are not brought before the court. The complainant certainly cannot obtain a decree that he takes the residuary estate beneficially free from any trust or charge in favor of the three parties named in his testimony when those parties have not been heard. The defendants, these heirs and next of kin, certainly cannot have this court in this cause adjudge, first, that the complainant takes the residue as a trustee; second, that the trust "is void for uncertainty and indefiniteness," although the intended beneficiaries are known and named, but not brought into the suit or afforded an opportunity to be heard; and, third, that on account of the unenforceable character of the trust in favor of these parties, who are not afforded an opportunity to show that such trust is enforceable, a resulting trust exists for the benefit of these defendants. The result is that, as all the parties to the suit agree that instructions are necessary, the decree will instruct the complainant, as executor, to pay over the residuary estate to himself individually as legatee. Whether as residuary legatee the complainant will hold title for his own benefit, or for the benefit of these three parties named in his testimony, or some of them, or partly for his own benefit and partly for the benefit of these three parties, or wholly for the benefit of the heirs and next of kin, are questions which will not be in the slightest degree affected by any decree in this cause upon the pleadings and proofs as they now stand.

KLEB v. KLEB et al.

(Court of Chancery of New Jersey. Nov. 28, 1905.)

1. HUSBAND AND WIFE—ANTENUPTIAL CONTRACT—EFFECT—PROPERTY SUBSEQUENTLY ACQUIRED—PROPERTY COVERED.

An antenuptial contract was made in Hanau, Germany, in the year 1861. It was stipulated as follows: "We voluntarily have engaged ourselves to be married. We are not related, and hereby wish ["wollen"], in case of the death without issue, to make a marriage contract to the effect that the surviving spouse shall be the sole heir of the predeceased spouse." The parties to this agreement were at the time domiciled in the then electorate of Hesse Cassel, and did not possess any property. Several years after their marriage they came to New Jersey, and there acquired real estate, title to which was taken in the name of the husband. The husband subsequently died in Germany. In a suit by the wife against her husband's heirs, based upon the above agreement, it was held that the New Jersey land was within the scope of the contract.

Semble, that in a suit against the heirs for the specific performance of the ancestor's con-

tract the contractee complainant cannot testify as to transactions with or statements by the ancestor.

(Syllabus by the Court.)

Suit by Maria Sophia Kleb against Jean Kleb and others to compel the performance of an antenuptial agreement. Decree for complainant.

Ernest F. Keer and the Attorney General, for complainant. John W. Queen, for defendants.

STEVENS, V. C. This is a bill to compel the performance of an antenuptial agreement, made between the complainant and her late husband, Peter Kleb. The defendants are his heirs at law. The agreement was made at Hanau in the year 1861, in the then electorate of Hesse Cassel. The original, signed by the parties and their parents, is contained in a court record of the town, and is translated as follows: "Marriage Record 1861, page 532. Hanau, this 29th day of April, 1861. In the presence of Assessor of the Court [Acting Judge] Schmedes, Clerk of the Court Michael, there appeared as the persons engaged to be married: First, former Peter Kleb, of Hanau, born on the tenth day of June, 1838, the legitimate son of Johannes Kleb, a driver, and of his wife Elizabeth, née Breitenberger, of this place; second, Maria Sophia Marx, of Hanau, born on the 17th day of November, 1838, as the legitimate daughter of George Friedrich Marx, master butcher, and of his wife, Susanne Franziska, née Kunz, of this place—who stated: 'We voluntarily have engaged ourselves to be married. We are not related, and hereby wish ["wollen"—a word importing obligation], in case of the death without issue, to make a marriage contract to the effect that the surviving spouse shall be the sole heir of the predeceased spouse.' The parents of the two engaged persons declared their consent thereto. The parties engaged thereupon submitted the following documents: First, their respective certificates of birth; second, certificates of the chief mayor of this place regarding the reception of the bridegroom to citizenship here, as well as in regard to his ability to make a living; third, certificate that notice had been given to the commander of the regiment; fourth, receipt for the citizen's money; fifth, receipt for the marriage tax; and, finally, the parents of the persons engaged declared that they are willing to waive, in reference to this marriage contract, their rights to their obligatory shares. Read and approved. Signed: W. P. Kleb. Sophie Marx. Fr. Marx. Johannes Kleb. S. Marx. Elizabeth Kleb. For certification of signatures, signed: Michael." At the time this agreement was made the parties had no property. The husband's trade was that of a brass founder. They resided at Hanau, and continued to reside there for four years. Then they went to Switzerland, where they lived four years more, and then they came to the United States. After living

in New York for a year they came to Newark, where they had a restaurant and saloon. They labored together in the business, and were so successful that in August, 1882, Peter Kleb purchased the premises known as 842 Broad street for \$30,000, paying \$9,000 or \$10,000 in cash. They continued in this business, which was conducted in Peter's name, until 1886, by which time they had paid off the \$20,000 mortgage which secured a part of the purchase money. Then they rented the property, which rapidly increased in value, and went back to Germany, where they continued to reside until September, 1901, when Peter Kleb died. Mrs. Kleb received the rents after his death until, desiring to sell, she discovered that the deed was in Peter's name, and that on the record she had no title except to dower. It may be proper to add that the bill alleges that a will was made and proved in Germany, but the evidence, or perhaps I ought to say the colloquy between counsel, shows that it was not executed in such manner as to transfer title to real estate here.

The question argued was whether the antenuptial agreement made in Hanau operates upon real estate subsequently acquired in New Jersey. Story, in his work on the Conflict of Laws, § 184, in a passage that has been frequently cited with approval, thus formulates the rule: "(1) When there is a marriage between parties in a foreign country, and an express contract respecting their rights and property, present and future, that, as a matter of contract, will be held equally valid everywhere, unless, under the circumstances, it stands prohibited by the law of the country where it is sought to be enforced. It will act directly on movable property everywhere. But, as to immovable property, it will, at most, confer only a right of action to be enforced according to the jurisprudence *rei sitæ*. (2) Where such a contract applies in terms or intent only to present property, and there is a change of domicile, the law of the actual domicile will govern the rights of the parties as to all future acquisitions." In the third edition of Wharton on the Conflict of Laws, Vol. 1, § 199a, the editor thus states the law as he gathers it from decisions, made mostly since the above passage from Story was written: "The statement in the last section that a change of domicile does not work any change of law governing the construction of the contract is undoubtedly true with respect to property, wheresoever situate, which is within the scope of the contract. It is often a question, however, what property is within the scope of the contract. The question is, in its last analysis, one of the intention of the parties. When the contract expressly, or by clear implication, covers future acquisitions after a change of domicile, its construction and effect with reference to such property, as well as property acquired before such change of domicile, are undoubtedly to be governed by the law of the original matri-

monial domicile, but when the contract applies in terms or intent only to present property, or is to be performed only in the country where made, and there is a change of domicile, the law of the actual acquisition will govern the rights of the parties as to all future acquisitions; for, upon this assumption, the contract is eliminated, so far as such property is concerned."

Counsel for the defendants, in support of their contention that the contract in question is to be construed as applying only to property that the spouses might have acquired in Germany, refers to the following cases: *Fuss v. Fuss*, 24 Wis. 256, 1 Am. Rep. 180; *Castro v. Illies*, 22 Tex. 479, 73 Am. Dec. 277; *Besse v. Pellochoux*, 73 Ill. 285, 24 Am. Rep. 242; *Long v. Hess*, 154 Ill. 482, 40 N. E. 335, 27 L. R. A. 791, 45 Am. St. Rep. 143. In each of these cases it was held that a marriage contract, executed abroad by spouses domiciled there, did not apply to or bind lands, acquired subsequently, situate within their new domicile. In the Wisconsin and Illinois cases it was held that the language of the contract indicated an intention to localize it. The Texas case was put on other grounds. I have not been referred to any case, and I have found none, which decides that where there is nothing in the contract evincive of an intention to give a restricted operation to it, where it relates only to after-acquired property, and where its terms are sufficiently comprehensive to include all such property, the mere failure to declare, in so many words, that it is to operate on property without the matrimonial domicile, will prevent it from so operating. In *Besse v. Pellochoux*, the antenuptial agreement had been made in Switzerland, the matrimonial domicile of the spouses. It provided, among other things, as follows: "(1) The future husband associates and renders his future wife partaker of half of the property acquired during their marriage. * * * (3) Joseph Nicholas Besse, as well for his wife as himself, both present, and natives of Orsiere, where they now live, desiring to prove to the young couple their approval of the union to be contracted, give to their son, Joseph Nicholas, half of their immovable, as well as their movable, property, on the close conditions that the conjoints will work the other half still retained and belonging to said parents." They subsequently emigrated to Illinois. The husband there purchased real estate. The wife died, and the heirs of the wife claimed title to one-half of it. Scott, J., after adverting to the fact that the word 'partaker' was one of doubtful signification, that no words were used which, in their ordinary or legal import, defined what estate the wife took, and that none were used that conveyed the idea that the estate should descend to her heirs, goes on to say: "The contract associating the parties thereto as joint partakers in the property to be acquir-

ed by the marriage does not specify any place where it is to be performed. But we are not left in doubt on this point. An examination of its provisions shows that it could not be performed at any place other than the place where it was entered into, viz., the place of the matrimonial domicile." *Long v. Hess*, 154 Ill. 482, 40 N. E. 335, 27 L. R. A. 791, 45 Am. St. Rep. 143, is to the same effect. The marriage agreement, made in Grand Duchy of Hesse, provided, among other things, that the bride agreed "to receive the groom to live at her house," that the groom brought into the marriage a piece of land situated at Unter Beerfelden, and that the contracting parties subjected themselves to the general laws of Germany, especially the rules and customs of the country. Bailey, J., said that the evidence furnished by the contract was "all in the direction of showing that their intention was to make Beerfelden their permanent home," and that there was a total absence of express provision in the contract making it applicable to the future acquisitions of the parties; the case in that respect being as he said, distinguishable from *Scheferling v. Huffman*, 4 Ohio St. 241, 62 Am. Dec. 281, where "the contract by its express terms was made applicable, not only to the property then owned by the intended wife, but also to all property acquired during the continuance of the marriage." The express terms thus referred to were contained in the following clause: "If I should die first, my affianced, Ernestine, shall inherit all my property"—a clause which does not differ materially from that under consideration. It is evident that these two cases furnish no support to the defendants' contention. *Castro v. Illies*, 22 Tex. 479, 73 Am. Dec. 277, is another of the cases upon which defendants rely. There a judgment creditor sought to avoid, as fraudulent, a conveyance by a husband to his wife. It was attempted to support it by reference to the provisions of a marriage contract entered into in France by persons then subjects of that country. The agreement provided that there should be no community of property between husband and wife, that they should hold their respective properties separately and that they intended to submit themselves to certain provisions of the Code Napoleon. The consideration for the conveyance alleged to be fraudulent was a debt due from husband to wife, said to have arisen many years before, under the provisions of this agreement. The decision was that the verdict of a jury condemning the conveyance as fraudulent should stand. As I understand the case, the decision was put ultimately upon the ground (1) that the contract would not bind creditors who had no notice of it, and (2) that the conveyance was fraudulent in fact. Under the provision of the marriage contract that the spouses should hold their property separately, I do not see

how the wife could have claimed that either in France or in Texas (if it operated on property in Texas) the marriage contract vested her with a title, legal or equitable, to her husband's lands. If she took at all, it was under her husband's conveyance, and this the jury found to be fraudulent. The case appears to have little or no relevancy to the question I am considering, although there are in the opinion dicta respecting it, whose bearing upon the facts of that case are not quite obvious. None of them, however, go to the length contended for.

The only case which appears to give any countenance to defendant's position is *Fuss v. Fuss*, 24 Wis. 256, 1 Am. Rep. 180. The agreement was made at Cologne. It provided, so defendants say in their brief (though the case as reported does not give the clause verbatim), that "The aforesaid John William Fuss hereby grants and transfers as a full irrevocable property, by a lawful warranty, and in the form of a donation among the living, to his wife, Anna M. Eichen, all and every personal and real property which shall belong to him, the donor, on the day of his death." This was a postnuptial and not an antenuptial contract. The wife had real property in Prussia at the time it was made. This was sold, and the spouses emigrated to Wisconsin. Some of the money arising from the sale was invested in real estate in Wisconsin in the name of the husband. The husband died, and the wife claimed it. Dixon, J., said: "There is nothing in the contract which speaks fully to the very point; nothing which manifests any intention of the parties to regulate or control it by and according to the laws of their matrimonial domicile, their future acquisitions and gains of property in any foreign state or territory, or any property which should be held or owned by them in such state or territory. The contract was obviously made with reference to its operation and effect within the kingdom of Prussia upon the property of the parties situate there, and with no reference to property situate elsewhere. It appears that they had no property elsewhere, and there is no ground for supposing that they, at that time, contemplated any change of domicile, or a removal to this country or any other." Had the opinion stopped here, it would have seemed that there were, in the estimation of the learned judge, two circumstances which tended to show that the intention was to make the contract operative only upon lands in Prussia. These were (1) the fact that the wife had real property in Prussia, which it was the design of the agreement to protect; and (2) the form of the transfer, viz., "donation among the living," an instrument unknown, both in its form and incidents, to the common law. But he adds these words: "The contract, to have operated upon the rights of the parties abroad, must have been made with express reference to such opera-

tion." If by this was meant that it must have been stated in the contract, in so many words, that it was intended to operate upon property without the domicile, then the statement is without support in any book referred to in the opinion. Story is the authority principally relied on, and Story says (section 184) that where the express contract "applies in terms or intent only to present property, and there is a change of domicile, the law of the actual domicile will govern the rights of the parties as to all future acquisitions." This is a very different proposition from that contained in the sentence last quoted.

The *Fuss Case*, and the three other cases above mentioned, differ from the case in hand in two important particulars bearing upon the question of intent: (1) In each of those cases the spouses, at the time of the making of the contract, possessed property. (2) The phraseology of the contracts was such as to indicate that all the property to which their provisions were designed to apply was to continue, subject to the law of the matrimonial domicile. Property without the domicile was, by implication, excluded from their operation. To use the words of Judge Story, it appeared affirmatively that the contract applied in terms or intent to present property, or to property to be acquired within the then domicile. In the case in hand neither of these indicia of intention appears. Mr. and Mrs. Kleb had no property when they made the agreement. They must, therefore, have intended it to operate upon after acquired property. But the terms used in reference to their future acquisitions are of universal application. They contain within themselves no implication that they were to be limited to Hesse Cassel. Instead of such expressions as "partaker of half of the property," "donation among the living," we find "death without issue," "marriage contract," "the surviving spouse shall be the sole heir of the predeceased spouse." Now "death without issue" and "sole heir" are as familiar to the common as to the civil law. Their meaning is definite and well understood, and they are used in all their generality. It is conceded that the question is one of intent. This is not an artificial intent, imputed without reference to the real wishes of the parties, but an intent such as we may reasonably attribute to them in the situation in which we actually find them.

In the construction of contracts it is proper to consider surrounding circumstances. In this connection there are two considerations not yet adverted to which seem to be of some weight. Spouses possessed of landed property are not as likely to think of bettering their condition by emigration as those who are possessed of none. At the period in question (1861) emigration from Germany to this country was, and for several years previously had been, taking place

on a large scale. It is not unreasonable to suppose that an intelligent couple like Mr. and Mrs. Kleb might have regarded emigration as among the possibilities of their married life. But there is another, and, as it seems to me, a stronger, circumstance. In 1861 the town of Hanau lay in the electorate of Hesse Cassel, an independent principality. It was no part of the German Empire, for the German Empire did not then exist. It was an independent state, like Prussia or Saxony. Having, however, sided with Austria against Prussia in the war of 1866, it was, as one of the results of that struggle, incorporated into the latter state. Hanau, as may be seen by reference to any map published prior to 1866, lay in what may be described as a narrow neck of territory scarcely 10 miles wide, from which one might see, to the southeast, the territory of Bavaria, and to the north, the Duchy of Hesse Darmstadt. Such being the situation, is it reasonable to impute an intention to confine the marriage contract to such property as the spouses might acquire in Hesse Cassel, and to exclude from its operation land, the subject of possible acquisition, in Bavaria and Darmstadt? If it was the intention that the agreement should operate beyond Hesse Cassel, I do not know on what theory we could say that it would operate in some foreign states and would not operate in others. The question, then, being one of intention, intention to be deduced from the language of the contract and the surrounding circumstances, it seems to me more reasonable to credit Peter Kleb with an intention to constitute his betrothed, in default of issue, the heir of all his real estate than the heir of such real estate only as he might thereafter have acquired in the narrow territories of Hesse Cassel. If I devise my realty to A., this means, not only my realty in New Jersey, but my realty elsewhere. If, for valuable consideration, I covenant that I will devise my property to A., I presume that, in the absence of restrictive words in other parts of the instrument, no one would contend that the covenant did not extend to lands in New York or California, independent sovereignties, so far as this question is concerned. If, by an antenuptial agreement, I agree to make my wife, in default of issue, heir or devisee of my future acquired estate, I am quite unable to understand why she should not take such real estate as I may be seised of at my death, not only in New Jersey, but elsewhere. It seems to me that such an agreement does speak to the very point. The cases uniformly hold that where, by the antenuptial agreement, it is shown to be the intention of the parties that its provisions shall apply to property without the matrimonial domicile, effect will be given to it everywhere, unless its execution be incompatible with the laws or public policy of the country in which its enforcement is sought. *De Couche v. Savetier*, 3 Johns. Ch.

190, 8 Am. Dec. 478; *Lebreton v. Miles*, 8 Paige, 261; *Crosby v. Berger*, 3 Edw. Ch. 538; *Murphy's Heirs v. Murphy*, 5 Mart. (O. S.) 83, 12 Am. Dec. 475; *Scheferling v. Huffman*, 4 Ohio St. 242, 62 Am. Dec. 281.

But it is argued that the contract must be regarded as local, because of the provision that "the parents of the persons engaged declare that they are willing to waive, in reference to this marriage contract, their rights to their obligatory shares." The argument is that this stipulation was local, and that consequently the entire contract must be deemed local. But in the first place there is no proof that it was local. The right to such shares may have been, and was, no doubt, accorded by other states comprised within what was then geographically designated Germany. It existed under the Roman law, and was given by the Code Napoleon, section 915 of which reads as follows: "*Les libéralités par acte entre-vifs ou par testament ne pourront excéder la moitié des biens, si à défaut d'enfant, le défunt laisse un ou plusieurs ascendants dans chacune des lignes paternelles ou maternelles; et les trois quarts, s'il ne laisse d'ascendants que dans une ligne.*" Aside from this, the agreement is the independent agreement of the parents. They stipulate that, whatever right they may have to their obligatory shares, they are willing to waive. This is by no means equivalent to a declaration that their right to obligatory shares will extend to all the property that their children may acquire, so far as it may be subject to the antenuptial contract. That would be a strange construction that would restrict a general grant to the limits of the actual operation of a release by third persons. The release means simply this: Whatever right, if any, we may acquire in our children's property, that we are willing to waive. I am of opinion, therefore, that the antenuptial agreement extended to the property in question. It plainly appears that the subsequent acquisitions of the spouses were quite as much the result of Mrs. Kleb's labors as of her husband's; and Frederick Struberg testifies that often, in conversation after Kleb's return to Germany, he (Kleb) would refer to the antenuptial agreement as giving to the longest liver "the benefit of all we are worth." This evidence cannot influence its construction; but it shows, at least, that the result reached is not in conflict with the opinion of Mr. Kleb as expressed in the latter years of his life.

There were other questions raised, but in the view that I have taken of the case only one need be adverted to. That is the question of the admissibility of Mrs. Kleb's testimony of transactions with and statements by her husband. It was admitted under objection. The situation is this: Mrs. Kleb sues the heirs at law of her husband to enforce his contract in respect of lands descended. Are they being sued in a representative capacity? The question has been twice before the Court of Appeals, and

It has declined to pass upon it. *Wyckoff v. Norton*, 60 N. J. Eq. 474, 46 Atl. 614; *Kempton v. Bartine*, 60 N. J. Eq. 412, 45 Atl. 966. In this court Vice Chancellor Van Fleet (*Crimmins v. Crimmins*, 43 N. J. Eq. 88, 10 Atl. 800), Chancellor McGill (*Vreeland v. Vreeland*, 53 N. J. Eq. 390, 32 Atl. 3), and Vice Chancellor Emery (*McKinley v. Coe*, 66 N. J. Eq. 70, 57 Atl. 1030) have thought the evidence admissible, while Chancellor Runyon (*Colfax v. Colfax*, 32 N. J. Eq. 206), Vice Chancellor Pitney (*Greenwood v. Henry*, 52 N. J. Eq. 448, 28 Atl. 1053), and Vice Chancellor Grey (*Kempton v. Bartine*, 59 N. J. Eq. 153, 44 Atl. 461) have deemed it inadmissible. In this conflict of authority any expression of opinion on my part can have but little weight. It has seemed to me, however, that the reasons for its exclusion are stronger than those for its admission. Vice Chancellor Van Fleet's decision seems to rest upon an erroneous conception of what was decided by *Beasley, C. J.*, in *Hodge v. Coriell*, 44 N. J. Law, 456. That this latter case was correctly decided no one can have any doubt. It was a replevin suit, and the wrongful act alleged was that of the defendant, not that of the defendant's intestate. *Beasley, C. J.*, said: "The defendant in this writ is called to account for a tort in his own person. With regard to any estate represented by him, the plaintiff has no concern. The defendant could not be sued in this matter in his representative capacity." How, from a decision put upon this ground, viz., that defendant was being sued for a tort of his own, not for the wrongful act of his testator, it could be legitimately inferred that the heir at law is not being sued in a representative capacity, when the suit is based upon the act or contract of the ancestor, I am at a loss to understand. The inference appears to me to be an entire non sequitur. Chancellor McGill simply followed Vice Chancellor Van Fleet without giving the matter, as far as appears, independent consideration, and Vice Chancellor Emery thought himself bound by their opinion. On the other hand, it seems to me that the principle upon which *Joss v. Mohn*, 55 N. J. Law, 408, 26 Atl. 987, was decided leads to the opposite conclusion. There the action was brought by plaintiff against the devisees of Mohn to recover money lent to testator in her lifetime. Mr. Justice Reed said: "The primary question is, are heirs or devisees under the statute representatives of the deceased debtor? I think they are. Mr. Bouvier, in his Law Dictionary, under the title 'Representative,' uses this language: 'The heir represents the ancestor; the devisee, his testator; the administrator, his intestate. It seems entirely undeniable that in an action like the present the heir or devisee stands instead of, and so represents, the deceased debtor. The object of the statute is to subject the real estate of the deceased

debtor to a liability for all classes of debts left unpaid by such debtor." It was held, in *New Jersey Insurance Company v. Meeker*, 37 N. J. Law, 282, that an action of covenant would lie, under the heirs' act, against heirs and devisees for a breach of covenant against incumbrances contained in a conveyance by an ancestor: that that act was "applicable to every obligation growing out of contract." Consequently, if an ancestor has made an agreement to convey real estate, an action to recover damages will lie for breach of it, and, under *Joss v. Mohn*, the heir in such action will be sued in a representative capacity. Now, if, in a suit at law, the heir is sued in a representative capacity, it would at least be singular if it were held that in a suit in equity between the same parties to compel a specific performance of the same contract the defendant was being sued in a nonrepresentative character. Are not the obligation and the person the same? Have we not the same ground of liability, viz., the immediate devolution upon the heir of property bound in one form or another to answer for the ancestor's obligation? The court in which relief may be sought and the particular species of relief asked for seem to be irrelevant considerations. That the court may look at the real character of the parties to a controversy is conclusively settled by *Smith v. Burnet*, 35 N. J. Eq. 314, and *Adoue v. Spencer*, 62 N. J. Eq. 794, 49 Atl. 10, 56 L. R. A. 817, 90 Am. St. Rep. 484. *Hodge v. Coriell* did not decide otherwise. All that it decided was that, when a defendant was sued for his own tort, he could not, by pleading, change the issue to one involving the acts of his intestate. *Smith v. Smith*, 52 N. J. Law, 207, 19 Atl. 255, rests upon much the same ground as *Haines v. Watts*, 55 N. J. Law, 149, 26 Atl. 572, and does not touch the question under consideration; and *Palmateer v. Tilton*, 39 N. J. Eq. 40, and *Rairdon v. Sampson*, 67 N. J. Law, 346, 51 Atl. 696, merely decide that the record determines the question of competency; that, if the person offered as a witness is not a party to the record, he is competent, no matter what his interest may be. The Court of Appeals has never decided, nor, as far as I can find, so much as intimated, that, if a person called as a witness appears by the allegations of the pleadings to be really sued in a representative capacity, the court may not exclude him, because the pleader has not, in so many words, called him administrator or heir or devisee, and has not expressly alleged that he proceeds against him in that character. In *Smith v. Burnet*, it decided just the reverse. If the pleadings or record state facts which show that he is suing or being sued in a representative character, then he is disqualified.

For these reasons, and for those stated by Vice Chancellor Grey in *Kempton v. Bartine*, *supra*, I should be disposed to ex-

clude the greater part of Mrs. Kleb's testimony. But there is one part of it which seems to be competent. It appears that, since her husband's death, Mrs. Kleb went to the record in Hanau and there compared a copy of the antenuptial agreement with the original. She says she knows her husband's handwriting, and that the signature "W. P. Kleb" is his. This, I think, she may testify to. It is not evidence of a transaction with or statement by the deceased. In the absence of evidence to the contrary, it may reasonably be presumed that her knowledge of his handwriting was at least partly acquired in other ways than by transactions with him. I think Mrs. Kleb is entitled to a conveyance from the heirs of the legal title to the Broad Street property.

STATE v. TWINING et al.

(Supreme Court of New Jersey. Nov. 18, 1905.)

1. STATUTES—TITLE—SUBJECT-MATTER.

Section 17 of the act entitled "An act concerning trust companies" (Revision of 1899; P. L. 1899, p. 461), which makes it a misdemeanor for any director, officer, agent or clerk of any trust company to knowingly subscribe or exhibit any false paper with intent to deceive any person, authorized to examine as to the condition of such trust company, is not in conflict with article 4, § 7, subd. 4, of the state Constitution, which provides that every law shall embrace but one object, and that shall be expressed in its title.

2. SAME.

A penal clause in a general statute embracing a given subject, which simply provides for the punishment of the violation of the provisions of such act, is not the intermixing in such act of things which have no proper relation to each other.

3. BANKS AND BANKING—TRUST COMPANIES—REGULATION.

It is within the power of the Legislature, in enacting a general law for the creation, government, and control of all trust companies, to impose, under given conditions, certain limitations upon the powers granted, or to reserve to existing trust companies, brought under the act, certain powers already possessed by them under existing laws; and, to make it a misdemeanor for the officers of companies, brought under the general act, to do the things prohibited by the general statute, although the things made misdemeanors by the general law were not such under the act under which the trust company so brought under the general law was incorporated.

4. SAME—SUPERVISION—EXHIBITING FALSE PAPER.

The exhibiting of a false minute of an alleged meeting of the board of directors of a trust company to an examiner appointed by the banking department, with the intent to deceive such examiner as to the financial condition of the company, is the exhibiting of a false paper under the statute, and is a misdemeanor under section 17 of the general trust company act of 1899 (P. L. 1899, p. 461).

5. SAME—COMPLICITY.

Where one of two officers of a trust company produces a false minute to the examiner, in the presence of the other, who by his silence acquiesces in such exhibition, although he knows of its falsity, both are guilty of exhibiting under the statute.

6. CRIMINAL LAW—EVIDENCE—BEST AND SECONDARY.

It is not error to permit an examiner of the banking department to testify that he was acting as such examiner when the false paper was exhibited. A public officer may testify that he is such officer, without producing his certificate of appointment or official commission.

(Syllabus by the Court.)

Error to Court of Quarter Sessions, Monmouth County.

Albert C. Twining and another were convicted of violating P. L. 1899, p. 450, and bring error. Affirmed.

Argued February term, 1905, before GUMMERE, C. J., and FORT and GARRETSON, JJ.

E. W. Arrowsmith, for plaintiffs in error.
H. M. Nevins, for the State.

FORT, J. The defendants were convicted in the Monmouth quarter sessions of exhibiting to an examiner of the state banking department a certain false paper, knowing it to be false, with the intent to deceive such examiner as to the condition of the Monmouth Trust & Safe Deposit Company, of which company Twining was the president and Cornell the treasurer. The false paper consisted of a typewritten copy of a minute of an alleged meeting of the board of directors of the trust company, which meeting was in fact never held. The minute purports to be an authorization for the purchase of 381 shares of the capital stock of the First National Bank of Asbury Park which was found by the examiner among the assets of the trust company. The jury found that the paper was exhibited, and the proof was conclusive that it was false. The indictment is founded upon the violation of section 17, of the trust company act of 1899 (P. L. 1899, p. 450).

The first contention of the defendant is that the section of the act under which the indictment is found is unconstitutional, in that it is a subject-matter, in the body of the act which is not embraced in its title. Const. art. 4, § 7, subd. 4. The title of the act is "An act concerning trust companies (Revision of 1899; P. L. 1899, p. 450). The section in question reads as follows: "Every director, officer, agent or clerk of any trust company who willfully and knowingly subscribes or makes any false statements of facts, or false entries in the books of such trust company, or knowingly subscribes or exhibits any false paper, with intent to deceive any person authorized to examine as to the condition of such trust company, or willfully or knowingly subscribes to or makes any false report, shall be guilty of a high misdemeanor and punished accordingly." If we fully comprehend the suggestion of counsel, it is, that a criminal offense cannot be provided for under the title of the act in this case, or, in fact, under the title of any act which does not specifically relate to

the fact that a criminal offense is created by the body of the act. Does the act in question have more than one object? An examination of its provisions will show that they all refer to trust companies. They do not relate to banks or insurance companies, or other corporations. The penalty imposed by section 17 is limited in its effect to directors, officers, agents, or clerks of any trust company. It seems to us that all matters of formation, management, control, regulation, offenses, and penalties are germane to a statute which covers, and is intended to cover, an entire subject-matter, and that a statute embracing the whole subject-matter of trust companies, which is entitled "An act concerning trust companies" may constitutionally include a provision making it an offense to do or fail to do certain named things in the operation and management of a trust company by its directors, officers, agents, or clerks. By the uniform course of legislation in the state, since the adoption of the Constitution of 1844, it has been the practice by the Legislature to embody in acts relating to an entire subject-matter, penal provisions for the doing of things not permitted by the statute, or the doing of acts prohibited thereby. Upon almost every subject of general legislation this condition of the statute law of the state will be found to exist. Sections making certain acts misdemeanors are found in the banking act (P. L. 1899, pp. 438, 439, 441, §§ 12, 14, 21); the savings bank act (Gen. St. pp. 3008, 3014, §§ 46, 47, 83); the trust company act (P. L. 1899, pp. 460, 461, §§ 15-17); the building and loan act (P. L. 1903, p. 476, § 52); the oyster act (Gen. St. pp. 832, 834-836, §§ 140, 156, 158, 172); the chosen freeholder act (Gen. St. p. 434, § 142); the bottling act (P. L. 1891, p. 218); the acts for protection of graveyards and cemetery associations (Gen. St. p. 355, § 34; Id. p. 361, § 57); the civil rights act (Gen. St. p. 804, § 2); the food and drug act (Gen. St. p. 1178, § 94); the dentistry act (P. L. 1898, p. 119), a conviction under which act was sustained in *State v. Chapman*, 69 N. J. Law, 464, 55 Atl. 94, affirmed 70 N. J. Law, 339, 57 Atl. 391; the fish and game act (Gen. St. pp. 1593, 1595, §§ 177, 182, 192); the health act (Gen. St. pp. 1672, 1673, 1674, 1675, §§ 206-210, 216); the labor act (Gen. St. p. 1904, § 42); the gunpowder act (Gen. St. p. 1634); the honey industry act (Gen. St. p. 1685, § 3); the itinerant vendors' act (Gen. St. p. 1828, § 13); the justices act (Gen. St. p. 1870, § 25); and the intoxicating liquor act (Gen. St. pp. 1814, 1824, §§ 150, 200). In the act to regulate elections (revised 1898) penal sections are found from sections 188 to 213, inclusive (P. L. 1898, pp. 321-330). In the medicine and surgery act (Gen. St. pp. 2081, 2082, 2084, 2086, 2089, §§ 4, 14, 25, 36, 50), the pharmacy act (Gen. St. p. 2459, § 9), the revision of the tax act (P. L. 1903, p. 434, §§ 61-62), the warehouseman's act (Gen. St. p.

3746, § 7), and the oaths and affidavits act (Gen. St. p. 2329), many penal sections will be found, as also in the harbor masters' act (Gen. St. p. 2323, § 64), the pilots' act (Gen. St. p. 2472, § 65), the weights and measures act (Gen. St. p. 3753, § 13), and many others.

We are not prepared to overthrow all the penal clauses in practically all the general acts of the state, after a uniform practice of over half a century of treating such clauses as germane to statutes embodying but a single subject. We think where a penal clause, in a statute embracing a given subject, simply relates to and provides for the punishment of violations of the provisions of such act, that such a provision is not in conflict with article 4, § 7, par. 4, of the state Constitution, and that it is not essential to valid legislation against offenses created by such acts, that they should be enacted under the title of "An act for the punishment of crimes." The case chiefly relied upon to sustain the contention of the plaintiff in error was *Shivers v. Newton*, 45 N. J. Law, 469. An examination of this case will show it to sustain the view we take. The title of the act there was "An act to prevent the adulteration and to regulate the sale of milk." Mr. Justice Reed points out that under this title only penalties for adulterating milk could be embodied in the act, while the second section of the act imposed a penalty for the production of unwholesome milk by other methods. He says: "The latter prohibition is, in my judgment, clearly outside the object of the legislation as expressed in the title." The penalty imposed by the trust company act under which the defendants were convicted, relates to the duties of the officers of a trust company conducting business under the act, and to the punishment for the violation of those duties in any of the respects provided for in the act. This does not seem to us to be within the reasoning of *Shivers v. Newton*, *supra*.

The next contention is that the defendants were officers of the Monmouth Trust & Safe Deposit Company and were organized under the act of 1885, entitled "An act for the incorporation of safe deposit and trust companies" (P. L. 1885, p. 270), and that section 17 of the act of 1899 entitled "An act concerning trust companies," under which this indictment was found, does not apply to "safe deposit and trust companies," created under the act of 1885. In 1899 there was a revision of all the acts relative to trust and safe deposit companies, and separate statutes were passed for the organization of each and all trust companies and safe deposit company acts, and acts for the creation of safe deposit and trust companies were repealed. P. L. 1899, p. 450, P. L. 1899, p. 468; P. L. 1899, p. 474. The act of 1885 is expressly repealed by section 4 of the statute last cited. By section 8 of the repealing act, all vested rights of the companies organized under

the acts repealed, are reserved with the right in the companies to continue to enjoy the rights and advantages which they then enjoyed (P. L. 1899, p. 475); and by section 30 of the trust company revision of 1899, it is expressly enacted that "the provisions of this act shall be applicable to and the words 'trust companies' when used in this act, shall be construed to include all trust companies, and all safe deposit and trust companies, heretofore organized under the laws of this state, whether by special charter or under general act or otherwise, as well as corporations hereafter organized under this act." This section also reserves to trust and safe deposit companies the rights and privileges they now possess. It is within the power of the Legislature, in passing a general act, to reserve and preserve rights and privileges existing in any class of corporations brought under the provisions of a general law. Such an act is not open to the objection of being special. *Dickinson v. Board of Freeholders*, (N. J. Err. & App.) 60 Atl. 220. Nor, to the contention that such a reservation is not embraced within the title of the act. Limitations upon a power granted by an act, or the reservation of powers existing in certain corporations brought under the act, in addition to those granted, are proper subject-matters to be embodied in a statute, where the powers relate to the class concerning which the legislation is enacted. All such provisions are germane to the subject-matter of the legislation embraced within the statute. It is clearly within the right of the Legislature, while reserving powers existing in a corporation, to provide that in the future exercise of such powers, the company or its officers shall be subject to certain restrictions, and liable to punishment for their violation. That is all that is done by this statute.

It was further argued that, conceding the statute under which this indictment is found, to be valid, the document exhibited in this case cannot be said to be a false paper within the meaning of the act, the contention being that "knowingly subscribes or exhibits any false paper" means negotiable paper, or some paper which is a part of the assets of the bank. We are unable to give this narrow construction to these words, in the connection in which they stand in the statute. We think it means what it says "subscribes or exhibits any false paper, with intent to deceive the examiner." Any other construction destroys all force to the word "subscribes," and any construction which sustains the theory that an offense exists by subscribing a false paper also upholds the construction that to exhibit such false paper to the examiner, with intent to deceive, is within the statute. But it is further insisted that "the false paper must be one that can deceive the examiner as to the financial condition of the corporation." We agree with that view. We think under

the proof that in exhibiting this paper it was the purpose of the defendants to deceive the examiner as to the financial condition of the bank. The proof was that the stock, the purchase of which the false minute purported to authorize, was in fact the stock of the defendant and other officers and directors of the trust company. That at the time they actually entered the transaction upon the books of the trust company, the stock was worthless, the First National Bank of Asbury Park having failed. If this action of the board of directors had actually taken place, and the purchase been made in good faith, the trust company had not only lost the value of this stock, but was liable to assessment, as the owner of this stock, under the national banking act, in case of a deficit in the funds of the Asbury Park National Bank, while the defendants were released, not only to the trust company, but as stockholders in the Asbury Park National Bank for any deficiency assessment. They had shifted their worthless asset, and its contingent liability, upon the trust company. Did not that affect its financial condition? If the transaction did not occur, as the false minute alleged, then the defendants and the others interested with them in the stock matter, were liable to the trust company to reimburse it for the stock which they as officers had sold to the trust company, and fraudulently taken \$45,000 of its funds to pay therefor, to themselves. An agent, such as these officers, cannot deal with the company (his principal), and pass over stock to it and take its funds in payment thereof. Whether the directors had authorized it, therefore, was of vital importance to the financial condition of the trust company, and to the examiner in reporting upon its financial condition. Its acceptance covered the fraud of the defendants and held the trust company to a bargain not otherwise legal, and relieved the defendants from liability to the trust company, for the fraudulent depletion of the assets of the trust company to the extent of their unlawful act in the matter. Without the false minute to exhibit the trust company could repudiate the transaction and hold the defendants for the whole amount. Upon the question of what was the true financial condition of the trust company the false minute was vital to the examiner.

The evidence, it is claimed, does not prove that the defendant Twining exhibited the false minute to the examiner. The testimony of the examiner was that he asked for the authority for this purchase. The proof was that Twining had dictated the false minute to his stenographer, and after it was written had placed it in the minute book. That he was present in an adjoining room when the examiner asked for it, and that the defendant Cornell told the examiner that it was in the minute book, and that either the examiner himself went and got

the minute book or that Cornell handed it to him. The examiner says specifically that Cornell was present when he received the minute book with this false minute in it, and he thinks he handed it to him; that on the 14th day of February, the day he first went to the company, Twining, he thinks, told him it was the minutes of the board, but, if he did not do so on that day, he is positive he did on the 16th, which was the Monday following, and was while he was still examining the bank. Any statement by Twining before or after the minutes came into the hands of the examiner, and while he was examining the bank, that that was the minute of the board authorizing the purchase, was an exhibition of the minute. To state to the examiner that that was the minute, for the purpose of deceiving him as to the truth, was to exhibit the minute within the statute. In this connection reference should be made to the exception taken to the charge of the trial judge, that: "If you are satisfied that one produced the false minutes, and that with the consent of the other, he being present and by his silence acquiescing in it, with full knowledge that it was being produced and exhibited for the purpose of deceiving the examiner, Twining is just as guilty as Cornell." There was no error in this. In misdemeanors all are principals. Standing by while a co-misdemeanant does the act of exhibiting, makes you guilty. Both will be deemed to exhibit under such circumstances.

We see no error in including in the indictment the prefatory matter which is objected to. It is at most mere surplusage. The charge upon which the defendants were tried and the evidence introduced, was the exhibition of the false paper only. The indictment was not offered in evidence, and did not go to the jury. It could not have prejudiced in any way the trial of the defendants.

We find no error in the suggestion that the witness Vredenburg, who was the examiner, was permitted to testify to the fact that he was an examiner, and that the court did not require him to show written authority that he was authorized to examine the bank. The statute does not require the banking commissioner to appoint his examiners in writing. That he was examining for and by the direction of the banking department, was proved. About the fact there was no question. An official may testify that he is such official, without producing his certificate of appointment. *Denn v. Pond*, 1 N. J. Law, 379; *Potter v. Luther*, 3 Johns. 481; *Berryman v. Wise*, 4 Term R. 366; *Brewster v. Vail*, 20 N. J. Law, 56, 38 Am. Dec. 547; *Reeves v. Ferguson*, 31 N. J. Law, 107 (119); 1 Greenleaf on Evidence, §§ 83, 92.

The Cornell confession was properly admitted as against Cornell, and the court expressly limited its evidential force to Cor-

nell, in admitting the evidence, and again on the request of counsel at the end of its charge. In the charge to the jury the court referred to the fact that the defendants did not see fit to go upon the stand in their own behalf and said, "because a man does not go upon the stand, you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him." This was not objectionable. *State v. Parks*, 61 N. J. Law, 438, 39 Atl. 1023; *State v. Wines*, 65 N. J. Law, 31, 46 Atl. 702.

The entire record is returned in this case; and, it not appearing that the defendants suffered manifest wrong or injury in the admission or rejection of evidence or the charge of the court, the judgment of the Monmouth quarter sessions is affirmed.

McDONALD v. CENTRAL R. CO. OF NEW JERSEY et al.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1905.)

1. CARRIERS—EJECTION OF PASSENGER.

The plaintiff, before purchasing a ticket at Elizabeth, inquired of the agent if a certain train stopped at Chester, was answered in the affirmative, and given a time-table showing that the train was scheduled to stop. *Held*, that the plaintiff had by the contract a right to have the train stop at Chester, and that his ejection at the last preceding station was wrongful.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1068.]

2. SAME—PASSENGER—WHAT CONSTITUTES.

The plaintiff was familiar with the route, his ticket was a coupon ticket, of which certain coupons purported to be issued by the Central Railroad Company as agent, and he did not deny that he knew that the Central Railroad Company acted as to points beyond its own road as agent only. *Held*, that the relation of carrier and passenger did not exist between the plaintiff and the Central Railroad Company after the train left the Central road.

3. SAME.

Little v. Dusenberry, 46 N. J. Law, 614, 50 Am. Rep. 445, distinguished.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Alexander McDonald against the Central Railroad Company of New Jersey and the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendants bring error. Reversed.

George Holmes and William A. Barkalow, for plaintiff in error Central R. Co. Vredenburg, Wall & Van Winkle, for plaintiff in error Baltimore & Ohio R. Co. John K. English, for defendant in error.

SWAYZE, J. This is an action of tort. The first count of the declaration is for negligently misinforming the plaintiff as to the train which he should take to go from Elizabeth to Chester, Pa. The second count is for a wrongful ejection of the plaintiff

at Philadelphia. The plaintiff recovered damages for the ejection, and judgment was entered against both companies.

Whether the ejection of the plaintiff was wrongful depends upon the contract. The material facts are as follows: Just before buying a ticket from Elizabeth to Chester, he inquired of the ticket agent at Elizabeth whether the train, which he afterward took, stopped at Chester, and was informed that it did. He then asked for a time-table and ticket and received both. The time-table purported on its face to be one of the Royal Blue Line, and bore the names of the Central Railroad of New Jersey, the Philadelphia & Reading Railway, and the Baltimore & Ohio Railroad. There was no other proof as to the company by which it was issued. The time-table showed that the train stopped at Chester. No question arose until just before the train reached Philadelphia, when the conductor of the Philadelphia & Reading Railway informed the plaintiff that the train did not stop at Chester, and that he would have to change cars at Philadelphia. When the train reached the station in Philadelphia, the conductor of the Baltimore & Ohio Railroad took charge. He came into the car with two policemen, inquired for the man who wanted to go to Chester, and told the plaintiff he would have to get off; to which the plaintiff replied that he would have to use force. The conductor grabbed the plaintiff by the shoulder, and the plaintiff thereupon left the car. The plaintiff had been in the habit of taking the same train, which had previously stopped at Chester.

It was not questioned on the trial or on the argument here that the ticket agent in Elizabeth was authorized to sell tickets from Elizabeth to Chester over the Central Railroad of New Jersey, the Philadelphia & Reading Railway, and the Baltimore & Ohio Railroad. The ticket appears on its face to be issued by the Central Railroad, and has attached three going and three returning coupons in the usual form of a coupon ticket. The coupons between Bound Brook and Philadelphia purport to be issued on account of the Philadelphia & Reading, and the coupons between Philadelphia and Chester on account of the Baltimore & Ohio. It is not necessary to decide that the terms of the published time-table became by mere fact of publication a part of the contract, as was held by a majority of the Court of King's Bench in *Denton v. Great Northern Railway*, 5 Ellis & Blackburn, 860, and decided by the Court of Appeals in *Le Blanche v. London & Northwestern Railway Company*, 6 R. 1 C. P. D. 268, 45 L. J. C. P. 521, 5 English Ruling Cases, 392. The difficulty suggested by Mr. Pollock (*Pollock on Contracts* [7th Eng. Ed.] 18) does not arise in this case; for the stopping of the train at Chester was an express condi-

tion upon which the plaintiff bought his ticket, and the time-table showing that the train made the stop at Chester was handed him with the ticket. The fact that a time-table furnished by the Baltimore & Ohio Railroad to the conductor (but not, as far as the case discloses, to the public or to the ticket agent at Elizabeth) showed that the train did not stop at Chester in no way alters the case. The train had been in the habit of stopping, and the time-tables of the ticket agent at Elizabeth bearing the name of the Baltimore & Ohio, and not denied to have been authorized by that company, showed such a stop. While the authority of the ticket agent to make the contract in question might be modified to correspond with the time-table furnished the conductor, there is no proof that it had been so modified. Whether it had been so modified was within the knowledge of the Baltimore & Ohio, and the failure to prove it justifies the inference that there had been no modification. The plaintiff had the right to assume that the train would stop at Chester as his contract required, and was not bound to believe the assertion of the conductor. He was entitled to make reasonable efforts to exercise his right. *Runyan v. Central R. R. Co.*, 65 N. J. Law, 228, 232, 47 Atl. 422. He did no more than to require the conductor to make use of slight physical force, and yielded immediately, and left the car. We think the conduct of the conductor was actionable.

The question remains whether both defendants are liable. The conductor was in the employ of the Baltimore & Ohio Railroad Company, and it is liable for his acts on the principle respondeat superior. The other conductor, whose route ended at Philadelphia, was in the employ of the Philadelphia & Reading Railway Company. The only fact in the case to indicate liability on the part of the Central Railroad Company is the issue of the ticket. The plaintiff's case does not rest upon a tort of the ticket agent at Elizabeth, but upon the theory that the agent at Elizabeth had the right to make the contract and was therefore guilty of no wrong. The Central Railroad would be liable for a violation of its duty as a common carrier, if that relation existed at the time between the plaintiff and the company. *Haver v. Central Railroad Company*, 62 N. J. Law, 282, 41 Atl. 916, 43 L. R. A. 84, 72 Am. St. Rep. 647. Whether that relation existed depends on whether the Central contracted for the carriage of the plaintiff beyond its own line as principal or agent. The ticket states that in selling the ticket to points on other roads the company assumes no responsibility beyond its own road. It may be questioned whether this provision was assented to by the plaintiff, and if so, whether it operates to exempt the Central Railroad from its common-law liability, or only to negative

the assumption of any further liability beyond its own road. This need not be determined, since the other facts sufficiently prove that the Central Railroad was, to the knowledge of the plaintiff, contracting only as agent as to transportation beyond its own road. The facts that there were separate coupons for different portions of the journey, that they bore the names in plain type of the connecting companies, and purported on their face to be issued, as far as the connecting roads were concerned, by the Central Railroad as agent only, and that the plaintiff was familiar with the route, justify the inference, in the absence of any denial from the plaintiff, that he knew that the Central Railroad was acting as agent only. The relation of common carrier and passenger did not exist as between the plaintiff and the Central Railroad Company after the train left the Central's road. The case differs from *Little v. Dusenberry*, 46 N. J. Law, 614, 50 Am. Rep. 445, and *Dunn v. Pennsylvania R. R. Co.*, 71 N. J. Law, 21, 58 Atl. 164. In both those cases the relation of carrier and passenger existed between the parties at the time of the injury. The case resembles rather *Alabama, etc., R. R. Co. v. Holmes*, 75 Miss. 371, 23 South. 187. There is no evidence that the Central Railroad took any part in the management of the train beyond Bound Brook. As far as the case indicates, the Baltimore & Ohio Railroad was in sole charge of the train at the time the plaintiff was ejected. The legal position of the Central Railroad was similar to that of the Pennsylvania Railroad Company in *Pennsylvania R. R. Co. v. Jones*, 155 U. S. 833, 15 Sup. Ct. 136, 39 L. Ed. 176. There should have been a nonsuit as to the Central Railroad.

It is assigned as error that the court allowed the jury to award damages for the indignity and consequent injury to his feelings. This is the settled law in case of an unlawful eviction. *Allen v. C. & P. Ferry Company*, 46 N. J. Law, 198; *D. L. & W. R. R. v. Walsh*, 47 N. J. Law, 548, 4 Atl. 323. The case differs from the cases cited in the briefs for the plaintiffs in error. The present plaintiff had in his possession and showed the conductor a ticket which entitled him to be carried to Chester, and a time-table, apparently authorized by the company, which showed that the train was scheduled to stop at Chester. On the face of it, he was entitled to be let off at Chester, and the reason for the decision in the cases cited, growing out of the propriety of the conductor having evidence of the plaintiff's right, is wanting in the present case.

The judgment, however, is a joint judgment, and indivisible; and, since it must be reversed as to the Central Railroad Company, it must be reversed in toto. *Peterson v. Middlesex & Somerset Traction Co.*, 71 N. J. Law, 293, 59 Atl. 456.

VAN COTT v. NORTH JERSEY ST. RY. CO.
(Court of Errors and Appeals of New Jersey.
Nov. 20, 1905.)

TRIAL — NONSUIT — INSUFFICIENCY OF EVIDENCE.

After the allowance of a bill of exceptions to the refusal of the trial court to nonsuit, the plaintiff for failure of proofs showing the negligence of the defendant's motorman, a witness produced on behalf of the defendant testified that the motorman, seeing the plaintiff in the act of crossing the street, slackened the speed of his car so as to bring it to a semi-halt, whereupon the plaintiff, who likewise had temporarily halted, made a swift run to cross the track in front of the car, but was struck by the car, to which "an extra burst of speed" had been imparted. *Held*, that after the admission of his testimony both the negligence of the motorman and the contributory negligence of the plaintiff became questions of fact for the jury, and that the refusal of the trial court to nonsuit the plaintiff for failure of proofs showing negligence is not reversible error, where such proofs are afterwards supplied by the defendant during the progress of the trial.

(Syllabus by the Court.)

Error to Circuit Court, Essex County.

Action by Sarah Van Cott against the North Jersey Street Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Hobart Tuttle, for plaintiff in error. Samuel Kalish, for defendant in error.

GARRISON, J. The plaintiff, while crossing a public street in the city of Newark, was struck by a trolley car of the defendant, receiving injuries for which she recovered damages in the circuit court. Upon this writ of error brought to reverse the judgment of the circuit court, the assignment chiefly argued was the alleged error of the trial court in denying a motion to nonsuit, which was asked for at the close of the plaintiff's case, upon the ground that the negligence of the defendant's motorman was not legitimately inferable from the testimony. As the testimony stood at that time it is very questionable whether a case of negligence had been made out by the plaintiff. The matter, however, will not be pursued, for the reason that if there was such a failure in the plaintiff's proofs at the time the nonsuit was denied, such proof was afterwards supplied by the defendant.

Harry A. Vaughan, a witness called on behalf of the defendant, testified that "the child stood for a moment on the curb, and then made a couple of steps to walk in a diagonal direction across the street, and looked and saw the car, and then made a few steps, running style; the motorman rang the bell at that time, which attracted the child's attention, and she stood—the child stood—at the time when the bell rang."

"Ques. How far away from the first rail?
Ans. Well, I think it was about the first rail

that she stopped. The car slackened speed at that time when the bell was ringing, the child stopped, and as the car slackened speed she made a swift run to cross the track in front of the car; the car had already started after she had remained stationary.

"Ques. How do you mean 'started'? Ans. Well, put on an extra burst of speed after having come to a semihalt."

From this testimony it might legitimately be inferred that the child and the motorman each saw the other; that the motorman, by slackening the speed of his car, led the plaintiff to believe that she could safely cross in front of it, and that under such circumstances the imparting of an extra burst of speed to the car after it had come to a semihalt was an act of negligence upon the part of the motorman. Upon the admission of this testimony the negligence of the motorman and the contributory negligence of the plaintiff became questions of fact for the jury, whatever may have been the state of the proofs at the close of the plaintiff's case.

The circumstance that this testimony came into the case after the denial of the motion to nonsuit displayed in the defendant's bill of exceptions does not militate against its application to the assignment of error based upon the exception to such refusal for the reasons stated in *Bostwick v. Willett* (N. J. Sup.) 60 Atl. 398. The rule established by the case there cited is that a refusal to nonsuit the plaintiff for failure of proofs is not reversible error where such proofs are afterwards supplied by the defendant during the progress of the trial.

No reversible error appearing in any of the reasons assigned, the judgment of the circuit court will be affirmed.

LIVERMORE et al. v. MAYOR, ETC., OF CITY OF MILLVILLE.

(Court of Errors and Appeals of New Jersey. Nov. 20, 1905.)

CERTIORARI—DEFECT OF PARTIES—DISMISSAL.

When it appears on the return of a certiorari, prosecuted to set aside municipal action, that parties not brought before the court have acquired rights thereunder in case such action be held valid, the court should ordinarily not proceed to judgment on the merits, and may either stay the proceedings until those parties are brought in or dismiss the certiorari.

(Syllabus by the Court.)

Error to Supreme Court.

Certiorari by Nelson G. Livermore and others against the mayor and common council of the city of Millville. Judgment for defendant, and plaintiffs bring error. Affirmed.

For opinion below, see 59 Atl. 217.

Henry O. Newcomb, Walter H. Bacon, Joseph H. Gaskill, and Robert H. McCarter, for plaintiffs in error. McLouis H. Miller, for defendant in error.

DIXON, J. The certiorari issued out of the Supreme Court in this case brought up a resolution of the common council of Millville appointing commissioners to determine the price to be paid by the city for the purchase of the water plant, etc., of the People's Water Company of Millville, under a certain contract between the city and that company. On the return of the writ, the prosecutors, who were residents and taxpayers in the city, filed reasons for reversal which question the validity and effect of the contract and the force due to the determination of the commissioners. The Supreme Court, after expressing its views on the legality of the reasons alleged, made an order dismissing the writ, of which the prosecutors now on error complain.

It is evident that the People's Water Company is directly and vitally interested in the matters which the prosecutors desire to put at issue, but they have not made that company a party to the proceedings. In its absence, the Supreme Court was not bound either to affirm or reverse the resolution brought before it; it would have been justified in staying the proceedings until the company had been made a party (*McFall v. Dover*, 70 N. J. Law, 518, 57 Atl. 136; *Allen v. Freeholders of Hunterdon* [N. J. Sup.] 58 Atl. 346); but certainly it acted within the bounds of its discretion when it dismissed the writ (*Bowlby v. Dover*, 64 N. J. Law, 184, 44 Atl. 844).

Without expressing any opinion whatever on the merits of the controversies presented by the reasons, we affirm such dismissal.

O'CONNOR v. INTERNATIONAL SILVER CO. et al.

(Court of Errors and Appeals of New Jersey. Nov. 20, 1905.)

1. CORPORATIONS—CONSOLIDATION—ELECTION OF DIRECTORS—VOTING SHARES.

Where corporation A has acquired all the capital stock of corporation B, and at the time of such acquisition corporation B owned and held a large number of the shares of the capital stock of corporation A, the officers and directors of neither corporation have the right, at a stockholders' meeting of corporation A, held for the purpose of electing directors of that corporation, to vote upon the shares of the stock of corporation A held by corporation B at the time of the acquisition of its stock by corporation A.

2. SAME — INJUNCTION — ACTION BY STOCKHOLDER.

An owner of shares of stock in corporation A, which he has held for several years, and who was entitled at the time of his purchase of the stock, and still continues to be entitled to have a certificate thereof issued to him, but has never exercised that right, and whose shares stand on the books of the company in the name of his grantor, who, however, has no interest therein, has a standing in a court of equity to ask the court to prevent corporation A or corporation B from voting upon such shares.

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by Michael P. O'Connor against the

International Silver Company and the United States Silver Corporation. Decree for plaintiff (59 Atl. 321). Defendants appeal. Affirmed.

John W. Griggs, for appellants. Charles D. Thompson, for respondent.

GUMMERE, C. J. The complainant in this case seeks an injunction to restrain the defendants, the International Silver Company and the United States Silver Corporation, or either of them, from voting at the stockholders' meeting of the International Company upon certain shares of stock of that company purchased and now owned by the United States Corporation. The situation disclosed by the bill is that both of these companies are New Jersey corporations; that the United States Corporation, shortly after its formation in 1902, acquired and still holds about 90,000 shares of the common stock and about 5,000 shares of the preferred stock of the International Company; that shortly afterward the International Company purchased, and now owns, all of the stock of the United States Corporation; and that it is the purpose of these two companies that one or the other of them shall vote the International stock, held by the United States Corporation, at the annual meeting of the stockholders of the International Company to be held, shortly after the filing of the bill, for the purpose of electing a board of directors for the then ensuing year. The bill further shows that the complainant is the owner of 400 shares of the common stock of the International Company; that he acquired 300 shares of said stock on the 19th of May, 1902, and the other 100 shares on July 30th of the same year; and that, while said stock stands on the books of the company in the name of one Hart, it is only nominally in him, and belongs to and is owned by the complainant. Each of the companies demurred to the bill. They challenge the standing of the complainant to file the bill, for the reason, as they say, that he is not a registered stockholder of the International Company, and therefore is not qualified to maintain a stockholder's bill against them. They also contend that the facts herein recited do not afford ground for holding that neither the one company nor the other is entitled to vote this block of International stock at the annual meeting of the stockholders of that company.

The learned Vice Chancellor held against the demurrants on both points, and overruled the demurrer. We concur in the conclusion reached by him. We consider that the complainant, as the real owner of the stock of the International Company which he has acquired, has a sufficient standing to file the bill, notwithstanding that the stock has not been transferred to him upon the books of the company, and for the reasons

which are given by the Vice Chancellor for his conclusion upon this point. We prefer to put our decision upon the other point of the case on a somewhat different ground from that expressed by the learned Vice Chancellor. The effect upon the United States Corporation of the purchase by the International Company of the whole issue of the stock of the United States Corporation ipso facto ousted the board of directors of the latter company. Section 39 of the corporation act (P. L. 1896, p. 290) declares that "no person shall be elected a director of any corporation issuing stock, unless he shall be, at the time of his election, a bona fide holder of some of the stock thereof; and any director ceasing to be a bona fide holder of some of the stock thereof shall cease to be a director. It also ousted the president of the corporation from his office, for, by the provision of section 13, p. 281, of the corporation act, the president must be a member of the board of directors. There was, therefore, at the time of the filing of the bill, no agency of the United States Corporation which could act for it in casting the vote upon the block of International stock held by it, and any attempt to do so by a person claiming to be its president, or the duly authorized agent of its board of directors, would be illegal, and an invasion of the rights of the complainant. The acquisition by the International Company of the whole of the stock of the United States Corporation carried with it to the International Company no right to vote upon the shares of its own stock belonging to the United States Corporation. By its acquisition of the United States Corporation stock, the International Company either did or did not become the owner of its own stock thus held by the United States Corporation. Whether it did or did not it is unnecessary to stop to inquire. If it did not, then plainly it is not entitled to vote upon the stock, for, by the express provision of the corporation act, owners of stock alone are entitled to vote upon it at a stockholders' meeting. The single exception is that declared by section 37, p. 290, of the corporation act, of a pledgee of hypothecated stock who has been expressly empowered to vote thereon by the owner. If, on the other hand, by its acquisition of the stock of the United States Corporation, the International Company became the owner of its own stock then held by the United States Corporation, its right to vote upon it at a stockholders' meeting is prohibited by section 38 of the corporation act (P. L. 1896, p. 290) which is in these words: "Shares of stock of a corporation belonging to said corporation, shall not be voted upon directly or indirectly."

The order appealed from should be affirmed.

SCHRAMM v. PARKER.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1905.)

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Where doubt exists as to whether a person is guilty of contributory negligence in doing a particular act, alleged to be negligent, it is a question for the jury whether such act, when taken in connection with the other facts and circumstances in the case, is or is not an act of negligence which contributed to the injury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 280, 291, 296, 299, 333-346.]

Magie, Ch., and Dixon and Vredenburg, JJ., dissenting.

(Syllabus by the Court.)

Error to the Supreme Court.

Action by Henry W. Schramm, by his next friend, against Ellie Parker. Judgment for plaintiff (58 Atl. 1103), and defendant brings error. Affirmed.

William Earley, for plaintiff in error. Joseph H. Gaskill, for defendant in error.

FORT, J. This is an action of tort to recover for injuries suffered by the plaintiff, a boy nine years of age, by being run into upon the public highway by a horse and wagon of the defendant, driven by a servant of the defendant. Only one question is raised, namely: Did the trial judge commit an error in refusing to charge the defendant's request: "That, if the jury find that the boy did not look for wagons before running toward the wagon, he is guilty of contributory negligence, and cannot recover."

Where there is doubt whether a person is guilty of negligence which contributed to his injury, the question is for the jury. *McLean v. Erie R. R.*, 69 N. J. Law, 57, 54 Atl. 238, S. C. 70 N. J. Law, 337, 57 Atl. 1132. Deeming on Negligence, § 403. The request in this case was too general. It asked the court to tell the jury that, if they found that the plaintiff did not look for wagons in the street before running toward a wagon, he was as a matter of law guilty of negligence which contributed to his injury, if thereby, he was injured. But it seems to me whether he was so guilty or not might not depend solely upon that isolated fact in the case. The evidence as to whether the plaintiff ran into, or even toward, the wagon, which injured him, is conflicting. Upon it reasonable minds differ. But, conceding the proof establishes the fact that the boy did run toward the wagon, still proximity and the speed at which the vehicle was going, and all the other circumstances surrounding his act in running toward the wagon, are factors entering into the question of whether the mere act of running toward the wagon without looking was or was not an act of negligence which contributed to his injury. The court was not required to tell the jury that, if they found but the single fact that the

plaintiff ran toward the wagon without looking, they must find from that fact alone, without giving any force to the other facts and circumstances surrounding the act, that the plaintiff was guilty of negligence which contributed to his injury.

There was no error in refusing to charge as requested, and the judgment of the Supreme Court is affirmed.

MAGIE, Ch., and DIXON and VREDENBURGH, JJ., dissent.

MORGAN v. THOMPSON et al.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1905.)

1. BILLS AND NOTES—ACCOMMODATION MAKER—PAYMENT—RIGHT OF ACTION.

Where one makes his own note for the accommodation of the payee and one or more subsequent indorsers, and is compelled to pay the note at its maturity to a bona fide holder for value, he may recover from the parties for whose accommodation he made the note the amount so paid, with interest.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 608, 727.]

2. EVIDENCE—PAROL.

Parol evidence is admissible to show the true relation of the maker of the note to the transaction.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1906.]

(Syllabus by the Court.)

Error to Supreme Court.

Action by John Morgan, Jr., against William J. Thompson and others. Judgment for defendants, and plaintiff brings error. Reversed.

Francis D. Weaver and H. D. Miller, for plaintiff in error. E. B. Leaming and T. J. Middleton, for defendants in error.

FORT, J. On October 31, 1902, the plaintiff made his promissory note for \$3,000 to the order of G. C. Mick, payable at the Security Trust Company, of Camden, N. J. The note was without consideration. The note was subsequently indorsed by Mr. Mick and William J. Thompson, and discounted at the Security Trust Company, the proceeds thereof being placed to the credit of Mr. Thompson. The note not being made at its maturity, the trust company sued the plaintiff upon it and recovered a judgment thereon, which the plaintiff paid, with interest and costs. This suit was instituted to recover from Mick and Thompson the money so paid.

At the trial it was testified by the plaintiff that the note was made, at the request of Mick and Thompson, to raise money for their purposes, and that at the time the plaintiff gave the note they had promised him that they would pay it and he would hear no more about it. On the plaintiff's proof it was clear that the defendants had received the proceeds of the note, and that the plaintiff was a mere accommodation maker. When the

plaintiff rested his case, a judgment of nonsuit was entered on the ground that under the proof it was an effort to establish by parol a contract different from that shown by the written instrument. We think this was a misconception of the true nature of the suit, and was error. This is not a suit upon the note, but a suit for so much money paid for the use of the defendants. The note is a mere item of evidence in the transaction. This note was not enforceable against the maker in the hands of either Mick or Thompson. If either of them had sued the maker upon it, the real transaction could have been shown. Since the passage of the negotiable instrument act evidence is admissible, even between indorsers, to show that as between themselves they have agreed as to the liability otherwise than as appears from the order of their indorsement upon the note. The note is only prima facie evidence of the order of liability. P. L. 1902, p. 596, § 68. As between the original parties, the consideration of a note may always be inquired into, and parol evidence is admissible for that purpose. *Edwards on Bills and Notes* (2d Ed.) p. 55. *Chaddock v. Vanness*, 35 N. J. Law, 520, 10 Am. Rep. 256. Prof. Edwards states the rule this way: "Where one man lends his note to another, and is afterwards obliged to pay and take it up, the law implies a promise on the part of the borrowers to indemnify the maker, though the maker cannot sue the borrower on the note itself. The note is a mere item of evidence." *Edwards on Bills and Notes* (2d Ed.) p. 356. *Griffith v. Reed*, 21 Wend. 502 (505) 34 Am. Dec. 267.

The nonsuit in this case was error, and should be reversed, and a venire de novo awarded.

SIGGINS v. MCGILL et al.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1905.)

LANDLORD AND TENANT—DEFECTIVE STAIRWAYS—LIABILITY.

Where a landlord lets out portions of a building to several tenants, retaining in his own possession or control the passageways and stairways for the common use of the tenants, and those having occasion to visit them, he is under the responsibility of a general owner of land who holds out an invitation to enter upon and use his property, and is bound to see that reasonable care is exercised to have the passageways and stairways reasonably fit and safe for such use.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 629, 633.]

(Syllabus by the Court.)

Error to Supreme Court.

Action by John Siggins against Julia Thayer McGill and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Bedle, Edwards & Thompson, for plaintiffs in error. Joseph Anderson, for defendant in error.

PITNEY, J. Plaintiff was a tenant of the defendants, occupying an apartment in a building owned by them in Jersey City. There were several apartments in the building, and these were separately rented out by defendants to different families. The halls and stairways of the building were used in common by the several tenants. While descending one of these stairways, the plaintiff stumbled and fell, sustaining personal injuries. This action was brought to recover compensation therefor from the landlords, upon the ground that the plaintiff's fall was due to the bad condition of the stair covering. The verdict and consequent judgment were in favor of the plaintiff. There were motions for nonsuit and for direction of a verdict in favor of the defendants, both of which were denied. They were based in part upon the ground that the plaintiff knew, or ought to have known, the condition of the stair covering, and either had assumed the risk or by his own negligence had contributed to his injury. These grounds were untenable; there being at least disputable questions of fact for the jury's determination with respect to the plaintiff's knowledge of the condition of the stairs and with respect to his care while using them. The motions were based also upon the ground that there was no liability on the part of the landlords for the condition of the staircase. The learned trial justice, having refused the motions, submitted the case to the jury with this instruction: That since the building was occupied by several families, who had the use of the halls and stairways in common, there rested upon the defendants the duty of using reasonable care to keep the halls and stairways in proper condition for the common use of the tenants. To this instruction, as well as to the denial of the motions, exception was duly sealed.

In this state it is established as a general rule that the landlord is not liable for injuries sustained by a tenant or his family or guests by reason of the ruinous condition of the premises demised; there being upon the letting of a house or lands no implied contract or condition that the premises are or shall be fit and suitable for the use of the tenants. So it was held by the Supreme Court in *Naumberg v. Young*, 44 N. J. Law, 331, 344, 43 Am. Rep. 380, *Mullen v. Ranier*, 45 N. J. Law, 520, 523, *Clyne v. Helmes*, 61 N. J. Law, 358, 39 Atl. 767, and *Land v. Fitzgerald*, 68 N. J. Law, 28, 52 Atl. 229, and by this court in *Murray v. Albertson*, 50 N. J. Law, 167, 18 Atl. 394, 7 Am. St. Rep. 787. But it is recognized that this rule does not apply to those portions of his property (such as passageways, stairways, and the like) that are not demised to the tenant, but are retained in the possession or control of the landlord for the common use of the tenants and those having lawful occasion to visit them; the ways being used as appur-

tenant to the premises demised. With respect to such ways, it has been held by our Supreme Court that the landlord is under the responsibility of a general owner of real estate who holds out an invitation to others to enter upon and use his property, and is bound to see that reasonable care is exercised to have the passageways and stairways reasonably fit and safe for the uses which he has invited others to make of them. *Gillvon v. Rellly*, 50 N. J. Law, 26, 11 Atl. 481; *Gleason v. Boehm*, 58 N. J. Law, 475, 34 Atl. 886, 32 L. R. A. 645. This doctrine, we think, is indubitably sound. It is in no wise opposed to the rule which exempts the landlord from liability for the condition of premises that are demised, but is plainly distinguishable therefrom. In the case of a demise the entry and occupancy are pursuant to an estate vested in the tenant, and are exclusive of the landlord; while in the case of passageways and stairways that are retained in the legal possession of the landlord, and are simply used by the tenants as appurtenances to the property demised to them, their ingress and egress are by virtue either of invitation or of necessity. This is the ground of the distinction as pointed out in *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295, cited with approval in *Gillvon v. Rellly*, 50 N. J. Law, 26, 11 Atl. 481. In *Phillips v. Library Co.*, 55 N. J. Law, 307, 27 Atl. 478, which was a case of one of several tenants of a building injured while using a path to the rear that was arranged for the common use of the tenants, this court affirmed the responsibility of the landlord for the condition of the path.

The judgment under review should be affirmed.

RYAN v. DELAWARE, L. & W. R. CO. et al.
(Court of Errors and Appeals of New Jersey.
Nov. 20, 1905.)

LANDLORD AND TENANT—DANGEROUS PREMISES.
This case controlled by *Siggins v. McGill* (decided by this court at the present term) 62 Atl. 411.

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.
Action by Johanna Ryan against the Delaware, Lackawanna & Western Railroad Company and the Morris & Essex Railroad Company. Judgment for plaintiff. Defendants bring error. Reversed.

John J. Fallon, for plaintiff in error.
Bedle, Edwards & Thompson, for defendants in error.

PITNEY, J. The record discloses that one Levering was in possession of the second floor of a tenement house in Jersey City under lease from the defendants or one of them. The house was a three-story building, each floor rented to and occupied by a different family. The only water-closets pertaining to

the premises were situate in the rear yard. There were two of these, used indiscriminately by the tenants of the several floors of the building. Neither of the closets was covered by Levering's lease. Mrs. Ryan, the plaintiff, was a sister of Mrs. Levering, and visited the premises for the purpose of doing her washing. While there she had occasion to go to the closet in the rear, and as she entered it the floor gave way through rottenness, precipitating her into the vault and injuring her somewhat seriously. She brought this action to recover damages for the personal injuries, and upon the trial was nonsuited. This judicial ruling is sought to be sustained upon the ground that there was no covenant, express or implied, on the part of the landlord that the demised premises should be fit or suitable for use, and no liability on the part of the landlord for injuries sustained by the tenant or a servant of the tenant by reason of the ruinous condition of the premises.

The bill of exceptions renders it clear, however, that the closet in which the plaintiff was injured was not a part of the premises demised to her employer, but was retained in the possession of the landlord, subject to the common use of the tenants by the landlord's permission. The duty therefore rested upon the landlord to exercise care about the condition of the closets. Since there was evidence from which the jury had a right to believe that there was a want of care on the landlord's part in this regard, and that the plaintiff was injured by reason thereof, without negligence on her part, the present case is governed by the rule laid down in *Siggins v. McGill* (decided by this court at the present term) 62 Atl. 411, and the nonsuit was erroneous.

Counsel for defendants in error insist that there is neither privity of contract nor privity of estate between the owner of the property and the servant or visitor of one of the tenants, and cite *Clyne v. Helmes*, 61 N. J. Law, 358, 39 Atl. 767, as authority for the proposition that the landlord is exempted from liability to others than his tenant. But the opinion in that case (at page 368 of 61 N. J. Law, and page 771 of 39 Atl.) makes it clear that the exemption does not apply to cases where the liability of the landlord rests upon invitation.

The judgment under review should be reversed, and a venire de novo awarded.

GUINN v. DELAWARE & A. TELEPHONE CO.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1905.)

TELEPHONE COMPANIES—NEGLIGENCE—ELECTRIC LIGHT WIRE—INJURIES TO PEDESTRIAN.
A telephone company maintained a guy wire in such a position that it was likely to and did become crossed with an electric light wire and charged with a deadly current of elec-

tricity. The guy wire broke, and the decedent came in contact with it and was killed. He was at the time in an open field, which the public were accustomed to cross without objection by the landowner. Whether he was there of right or as a trespasser did not appear.
Held:

1. That the telephone company was under a duty to the decedent to exercise care, even if he was a trespasser as between himself and the landowner.

2. That the jury might infer negligence from the omission of a guard between the electric light wire and the guy wire.

3. That the telephone company was not excused because the danger arose after the construction of the telephone line and was due to the running of the electric light wire below the guy wire; the care required changed with the changed circumstances.

(Syllabus by the Court.)

Error to Supreme Court.

Action by William Guinn, administrator of William C. Guinn, against the Delaware & Atlantic Telephone Company. Judgment for plaintiff. Defendant brings error. Affirmed.

E. A. Armstrong, for plaintiff in error.
Peter Backes, for defendant in error.

SWAYZE, J. William C. Guinn, a lad 13 years of age, was killed by contact with a guy wire charged with electricity. The wire was of a character used for telephone construction, copper wire of a tensile strength of 250 pounds. It was attached to a pole on which were strung wires of the defendant alone. There was no proof except by inference that the defendant erected or owned the pole or had attached the wire. In answer to an interrogatory, the defendant stated that the wire had been inspected May 27 or 28, 1904, about three weeks before the injury. No testimony was offered by the defendant. The trial judge left it to the jury to say whether the wire was put there by the servants of the defendant. We think there was sufficient evidence to warrant the inference that such was the fact. The injury was caused by the guy wire breaking and falling on an electric light wire belonging to another company. The broken end fell in the grass in a field belonging to Gulick. Across this field people were accustomed to travel without objection, but as far as appears without other right. The boy's body was found still in contact with the guy wire shortly after the shock. It does not appear that he had any right to be on Gulick's property, except such as may be inferred from the facts stated. The contention of the defendant is that it was under no duty to the decedent for the reason that he was a trespasser on Gulick's property or at best a mere licensee. The liability of the defendant rests upon the fact that it was maintaining wires which might become charged with a deadly current of electricity. *New York & New Jersey Telephone Co. v. Bennett*, 62 N. J. Law, 742, 42 Atl. 759; *Brooks v. Consolidated Gas Co.*, 70 N. J. Law, 211, 57 Atl. 396.

The duty to exercise care is established as to travelers upon the highway and employees of the defendant or of another company who in the exercise of their rights are likely to come in contact with the wires, and of persons who are lawfully in a place of proximity to the wires. The question presented in this case is whether the duty exists also as to third persons who are not at the time in the exercise of any legal right. The principle underlying the case is stated by Chief Justice Beasley, in *Van Winkle v. American Steam Boiler Company*, 52 N. J. Law, 240, 247, 19 Atl. 472, to be that in all cases in which any person undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law, ipso facto, imposes as a public duty the obligation to exercise such care and skill. The test of the defendant's liability to a particular person is whether injury to him ought reasonably to have been anticipated. In the present case, the guy wire was stretched over an open field across which people were accustomed to travel without objection by the landowner. The adjoining field was used as a ball ground. It was probable that, if the guy wire broke, some one crossing the field would come in contact with it. That whoever did so was a trespasser or a bare licensee, as against the landowner, cannot avail the defendant. If a bare licensee, he would still be there lawfully. If a trespasser, his wrong would be to the landowner alone, not a public wrong, nor a wrong to the defendant.

The case differs from one where a trespasser or licensee seeks to recover of the landowner. A landowner may, in fact, reasonably anticipate an invasion of his property, but in law he is entitled to assume that he will not be interfered with. His right to protect his possession and to use his property is paramount. It is these considerations which led this court to deny the liability of the defendant in the turntable cases. *Turess v. N. Y. S. & W. R. R.*, 61 N. J. Law, 314, 40 Atl. 614; *D. L. & W. R. R. v. Reich*, 61 N. J. Law, 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727; and in *Friedman v. Snare & Triest Co.* (N. J. Err. & App.) 61 Atl. 401. The general rule is that a person is liable for those results of his negligence which are reasonably to be anticipated. The exemption of the landowner from liability as to trespassers and licensees is necessary to secure him the beneficial use of his land; but no reason exists for extending this exemption to the case where the rights of the defendant have not been interfered with. There is no proof that the defendant had any right to maintain the pole and wire; but, even if it had, the deceased is not shown to have interfered with the defendant's rights. The right to maintain the pole and wire did not include the right to have the

wire swing loose or occupy another portion of the field. Whoever interfered with the pole and wire in place, might be a trespasser, but he would not be a trespasser upon the defendant's rights if he came in contact with the wire elsewhere.

The trial judge in his charge rested his refusal to nonsuit upon the theory that the defendant had no right to stretch the guy wire, and he therefore refused to charge that the mere fact that the boy was there as a licensee defeated the plaintiff's right to recover. We think that even if the defendant had a right to stretch the guy wire, the plaintiff might still be entitled to recover. There was no error in the refusal to charge. The judge was asked to charge that the jury must be satisfied by the greater weight of the testimony that the defendant company was negligent, or the verdict must be for the defendant. He charged that it must appear by the weight of probabilities that the defendant's servants put the guy wire there. He then left it to the jury to say whether the defendant was negligent in doing something which it did, or in leaving undone something which it should have done.

In a case where the testimony was in conflict, the defendant would be entitled to have this request charged; but in the present case, there was no conflict of testimony, and the only question was whether the jury would draw an inference of negligence from undisputed facts. Under the decision of this court in *Newark Electric Co. v. Ruddy*, 62 N. J. Law, 505, 41 Atl. 712, 57 L. R. A. 624, affirmed 63 N. J. Law, 357, 46 Atl. 1100, 57 L. R. A. 624, in the absence of explanation by the defendant of the cause of the breaking of the wire, no other inference was open. The present case is even stronger, for here there was proof that the wire was of less tensile strength, though of greater durability, than the wire ordinarily used for that purpose. It was permissible for the jury to infer that the omission of a guard between the electric light wire and the guy wire was an act of negligence. *Rowe v. N. Y. & N. J. Telephone Co.*, 66 N. J. Law, 19, 48 Atl. 523. Although the danger arose after the construction of the telephone line, and was due to the running of the electric light wires below the guy wire, the care required of the telephone company changed with the changed circumstances. *Rowe v. N. Y. & N. J. Telephone Co.*, 66 N. J. Law, 19, 48 Atl. 523.

The judgment should be affirmed, with costs.

In re FOLWELL'S ESTATE.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1905.)

WILLS—MARRIED WOMAN—RIGHTS OF HUSBAND IN PERSONALTY.

The will of a married woman, who, under our statute, has power to dispose of her personal property absolutely, even as against her husband, which devises and bequeaths all her estate,

real and personal, to another, subject to the legal rights of her husband if he survives her, and which appoints another than her husband as executor, does not give to the husband, in the case of his survival, any right to the personality so bequeathed, as such a right is purely equitable, and is not one of his legal rights in his wife's estate.

Swayze, Pitney, Vredenburg, and Green, JJ., dissenting.

(Syllabus by the Court.)

Appeal from Prerogative Court.

In the matter of the estate of Susan M. Folwell, deceased. From a judgment of the Prerogative Court (59 Atl. 467), the executrix appeals. Affirmed.

Norman Grey, for appellant. John F. Har-
ned, for respondent.

FORT, J. This is an appeal from the Prerogative Court, and there is but a single question for decision, namely, does the last will and testament of Susan M. Folwell bequeath her personal estate to her daughter, Elsie, absolutely?

The following is the will: "Know all men by these presents that I, Susan M. Folwell, of Atlantic City, New Jersey, being of sound and disposing mind and memory, do make and publish this my last will and testament, hereby revoking all former wills made by me. I direct that all my just debts and funeral expenses be paid as soon as convenient after my decease. I give and bequeath to my son, Robert Lincoln Folwell, my white trotting horse, Eagle, with his harness and spindle wagon. I give, devise, and bequeath unto my daughter, Elsie Maynard Folwell (subject to the legal rights of my husband, Thomas G. Folwell, should he survive me) all the rest, residue, and remainder of my estate absolutely. I nominate, constitute, and appoint my said daughter, Elsie Maynard Folwell, sole executrix of this, my last will and testament. In witness whereof I have hereunto set my hand and seal this eighteenth day of March, A. D. 1895. Susan M. Folwell. [Seal]"

Thomas G. Folwell, the husband of the testatrix, survived her. The will was duly probated, and letters testamentary thereon granted to Elsie M. Folwell, as executrix, on October 23, 1902. The grant of these letters stands unrevoked and unappealed from. All the personal estate passed into the hands of the executrix, and she claims the right to retain it under the residuary clause of the will, except as to that specifically bequeathed to others. The executrix has never filed an inventory of the estate, and the husband filed a petition in the Atlantic county orphans' court for an order to require her to do so. The orphans' court made the order, and it was affirmed in the Prerogative Court.

If, under the will of the testatrix, Elsie took absolutely all the personality not specifically bequeathed, she is not required to file an inventory. P. L. 1898, p. 759, § 120.

The opinion of the ordinary in this case correctly construes our statute as to the right of a married woman to bequeath her personal property and to deprive her husband, by her will, of all interest therein; and it is not necessary to further discuss that question. The act of 1874 is clear upon that point. Gen. St. vol. 2, p. 2014. Did the parenthetical clause in the residuary item of the will of Susan M. Folwell defeat the right of Elsie to the personal estate, owing to the survival of the husband? This clause gave the whole of the residue of the estate of the testatrix to her daughter, Elsie, "subject to the legal rights of my husband, Thomas G. Folwell, should he survive me." What did he take under this clause? By the plain words of the will he was to get only such rights as were "legal rights." It is clear that under this will all legal rights in the personality of the testatrix passed to the executrix. She holds the legal title and the *jus disponendi*.

The executor, once appointed under the will of a wife duly probated, takes the legal title to her personality, and the husband cannot be appointed administrator, except and until after the probate and order appointing the executor have been set aside by appeal. If he be appointed administrator after such probate and appointment, the proceeding is void. *Ryno's Ex'r v. Ryno's Adm'r*, 27 N. J. Eq. 522. An executor is a trustee, required to account for funds coming to his hands. He cannot be sued at law for an alleged beneficial interest which may be claimed by one in the estate of his testator. He may be required to account in equity or in the manner pointed out by the orphans' court. P. L. 1898, pp. 757-778, §§ 116-168. A right to an accounting by an executor is an equitable right only. The party holding the legal title to property only has a right to seek a remedy at law, even though he have no beneficial interest therein. The equitable owner is he who has not the legal estate, but is entitled to the beneficial interest. *Bouvier*, vol. 2, p. 24, "Legal Estate." The effect of a general probate of the will of a deceased married woman is only to enable the executor to get in all the assets of the wife, whether she have power to dispose of them or not, and it does not effect the beneficial title to them. *Williams on Ex'rs*, vol. 1, p. 465. Where a wife makes a will, giving all her personal estate to her husband, but appoints another than her husband as executor, the executor takes the legal title, and the equitable or beneficial estate only is in the husband under the will. When, therefore, a wife declares by her will that it is her purpose to give all of her estate to a named person, "subject only to the legal rights" of her husband therein, should he survive her, and where, by a statute, she has full power to bequeath her personal property absolutely, even as against her husband, as she may by our statute,

she, by such a will, cuts off all the equitable or beneficial interest of her husband in her personal estate, and leaves to him only such rights in her estate as are purely legal and enforceable by suit at law. All beneficial or equitable interests are cut off by such a will.

A legal right is a claim recognizable and enforceable at law. *English Law Dec.* p. 700; *Avery v. Dufrees*, 9 Ohio, 147. "Legal" is defined as according to the principles of law; according to the method required by statute; by means of judicial proceedings; not equitable. *Am. & Eng. Ency. of Law*, vol. 18, p. 807. The right of the husband to an accounting by the executrix is purely an equitable one, to have the amount due him settled and fixed, and, when it is ascertained, that it be decreed that the fund be paid to him. In suits affecting funds in the hands of executors, the executor only is a necessary party. He represents the legatees under the will. It is unnecessary to join the person to whom the funds may go. *Sweet v. Parker*, 22 N. J. Eq. 456. This rule could not exist but for the fact that the executor holds the "legal title" to the personal property coming into his hands. It may be, as it no doubt is, a naked legal title; but it is the legal title, nevertheless. Legatees under the will can only claim as equitable owners, not legal. Their rights are all equitable, and can only be enforced in the manner pointed out by the statute, or under equitable rules. There is no "legal right" in a legacy under a will. We think the will of Susan M. Folwell cut off all equitable or beneficial interests or rights which her husband had in her estate, and that he has, therefore, no equitable interest in the personal estate which entitles him to call upon the executrix for an accounting.

I shall vote for the reversal of the decree of the Prerogative Court, and of the Atlantic county orphans' court, and to remit the record, with directions that the petition filed by Thomas G. Folwell in the Atlantic county orphans' court for an accounting by the executrix of Susan M. Folwell be dismissed.

SWAYZE, J. (dissenting). I am not able to agree with the result in this case. The testatrix intended to reserve something for her husband, and therefore made the devise and bequest to her daughter, subject to the legal rights of her husband. To hold that this clause related only to his right of curtesy makes it entirely superfluous, for she could not dispose of that, and it was unnecessary for her to say that the gift to the daughter was subject to that right. The construction adopted by this court also ignores the fact that the bequest, as well as the devise, was subject to the legal rights of the husband. In a will using terms of art in a technically correct sense, as this will does, the use of the word "bequeath" in connection with the words "subject to the legal rights of my

husband" seems to me of some significance. The construction adopted by the ordinary gives a meaning to all the words of the will. That adopted by this court, I think, falls in this respect.

Again, the opinion defines a legal right as a claim recognizable and enforceable at law. Even if we ignore the right of the husband to his wife's chattels, and look only to his right to her choses in action, on which he must administer in case of intestacy, this right is, I think, a legal right. An action at law can be maintained under our statute for a legacy (Gen. St. p. 1938, "Legacies," § 1) and for a distributive share (Orphans' Court Act, § 168; P. L. 1898, p. 778). The fact that proceedings may also be taken before other tribunals does not prevent the right from being a legal right within the definition of the opinion. The words seem to have been used by one familiar with legal terms. At the date of this will two cases had been decided in the Court of Chancery, in which the words were used in connection with wills of married women. In *Vreeland's Executors v. Ryno's Executor*, 26 N. J. Eq. 160-163, they were used by Chancellor Runyon in discussing the power given by the act of 1864 to married women to make wills, and he used them as applying to both real and personal property. And in *Beals' Executor v. Storm*, 26 N. J. Eq. 372, 378, he used them in the same sense. I think the draftsman of this will followed these judicial precedents. The husband's right is more than a mere right to administer, or to call an executor to account. It is a right to sue at law for a legacy in case of a will, or for the personal estate, after payment of debts and costs of administration, in a case of intestacy, where some one else administers.

I think the decree should be affirmed.

PITNEY, VREDENBURGH, and GREEN, JJ., concur in this view.

GARDNER & MEEKS CO. v. NEW YORK CENT. & H. R. R. CO.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1905.)

1. MECHANICS' LIENS—RIGHTS OF SUBCONTRACTOR.

Under Mechanic's Lien Law (P. L. 1898, p. 538) § 1, where the building contract is not filed, a lien may be claimed for materials furnished to a subcontractor to enable him to carry out his part in the construction of a building pursuant to the owner's contract with the principal contractor.

2. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—MECHANIC'S LIEN LAW.

The mechanic's lien law is not unconstitutional, as depriving the owner of his property without due process of law, nor as interfering with his right to acquire, possess, and protect property.

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.
Action by the Gardner & Meeks Company

against the New York Central & Hudson River Railroad Company and another. Judgment for plaintiff. Defendant railroad company brings error. Affirmed.

Edmund W. Wakelee and Vredenburg, Wall & Van Winkle, for plaintiff in error. Charles E. Hendrickson, Jr., for defendant in error.

PITNEY, J. This is an action upon a mechanic's lien claim brought by the Gardner & Meeks Company (plaintiff below) against the Chert Stone Company, as builder, and the New York Central & Hudson River Railroad Company, as owner. The latter company alone made defense, and the only controversy raised was under its statutory plea that the building and lands in question were not liable to the builder's debt. Upon the trial in the circuit court it appeared that the railroad company had made a written contract with one Crowe for erecting the building in question and furnishing the materials therefor. This contract was not filed until after the materials in question in this suit were furnished. Crowe made a subcontract with the Chert Stone Company for the execution of a part of his contract with the railroad company, including the furnishing of materials. The stone company in undertaking to perform their subcontract, purchased of the plaintiffs the materials upon which their mechanic's lien claim is based. The sole ground of defense was that a mechanic's lien cannot be claimed in favor of a person supplying materials to a subcontractor, but that the right of lien, under the first section of the mechanic's lien law (P. L. 1898, p. 538), is restricted to the principal contractor and to those who do work for him and furnish materials directly to him.

The language of the section is broad. It declares that every building shall be liable for the payment of any debt contracted and owing to any person for labor performed or materials furnished for the erection and construction thereof, which debt shall be a lien on such building, etc. In *Van Pelt v. Hartough*, 31 N. J. Law, 332, Beasley, C. J., declared: "This provision is so comprehensive that, if it had been left unconfined by subsequent restrictions, a lien would have been given to all persons who, under any circumstances whatever, performed any labor in the erection of a building, or whose materials entered into its structure." In *Murphey-Hardy Lumber Co. v. Nicholas*, 66 N. J. Law at page 417, 49 Atl. at page 449, Justice Collins said: "The normal effect of this legislation is to subject lands upon which a building is erected, by authority of the owner, to a lien in favor of any one who furnishes labor or materials therefor. To limit this effect strict compliance with the proviso of the second section of the act is essential." In *Coddington v. Drydock Co.*, 31 N. J. Law

at page 482, Justice Vredenburg, speaking for this court, put the rationale of the mechanic's lien upon its fundamental basis, viz.: "To hold a lien on the estate of the owner of the building in the land, on account of the increased value given by the building to the land, and the natural injustice there is in the owner of the land appropriating to his use, without compensation, the toil and capital of others." It is true that under the language of the first section of our mechanic's lien law it has been held that, if materials are furnished for the erection of a building, the mere fact that they are not used in the building does not defeat the lien thereon. *Morris County Bank v. Rockaway Mfg. Co.*, 14 N. J. Eq. 189, cited with approval in *Campbell v. Taylor Mfg. Co.*, 64 N. J. Eq. 347, 51 Atl. 723. But this does not at all impair the force of the view declared by Justice Vredenburg.

The argument for the plaintiff in error lays especial stress upon the words "contracted and owing" in the first section of the act. It is insisted that this expression limits the benefit of the first section to those whose debts are contracted by one who has authority to contract such indebtedness. While it is conceded that the master builder may subject the building to a lien for a debt contracted by him, it is insisted that his subcontractor cannot do the like. This argument proves too much, for, if the force of the first section is to limit the lien to debts contracted by persons who, in the absence of the statute, would have authority to bind the land, it would debar all claims saving such as were contracted by the owner himself. It is manifest that the Legislature had no such intent, for section 2, by limiting the lien to the contractor alone where the contract is in writing and properly placed on file, distinctly recognizes that in the absence of that formality there may be a lien by virtue of section 1 in favor of parties not standing in privity of contract with the owner. Section 16 (page 543) which prescribes the form of the lien claim, plainly recognizes that the party contracting the debt may be some other person than the owner of the land, or his immediate contractor, for it not only requires a separate statement of the name of the owner and the name of the builder, but it defines the latter term as meaning not necessarily the person employed by the owner to construct the building, but the person who contracted the debt, or for whom or at whose request the "labor was performed or the materials furnished." And section 23 (page 547) provides for combining a personal action for the recovery of the debt with an action quasi in rem for the enforcement of the lien, prescribing that the process shall be against the builder and the owner, or, if the owner contracted the debt, then against him as both builder and owner.

In short, as we construe the act, section 1 gives a lien to any person who performs

labor or furnishes materials for the erection and construction of the building, irrespective of privity of contract with the owner or with the owner's contractor. This does not mean, of course, that there may be a lien for work performed, or materials furnished by a mere volunteer or meddler, acting without authority derived directly or indirectly from the owner. No such question is raised in this case. The materials were furnished to a subcontractor to enable him to carry on his part in the construction of the building pursuant to the owner's contract with the principal contractor. If the owner desires to protect his land against liens thus incurred in favor of any and all persons other than the party with whom he contracts, his proper course is to adopt the simple method pointed out in section 2, which limits the lien upon the land to the contractor himself where the contract is duly placed on file. And section 3 gives the substituted remedy of a lien upon the fund payable by the owner to his contractor, in favor of parties debarred from a lien on the land by the filing of the contract, so far as they come within the class described in section 3. It has been held by this court, in *Carlisle v. Knapp*, 51 N. J. Law, 320, 17 Atl. 633, that the remedy by stop notice prescribed by section 3 does not extend to one who has furnished materials to a subcontractor. But this is on the ground that this section gives the right to demand payment from the owner only when his contractor is in default of paying that which he owns to the claimant; and, where there is no privity between the claimant and the contractor, there is no right in the claimant to demand payment from the contractor.

It is argued that the Legislature itself has construed the meaning of section 1 by the passage of the acts (P. L. 1890, p. 479; P. L. 1892, p. 358; repealed P. L. 1895, pp. 313, 317) by which it was provided that the exemption of the building from liens to others than the contractor, where the contract was in writing and filed, should be conditioned upon the production by the contractor to the owner of a release of mechanics' liens signed by all persons who might have furnished materials used in the erection of the building, and by all journeymen employed in the erection and construction thereof. We see no force in this argument. The acts of 1890 and 1892 were an attempt to extend the benefits and diminish the hardships of the act by a special method of procedure in case where the contract was in writing and placed on file, and they have no particular bearing upon the remedy afforded to materialmen and others by lien upon the building, where the contract is not filed.

Finally, it is argued that, if the first section of the mechanic's lien law be so construed as to allow a lien for a debt due to any person further removed from the owner than the first subcontractor, it renders the act unconstitutional, as depriving the owner

of his property without due process of law, and interfering with his liberty of acquiring, possessing, and protecting property. The owner's right to hold and enjoy property must be subject to the general law of the state. He has no natural right to improve it by the construction of a building thereon without compensation to those who perform the labor and furnish the materials that enter into the improvement. And where the general law prescribes formalities whereby such laborers and materialmen may recover their compensation by means of a lien upon the property, unless the owner pursues the method that the statute prescribes for limiting the right of such lien to the party with whom he contracts, the presumption arises that his building operation is undertaken in full view of the general law, and the law enters into and becomes a part of his contract by his own consent. It has been repeatedly held that such a statute is not an undue restraint upon the owner's liberty of contract considered as an incident to the right of acquiring, possessing, and protecting property, and does not deprive him of his property without due process of law. *Jones v. Great Southern Fire Proof Hotel Co.*, 86 Fed. 370, 30 C. C. A. 108, and cases cited; *Great Southern Fire Proof Hotel Co. v. Jones*, 116 Fed. 793, 54 C. C. A. 165; *Smith v. Newbaur*, 144 Ind. 95, 42 N. E. 40, 1004, 33 L. R. A. 685; *Henry & Coatsworth Co. v. Evans*, 97 Mo. 47, 10 S. W. 868, 3 L. R. A. 332; *Blauvelt v. Woodworth*, 31 N. Y. 285; *Gladius v. Black*, 67 N. Y. 563. Nor is there greater force in the insistence that under exceptional circumstances the land may be subjected to mechanics' liens in favor of two or more parties for the furnishing of materials that should create but a single debt. Aside from the easy protection afforded to the owner by section 2 of the act, its twenty-ninth section (page 550) provides for a distribution of the proceeds of the sale of lands among the several lien claimants; and either under this section or by appropriate proceedings in equity, by bill of interpleader, or otherwise, the owner has ample protection against being obliged to pay any claimant other than him at whose actual cost the materials were supplied.

The judgment under review should be affirmed.

SNYDER et al. v. NEW YORK CENT. & H. R. CO.

(Court of Errors and Appeals of New Jersey. Nov. 20, 1905.)

MECHANICS' LIENS.

This case is controlled by *Gardner & Meeks Co. v. N. Y. Central & Hudson River R. R. Co.* (decided by this court at the present term) 62 Atl. 416.

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.

Action by Hiram Snyder and William H.

Hendrickson against the New York Central & Hudson River Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Edmund W. Wakelee and Vredenburg, Wall & Van Winkle, for plaintiff in error. Cornelius Doremus, for defendants in error.

PER CURIAM. The questions raised in this case are the same as those raised in *Gardner & Meeks Co. v. N. Y. Central & Hudson River R. R. Co.* (decided by this court at the present term) 62 Atl. 416. The judgment under review herein will be affirmed, for the reasons stated in the opinion of Mr. Justice Pitney in that case.

GRUNAUER et al. v. WESTCHESTER FIRE INS. CO.

(Court of Errors and Appeals of New Jersey. Nov. 20, 1905.)

1. INSURANCE — CONDITIONS OF POLICY — CHANGE OF OWNERSHIP — CONTRACT OF SALE.

A fire insurance policy contained a condition that "if any change other than by the death of an insured takes place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise, * * * the entire policy shall be void." In a suit upon such policy to recover for a loss by fire, it appeared that the plaintiffs, who were the sole owners of the insured dwelling house and premises, had, after the issuance of the policy, executed a written agreement to sell and convey the property in fee to their tenant, who was in possession, upon the payment of the stipulated price (a portion of which was then paid), and it was held that such acts caused a change in interest, title, and possession of the subject of insurance sufficient to avoid the policy.

2. SAME.

By force of such contract and transfer of possession a complete transition of the equitable and beneficial ownership from the vendors to the vendee was effected, subject only to the claim of the vendors for purchase money. Although the vendors thereafter still retained the legal title to the land, they held it as trustees for the vendee, who became the owner in equity.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Raphael Grunauer and others against the Westchester Fire Insurance Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Louis H. Grunauer and Michael Dunn, for plaintiffs in error. James G. Blauvelt, for defendant in error.

VREDENBURGH, J. The fire insurance policy, the subject of this suit, was executed August 21, 1902, between one Garretson and the defendant, and contains the following standard policy insurance conditions, authorized by statutory forms (Gen. St. p. 1766, and act of 1902 [Laws 1902, p. 437, § 77]), viz., that "if the interest of the insured be other than unconditional and sole ownership,

" * * * or if any change, other than by the death of an insured, takes place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment, or by voluntary act of the insured, or otherwise, * * * the entire policy * * * shall be void." At the execution of the policy one Garretson was the owner in fee simple of the insured premises, consisting of a dwelling house and the land upon which it stood, but at the issuance of the policy a mortgage clause was attached, by which any loss thereunder was payable to one Manson, a mortgagee; and in February, 1903, when the property was conveyed by Garretson to plaintiffs, they assumed payment of the mortgage as part of the consideration, and claimed, also, to stand in such prior right, as well as subsequent owners, by the indorsed consent of the company upon the policy. On July 1, 1903, one Mrs. Speck, having about a month previously rented and entered into the occupation of the premises as a tenant paying monthly rent, made with the plaintiffs a written agreement to purchase the insured premises, the material provisions of which were that the plaintiffs agreed (to quote) "to sell and convey to her, her heirs and assigns, all the land and dwelling house thereon erected for the sum of three thousand five hundred dollars," which sum she agreed to pay to the plaintiffs, "their heirs and assigns," in the amounts and manner following: "One thousand dollars to be paid on the delivery of this agreement, * * * and the balance, or two thousand five hundred dollars, to be paid in monthly installments of ten dollars a month on the first day of each and every month hereafter, beginning with the month of August, next, 1903, until the sum of three thousand five hundred dollars is fully paid and satisfied, together with interest on the unpaid balance at the rate of six per cent. per annum, payable semiannually, until the whole amount is paid up," and "on receiving such payments, and being fully paid and satisfied at the time and manner above mentioned," the plaintiffs should "execute, acknowledge, and deliver * * * to her," or her heirs and assigns, a "proper deed for the conveying and assuring to her or them the fee simple of the said premises, free and clear of all incumbrances." On July 1, 1903, Mrs. Speck paid to plaintiffs, upon account of the consideration mentioned in the contract, the specified \$1,000, and thereafter, on the first days of each month following before the loss, paid not only the agreed \$10, but also \$30 per month additional, making for the four months \$160. During this period she made in the house certain permanent improvements, adding three rooms in the attic, a china closet in the kitchen, and various other additions, at a cost of about \$250, and obtained a policy of insurance upon her insurable interests in the premises, in her own name, of \$2,000, upon which she, after the loss, collected the sum of \$1,160

as representing her portion of the loss. On November 10, 1903, the house was consumed by fire, while Mrs. Speck was still in possession. At the close of the evidence in the suit upon the policy first named, the learned trial justice, upon defendant's motion, directed a verdict for the defendant.

The plaintiffs in error now urge that judgment should have gone in their favor, claiming, first, that the condition respecting ownership is only applicable to the subject of insurance at the time the policy is issued or indorsed, and not at the time of the loss; and, secondly, that notwithstanding their execution of the agreement to convey, and putting the purchaser in possession of the insured premises, there had been no change of interest, title, or possession, within the meaning of the condition last above set forth.

Passing to the consideration of the latter condition, we think that the judgment below, holding that it was violated by reason of the change of interest, title, and possession of the assured in the premises, as shown by the recited facts, can readily be vindicated. It is not open to question that, under the admitted facts, a change, at least, in the possession and right of possession of the insured in the premises had taken place. The period of interest in the insured embraced in the condition is, incontestably, from the beginning to the expiration of the policy. That such conditions are reasonable and valid, even though they tend to create forfeiture of the policy, cannot be denied. May on Ins. vol. 1, par. 287a. The effect of the recited acts of the insured upon the condition in question has not as yet, it seems, received judicial consideration in this state, but the references below will assist in determining the nature and extent of the change of interest effected by the contract to convey. Undoubtedly such contract creates the relation of trustee and cestui que trust between vendor and vendee. It produces in equity a complete transition of the vendor's holdings from real to personal, and gives the vendee the equitable ownership. After such contract the vendor's interest is no longer real estate, and the unpaid purchase money is personalty, and goes to the vendor's personal representative in case of his death. Thereafter the assured could have but a diminished incentive in the preservation of the property from injury, and such result was the very object intended by the insurer to be guarded against by the inserted condition. Although the vendor still retains the legal title to the land agreed to be sold and conveyed, he thereafter holds it only as a trustee for the vendee, who becomes the equitable and beneficial owner. In *Martin v. State Insurance Company*, 44 N. J. Law, 485, 43 Am. Rep. 397, it was held in our Supreme Court that where the whole beneficial interest and the possession were in the assured, although the naked legal title

of the property insured was in a third party, the former had the entire, unconditional, and sole ownership of the property. It was there said by Mr. Justice Dixon, writing the opinion of the court, that the "mere fact that W. held the naked legal title did not destroy the plaintiff's ownership, * * * and as his ownership was of the fee simple in equity, and was not held jointly or in common with another, it was entire and sole." The respective situation of the parties there were the reverse of those here, but the principle established is clearly adverse to the contention of the plaintiffs in error. The reasoning thus adopted in our Supreme Court was in entire accord with the principle previously declared in this court in *Franklin Fire Insurance Company v. Martin*, 40 N. J. Law, 568, 29 Am. Rep. 271, where the proof was that the plaintiff (the insured) had contracted to purchase the insured property of another, and had paid all the purchase money, except \$2,000, and had gone into possession and expended money in improvements. The late Chief Justice Depue there said that "a person in possession under an agreement for a conveyance has a substantial and an insurable interest. If the property is destroyed, it will be his loss, in contemplation of law. If he had paid the purchase money, the property is his property in fact, and its destruction by fire would be his loss, as much as if the formal legal title was in him."

In the recent case of *Ordway v. Chace*, 57 N. J. Eq. 478, 42 Atl. 149, the question of the effect of the clause first above set forth arose in chancery in a foreclosure suit. The policy was issued to one Chace, as owner, but his interest was shown only to be that he had given his bond for a debt secured by a mortgage of the premises, and was the holder of a subsequent mortgage made to him by one Enger, to whom he (Chace) at that date conveyed the premises, which were afterwards conveyed to one Henderson, who was the owner in fee at the time of the loss. The court held that the insurance company was not liable on the policy, because the assured was not the unconditional and sole owner of the property insured. The learned vice chancellor in his opinion referred to that class of cases, like the present, in which recovery is denied to the assured, where it appears that the equitable title to the insured premises was vested in a third person, "so that the loss would fall directly upon him, as where he is in possession under a contract of purchase, and has paid the whole or a part of the purchase money, and is personally liable for the remainder." Under such contract and surrender of possession the vendee becomes the beneficial owner, and loss or destruction of the property falls upon him and not upon the vendor; and many cases decided in other jurisdictions directly hold such contract (either with or without

transfer of possession) to be a breach of the condition in question. In *Skinner v. Houghton*, 92 Md. 68, 48 Atl. 85, 84 Am. St. Rep. 485, it was held that "the effect of the contract of sale was to vest the beneficial ownership of the property in the vendee, and that consequently the policies were avoided as to the defendants, who denied all liability because of a change of interest of the assured without the consent of the insurer." So it was held in *Cottingham v. Fireman's Fund Ins. Co.*, 90 Ky. 439, 14 S. W. 417, 9 L. R. A. 627, that "an executory contract for the sale of insured property causes a change of the title, within the meaning of a policy of insurance which provides that it shall be void, if any change takes place in the title or possession, for the reason that the vendee becomes the beneficial owner, and the loss or destruction of the property falls upon him, and not the vendor." In the appendix to 1 May on Insurance (4th Ed.) at pages 577, 578, is a collection of many citations of decided cases in various states and jurisdictions holding to the same effect as the preceding. As I do not find any sustaining a contrary rule with respect to the condition in question, I think it unnecessary to lengthen this opinion by further reference to authority.

The judgment of the Supreme Court should be affirmed.

FEINER et al. v. BOYNTON.

(Supreme Court of New Jersey. Nov. 22, 1905.)

1. HUSBAND AND WIFE—PURCHASES BY WIFE—LIABILITY OF HUSBAND.

The husband is liable for suitable clothing purchased for the use of his wife.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 134.]

2. SAME.

When a husband and wife are living together, in purchasing articles of clothing for her own use the wife is presumed to be acting as agent for her husband.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 142, 146.]

3. SAME—LIABILITY OF WIFE.

To charge her it must appear affirmatively that she made the purchase on her individual credit.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 325, 584.]

(Syllabus by the Court.)

Appeal from District Court of Newark.

Action by Elizabeth Feiner and others against Harriet G. Boynton. Judgment for plaintiffs, and defendant appeals. Reversed.

Argued June term, 1905, before GARRISON and GARRETSON, JJ.

Howe & Davis, for appellant. George Harner Pierce, for appellees.

GARRETSON, J. The plaintiffs recovered a judgment against the defendant in a dis-

strict court for the value of goods furnished. The defendant is, and at the time the goods were furnished was, a married woman living with her husband. The goods furnished were for the personal use of the defendant. It appears from the state of the case that the husband provided the defendant with money from time to time for her household and personal expenses; that the account with the plaintiffs had always been in the defendant's name; that the defendant paid the bills, of which there were a large number, during the 11 years through which the account had been running, with her own checks, drawn upon a bank where her husband had deposited money for her, of which deposit the plaintiffs had no knowledge at all; that the plaintiffs had never had any dealings with her husband; that the husband deposited various sums of money, ranging from \$300 to \$700, in the People's Bank of East Orange, and that the defendant drew her own checks against said accounts to pay for the various household expenses, as well as for her clothing; that she had a separate estate.

There is no evidence to show that the defendant ever made any express contract with the plaintiffs which would bind her separate estate, and the only evidence from which a contract could be inferred was that the goods were charged to the defendant on the plaintiffs' books, and that the defendant paid the bills with her own checks; but there is nothing to show that the defendant knew that the goods were being charged to her by the plaintiffs, and the checks she gave in payment were of her husband's moneys, which had been deposited by her husband to pay for household expenses and her clothing. A debt incurred for the necessary clothing of a married woman is presumably the debt of the husband, and, if incurred by the wife, it is presumed she is acting as the agent of her husband, unless there is affirmative evidence to show that she intended to charge her separate estate. In *Wilson v. Herbert*, 41 N. J. Law, 461, 32 Am. Rep. 243, it is held: "When husband and wife are living together, and the wife purchases articles for domestic use, the law imputes to her the character of an agent of her husband, and regards him as the principal debtor. She may contract for such articles as principal, and assume the responsibility of a principal debtor. But, to fix upon her a liability, it must affirmatively appear that she made the purchase on her individual credit. There must be either an express contract on her part to pay out of her separate estate, or the circumstances must be such as to show clearly that she assumed individual responsibility for payment, exclusive of the liability of her husband."

The judgment of the district court is reversed.

RUSSELL & ERWIN MFG. CO. v. E. C. FAITOUTE HARDWARE CO.

(Court of Chancery of New Jersey. Dec. 8, 1905.)

1. CORPORATIONS—INSOLVENCY—TRANSFER OF ASSETS.

P. L. 1896, p. 298, § 164, prohibits any assignment of property of a corporation whenever the corporation shall have become insolvent or shall have suspended its ordinary business for want of funds, and prohibits such transfer "in contemplation of insolvency," declaring that every such sale shall be utterly void as against creditors, provided that a bona fide purchase for a valuable consideration before actual suspension by any person without notice shall not be invalidated. *Held*, that a transfer of credits of a corporation after it suspended business, when it was insolvent, was not protected by the proviso of the section, even though made on a present valuable consideration and without notice to the assignee.

2. SAME—ASSIGNMENTS—TIME—DELIVERY.

Where certain assignments of credits by a corporation were made out in the morning of the day on which the corporation suspended business and before the mortgagee took possession, but were not delivered to the assignee until after such suspension and assumption of possession by the mortgagee, the assignments should be considered as having been legally made at the time of their actual delivery to the assignee, and not at the time the papers were executed.

3. SAME—INVOLUNTARY SUSPENSION—ASSIGNMENTS.

Under P. L. 1896, p. 298, § 64, prohibiting any assignment of choses in action of a corporation which shall have become insolvent or shall have suspended its ordinary business for want of funds, etc., the fact that a corporation's suspension was in pursuance of legal proceedings, and was not voluntary, did not affect the invalidity of certain assignments made by it after such suspension.

4. SAME—INSOLVENCY.

At the time a corporation suspended business its entire tangible property, including its leasehold and most of its accounts, were assigned as collateral security for debts aggregating \$10,000. The unsecured debts amounted to \$15,000 more, which was far in excess of the equity in the property mortgaged. Suits had been brought against the company and a judgment entered in one of them. Its credit was exhausted and it had little or no cash on hand or in bank. *Held*, that the company was insolvent, though the book valuation of its stock and property exceeded its entire liabilities by about \$4,000, and its officers believed such valuation was honest and correct.

5. SAME—NOTICE OF INSOLVENCY.

Where an assignee of certain credits of a corporation was notified at the time the assignment was delivered to him of the foreclosure of a mortgage on all the company's property and of the mortgagee's entry under the company's lease, which had also been assigned, and inquiry would have led to information as to the actual condition of the company, the assignee was charged with notice of its insolvency.

6. SAME—CONSIDERATION.

Where an assignment of credits by a corporation was made, for the most part, in consideration of a pre-existing indebtedness, such indebtedness was not a "valuable consideration" sufficient to sustain the assignment, under P. L. 1896, p. 298, § 64, providing that a bona

fide purchase for a valuable consideration before a corporation shall have actually suspended its ordinary business by a person without notice of the corporation's insolvency, etc., should not be invalidated.

7. FRAUDULENT CONVEYANCES — CONSIDERATION.

Under 2 Gen. St. pp. 1604, 1605, §§ 11, 12, 15, making conveyances with intent to defraud creditors utterly void as against creditors, but saving bona fide conveyances for a good consideration to a grantee without notice, a fraudulent conveyance to a person taking with notice is void, though a full consideration was paid.

Suit by the Russell & Erwin Manufacturing Company against the E. C. Faltoute Hardware Company. On petition of the receiver of the defendant to set aside an assignment of book accounts by the defendant company to one Peters. Petition allowed.

F. Benjamin and E. C. Duffield, for receiver. Brown & Beecher, for respondent.

EMERY, V. C. The receiver of an insolvent corporation, the E. C. Faltoute Hardware Company, files this petition in the insolvency proceedings to set aside assignments of book accounts, amounting to \$4,107.90, made by the company to the respondent, Peters, on December 6, 1904, four days prior to the filing of the bill, upon which the company was declared insolvent and the receiver appointed. The ground alleged in the petition is that the company had suspended its ordinary business on the day of the assignments and before they were made, and that the assignments, which were made to secure an indebtedness of \$4,000, were made in contemplation of insolvency, of which Peters had notice. The respondent by his answer admits the company's suspension of its ordinary business on December 6, 1904, and that its stock in trade was on that date taken possession of by the mortgagee holding a chattel mortgage. The assignments are admitted to have been made to secure an indebtedness of \$4,000, but it is denied that the assignments were made after the suspension of business and in contemplation of insolvency of which respondent had notice. As a further defense the answer sets up that the assignment of the accounts was made for a then present consideration, and not a pre-existing debt, and that its consideration was the assignment and surrender by respondent of certain other book accounts of the company assigned and taken possession of by the respondent previous to that time, and the payment by the respondent to the company of moneys collected for him from book accounts previously assigned and delivered by the company to him. The corporation law (P. L. 1896, p. 298, § 64) prohibits any sale, conveyance, transfer, or assignment of the property of a corporation, including choses in action, rights, or credits, "whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same and also pro-

hibits such sale or transfer "in contemplation of insolvency." The act further declares that "every such sale, conveyance, assignment or transfer shall be utterly void as against creditors; provided that a bona fide purchase for a valuable consideration, before the corporation shall have actually suspended its ordinary business, by any person without notice of such insolvency or of the sale being made in contemplation of insolvency, shall not be invalidated or impeached."

The first question relates to the time of the making of these assignments, and whether they were made after the corporation actually suspended its ordinary business for want of funds to carry it on. If actually made after such suspension, and the company was insolvent at the time, the assignments are not, as I read the act, protected by the proviso, even if the transfer was upon a present valuable consideration and without notice of the insolvent condition of the company. The facts in reference to the time of the delivery of the assignments are proved by the officers of the company—Mr. Hare, the president, and Mr. Beach, the secretary and officer who delivered the assignments to Mr. Peters. Their evidence shows that the assignments were completed by annexing the full list of accounts and signed by the president, Mr. Hare, and the seal of the company affixed by Mr. Beach, about 9 o'clock in the morning of December 6th, at the store or place of business of the company in Newark. After the execution of the assignments and while Mr. Beach (and probably Mr. Hare) were still in the store, and about noon, Mr. Gray, who held a chattel mortgage on the stock to secure a debt of \$5,000 and an assignment of the lease to secure an advance made about December 1st for \$500 to pay the rent, took possession under his chattel mortgage. Mr. Beach subsequently went to New York City, and there, at Mr. Peters' office, about 4 o'clock, delivered the assignments to Mr. Peters, receiving from him previous assignments of accounts dated November 19, 1904, which were in Mr. Peters' possession in New York and were delivered to Mr. Beach for cancellation. At this interview Mr. Beach informed Mr. Peters that the chattel mortgagee had foreclosed his mortgage and was in possession of the store and stock of goods, and Beach then received direction from Mr. Peters to consult counsel and protect his interest in the accounts. Pursuant to this direction notices of the assignments of accounts (dated December 6th) were printed and mailed on the three following days and before the filing of the bill for a receiver.

The assignments must be considered as having been legally made at the time of their actual delivery in New York, and not at the time of the execution of the papers in Newark. At the time of the delivery the company had actually suspended its ordinary business, by reason of this foreclosure of the chattel mortgage and entry under the lease. That

this suspension was not voluntary on the part of the company, but was under legal proceedings, does not relieve the assignment from the effect of the act, as counsel claim. The assignments therefore are void, if the company was insolvent at the time of their delivery, or if they were made in contemplation of insolvency. Under the evidence in the case, both of these points are established. At this time the entire tangible property, the leasehold and most of the company's accounts, were assigned as collateral security for debts aggregating \$10,000, and the unsecured debts amounted to about \$15,000 more, far more than any possible equity in the property mortgaged. Suits had been brought against the company. One was then pending on which judgment was entered on December 9th, and the credit of the company was exhausted. The company had little or no cash on hand or in bank. There appears in the case that general inability to meet pecuniary liabilities as they matured, by means of either available assets or an honest use of credit, which constitute insolvency, under our corporation acts. *Empire State Trust Co. v. Trustees of Wm. F. Fisher & Co.* (N. J. Err. & App.; April, 1905) 60 Atl. 940. The only basis upon which solvency is here claimed is that the book valuation of the stock and property, which was made on October 31, 1905, exceeds the entire liabilities by about \$4,000, and that the officers and the assignee, who knew of this valuation, believed this was honest and correct. As a test of insolvency, such valuation is entitled in this case to little or no weight. The company being insolvent and having suspended its business before the delivery of the assignments to the respondent, they are under the act "utterly null and void against creditors," and are not at all within the proviso, which reaches only to a bona fide purchase before the corporation shall have actually suspended business. The assignee's notice of the suspension of business at the time of the delivery of the assignments is proved, and was besides such notice of the insolvency, or of a transfer in contemplation of insolvency, as to prevent the transfer being bona fide. Notice of facts such as the foreclosure of the mortgage and entry under the lease, which on inquiry would have led to information as to the actual condition of the company, must be taken as notice of the insolvency. *Tantum v. Green* (Err. & App. 1869) 21 N. J. Eq. 364, 369; *Dougherty v. Connolly* (1901) 61 N. J. Eq. 421, 48 Atl. 777, and cases cited by me on page 428 of 61 N. J. Eq., page 780 of 48 Atl.

These assignments, moreover, are not within the saving clause of the statute, not only because the assignee did not receive them before the suspension of the company's business, and because he is chargeable with notice of the company's insolvency at the time of receiving them, but the assignments were not, except to a small extent, for a valuable consideration, and were made to

secure what was in fact for the most part an antecedent indebtedness of the company. Such antecedent indebtedness is not a valuable consideration for a mortgage or assignment under this act. *Empire State Trust Co. v. Trustees of Fisher*, supra. The facts as to the consideration are these. In October, 1903, Mr. Peters advanced to the company \$4,000; the repayment being secured by assignments of book accounts, specified in lists annexed to the assignments, which were declared to be made as collateral security. The loan, which was payable on demand, continued, and weekly thereafter new assignments of accounts were prepared; the previous assignments being delivered up for cancellation upon the execution of each subsequent assignment. Each subsequent assignment included accounts previously assigned which had not been collected. The last of these assignments, preceding December 6th, were two dated November 19, 1904, one of accounts amounting to \$3,038.89, to secure \$3,000, and one of \$1,042.41 of accounts to secure \$1,000. Up to this time and in fact up to December 3, 1904, the course of business between the parties had been that the company, and not Mr. Peters, collected the money due on the assigned accounts in regular course, and the money collected was deposited with the company's other funds in its bank account, and was in fact drawn against for the ordinary uses of the company. Whether Mr. Peters knew that the money was so used, is perhaps not entirely clear. There was no express provision in any of the assignments for the collection of the accounts by the company or the substitution of new accounts in the place of accounts collected, nor was any express agreement of this character proved. Beach's present statement is that, on the making of each new assignment, he asked for a continuance of the loan, stating that the money for the assigned accounts then collected was on hand, and that he (Mr. Peters) could have the money or a new assignment. Upon this assurance regularly made, as he says, the new assignments were taken and the loan continued. At the time of the failure, December 6th, the only money on hand from collection of accounts was money which from December 3, 1904, was put by Mr. Beach in his own name from these accounts collected by the company. The amount of this does not appear, nor whether it was from accounts included in the November assignment. On December 6th, the situation in fact was that some of the accounts included in the November assignment, being uncollected, were included in the December assignment, and for the accounts included in the November assignment which had been collected by the company the other accounts specified in the December assignment were substituted. But previous to December 6th, the company had in fact used the money collected on these accounts (except those which might have

been paid over to Mr. Beach since December 3d), and this fund could no longer be followed. As to this amount, therefore, the company on December 6th was merely a debtor to the company, and to this extent the assignment of December 6th was made to secure an antecedent indebtedness for money collected by the company for the respondent and used by the company. The only part of the consideration for the December assignment, which was a present valuable consideration, were those accounts included in the November assignment still uncollected and continued in the respondent's security by the December assignment, and the money (if any) in Beach's hands, received from the assigned accounts. The surrender and cancellation of the November assignments operated as a relinquishment of title thereunder to the accounts uncollected, and a release of claim thereunder to the proceeds of accounts collected and actually in the control or possession of the company. To this extent, but to this extent only, the consideration for the December assignment was a present valuable consideration, but as this surrender and cancellation, the valuable consideration paid, was made with notice of insolvency, the assignment made "utterly void as against creditors" by the statute cannot be validated, even to this extent. The statute of frauds, making conveyances with intent to defraud creditors utterly void and of no effect as against creditors, contains a proviso saving conveyances for a good consideration and bona fide to a grantee not having notice or knowledge of the fraud. 2 Gen. St. pp. 1604, 1605, §§ 11, 12, 15. Under this proviso, a conveyance with notice is void, although full consideration be paid. *Tantum v. Green* (Err. & App. 1869) 21 N. J. Eq. 364. And if only a partial consideration is paid, the conveyance is also to be declared void in toto. *Mead v. Combs* (Zabriskie, Ch.; 1868) 19 N. J. Eq. 112; *Holt v. Creamer* (Van Fleet, V. Ch.; 1881) 34 N. J. Eq. 181, 187. The express language of the sixty-fourth section of the corporation act controls the case.

The assignment must be declared altogether void, and Mr. Peters must account for the amounts received from the accounts assigned in December. The form of decree will be settled on notice, and I will then hear counsel on the question of including in the account the amounts, if any, received on the accounts assigned in November and held by Mr. Beach after December 3d, and on December 6th at the time of the December assignment.

RUSSELL & ERWIN MFG. CO. v. E. C. FAITOUTE HARDWARE CO.

(Court of Chancery of New Jersey. Dec. 8, 1905.)

Action by the Russell & Erwin Manufacturing Company against the E. C. Faitoute

Hardware Company. On petition of defendant's receiver to set aside an assignment of certain book accounts by defendant to E. Forest Powell. Petition granted.

Frank Benjamin and Mr. Duffield, for receiver. Brown & Beecher, for respondent.

EMERY, V. C. This petition is filed to set aside an assignment of book accounts, amounting to \$995, and to secure an indebtedness of \$1,000 made by the insolvent corporation to the respondent Powell on December 6, 1904, four days before the filing of the bill on which the company was declared insolvent and a receiver appointed. The ground alleged in the petition is that the company at the time of the assignment was insolvent and had suspended its ordinary business, and that possession of its stock in trade at its place of business in Newark had been taken under a chattel mortgage. Notice to the respondent that the company had suspended business and contemplated insolvency is charged. The answer admits the suspension of the ordinary business of the company on December 6, 1904, and the taking of possession by the mortgagee as charged, but denies a voluntary suspension of business, or that it suspended on account of insolvency or in contemplation of insolvency, and sets up that the assignment of that date was to secure an indebtedness of \$1,000, but denies that it was made after the suspension of business, or notice of the insolvency. A present consideration of the assignment is also set up, being the cancellation and surrender of other book accounts assigned to him by the company, taken possession of by respondent previous to that time, and the payment by him to the company of moneys collected for him by the company of accounts previously assigned to him. The cause was tried together with the cause on the petition of the receiver against Peters (62 Atl. 421), to set aside assignments of similar character to him on the same day, and the evidence relating to the validity of those assignments applies equally to the present assignment. This assignment was delivered to the respondent in New York at the same time as the assignments to Peters were delivered, after the company had suspended business and not before. Powell as well as Peters was told at the time of the delivery that the mortgagee had taken possession. Powell also then delivered up his previous assignment of November 19, 1904, and directed Beach, the officer of the company, to employ counsel to protect his interest, and at once proceeded to collect the accounts assigned on December 6th.

The assignment must be declared null and void as against the receiver under the statute, for the reasons given in the Peters Case, and a decree for account will be advised.

**FLANERTY v. NORTH JERSEY ST.
RY. CO.**

(Court of Errors and Appeals of New Jersey.
June 19, 1905.)

**WRIT OF ERROR—DEFECT IN RECORD—DIS-
MISSAL.**

A writ of error will be dismissed when no judgment is returned with it.

Error to Circuit Court, Hudson County.
Action by Michael Flanerty against the
North Jersey Street Railway Company.
Judgment in favor of defendant, and plaintiff
brings error. Dismissed.

Alexander Simpson, for plaintiff in error.
William H. Speer, for defendant in error.

PER CURIAM. The printed case discloses
no judgment returned with the writ of error.
There is, therefore, nothing before the court
to reverse or to affirm, and upon the applica-
tion of counsel for defendant in error the writ
is dismissed.

NORRIS v. BEARDSLEY et al.

(Court of Chancery of New Jersey. Nov. 8,
1905.)

**1. WILLS—SUIT TO CONSTRU—RIGHTS OF AD-
MINISTRATOR.**

An administrator with the will annexed
has no right to institute a suit to construe the
will, where the case is clear and there is no rea-
sonable doubt as to his duty.

[Ed. Note.—For cases in point, see vol. 49,
Cent. Dig. Wills, § 1673.]

2. SAME—AMBIGUOUS DEVISE.

A bill on behalf of an administrator with
the will annexed to construe an ambiguous
devise involving no equitable estate will not
lie, where the executor was not charged with
any duty in respect to the land devised.

[Ed. Note.—For cases in point, see vol. 49,
Cent. Dig. Wills, § 1673.]

3. SAME—AMOUNT INVOLVED.

Where testatrix left only a small amount
of personal property, and it did not appear
that the administrator with the will annexed
had obtained possession or could obtain posses-
sion of any of such property, or that its value
was sufficient to enable the administrator to
invoke the jurisdiction of the court of chancery,
a bill on his behalf to construe an ambiguous
devise would not lie.

4. SAME—CONSTRUCTION—PREMATURE ACTION.

A bill to construe a will for the purpose
of obtaining instructions as to the proper dis-
position of moneys which it was alleged would
come into complainant's hands as the proceeds
of certain property in which testatrix was in-
terested, brought before the land had been sold
or the proceeds had been paid to complainant,
was premature.

Bill by William I. Norris, as administra-
tor with the will annexed of Emeline A. Dore-
mus, deceased, against Benajah M. Beardsley
and others, for construction of the will. Dis-
missed.

George S. Hilton, for complainant. Abram
Klenert, for defendants.

STEVENSON, V. C. The bill is filed by
the administrator with the will annexed of

Mrs. Emeline A. Doremus, deceased, for a
construction of the following clause of Mrs.
Doremus' will: "After the payment of my
just debts and funeral expenses I give, be-
queath, and devise all my property, both
real and personal, wheresoever situate and
whatever the same may be, to my husband
Cornelius Doremus of the city of Paterson,
in the county of Passaic and state of New
Jersey, to him and his heirs, forever." The
will was executed in January, 1899. Mrs.
Doremus died in November, 1904. Her hus-
band died about April 1, 1899. The question
submitted is whether the residuary gift to
the husband lapsed or passed to any persons
who are described in the language of the will
above quoted as "his heirs." The heirs and
next of kin of both Mr. and Mrs. Doremus
are made defendants. The only answer filed
is by Mrs. Doremus' next of kin. The bill
has been taken as confessed against the other
defendants, and it does not appear that any
of the heirs and next of kin of Mr. Doremus
have in any way come forward with a claim
to the residuary estate of Mrs. Doremus.

The answer admits the facts alleged in the
bill, but denies that there is any "occasion
for uncertainty or doubt under the provisions
of the said will" as to the disposition of Mrs.
Doremus' estate, and sets up that, upon the
death of Cornelius Doremus in the lifetime of
the testatrix, the bequest and devise to him
lapsed, and that therefore as to her residu-
ary estate Mrs. Doremus died intestate. The
case of *Zabriskie v. Huyler* (1901) 62 N. J.
Eq. 697, 51 Atl. 197, affirmed, 64 N. J. Eq.
794, 56 Atl. 1133, is cited to sustain these
legal propositions. The answer does not ask
that a decree be made establishing the rights
of the heirs and next of kin of Mrs. Doremus,
but prays that the bill be dismissed. The
issue is thus raised whether a case is pre-
sented of such doubt and uncertainty as to
warrant the complainant as trustee in seeking
the advice and direction of the court. The
general rule is well settled that "when the
duty of a trustee is a matter of doubt, it is
his undoubted right to ask and receive the
aid and direction of a court of equity in the
execution of his trust." *Kearney v. MacComb*
(1863) 16 N. J. Eq. 189; *Atty. Gen. v. Moore's*
Ex'rs (1868) 19 N. J. Eq. 503; 2 Pom. Eq. §
1064; 2 Perry on Trusts, § 476a. But a
trustee has no right to place himself under
the direction of the court where the case is
clear, where there is no reasonable doubt as
to his duty. *Ex'rs of Vanness v. Jacobus*
(1864) 17 N. J. Eq. 153; *Griggs v. Veghte*
(1890) 47 N. J. Eq. 179, 181, 19 Atl. 86; 28
Am. & Eng. Ency. (2d Ed.) 1052; 2 Perry on
Trusts, § 476a, note 1. What degree of doubt
will warrant an application to the court is
evidently beyond definition. Each case must
to a large extent stand on its own circum-
stances. It may be conceded that the rea-
sonableness of the doubt or question is not
necessarily to be tested by the mind of the
court to whom the trustee applies for protect-

ive instructions. The complainant in this case may have a right to protection against future litigations based on views of the law or facts, which to this court may now seem entirely without foundation, or based upon a state of facts altogether different from that which now is presented, or which the complainant had before him when he filed his bill.

I am not, however, obliged to determine whether the application to this court in this case, which is made with technical skill and in undoubted good faith, does or does not present a reasonably doubtful question within the meaning of the above-stated rule. Assuming that such a question is presented, it cannot at present be entertained in relation to any part of the estate of Mrs. Doremus exhibited in the bill or proofs. The residuary estate in question consists of three classes of assets. In the first place, Mrs. Doremus died seised of two houses and lots in the city of Paterson. The bill prays that the residuary clause may be construed as a devise of this land. It is, however, well settled that a court of equity under its jurisdiction to construe wills will not entertain a bill to construe an ambiguous devise of land where no equitable estate or interest is involved; but the matter in dispute is between rival claimants under conflicting legal titles. *Torrey et al., Executors, v. Torrey* (1897) 55 N. J. Eq. 410, 36 Atl. 1084; 2 Pom. Eq. § 1155; 2 *Perry on Trusts*, § 476a. If the rule were otherwise, such a bill could not be entertained on behalf of an executor who is charged with no duty whatever in respect of the land in dispute, but would have to be filed by one of the claimants. In the second place, it appears that according to the bill of complaint Mrs. Doremus "left in her name and possession only a small amount of personal property, an inventory of which has not been filed." It does not appear that the administrator has obtained possession or can obtain possession of any of this personal property, or that the value of it is sufficient to enable the administrator to invoke the jurisdiction of this court. Counsel for the complainant concedes that the bill cannot be sustained in order to have directions given to the complainant in regard to the disposition of this "small amount of personal property." He states in his brief as the proofs indicate, that Mrs. Doremus "did not have any personal property of any account in her possession" at the time of her decease. If the administrator should obtain possession of this personal property of small but unknown value, it does not appear that, after the expenses of administration have been paid, there would be anything left for distribution. In the third place, the bill sets forth that Mrs. Doremus at the time of her death was entitled to a share of the proceeds of certain lands which will be sold under the provisions of the will of one Martha Doremus, deceased, and also a share of the pro-

ceeds of certain other lands held by a trustee charged with the duty of making sale thereof. Counsel for complainant contends that the case is one of equitable conversion, and that these proceeds of the sale of lands have the status of personal property, and are to be administered as such by the complainant. The bill of complaint alleges that these moneys, when sale of the land shall have been effected, "will come" to the complainant's hands, and prays for directions as to the mode of distribution. It is a fatal objection to the granting of this request that the land has not been sold, and the funds are not yet in the complainant's hands, so that he is not at present charged with any duty whatever with reference to their distribution, and may never be charged with any such duty. *Griggs v. Veghte*, 47 N. J. Eq. 180, 19 Atl. 867; *Traphagen v. Levy* (1889) 45 N. J. Eq. 448, 453, 18 Atl. 222; *May v. May* (1896) 167 U. S. 810, 17 Sup. Ct. 824, 42 L. Ed. 179; *Bullard v. Chandler* (1889) 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104; *White v. Mass. Inst. of Tech.* (1898) 171 Mass. 84, 97, 50 N. E. 512; 28 Am. & Ency. (2d Ed.) 1052, and notes.

The slightest reflection will show that any one of several events or series of events may happen which will prevent the complainant from receiving any of the proceeds of the sale of either of these tracts of land, or from receiving proceeds of sufficient amount to warrant an application to this court for directions as to their distribution. Moreover, if it were certain that the complainant in the future will have possession of these moneys the parties entitled to receive them, who therefore should be brought in to litigate all questions concerning them, cannot now be ascertained. The fact that the right to receive the money when collected is vested does not affect the rule that the litigation to settle doubtful questions must be postponed until the defendants, the rival claimants, or possible claimants, have before them in the possession of the trustee the fund itself, and are thus assured that the successful party will actually enjoy the fruits of the litigation. In the case of *Tuttle v. Woolworth* (1901) 62 N. J. Eq. 532, 50 Atl. 445, an executor and trustee filed a bill for directions *inter alia* in regard to the disposition of the proceeds of real estate which he himself held in trust to sell. The question in that case as in this was as to which of certain parties defendant the proceeds were payable under the terms of the trust. Vice Chancellor Emery, in declining to give any instructions, laid down the rule applicable to the situation as follows: "As the surviving executor has not yet sold the house and lot. It would be premature to decide upon the disposition of the proceeds of sale, and the executor is not entitled to the protection of the court upon this disposition, until the proceeds of sale are on hand ready to distribute, and the persons then entitled

to or claiming the funds are in court." This same rule applies with greater force to the present case, because the existence of a fund to divide depends in part, not upon the action of the complainant, but upon the action of strangers to this cause.

Inasmuch as the complainant is under no present duty in respect of which he is entitled to directions from this court, the bill must be dismissed.

JAMES v. ALLER et al.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1905.)

PARENT AND CHILD—GIFTS—REVOCATION.

A voluntary settlement by a father, after a second marriage, on the children of the first marriage, covering substantially all his property, but executed when he was steadily accumulating money, with knowledge of the effect of the instruments, was not subject to revocation in equity at his instance as improvident.

Fort and Vroom, JJ., dissenting.

Appeal from Court of Chancery.

Bill by Llewellyn James against T. Owen Aller and others to set aside a gift. From a decree in favor of complainant (57 Atl. 476), defendants appeal. Reversed.

See 57 Atl. 1091.

George H. Large and Paul A. Queen, for appellants. B. W. Ellicott, for respondent.

GUMMERE, C. J. The nature of the controversy between the parties and the facts submitted at the hearing are very fully set out in the opinion of the learned Vice Chancellor before whom the case was tried. It is unnecessary to state them in full. Briefly, the following case is presented: In the spring of the year 1880 Llewellyn James, the complainant, conveyed to his children, defendants herein, his homestead property in the village of High Bridge, reserving to himself the right to occupy it so long as he should desire to do so. At the same time he assigned to them two mortgages aggregating \$4,200. In the autumn of the year 1881 he gave to his daughter Lydia Aller certain notes and other securities amounting to \$4,000. In making these several gifts, he reserved to himself no power to revoke them. In June, 1902, he filed his bill in this cause, seeking to annul these several transactions. In it he rested his right to relief as to the conveyance of his homestead and the assignments of the mortgages upon the ground that he was induced to sign these papers by Mrs. Aller and her husband through false representations made by them to him as to the character thereof, and without any knowledge of their real nature. His contention as to the notes and other securities given to Mrs. Aller in the autumn of 1881 is that they were delivered to her to hold in trust for him. The defense set up was that the conveyance of the homestead and the assignment of the mortgages were made by the complainant to his children as a

gift at the time of his second marriage, for the purpose of making provision for their support, and that the notes and other securities given by him to Mrs. Aller in 1881 were not intended by him to be held by her for his benefit, but that his purpose, expressed at the time, was that they were delivered to her as an absolute gift for herself and her sisters.

A mass of testimony was taken in the case, from a consideration of which the learned Vice Chancellor reached the conclusion that, in making the conveyance of the homestead and the assignments of the mortgages, the complainant thoroughly understood the nature of the papers which he was signing: that his purpose in executing these several papers was to make a gift to his children of the property which they transferred; that no influence whatever was exerted upon him by his children to induce him to make this gift; and that he made the transfers voluntarily and deliberately, after consultation with his counsel. He held that a gift made by a father to his children, under these conditions, when not unreasonable in amount (and this, he considered, was not), was irrevocable by the donor, and that the complainant was not entitled to relief upon this part of the case. As to the transaction of the autumn of 1881, the Vice Chancellor concluded from the proofs that the notes and other securities were given by the complainant to his daughter Mrs. Aller for the benefit of herself and her sisters; that the gift was made freely by the father to carry out his wishes expressed at the time, and without the exercise of any influence on the part of the daughter; and that no power to revoke the gift was reserved by him. The Vice Chancellor considered, however, that the gift was improvident, because, by making it, the complainant divested himself of all the property then owned by him, and held that, for this reason, it was inequitable for the defendants to retain this gift after a demand for its return made upon them by the complainant, and decreed that they should pay back to him the amount thereof, less certain moneys which had been advanced by them to him prior to the time of the filing of the bill. From that portion of the decree which annuls the gift of 1881, the defendants have appealed.

Mr. James at the time of making the gift which was set aside, was, as is stated in the opinion of the Vice Chancellor, in the prime of life, and was steadily earning from \$100 to \$300 a month, and sometimes as much as \$500. It may well be doubted whether a man in such a situation necessarily acts improvidently in giving to his children the property which he has then accumulated. But, assuming this to be so, it does not, in our view, afford any ground for declaring such a transaction voidable at his option. The law permits any one to dispose of his property gratuitously, if he pleases, provided the rights of creditors are not injuriously affected thereby. He may, if he sees fit,

reserve to himself the right to revoke his gift, or, if he desires, he may make the gift absolute and irrevocable, and his power in this regard does not depend upon the providence or improvidence of his act. It has, indeed, frequently been declared that where a relation of trust and confidence exists between the donor and the donee, and the donee occupies the dominant position, the fact that the gift is improvident is of great importance in determining whether it was the voluntary, well-understood act of the donor, and that the failure of the donor to reserve to himself a power of revocation will vitiate the transaction. The two cases referred to by the Vice Chancellor in support of his conclusion that the gift should be set aside are of this character. In *Garnsey v. Mundy*, 24 N. J. Eq. 243, the donor was a young woman who had just reached her majority. The gift was to her mother, in trust for the donor's child. It was made at the solicitation of the mother, without any independent advice to the daughter, and without the reservation to her of any power of revocation. The proofs made it clear that the donor did not understand the provisions of the deed which she executed, nor their effect, that she did not suppose the conveyance would place the property beyond her reach and control, and that the donee supposed that the gift was, and intended that it should be, revocable. In *Powell v. Powell*, L. R. 1 Ch. Div. (1900), the donor was a young woman who had attained the age of 21 years shortly before making the deed which was set aside. The donee was her stepmother. The gift was held to be the result of strong pressure brought to bear upon the donor by the donee. The underlying distinction between cases like those just referred to and the present one, as it seems to us, is the relationship existing between the parties. Where no relation of trust and confidence exists between the donor and the donee, or where, when such relation does exist, the donor, and not the donee, occupies the dominant position, the rule laid down in those cases has no application, and a gift absolute in its terms, made voluntarily and with a full understanding of its effect, cannot be revoked by the donor, either by his own act alone, or with the aid of a judicial tribunal. Such is the case now before us. The respondent, in the prime of life, as has already been stated, in the full possession of his faculties, as the case shows, and without the exercise of any influence over him by his children, made this gift to them. At that time no conditions existed to justify the conclusion that the original relation existing between parent and child (i. e., a relation where the parent occupies the dominant position) had been reversed, and that the children then occupied that position. His purpose at the time of making the gift was to make them the absolute owners of the property donated. It was his to dispose of as he saw fit. The

gift was intended by him to be, and was, irrevocable. That being so, he has no legal right to now require the return of the property with which he then parted.

The portion of the decree appealed from should be reversed, and a decree entered in conformity with the view herein expressed.

FORT, J. (dissenting.) I am unable to agree with the view taken by the majority of the Court in this case. I agree with the opinion of Vice Chancellor Emery in its entirety, and vote to affirm for the reasons given by him in the Court of Chancery.

VROOM, J., concurs in this dissent.

ATLANTIC CITY v. BROWN.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1905.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—REGULATION OF OMNIBUSES — EXCESSIVE FINE.

A fine of \$20, imposed by an ordinance for the refusal of an omnibus driver to convey any passenger, was not excessive.

2. SAME—REGULATION OF FARES — REASONABLENESS.

An ordinance permitting an omnibus driver to charge only 10 cents for carrying a passenger, irrespective of the distance, is not unreasonable.

3. SAME—VALIDITY OF ORDINANCE.

An ordinance requiring the driver of an omnibus under all circumstances to accept a person tendering himself as a passenger is not wholly void, but only so far as it imposes the penalty prescribed therein against those whose refusal to accept a person who offers himself as a passenger is justified by the circumstances under which the refusal occurs.

4. SAME—OBLIGATION TO CARRY PASSENGERS.

The fact that an ordinance requires an omnibus driver to carry any person tendering himself as a passenger, whether the driver desires to carry him or not, does not render it invalid.

Error to Supreme Court.

Joseph Brown was convicted of violating an ordinance in relation to omnibus drivers, and he brings error. Affirmed.

Clarence L. Cole, for plaintiff in error.
Henry Wootton, for defendant in error.

GUMMERE, C. J. This writ of error brings up a judgment of the Supreme Court affirming the conviction before the recorder of the city of Atlantic City of the plaintiff in error, a licensed omnibus driver, for violating the provision of section 2 of an ordinance of Atlantic City which provided that it should be unlawful for the driver of any omnibus to refuse to convey any passenger from any one point to any other point in Atlantic City, and that no delay or wait for additional passengers should be made exceeding five minutes. The violation of which the plaintiff in error was convicted was his refusal to carry one Frank Scott as a passenger from one point in the city to another. The principal

assignments of error are: (1) That the city council was not, at the time of passing the ordinance in question, invested with the power to pass the same; and (2) that Scott was not a passenger within the meaning of the ordinance, because when he applied to the plaintiff in error for transportation his application was refused. Both of the matters raised by these assignments are discussed in the opinion delivered by the Supreme Court (*Atlantic City v. Brown*, 58 Atl. 110), and, for the reasons stated therein, we consider these assignments without merit.

Two other reasons are assigned for the reversal of the judgments which were not discussed in the opinion of the Supreme Court. The first is that the ordinance under which the conviction was had is unreasonable, and therefore void: (a) Because the penalty which it imposes for a violation of its provisions, viz., a fine of \$20, is grossly excessive; (b) because it permits the driver of an omnibus to charge only 10 cents for the carriage of a passenger, even though he traverses the whole length or breadth of the city in transporting him; (c) because it requires the driver, under all circumstances and conditions, to accept a person who tenders himself as a passenger, under penalty of a fine for refusal; and (d) because it requires the driver to carry a person tendering himself as a passenger, whether the driver does or does not want to carry such persons. In disposing of the first point raised by this assignment, it is enough to say that the imposition of a fine of \$20 for a violation of this provision of the ordinance does not seem to us to be excessive. In order to insure its observance the fine is required to be sufficiently large in amount to make it a matter of some moment to him who violates the provision.

We think the second point specified under this assignment is also unsound. The fact that the rate of fare fixed by the ordinance prevails without regard to the distance traveled, the driver being permitted to charge 10 cents for carrying his passenger a single block, as well as across the whole city, makes the ordinance reasonable in this regard. Ordinances regulating the rate of fare to be charged by street railway companies for the transportation of passengers are usually passed by cities in which such companies operate, and almost without exception the price permitted to be charged the passenger is the same, whether the passenger rides a short distance, or from one end of the road to the other, within the city limits. The reasonableness of such an ordinance seems to be so universally conceded that we find no reported case where it has been challenged, much less where it has been declared unreasonable. The burden of carrying a passenger a long distance for an inadequate compensation is compensated for by permitting a large compensation to be exacted for carriage over short distances. Assuming it to be true, as is suggested by the third point in this as-

signment, that the ordinance requires the driver, under all circumstances and conditions, to accept a person who tenders himself as a passenger, the provision is not on that account void in toto, but only so far as it imposes the penalty prescribed therein against those whose refusal to accept a person who offers himself as a passenger is justified by the circumstances and conditions under which the refusal occurs. *Penn. R. R. Co. v. Jersey City*, 47 N. J. Law, 286; *Gaslight Co. v. Railway*, 58 N. J. Law, 510, 34 Atl. 8. As the case discloses no circumstance or condition which justified the refusal of the plaintiff in error to accept Scott as his passenger, his conviction cannot be set aside upon this ground. Nor does the fact that the ordinance requires the driver to carry a person tendering himself as a passenger, whether the driver does or does not want to carry such passenger, render it invalid. The duty is imposed by the city upon its licensees, for the protection and convenience of intending passengers. Omnibus drivers who do not desire to be bound by the provision are under no obligation to accept a license from the city; if they choose to accept the license, they are bound to observe such reasonable regulations relating to the subject-matter of the license as the city sees fit to impose. That this regulation is a reasonable one seems to us to be beyond dispute.

The only other assignment of error requires no discussion. It is that the conviction does not show such a finding of facts as is required by law. The assignment plainly is based upon a misapprehension. An examination of the record shows that all of the facts necessary to sustain the conviction were either proved or admitted at the trial before the recorder, and are set out in the conviction itself.

The judgment under review should be affirmed.

WOOD v. WOOD.

(Court of Chancery of New Jersey. Nov. 24, 1905.)

1. WITNESSES—COMPETENCY.

In a suit for divorce, petitioner is a competent witness in her own behalf.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 168-172.]

2. DIVORCE—DESERTION—EVIDENCE.

In a suit for divorce on the ground of desertion, petitioner's uncorroborated testimony is insufficient to justify a decree in her favor.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 405.]

3. SAME—SUFFICIENCY.

In a suit for divorce, evidence held insufficient to establish a desertion by defendant husband.

Petition for divorce by Ethel J. Wood against Frank H. Wood. Petition dismissed.

Robert R. Howard, for petitioner.

MAGIE, Ch. The solicitor of the petitioner has been heard on the question whether the report of the master in favor of a divorce is supported by sufficient evidence. The proofs show that petitioner and defendant were married in New York, and after a brief stay with petitioner's parents at South Orange, N. J., took up their residence in New York, which continued until June 1, 1902, when both came to the residence of petitioner's parents, and there lived together as husband and wife until July 23, 1902, when defendant left and went to Wyoming. He has never returned to her, nor has he contributed to the support of petitioner or the child of the marriage. The petition was filed November 23, 1904. The master has found that defendant's leaving the petitioner on July 23, 1902, was a willful desertion. To use the master's language, he says: "It seems to me that he, at the time of his leaving her, had it in his mind to then leave her 'for good.'" Is there evidence, such as the law requires, upon which the master's report can be supported?

Petitioner was a competent witness in her own behalf, but her evidence will not justify a decree unless corroborated by the testimony of other witnesses, or proof of other circumstances. The petitioner declares that, when the defendant left her, it was with the avowed purpose of going to Wyoming to engage in business, and that he promised to send her money so that she and their child could go there and live with him. That he avowed such a purpose and made such a promise appears from the evidence of petitioner's brother, who further states that, when petitioner expressed a desire to go with her husband to Wyoming, he said he thought it better for her to wait until he got out there and was established. Is it to be inferred that defendant's avowal of his purpose was deceptive, and that he then entertained a purpose to desert petitioner? Both the mother and the brother of petitioner testified that they, at the time defendant left, believed that his purpose was to desert his wife, but I am unable to find any evidence of facts justifying such belief.

It is urged that the failure of defendant to send for his wife and child, or to furnish support for them, may be considered in determining his intent when he left. If there was proof that defendant had established himself in Wyoming or was able to maintain his wife and child there or here, it would be significant. In the absence of such proof, his failure may as well be attributed to necessity. Petitioner testifies that after defendant left her she wrote to him quite regularly, until the spring of 1903, and that her husband responded to her, though infrequently, one letter having been written in February, 1903. In June, 1903, she testifies she wrote a letter threatening to obtain a divorce from him, and that he replied that she could go on with the suit, which he would not defend. None of these letters were pro-

duced, no copies of those written by her were kept, and no witness testifies to their contents except petitioner. Defendant's letters have been destroyed, and petitioner's testimony alone is depended on as to their contents. Obviously, this furnishes no competent proof of defendant's intent.

On the whole case, I think the master's report is not supported by the proof, and that the petition must be dismissed.

WHITE v. WHITE.

(Court of Chancery of New Jersey. June, 1905.)

CONTEMPT—PROCEEDINGS—EVIDENCE.

In contempt proceedings for attempting to bribe a witness, evidence considered, and held sufficient to show guilt.

Bill by George W. White against Anna M. White. George W. White and others were ordered to show cause why they should not be adjudged guilty of contempt of court for attempting to improperly influence the proper administration of justice, and on hearing were adjudged guilty.

Charles D. Thompson, for the State. Robert S. Hudspeth, for complainant and others.

PITNEY, V. C. In the progress of the taking of proofs in this cause evidence was given tending to show that Dr. White, the complainant, had attempted to bribe a witness for the defendant, either to abstain entirely from going on the witness stand or to suppress the truth if called and sworn. The court, on its own motion, instituted an investigation into the facts of the case, and numerous witnesses were sworn. Dr. White was represented by counsel, and has been heard, both in the production of witnesses and by argument of counsel; and I have now to state the effect of the evidence on my mind.

In order to a proper understanding of the bearing of the evidence, the character and situation of the cause at the time mentioned is important. The complainant, Dr. White, is a practicing physician, having his home and residence in West Hoboken, in Hudson county. His wife, during the whole progress of the suit, was living with her mother, a widow, in the city of Paterson. The doctor, by his bill, charged his wife with adultery with one Edward Zink, a lad now just past 20 years of age. The wife, by her answer, denied the adultery, and countercharged adultery on the part of her husband, committed with divers women, among others a Mrs. Julia Eaton, a young married woman living in West Hoboken with her husband. The production of the evidence had occupied several sessions of the court at intervals of considerable time, and much evidence was given on both sides, and of a character, if reliable, to show that both parties were guilty. The complainant, of course, made his case first, and had rested. The wife proceeded to make

her proofs, and had not yet rested her case, when the counsel who at first represented her retired, and his place was taken by Col. Z. M. Ward, of Paterson. Col. Ward had attended one session previous to the 13th of January, 1902, and Zink, the co-respondent, had been examined on behalf of the defendant, and was on the stand, as I now recollect, for cross-examination, when the case was put over to Monday, the 13th of January, which was a motion day. This was done at the earnest request of the counsel for the complainant, and because none of the days usually devoted to the trial of causes were open for several weeks then to come. The result of setting a cause for trial on motion day is that it must await the disposition of all the motions for that day.

There was usually in attendance on the hearing of this cause a large number of witnesses and followers of both parties, and these witnesses and followers naturally divided into parties, known as the "doctor's party" and his "wife's party." That of the doctor's, so far as the court could observe, was the more numerous. On Monday morning, the 13th of January, the courtroom was filled with witnesses and parties. The cause was not reached until about half past 2 in the afternoon, when Mr. Zink took the stand, and his examination was finished probably about half past 3 o'clock. Then Col. Ward put upon the stand a witness named David Ross, a young man apparently under 30 years of age, who said that his occupation was that of an architect's draftsman, but that he was also a bricklayer. He was respectable in appearance, but manifested symptoms of having been recently intoxicated, but at the moment of taking the stand was almost, if not quite, sober. He swore that he was subpoenaed as a witness (and upon a production of the subpoena it appeared that he was subpoenaed by the defendant); that he was acquainted with Dr. White, and that he was also slightly acquainted with a young man named Gilkyson, whom he had met in the corridor which belonged especially to the suite of courtrooms; and that Gilkyson seemed to be attending the court. Further, that Dr. White approached him (Ross) and asked him if he knew Gilkyson, and asked him to induce Gilkyson to go away and not continue his presence in the court or its vicinity, or, if he went on the stand as a witness, to know nothing; that for that purpose Dr. White gave him \$10, out of which he was to pay Gilkyson for staying away, or, if he was forced to go upon the stand, that he should suppress any knowledge he had of facts which might be desired to be drawn from him. Further, that he (Ross) went out with Gilkyson and approached him on the subject; that they had drinks together at the expense of Dr. White; that later on he induced Gilkyson to promise that he would either go away, or, if sworn, would know nothing, and that he gave him \$5 for that

purpose; that in the meantime, one Henry Spitz, who proved to be a detective in the employ of Dr. White, and attending court in his service, had invited himself and Gilkyson to dine with him, and, without going into further detail, that Gilkyson informed him that he had received \$10 or some such sum from Spitz to leave the court, and that he finally did leave; that he (Ross) had given Gilkyson \$5, and promised him \$5 more on behalf of the doctor, if he (Gilkyson) should go upon the stand and know nothing; and that he (Ross) by agreement with Dr. White, was to have \$10 for his services; and that after having paid Gilkyson \$5 the doctor gave him \$5 more in a private room in the restaurant. He said that the first \$10 he received was paid to him by Dr. White in the courtroom corridor, and, when asked, he produced two \$5 bills which he said were given to him by Dr. White, which were immediately taken from him by the court. In the course of the examination Col. Ward stated that he himself had seen the money paid by Dr. White to Ross. Ross was cross-examined by counsel for Dr. White, and Spitz stood up and was identified by Ross while on the stand. When Ross' cross-examination was finished, time for adjournment had arrived. The continuation of the trial of the issue of the main cause was set over to Thursday, the 30th of January, but the court declared that the matter of the alleged bribery would be taken up by the court one week from that day, January 20th, and oral directions were given that all the persons named should be there present on that day. Mr. Ward, in leaving the courtroom, stated that he could not be present, would be out of the state, and the court stated in substance that it did not require any immediate assistance from Col. Ward, but proposed to conduct the examination on its own behalf. Col. Ward also stated openly that a man by the name of Van Buren had seen the money paid. In the interval before the next Monday the court requested Mr. Charles D. Thompson, of the Hudson county bar, to act as counsel on behalf of the state in the investigation of this matter, which he kindly consented to do, and was furnished with a copy of Ross' testimony. It appeared that Gilkyson had left the courtroom and corridor shortly after 2 o'clock on the 13th, and returned to his place of employment, which was as a salesman and deliveryman in a vegetable market or green grocery in West Hoboken, kept by a firm of Heiney Bros.

Before coming to the evidence produced the next Monday, the 20th, I will mention what then appeared had occurred during the week. Shortly after the rising of the court Mrs. Julia Eaton, sometimes called Julia Madden, who was present in court, and who was the co-respondent named by Mrs. White, with her sister, Miss Madden, and the fiancé of her sister, a Mr. Gerhart, at the special request of Doctor White entered a closed

carriage and drove to Helney Bros. establishment, and called Gilkyson out and interviewed him. The details of that interview will be stated later. In the evening Gerhart visited Mrs. Eaton's house in West Hoboken to see his fiancé, Miss Madden, who lived with her, and from there went to the house of Gilkyson, who was a newly married man living in a suite of rooms a few blocks away from his place of business. While Gerhart was talking with Gilkyson, the hour being late, Mr. Spitz, the detective, in company with a Mr. Kriger, who has a detective bureau and of whose staff Spitz is a member, also visited Gilkyson and talked with him. What occurred there is a matter of dispute, and will be referred to later on. But the result was that the four—Kriger, Spitz, Gerhart, and Gilkyson—at that late hour went to a justice of the peace, and Gilkyson made an affidavit that he had been offered money, but refused to accept it. The affidavit was sworn to and was taken away by Mr. Kriger. The next Thursday Gilkyson was induced to go with Spitz and Kriger (I think) and Dr. White to the office of Judge Hudspeth, Dr. White's counsel, and there was questioned by Judge Hudspeth, and declared that he had received no money. Again, on Saturday night Dr. White and Mr. Kriger called together at Gilkyson's house, and found only his wife, Gilkyson being absent, and left word with her that her husband should come to Dr. White's office the next morning (Sunday); and Gilkyson, in pursuance of the message, did go to Dr. White's office the next Sunday morning, and saw Dr. White, and there met Kriger and another man named ——. What occurred at Dr. White's office is also a matter of dispute, which will be referred to later on. But I stop to say that Dr. White's account of why he called on Gilkyson, and why Gilkyson came to his office on Sunday morning, was decidedly unsatisfactory. At first he seemed to be uncertain whether any such visit had taken place.

On Monday, the 20th of January, all the parties attended, with a full following of witnesses and friends; also Mr. Thompson, on behalf of the state, and Judge Hudspeth, on behalf of Dr. White. Gilkyson was the first person sworn. He is a young man, 22 years old, and appears, by the evidence of his employer, to have been eight years steadily employed by Helney Bros., and to be a trusted employé. He also appeared to be a man of limited education. He gave his evidence at first on direct with considerable reluctance, and was by no means what is called a willing witness, but the effect of a severe cross-examination was to make him more inclined to speak out. He stated that, knowing that the White Case was coming on for trial, he obtained leave of absence for half a day from his employers, and attended the court out of curiosity; that between 10

and 11 o'clock in the morning Mrs. White accosted him and asked him what he knew; that he told her, in substance, that he had met Dr. White at Mrs. Eaton's, and that Mrs. Eaton had introduced him to Dr. White as her brother; that during the forenoon, while in the corridor of the courtrooms, he was approached by Ross, who commenced to talk about the case, and asked him down to have a drink; that they went out to a near-by drinking saloon, and had two drinks together; that Ross gave him \$5; that he did not know for what it was given, but he finally stated that Ross had promised him another \$5 after he got off the witness stand, but he did not know for what it was given. He further stated that Mr. Spitz had given him \$5, but he did not know for what it was given; that altogether he had received \$10; that both of the sums were given avowedly on behalf of Dr. White. He testified that he had told Spitz that he had met Dr. White at Mrs. Eaton's; that after they had two or three drinks they went back to the court rooms, and that Spitz invited him and Ross out to dinner; that was about noon and while the court was still in session; that after dinner, and after the court had reassembled after recess, Spitz had given him \$5 more in a saloon, making \$10, which he had received in all; and that shortly after receiving the \$5 from Spitz he went back to his business. He further said that, when he went out with Ross to drink, he was followed by Zink, who seemed to be watching him and Ross. He further testified that he did not take the money when it was first offered to him, but afterwards did take it. The offer of money in the corridor by Ross to Gilkyson is proven by Gerhart. He further testified that in going down in the elevator with Ross and Zink, after, as the proofs show, Ross had become somewhat intoxicated, Mr. Ward was also in the elevator, and that Ross talked to him and spoke to him about having given him the \$5, and that he was hushed by Spitz, who was also in the party; and that Julia Eaton had said to him in the corridor, "There is five more coming to you, if you shut your mouth," and that, if he would come to her house at night, she would give it to him. He further stated, on cross-examination, that Dr. White spoke to him and recognized him before he had the conversation with Mrs. White early in the morning, and that in the afternoon, a little after 2 o'clock, the doctor asked him if he had got \$5 from Ross, that he understood that he had, and then the doctor told him that he had better go home, and said that Spitz would give him another \$5 to go home, and then, when he told him to go home, he added, "I will send Spitz down with \$5," and then Spitz came out in the hall and said, "Hurry up down;" and that he went down with him; and that Spitz gave him the \$5. He further testified on this occasion to the

visit to him on Monday night made by Gerhart, Spitz, and Kriger, and his going to the justice of the peace and swearing to an affidavit; also that in the afternoon of the same Monday Julia Eaton had come to him where he was working and said, if he did not look out—if he said that he took the money, he would get five years in the State Prison, and Gerhart, on the same occasion, told the same thing; and that in the evening, when Gerhart and Spitz came to see him, they told him, that, if he admitted that he got the \$5, he would go to the State Prison for five years. And it was plain from his evidence that the threats made by Mrs. Eaton and by Spitz and Gerhart influenced him in signing the affidavit, and also in making the statement at Judge Hudspeth's office. He further, being recalled, testifies that on Sunday morning, January 19th, the day before the investigation was to come on, he went, in pursuance of Dr. White's request, to his office and saw him; that Dr. White took him into a private room and gave him a cigar, and commenced to talk with him, and said, "We will put Dave Ross in jail. We will put him in jail, and you stick to me and I will give you \$75."

The next witness sworn was Mr. Van Buren, who was mentioned by Col. Ward when he left the courtroom on the afternoon of Monday, the 18th of January. He testified that he was a subpoena server and had been a bartender, and that he had been employed, first, by Mr. Gilman, the former counsel, and afterward by Mr. Ward to serve subpoenas. He denied that he was a detective or had done any detective work. His business was that of a bartender. He had a decidedly sober and respectable appearance, and not a single suggestion was made at any time against his character. (It is proper here to say that the courtroom door leading to the corridor is not visible from the bench and from that part of the courtroom occupied by the bar, from which it is hidden by a high screen which makes a sort of inner hall or corridor in the courtroom.) Van Buren swears that he was standing in the corridor in the afternoon while Zink was on the stand, and that he saw Gilkyson and Dr. White talking together in the corridor, and Dr. White left Gilkyson and came to the courtroom door and beckoned to Spitz, who answered his call, and they met in the corridor; that the doctor took money out of his pocket, gave it to Spitz—how much he could not see—and the doctor came in the courtroom, and Spitz went right up close to Gilkyson and, as he thought, handed him some money—he could not tell how much—and told him to get out; and they went out together, and went down the elevator. Spitz swears to this occurrence, but denies the acceptance.

In corroboration of this witness a Mrs. Welcher, who lived in Paterson, and had been sworn previously as a witness for Mrs. White,

and was one of her suite, was called. She swears that she was present on the 18th of January; that, while Zink was on the stand, she was sitting in the window recess behind the screen and she saw Dr. White go past her into the corridor, and in a few minutes he came back to the screen; saw him motioning to somebody, and Spitz passed out from the second seat in the courtroom and followed him; that in a few minutes Dr. White returned; and that the witness waited until he passed into the courtroom, and then she stepped into the corridor and saw Spitz talking to Gilkyson. And, further, by a witness named Schmale, who swore that he was in the courtroom during the morning and afternoon of the 18th of January. He left the courtroom while Zink was on the stand, went out through the corridor to the toilet in the main corridor, and on his way coming back to the courtroom he saw Dr. White, who was standing in the corridor, put his right hand in his pocket and pull out a roll of bills and give some of the money to Spitz; that Gilkyson was then in the corridor by the folding doors, and Spitz motioned to him to wait, and then Spitz went towards Gilkyson, and Gilkyson went out, and he (the witness) came into the courtroom and reported to Mr. Ward and Mr. Van Buren what he had seen; that he did not see Spitz give Gilkyson money, but he saw them go out together. Spitz swears that on that occasion he was called out of the courtroom to the corridor by Dr. White, but denies that White gave him any money. He says that White called him out to inquire who a certain woman sitting in the courtroom was. This transaction is denied by Dr. White, and his counsel and the clerk of the latter both testify that all the while Zink was on the stand Dr. White was sitting beside them. But it was quite possible that he might have left the table for a few minutes without attracting their attention, or that the witnesses were mistaken as to the occurrence taking place after Zink took the stand. It might well have occurred in the afternoon before Zink took the stand. The witnesses of the state are corroborated by Spitz.

Next after Gilkyson and Van Buren were sworn, on the 20th Ross was again put on the stand. He was perfectly sober, and proved to be a prompt and reasonably intelligent witness. He reiterated his previous statement much more in detail. His manner on the stand was decidedly in his favor. The only difference being that while he was understood on the 18th of January to swear that Dr. White gave him the money for the double purpose of getting Gilkyson not to go on the stand, or, if he went on the stand, to know nothing, the effect of his testimony was that the money was given to him to induce Gilkyson, if he went on the stand, to suppress what he knew. The witness was severely cross-examined, and, in my judgment, except in the matter just stated, came out from his cross-

examination unhurt. It clearly appeared from his evidence that the doctor and his followers, especially Spitz, maneuvered to give him an opportunity to operate upon Gilkyson; that he and Gilkyson were induced to drink; that Spitz invited Ross and Gilkyson to take luncheon with him, and that he was given an opportunity by Spitz to talk with Gilkyson over the luncheon table; and it also appears clearly enough that, in this operation of treating Ross, the latter drank too much, so that he was incautious and practiced his persuasions with Gilkyson rather openly in descending the elevator in the presence of Mr. Ward and Zink, he (Ross) not knowing who the latter gentlemen were. After, owing to his lack of caution, he had been detected by Mr. Ward, Ward approached Ross and charged him with having been engaged in improper practices, and told him that, if he would go on the stand and tell the truth, he would not prosecute him. Ross was somewhat sobered by this time, having lost some of the contents of his stomach by natural causes, and consented to go on the stand, and did so the same afternoon. A fierce attack was made upon the character of Ross. Witnesses were produced, first, to attack his general character for truth and veracity. It appears that he lived with his parents in West Hoboken or Jersey City Heights, or somewhere in that neighborhood, and that he and his father have been more or less engaged in local politics and had stirred up enmity, and that his father had had quarrels with one or two of his neighbors, with the result that some of these neighbors were willing to come forward and swear that his reputation for truth and veracity was not good; but on cross-examination it appeared that each had had quarrels with his father. In addition to this evidence certain deputy sheriffs, of respectable appearance, were sworn, and testified that he was known as what is called a "booster," who attended fairs and public places where gambling devices were permitted, and that he was in collusion with the proprietors of these establishments, and openly gambled with them, and was permitted by them to win money and thereby induce innocent bystanders to suppose that they could accomplish the like result by taking their chances in turn. This evidence was permitted by the court, with protest as to its admissibility. But, on the other hand, it appeared that the man was an ordinary industrious working man, and was entitled to such credit as was due to that circumstance. There is not the least circumstance in the case from which it may be inferred that he had the least interest to be served by coming forward and telling a positive falsehood of the character which has been mentioned, except that of saving himself from criminal prosecution. The worst that can be urged against his character is his open confession on the stand that he took Dr. White's money to be used for the purpose of perverting evidence to be given in

a court of justice; and, as before remarked, in testifying as he did he was testifying directly against his own interests. And it must be observed right here that there is not the least reason to believe that he was subjected to any influence on the part of Mrs. White after he was sworn on the 18th of January and before he was sworn the second time. Mrs. White, I may say here once for all, is somewhat helpless, apparently with little or no money, and with no male following to assist her, except the lad, Zink. And it must be remarked here that the marshaling of the evidence on the part of what may be termed the prosecution was done entirely by Mr. Thompson and his clerk, and that Mr. Ward had nothing whatever to do with it—was not, so far as appears, in Hudson county from the 18th of January until he himself was sworn as a witness, among the very last, on the 3d of February. Ross was interviewed by Spitz between the 13th and 20th, and all that Spitz got from him was that Dr. White had got him in the scrape and ought to get him a lawyer and get him out.

The next witness called was Mr. Zink, who swears that early in the forenoon of the 18th of January he saw Gilkyson sitting in the corridor, and inquired of him whether he was a witness, and he said he was not, and later on in the conversation asked him what he was doing there, and he said he knew a thing or two, but would not tell, but that finally he said that it would help Mrs. White a great deal; that he learned from Gilkyson later that he had received money, and that he communicated that fact to Mr. Ward, and before that, at Mr. Ward's request, he followed and watched Ross and Gilkyson, and presumably reported what he saw to Mr. Ward or Mrs. White.

Dr. White commenced with the presentation of his case on the 20th of January. He himself denied directly all the charges made; denied that he had ever had any conversation with Ross or gave him any money. He admitted that he gave Spitz \$2 before luncheon, to be used in getting dinner for himself and two others. He denied that he had ever seen Gilkyson before; that he had ever met him at Mrs. Eaton's. He admitted meeting Gilkyson at his counsel's office on the Thursday; admitted going to his house on Saturday evening with Mr. Kriger; and admitted that Gilkyson had come to his office on Sunday morning, the 19th, but denied that he had offered him or promised him any money whatever.

Kriger swore that he heard on the afternoon of the 13th of January that it had been stated in court that his employé, Spitz, had paid a man \$5 to affect his evidence or to get him away, and that he was very much worried about it; was unwilling to have it supposed that a man in his employ would do such a thing; that he cared nothing about Dr. White, and took no interest in the affair,

so far as he was concerned; and, looking out entirely for his own interest, he went with Spitz, late at night, to Gilkyson's house and found Gerhart there; he denied all expectation of meeting Gerhart there; that he asked Gilkyson if it was true that any money had been paid him by Spitz, and that Gilkyson denied it; that no threats of any kind were made to Gilkyson at all; that Gilkyson voluntarily went with him before Squire Maes, and voluntarily made the affidavit. He produced the affidavit, and upon its reading it appeared that the affidavit did not mention Spitz's name at all. It speaks entirely of a charge of receiving money from Ross, but at the end of it is a little clause in which he denies that he received any money from anybody. Mr. Kriger was not able to explain to the satisfaction of the court how it came that, if he was there entirely looking after the character of his own employé, Mr. Ross' name was specifically mentioned in the affidavit, and not that of Spitz. Further, Mr. Kriger swore that he came to the chancery chambers on Monday morning, the 20th of January, and was there interviewed by Mr. Thompson before the investigation was taken up, and that Mr. Thompson asked him about this affidavit which Gilkyson had made, and asked him if he had it; that he told Mr. Thompson that he had lost it, and that he had looked for it two hours and could not find it. He admitted that this was a positive lie, for he had the affidavit in his pocket. Asked why he did not tell Mr. Thompson the truth, he said that he did not know who Mr. Thompson was, and intimated that it was none of Mr. Thompson's business. This explanation of Mr. Kriger is entirely unsatisfactory to the court. In the first place the court does not believe that Mr. Kriger did not know who Mr. Thompson was, and, while Mr. Thompson was not sworn, the court can almost presume that a gentleman of Mr. Thompson's standing at the bar would have informed Mr. Kriger that he was acting on behalf of the court in getting information. And on the best standpoint for Mr. Kriger all Kriger had to do was to say that he had the affidavit and decline to produce it. I am of the opinion that that is the stand that a truthful man would have and should have taken, if he did not desire Mr. Thompson to see the affidavit; and the only motive he could have in making the statement that he did was to try and induce Mr. Thompson to believe that the affidavit was not in existence, in order thereby to lead Gilkyson to deny some of the contents, and then produce the affidavit to contradict him. That motive I conceive to be an entirely unworthy one, and not consistent with uprightness of character. Besides, it is entirely manifest throughout the examination of this witness, who was twice on the stand, that he gave a gloss, favorable to Dr. White and unfavorable to the witnesses Ross, Gilkyson, and others who

were produced against him, to all the facts that he was obliged to admit. So far, therefore, as Kriger's testimony contradicts anything that Gilkyson has testified to, I can give it little weight.

Spitz, being sworn, testified: That early in the forenoon he met Gilkyson in a saloon, and asked him what he was there for and what he knew, and that Gilkyson told him that he had met Dr. White at Mrs. Eaton's, and had been introduced to him by Mrs. Eaton as her brother, and that he had drunk whisky with Dr. White at Mrs. Eaton's. That when he went in the saloon he found Dr. White and his party there, and Ross and Gilkyson, all drinking, apparently together. That afterwards he went up to the courtroom and saw Ross and Gilkyson about there, and then they went down together and had something more to drink, and afterwards had luncheon, and by this time Ross had become drunk. That on one occasion in going down in the elevator, when Ross, Gilkyson, Zink, and Mr. Ward were all present, Ross told Gilkyson that he had done the right thing by him, had paid him \$5 to know nothing, or something to that effect, and that he (Spitz) had hushed him up. He admits that he received \$2 from Dr. White to pay for dinners, which was used by him in paying for the dinners of Ross and Gilkyson. That was before luncheon time and while the court was still in its morning session. That after luncheon, as I have already stated, he was called from the courtroom to the corridor by Dr. White, precisely as was testified to by Van Buren, Mrs. Welcher, and Schmele; but that Dr. White did not give him any money, and that he did not, on that occasion, speak to Gilkyson. He denies that he gave Gilkyson any money. He denies that any threats were made to Gilkyson on the occasion of his signing the affidavit. He denies that on the morning of the 13th of January, after he learned from Gilkyson what he knew about the doctor, he communicated that information to either his principal, Dr. White, or to the latter's counsel. Now, Mr. Spitz was by profession a detective, and he was in the employ of Dr. White, and was using Dr. White's money, and his statement that he failed to inform his principal of what he had so heard is simply incredible. In fact, it is quite plain that he approached and talked with both Ross and Gilkyson for the purpose of finding out what they knew, and that it was done at the request of his principal, Dr. White. The manner of this witness on the stand was not good, and, so far as he contradicts anybody, I place no reliance upon his evidence.

One other important feature of the case may be disposed of here. Mr. Gilkyson, called to the stand the second time, stated in greater detail what occurred when he was called upon at his place of business by Gerhart and Mrs. Eaton on the afternoon of

the 13th. He swears that they came there in a closed carriage, and Gerhart called him out, and that the carriage was close to the curb, and that Gerhart said to him, "Are you Gilkyson?" He said, 'Yes.' 'Do you know what is staring you in the face?' I says, 'No.' He said: 'Five years for taking the money. If anybody comes down and wants you to make out an affidavit on Mrs. White's side, don't you do it. Stick to us. There is more money on Dr. White's side. Mrs. White has not got a cent to back it'—and to go in the coach and see the doctor." And then that, after Mrs. Eaton invited him into the coach the door was closed, and Gerhart was on the outside. She said to him: "Do you know what is staring you in the face?" I said, 'No,' and she says, 'Five years.' But she says, 'Stick to Dr. White. If you don't, you will go to jail for five years.'" He further stated that Miss Madden and Mrs. Eaton advised him not to admit that he had received such money, and that, if he would call at the doctor's office, he would get \$5 more. The whole of this story is denied by Gerhart, Mrs. Eaton, and Miss Madden. They all swear that no such conversation took place, and positively denied that Gilkyson entered the carriage.

In support of his evidence Gilkyson brings on the stand a young man, Mr. Cathcart, who was a salesman in Heiney Bros. market, and who swears that his attention was called to the carriage stopping at the side of the store, which was on a corner; that Gilkyson was called out, and that he had an opportunity to see what was going on from the side window of the store or market; and that he saw Gilkyson get in the carriage with the ladies, and the door close after him. The manner of this witness on the stand was good, and he was not shaken on cross-examination. I can find no reason, other than the contradictory evidence, why I should not believe him.

Another important witness to the same effect was produced, and that was a boy, only 12 years old, named Reitz, who lived with his parents next to Heiney's store, and who was evidently badly frightened by being put upon the witness stand, so that he sobbed and was obliged to be relieved for several minutes until he could gain courage enough even to open his lips; but finally he summoned courage to testify, and he swore that he was playing on the sidewalk that night, saw this carriage drive up, and saw Gilkyson, whom he did not know by his name, but by his nickname, "Red," from the color of his hair, get into the carriage with the ladies, leaving Gerhart outside. Now, I watched the manner of this boy with great care, and while I am well aware that children of that age can sometimes be prepared for an examination so that they can falsify with great ease, and sometimes are difficult to detect, yet in this case, judging from the manner of

this boy, I find it impossible to believe that he was so prepared, and I find it impossible to disbelieve his evidence. I therefore come to the conclusion that it is true that Mrs. Eaton and her sister and Gerhart did call upon Gilkyson and use to him, in substance, the language which he states. That they went there at the instance of Dr. White is equally plain.

The theory of the defense was that the whole affair was the result of a conspiracy between Zink, possibly Mrs. White, and Ross; and in support of that theory proof was offered that Zink and Ross were seen talking together during the forenoon of the 13th of January, and that Zink was seen close to Ross and Gilkyson in the drinking saloons. And there is further evidence, given on behalf of Dr. White, to the effect that on the afternoon of the 13th, after Ross had left the stand, Zink went to him, and, in the full hearing of three or four ladies belonging to the Dr. White party, said to him that he did first-rate on the stand, and that, when Ross said that he had lost his \$10, Zink said, "Never mind; come downstairs, and I will make it all up to you." Evidence was given on the other side showing facts which were entirely inconsistent with the possibility or probability of any such conversation having taken place. I deem the solution of that question of fact of little importance, because I think that what Zink is alleged to have said to Ross was, under the circumstances, quite natural, and consistent with the truth of Ross' story. The investigation was adjourned from the 20th of January to the 3d of February.

On the afternoon of the 3d of February, and after most of the evidence on the part of the state had been put in, Col. Ward, who had been absent until then, took the stand, and gave at much length his recollection of the occurrences of the 13th of January. I do not propose to recite his evidence in full. It is enough to say that he swears: That he was warned by his client, Mrs. White, that Dr. White had been using money outside against her, and that she told him during the forenoon that she thought the doctor was up to his old tricks, and that, as a consequence, he kept his eyes open. That he had a talk with Gilkyson early in the morning, in which Gilkyson told him that he had met Dr. White in Mrs. Eaton's house, and had been introduced to him by Mrs. Eaton as her brother, and that the doctor had then treated him to whisky, and asked him his opinion as to Mrs. Eaton. That he asked him if he had been subpoenaed, and he said, "No." That he told him that he wished him to stay as a witness, and that he was entitled to a witness fee and would get it from Mrs. White. That Gilkyson promised to stay. That after this interview, and after he learned that Ross was one of Mrs. White's witnesses, he saw Dr. White in very earnest conversation with Ross

in the main corridor, at some distance from the door leading into the courtroom corridor. That White was speaking to Ross in a very persuasive manner, and that finally they came into the courtroom corridor, and that he, the witness, passed into the courtroom No. 2. (And I stop here to say that the entrance to that courtroom, as well as the other, is guarded by a high screen, which forms a sort of interior corridor leading to the seat by the window, so that a person opening the door cannot be seen from the space occupied by the bar and bench.) That White and Ross came into the corridor, and that the earnest conversation continued; Ross at first refusing, by shaking his head, to accede to White's request, and finally consenting. That he saw White take money out of his pocket and hand it to Ross. That shortly after Ross received the money he came in and spoke to the boy, Gilkyson, and wanted him to go downstairs, and that he, the witness, said to Ross, "Hold on! Don't go yet. You are our witness. We will need you any moment." Ross said: "That is all right. Come on, Gilkyson." And they went away rapidly. Then he told Zink not to lose sight of them, not to take his eyes off them, but follow them. That they went off together and presently returned, and that Dr. White was behind them. That afterwards the witness went down in the elevator with Van Buren just before luncheon, found Ross, Gilkyson, and Spitz in the elevator, and heard Ross saying to Gilkyson: "You mustn't know a thing. You are going to get money not to know a thing. Now, you are going to get well paid for this. Don't know a thing when you go on the stand. You are going to get money when you get off." Then Spitz said to Gilkyson: "Now, you know Julia Eaton. You go up there, and she is going to make it all right with you to-night. This ain't all you are going to get. You are going to get more." That he afterwards saw Dr. White talking to Ross earnestly. That after luncheon he approached Ross and asked him if he knew what he had been doing, that he could send him (Ross) with White and Gilkyson to State Prison, that they were conspiring together to do Mrs. White an injury—and told him that he had seen him take money from Dr. White in the hall, that he was interfering with justice, etc., and that he proposed to complain to the Vice Chancellor and threatened him with punishment, and that Ross said to him that he would be willing to tell the truth about it. And Col. Ward said: "That is all I want you to do. You tell the truth when this matter comes up, for I am certainly going to call the Vice Chancellor's attention to this matter." And that shortly afterwards Gilkyson came to him and started to repeat to him what he told him in the morning, and that Mr. Ward told him that he had heard him talking to Ross, and that Gilkyson said, "They have

given me money to go away, \$5, and I won't give it back to them, but I am going to tell the truth," and that he put Ross on the stand, with the result already stated.

Now, the principal and most important question to be determined is, did Dr. White give Ross money? For, if he did, then, under all the evidence in this case, there can be no doubt of the object for which he gave it to him. If he gave the money, as testified to by Mr. Ward and Ross himself, then he is so thoroughly contradicted in the case that I am justified in assuming that the evidence of the other witnesses, Ross and Gilkyson, is true, namely, that he gave it to him for the purpose stated. And it is also true that, if what Mr. Ward swears to is not true, then he is a part and parcel of the conspiracy which is charged by the counsel of Dr. White against Mrs. White and Zink. Now, there is one remark to be made about Mr. Ward and his evidence. In the first place, he is a member of the bar of the state of New Jersey, of long and high standing, and, also, he is a man of great experience in affairs, and to say the least, of ordinary common sense and judgment; and all this is quite independent of the reputation for honesty and truthfulness which must be accorded to him. But grant, for argument's sake, that he is capable of devising such a conspiracy and setting it in motion, as is claimed by the defendant; would he be foolish enough to do it? Certainly, if he did undertake it, he must have known that when he instigated Ross to go through the motions which he did with Gilkyson—for it must be remembered that there is no kind of doubt but that Ross did, in his drunken moments, openly declare to Gilkyson that he had done the square thing by him, and that he must go away, or know nothing if he got on the stand—I say that when Mr. Ward devised that scheme and set it in motion, if he did do it, he must have known that he was subjecting himself to the risk of having both those persons, who were before that day, so far as appears, perfect strangers to him, betray him, and if they betrayed him, the result would be ruinous to him. Now, it seems to me that the notion that Col. Ward would place himself at the mercy of two such men as the defendant insists Ross and Gilkyson are is simply incredible. But now, independent of that consideration, is it possible to believe that Col. Ward has deliberately perjured himself in the story which he tells? I am unable to believe that he has. His story fits in substantially with that of Ross and Gilkyson and Van Buren and several other witnesses called by Mr. Thompson, and all that evidence is entirely inconsistent with the truth of the line of defense put forward by Dr. White and by Spitz.

It is urged that the evidence of Gilkyson was not of sufficient importance to make it worth while for Dr. White to spend the money which it is alleged he did spend for the

purpose of suppressing it, and hence that there was no sufficient motive for the act. The evidence is that Gilkyson told Col. Ward that he had met Dr. White at Mrs. Eaton's house late in the evening, and that the doctor had there produced spirits and treated him, and that some conversation had passed between him (Gilkyson) and the doctor, from which it might be inferred that the doctor had admitted to Gilkyson that Mrs. Eaton was a person of easy virtue. Here, then, was, I think, a sufficient motive. However, the fact that Dr. White was seen in Mrs. Eaton's house in the evening was one which it is quite evident the doctor might not wish to have proven against him, and it would be impossible for the court to estimate in money the measure of his desire to suppress the evidence. Then, again, is it at all probable that the two men, Ross and Gilkyson, would have stood out to the end in support of their stories, if those stories had been false? The case of Gilkyson is remarkable in that respect. He had everything to gain and nothing to lose by adhering to the denial he had made both to Kriger and Judge Hudspeth. What influence changed him? Did Zink operate upon him? There is no proof of it. On the contrary, the proof is that he (Gilkyson) was constantly watched and pressed by Dr. White and his employes. No stone was left unturned to keep him to his denial. So far as appears, his employers were friendly to Dr. White. Then, again, how can we account for the conduct of Dr. White and his employes in following up Gilkyson so closely and procuring these statements from him, if Dr. White was innocent? Then, again, I have read the evidence of the two witnesses, Ross and Gilkyson, several times, and I find it difficult to believe they could have concocted, though inspired by Col. Ward, and have carried through, a scheme such as it is contended they have, and relate it on the stand, and stood the test of cross-examination as well as they have, if it had not been substantially true.

An attempt has been made to discredit the evidence of Col. Ward and of Ross and Gilkyson by showing that the alleged payment by Dr. White to Ross, which they charged was made in the main corridor of the courtroom, must have been so made in the presence of several persons under circumstances which render it highly improbable that Dr. White would attempt such a thing. For this purpose the hour mentioned by Col. Ward and by Ross for that occurrence is relied upon, and evidence is given tending to show that the corridor was at that time full of people who must have witnessed the transaction. Now, in the first place, no particular hour was or could be fixed, either by Col. Ward or by the witnesses who testify to the condition of the corridor at the time. It appears that persons were lounging in and passing through the corridor at various times, but the whole time was not covered by the evidence; and,

considering it all together, I am satisfied that it was quite easy for Dr. White to hand the money to Ross at the place mentioned, near the outside swinging doors and near the entrance to the courtroom No. 2, where Col. Ward stood, without being observed by any person in the lobby other than Dr. White's own friends.

Again, some confusion in the evidence arises out of the fact that Ross, Gilkyson, and Spitz went out to lunch at or shortly after 12 o'clock, and before the midday recess of court, which was between 1 and 2 o'clock. I gather the order of events to be as follows: The money was handed by Dr. White to Ross about 11 a. m., or possibly a quarter of an hour sooner, or a quarter of an hour later. Ross and Gilkyson, followed by Zink, left for the drinking saloon, all followed by Dr. White and his party. They drank several times, until both Ross and Gilkyson became somewhat intoxicated—Ross probably the more of the two. They returned to the courtroom at or about 2 o'clock. Ross showed his condition by loud talk, etc., and offered Gilkyson some money almost openly. So Gerhart swears, and is corroborated by Gilkyson, who swears that he first refused the money and afterwards accepted it. They then went to luncheon under the escort of Spitz, and had a further talk about money with Gilkyson, and I infer that he had required \$5 cash, and a promise of more at the end of his evidence. Ross had already obtained an additional \$5 from White. After lunch they again ascended to the courtroom, reaching there about 1 o'clock. Ross then gave Gilkyson \$5, and promised him another \$5 after he came off the stand, and Mrs. Eaton also promised him an additional \$5. A little after 1 o'clock, and after the court had arisen, they descended in the elevator, and on their way down Ross exposed himself by reminding Gilkyson of the money he had paid him, and promised him more in the presence of Spitz and Col. Ward and some others. They then had further refreshments in one of the eating and drinking places, and Ross, being sickened, relieved his stomach, and found his way back to the courtroom about or a little after 2 o'clock. Then he was accosted by Col. Ward, and threatened with prosecution, unless he told the truth, and Gilkyson was accosted by Dr. White and urged to go home. White called out Spitz and gave him money to send Gilkyson home, and Spitz went out with Gilkyson and gave him another \$5, and started him off for home. That I believe to be the order of events and the actual truth of the case.

The result is that I find, as a matter of fact, that Dr. White, Spitz, and Mrs. Eaton were all engaged in the enterprise of suppressing Gilkyson's evidence which he was expected to give on the merits of the case. And I further find that Dr. White, Spitz, Gerhart, Kriger, and Mrs. Eaton were afterwards engaged in a conspiracy to prevent

Gilkyson from the telling the truth in this investigation. Dr. White has been fully heard by counsel on an oral order to show cause. The other parties just named were not technically represented by counsel, and technically have not had their day in court, though in truth and fact they have had their day in court. If they desire further to be heard in evidence and by argument, I will give them an opportunity to be heard.

Subsequently all those parties waived further hearing, and submitted to the judgment of the court. The Chancellor adopted the result of the Vice Chancellor, and sentenced them each to pay a fine, varying according to his judgment of the degree of their several guilt.

PRYOR v. GRAY.

(Court of Chancery of New Jersey. Dec. 21, 1905.)

1. EQUITY—BILL—SUFFICIENCY.

A bill alleging that the defendant, under a void chattel mortgage obtained from an insolvent corporation of which complainant was receiver, by taking possession and sale of the corporation's chattels, wrongfully realized unknown sums of money, for which an accounting was prayed, stated a sufficient ground of equitable jurisdiction.

2. SAME—CERTAINTY OF ALLEGATIONS.

A bill alleging the appointment of complainant as receiver of a corporation; the execution by the latter to defendant of a chattel mortgage on the corporation's stock in trade, etc., that such chattels remained in possession of the corporation, etc.; that the mortgage was illegally recorded, because neither acknowledged nor properly witnessed; the subsequent taking possession of the mortgaged chattels by defendant; a sale of part thereof by him, and the acquisition of possession by complainant under a stipulation with defendant providing in effect that complainant should have such possession and be entitled to sell the chattels clear of the mortgage, the lien thereof, if of any validity, to attach to the proceeds of the sale; a subsequent sale of the property under order of court—and further alleging that defendant claimed a lien on the purchase money, that he had in his possession a large sum derived from the sale by him prior to the time complainant took possession, the filing of claims against the corporation, and praying an accounting, was sufficiently definite in its statements of fact to show that it charged defendant with wrongfully claiming under his void chattel mortgage to have been entitled to sell the chattels and keep the proceeds, and the subsequent sale by complainant under the agreement that defendant's lien, if valid, should attach to the proceeds thereof.

3. CHATTEL MORTGAGES—RETENTION OF POSSESSION—RECORDING ACT.

Under the statute requiring immediate possession as a prerequisite to the validation of an unrecorded chattel mortgage, a chattel mortgage made July 13, 1904, and unrecorded, was void, where possession of the mortgaged property was not taken thereunder until December 8, 1904.

4. CORPORATIONS—INSOLVENCY—RECEIVERS—COLLECTION OF ASSETS.

A receiver of an insolvent corporation, praying an accounting by defendant for moneys received at a sale under a void chattel mortgage executed by the corporation to defendant, is

not limited in challenging defendant's wrongful acts under such mortgage to those done after complainant's appointment.

5. EQUITY—DEMURRER TO ORIGINAL BILL—AMENDED BILL—WAIVER OF OBJECTIONS.

A defendant, demurring to an original bill, may not reserve existing grounds for demurrer thereto for presentation against the bill as amended; and by failing to present such grounds on demurrer to the original bill he waives any right of objection based thereon to the same extent as if he had pleaded over.

Bill by Robert W. Pryor, receiver of the E. C. Faltoute Hardware Company, against Allan J. Gray. On demurrer to amended bill. Demurrer overruled.

The bill of complaint in this cause, as amended, alleges that the complainant was on December 16, 1904, appointed receiver of the insolvent, a corporation of the state of New Jersey, because of its insolvency, and that he has duly qualified as such receiver; that on July 13, 1904, the insolvent corporation executed to the defendant a chattel mortgage on its stock in trade, fixtures, and other personal property in Newark, N. J., reasonably worth \$11,000, to secure the payment of the sum of \$5,000; that the mortgaged chattels remained in the possession of the insolvent company until December 8, 1904; and that the said chattel mortgage was illegally recorded in Essex county register's office, because it was neither acknowledged by the mortgagor, nor was the execution thereof proven by the subscribing witness. The bill further alleges that on the 6th day of December the defendant, Gray, took possession of the mortgaged chattels, and proceeded to sell the same at retail, and continued to do so until December 17, 1904, when the complainant, as receiver of the insolvent corporation, took possession of the mortgaged chattels under a stipulation with the defendant's solicitor, whereby it was agreed that the said receiver should have possession of the chattels, that they should be sold clear of the mortgage, and that the lien thereof, if of any validity, should attach to the moneys received from the sale; that all of the said chattels were, under an order of this court, sold at public auction to the defendant for the sum of \$3,935, part of which was paid in cash, and part secured, to be paid by the complainant's bond, conditioned that if the mortgage should be declared illegal, and the defendant should pay the sum of \$3,541.50, with interest thereon, and perform the order of the court in relation to the purchase money, the bond should be void. The bill further alleges that the defendant claims a lien on the purchase money and on the money due under said bond, and that he has in his possession a large sum of money collected from the sale of the said mortgaged chattels between December 8, and December 17, 1904; that claims against the insolvent company have been filed with the complainant as receiver to the amount of \$17,411.07; and that the proceeds from the

sale of the mortgaged chattels are all the assets of the insolvent company in possession of the receiver. The complainant prays that the mortgage may be decreed fraudulent and void as to him, and the lien thereof null and void, and that the defendant may account to the complainant for moneys received from the sale of chattels up to December 17th, at noon, and for further relief, etc. The only defendant is the chattel mortgagee, who demurs to the whole amended bill, and sets forth five several causes of demurrer which will be hereafter stated.

Frank Benjamin, for complainant. Malcolm MacLear, for defendant.

GREY, V. C. (after stating the facts). The first cause of demurrer challenges the bill because it does not show any facts which give this court jurisdiction, and particularly the demurrant insists that the bill shows that the mortgaged chattels have been sold clear of the mortgage, and no facts are alleged which show that the defendant claims any lien by virtue of the mortgage on either the mortgaged chattels or the money proceeds of their sale, etc. A sufficient ground of equitable jurisdiction is stated in the allegations that the defendant, under a void chattel mortgage obtained from the insolvent corporation, has, by taking possession and sale of that company's chattels wrongfully, realized unknown sums of money, for which the bill prays he may be decreed to account to the receiver of that company. The bill, taking it as a whole, is also sufficiently definite in its statements of fact to show that it charges that the defendant wrongfully claims under his void chattel mortgage to have been entitled to sell the insolvent company's chattels and keep the proceeds; that the moneys in dispute were realized under an order of this court upon an agreement of the defendant that the mortgaged chattels should be sold clear of the disputed chattel mortgage; and that the lien thereof, if it had any validity, should attach to the moneys proceeding from that sale. The averments of the amended bill inform the defendant that the subject regarding which he is called upon to respond is his claim to a lien, by virtue of his chattel mortgage, upon the goods of the insolvent company, and upon the fund raised by the sale of the chattel mortgaged goods, which chattel mortgage the complainant charges is void because not lawfully recorded. This notifies the defendant of the purpose of the suit which the Court of Appeals has held is all that is required in bills in equity. *Mutual Life Ins. Co. v. Sturges*, 33 N. J. Eq. 337. The first ground of demurrer is overruled.

The second ground of demurrer avers that the complainant's attack on the chattel mortgage is inefficient, because on the face of the bill it appears that the defendant had, in fact, taken possession of the mortgaged property before the complainant was appointed

receiver for the insolvent company mortgagor. The statute in dealing with the sort of possession which may validate an unrecorded chattel mortgage declared that it must be immediate. The complainant's contention is that the entry of the defendant's chattel mortgage in the mortgage book, without either certificate of its acknowledgment or proof of its execution, was in law not a recording. The pleadings show that the chattel mortgage was made on the 13th day of July, 1904, and that possession of the mortgaged goods was taken under it on the 6th day of December, 1904, nearly six months after its execution. In *Roe v. Meding*, 53 N. J. Eq. 368, 33 Atl. 394, the Court of Appeals declared that the requirement of the state regarding chattel mortgages is for immediate recording or immediate taking possession, for the obvious reason that one or the other is necessary to give notice to possible creditors of the mortgagor of the mortgagee's interest in the goods. In that case the delay in recording was less than three months, yet it was held to invalidate the chattel mortgage. The receiver is not limited in challenging the defendant's wrongful acts to those done after his appointment. The second ground of demurrer is overruled.

The third ground of demurrer contends that the bill of complaint does not show that the defendant claims any lien on the moneys received from the sale of the mortgaged chattels, by virtue of the mortgage, and does not show that the defendant has filed any claim with the receiver for moneys due under the chattel mortgage, or due by virtue thereof. This is substantially answered in the above discussion of the first ground of demurrer. Upon the whole case, as exhibited by the said bill of complaint, it obviously appears that the complainant, as receiver, etc., alleges that the defendant by virtue of his void chattel mortgage, and of the stipulation with the receiver, claims a lien upon the proceeds of the sale of the mortgaged goods. This ground of demurrer, therefore, should be overruled.

The fourth ground of demurrer is that the amended bill of complaint does not show that there are any moneys due by the insolvent company to persons other than the defendant, or that persons other than the defendant are interested in the estate of the insolvent company. The fifth ground of demurrer is that the amended bill of complaint does not show that there are not sufficient moneys to pay all the debts of the insolvent company. Both these grounds of demurrer, challenging the amended bill (and indeed most of the others), might have been assigned against the original bill of complaint before it was amended. The defendant demurred to that bill, and did not then see fit to present these criticisms as grounds of demurrer. He thereby waived any right of objection for that cause to the same extent

as if he had pleaded over. *Bean v. Ayers*, 69 Me. 128. He may not reserve existing grounds of demurrer to an original bill, and by presenting those defects successively against amendments unreasonably protract litigation and unjustly enhance the costs. *Id.*

The demurrer should be overruled, with costs.

FIDELITY TRUST CO. v. STATEN ISLAND CLAY CO. et al.

(Court of Chancery of New Jersey. Nov. 22, 1905.)

CHattel Mortgages—Failure to Record—Effect—Creditors Entitled to Assert Invalidity.

Under the chattel mortgage act, declaring that an unrecorded mortgage "shall be absolutely void as against the creditors of the mortgagor," an unrecorded chattel mortgage is void as to creditors of a purchaser of the mortgaged property subject to the mortgage; such owner becoming, within the meaning of the statute, a mortgagor.

Bill to foreclose by the Fidelity Trust Company against the Staten Island Clay Company and others. Application for a rehearing and an order permitting defendant Dickinson, as receiver of defendant corporation, to amend his answer, etc. Motion allowed.

S. W. Beldon, for complainant. J. M. Dickinson, for defendant receiver.

BERGEN, V. C. The questions presented on the final hearing of this cause having been disposed of in accordance with the situation then existing. Application is now made for a rehearing, and an order permitting the defendant Dickinson to amend his answer so that it may set out that, as receiver of the defendant corporation, he represents creditors whose debts are unpaid, and also for permission to submit testimony in support of such amendment, it being suggested to the court that this defense was inadvertently overlooked by counsel on the former hearing. The application being made on behalf of creditors, is well addressed to a court of equity, and should receive favorable consideration if bona fide creditors will be benefited thereby. The complainant resists this application upon the ground alone that, admitting the applicant's claim to be true in fact, no relief can be given. The contest relates to the lien of a chattel mortgage on personal property, which for want of proper record, the complainant concedes is void as to creditors of the mortgagor. The mortgage was given by the Staten Island Terra Cotta Lumber Company; it was never recorded, and the mortgaged chattels remained in the possession of the mortgagor, by whom they were sold in bulk to the defendant company, of which the present applicant is the receiver, appointed in insolvency proceedings. The sale was made subject to the mortgage, so

that the purchaser took with notice of the mortgage, and, as between it and the mortgagee, it was a valid incumbrance. The applicant now claims the right to contest the validity of this mortgage as the representative of the creditors of such purchaser; it not appearing that there are any creditors of the mortgagor. The complainant puts its resistance to the granting of the application, upon the ground that the statute declares such an unrecorded mortgage void, only as to the creditors of the party giving the mortgage, and that the advantage which the law gives to the creditors of a mortgagor, where the mortgage is not recorded, does not extend to creditors of a purchaser from the mortgagor. The pertinent words contained in the chattel mortgage act are, "shall be absolutely void as against the creditors of the mortgagor." The complainant contends that these words have a limited meaning, and that if there are no creditors of the person who gave the mortgage, there is no such "mortgagor," as the act contemplates, and that the mortgage is good, though unrecorded, not only against the purchaser with notice, but also against the creditors of such purchaser, even though they have dealt with, and extended credit to him, as the owner of the goods, without actual or constructive notice that such chattels are subject to the lien of the mortgage.

Before the recording act, chattel mortgages unaccompanied by change of possession were prima facie fraudulent as to creditors, mortgagees or purchasers, without notice; the fraud inferred, however, being subject to explanatory evidence of the bona fides of the transaction, and the act referred to was passed to enable the holder of a mortgage to permit the owner to retain possession, and at the same time warn all who might give credit to the owner because of his possession of the goods, that there was an outstanding claim against them. *Knickerbocker Trust Company v. Penn. Cordage Company*, 65 N. J. Eq. 181-185, 55 Atl. 231. This mortgage, in the absence of the statute, would be void as to every creditor of a subsequent owner of the goods, who might obtain a lawful lien thereon, because possession of the goods had not been taken by the mortgagee, unless such nontransfer was satisfactorily explained, for such neglect to take possession was held to be prima facie fraudulent. We must therefore consider to what extent the recording act has changed the relation of the parties to such a contract. By its terms, a mortgage on chattels, unaccompanied by possession, is made absolutely void as to the creditors of the mortgagor, the purpose of the act being to protect persons in extending credit to one having the visible possession and ownership of chattels, unless the mortgagee saw fit to make public, in the manner required by law, his claim against such goods.

To read the act in the restricted sense now contended for would aid in the perpetration of the very fraud, which at common law was so strongly condemned, for the mortgagee with his secret claim could stand by and permit the original mortgagor to dispose of the chattels in bulk, subject to his mortgage, and thus allow the purchaser to deal with his creditors as the owner of unincumbered property. As the mortgagee with knowledge of the transfer by the mortgagor to a third party, as is the case here, could reduce the goods to its possession, it has, in my opinion, no greater protection for its unrecorded mortgage against the creditors of the purchaser, than it would have had against the creditors of the mortgagor, and having permitted a new owner to retain the possession of the goods, that owner becomes, within the meaning of the statute, a mortgagor.

The complainant's claim is that he is relieved from the consequences of his neglect to take possession, which, under the common law, renders his mortgage *prima facie* fraudulent, because under the recording act the failure to record, where the possession of the mortgaged property remains unchanged, only avoids the mortgage as to the persons named, and that as to all others it is a valid incumbrance. In other words, a chattel mortgage, unaccompanied by change of possession of the property, is, because of the act, a stronger security than it was before, and no fraud can be imputed for want of record in such cases, so that instead of being *prima facie* fraudulent, it is good against every one, other than the limited class named in the statute. This reasoning does not convince me as being sound, for I think the words and plain intent of the act are against such construction, and that it makes all such mortgages void as against the creditors of any owner holding the property, subject to such unrecorded mortgage, with the knowledge and consent of the mortgagee. When conditions change and innocent parties may suffer, it becomes the duty of the mortgagee to warn them by taking possession if he desires to obtain priority of lien.

My conclusion is that under the conditions present here this mortgage is void as against the creditors of the purchaser from the mortgagor, and that the recording act does not remove the imputation of fraud which the common law attached to a chattel mortgage of goods unaccompanied by change of possession, and that while it may not be void as to the purchaser because of notice, such notice is not chargeable to his creditors. It therefore follows that if this applicant can support, with evidence, the allegations he proposes to incorporate in his amended answer, this mortgage would be void as to such creditors, and I will allow the motion.

PERLBERG v. SMITH.

(Court of Chancery of New Jersey. Dec. 6, 1906.)

1. TRADE-MARKS AND TRADE-NAMES—FILING IN PATENT OFFICE.

No rights are acquired by the filing of a label in the United States Patent Office, as against any person doing business in the same state, since Congress has no power to legislate with respect to trade-marks so far as concerns commerce within the boundaries of a state.

[Ed. Note.—For cases in point see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 46, 47.]

2. SAME—UNFAIR COMPETITION.

Where the owner of a shoe store marked all of the shoes he sold "Eagle Shoes," though they were procured from various sources, so that the name did not indicate any particular brand or make of shoes, he is not entitled to protection in the use of the name.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 4-7, 78-84.]

3. SAME.

One who procured from a manufacturer shoes marked "Eagle Shoes" could not be enjoined from selling them by one who had previously built up a business in the sale of shoes, and who marked all his shoes "Eagle Shoes," where the name had formerly been used by various manufacturers, and where the person sought to be enjoined did not attempt in any way to deceive the public into the belief that they were buying the shoes offered for sale by the other person.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 78-84.]

Suit for injunction by Edward Perlberg against Samuel C. Smith, trading as S. C. Smith & Co. Heard upon bill, answer, replication, and proofs in open court. Bill dismissed.

This is a bill filed by Edward Perlberg against Samuel C. Smith to restrain the latter from selling shoes under the name of "Eagle Shoes." The bill sets out that the complainant is a shoe dealer in Jersey City, with a place of business at No. 2 Newark avenue in said city, and that the defendant is a shoe dealer, with a place of business at No. 90 Newark avenue in said city; that the complainant, some seven years ago, adopted a label to be placed upon shoes sold by him, and upon the 12th of October, 1901, filed in the office of the Department of the Interior, in the Patent Office, a copy of said label and received from said office letters patent therefor; that he had used said trade-mark for a long time prior to obtaining said letters patent, and is still using the same; that the public have placed great confidence in said trade-mark, and that, by reason of the confidence of the public in the said style and make of the shoes sold by him and marked in accordance with the said letters patent, he has built up a lucrative and prosperous business, and that the style, make, comfort, and durability of said shoes have been recognized by the public; that he is the sole pos-

essor and owner of said trade-mark, and is the sole and exclusive agent for the sale of the said Eagle Shoes; "and that Samuel Smith represents to the public that he has for sale shoes known as 'Eagle Shoes,' " which shoes complainant charges are inferior to the shoes sold by him. The complainant further charges that Smith is using the same labels as complainant, and that by reason of the acts of the defendant complainant is irreparably damaged, and should be protected by the injunction of this court. The answer of the defendant need not be further referred to than to state that it denies all of the material allegations of the complainant and puts him to proof with respect to his right to relief.

J. Merritt Lane, for complainant. Chas. C. Kelly and C. J. Roe, for defendant.

GARRISON, V. C. (after stating the facts). The proofs, so far as they are pertinent to the decision, show that Edward Perlberg, in the year 1898, opened a shoe store at No. 2 Newark avenue, in Jersey City. He had not been in the shoe business prior to that time. His name did not appear upon any sign, and the sign that he adopted had upon it the words the "Eagle Shoe Store." Upon the windows of his store he had painted the representation of an eagle with outstretched wings, bearing in its claw a shoe. This picture, with the addition of a streamer proceeding from the beak of the eagle upon which were the words "Eagle Shoes," constituted the label adopted by the complainant and subsequently filed by him in the Patent Office. The proofs are indefinite as to whether he ever placed this complete label upon any of the goods sold by him, but, if he did, its use was early discontinued, and no part of his present claim rests upon the use by him of this label. He advertised very extensively in the local newspapers and by handbills, always referring to his store as the "Eagle Shoe Store," and always calling attention to the shoes that he sold under the name of "Eagle Shoes." There is abundant proof that shoe stores in many other places had adopted the name "Eagle Shoe Store" long prior to the time that the same was adopted by the complainant for his store. The proofs are also perfectly clear that the word "Eagle," in connection with shoes, has been at various times and in various places, by manufacturers and local dealers, used to designate shoes sold by them, and that it was so used long prior to the time that Perlberg went into the shoe business. In some instances the words "Eagle Shoes" were placed upon the shoe when made by the manufacturer, and in others they were placed thereon by the local dealer himself. Those that were marked by the manufacturer were sold either directly to the retailer or were sold to jobbers and by them sold to retailers, or were sold at auction to whomsoever would buy. The defendant, Smith, for at least 18

years has been in the shoe business in Jersey City; his store now being at No. 90 Newark avenue in said city. This is near where Perlberg opened his store. Just prior to the filing of the bill in this cause it is proven that Smith placed placards upon the outside of his store announcing a sale of "Eagle Shoes," with the prices stated. The shoes thus advertised were made by Taylor, a manufacturer, who had marked them "Eagle Shoes," and were sold to Smith through a jobber named Young. They had upon the sole a representation of an eagle and the name "Eagle Shoes," together with the price. They also had upon the back strap the name "Eagle Shoes," with the price.

The complainant alleges that Smith's reason for advertising the sale of "Eagle Shoes" was to revenge himself upon Perlberg because of a real or fancied grievance that he had against Perlberg with respect to the agency for the sale of shoes named "Queen Quality Shoes." I believe Smith displayed the placards, announcing the sale of the Eagle Shoes he had, to catch some of the custom attracted by Perlberg's advertising. Smith testifies, and it is not disputed, that for more than 11 years on and off he had sold different shoes from different sources of manufacture which, in one way or another, were designated as "Eagle Shoes"; that is to say, either on the carton in which the shoes were contained, or on the back strap of the shoes, or on the sole thereof, they were marked or designated as "Eagle Shoes." The bill was evidently framed upon the theory that the complainant had a technical trade-mark or label, and that this right was infringed by the defendant. The trade-mark or label claimed in the bill by the complainant was that which he filed in the Patent Office and which has been heretofore described. The undisputed proofs show that the complainant, if he ever placed this trade-mark upon shoes sold by him, long since abandoned the use of the same, and contented himself with placing the words "Eagle Shoes" upon the back strap of each of the shoes sold by him. There was not the slightest attempt on the part of the complainant to prove that he was the "sole and exclusive agent for the sale of said 'Eagle Shoes,' " as he pleaded in his bill that he was, or that, as a fact, there was any proprietary shoe called "Eagle Shoe," sold by him as agent. There is no pretense in the proofs of showing that the defendant in any way simulated the label claimed by the complainant. There is ample proof that other dealers in shoes, prior to the adoption by the complainant of the aforesaid label, had adopted similar labels for shoes, using almost the same design and the same words. The complainant obtained no rights which he may enforce in this suit by virtue of filing his label in the Patent Office. It has been settled by the Supreme Court of the United States that

there is no power in the Congress to legislate with respect to trade-marks, so far, at least, as concerns commerce within the boundaries of a state. *United States v. Steffens*, 100 U. S. 82, 25 L. Ed. 550. The complainant, at the argument, very properly abandoned the issue based upon the claim of any exclusive right, and did not claim that he had a technical trade-mark which had been infringed. He shifted his ground to a charge of unfair competition. There is a very grave question whether the complainant, by abandoning so much, has not abandoned all. Whatever his rights might be as the owner of a technical trade-mark, or as the user of a mark adopted by him which another would not, to his damage, be permitted to simulate, there is a very serious question as to whether he may proceed against another who is not charged with simulating the design or mark of the complainant, but is merely charged with using words which appeared in the complainant's trade-mark, but which were equally open to use by the complainant and the defendant. *Corbin v. Gould*, 133 U. S. 308, 10 Sup. Ct. 312, 33 L. Ed. 611.

But I do not desire to rest my determination upon this sole point, and I therefore pass to the consideration of the charge of unfair competition. Stripped of extraneous matter, the complainant's contention urged upon the court was that for seven years he had called all the shoes sold in his store "Eagle Shoes," and had marked upon the back straps of each of such shoes the words "Eagle Shoes"; that he had spent large sums of money in advertising the shoes sold by him, referring to such shoes in his advertisements as "Eagle Shoes"; that his place of business was close to that of the defendant; and that the defendant displayed placards announcing the sale of "Eagle Shoes," and that this was unfair competition as against the complainant. Care must be taken in these cases not to extend the meaning of the word "unfair" to cover that which may be unethical, but is not illegal. It may be unethical for one trader to take advantage of the advertising of his neighbor, but his so doing would in many instances be entirely legal. If one dealer advertises extensively and at great expense the sale of a staple article or of any article which he has not the exclusive right to vend, his neighbor may undoubtedly endeavor to cause the customers attracted to the neighborhood by the advertising to purchase the same or a similar article at his store, instead of at the store of the advertiser. What conduct on the part of a defendant will be held to constitute unfair competition is the subject-matter of discussion in cases too numerous for useful citation, but the principle applied in each case is extremely simple. As Lord Chancellor Halsbury said, in the House of Lords, in the case of *Reddaway v. Banham*

[1896] A. C. 199, p. 204 (Eng. Rul. Cas. p. 197); "For myself I believe the principle of law may be very plainly stated; and that is that nobody has any right to represent his goods as the goods of somebody else." If the complainant has a technical trade-mark, the deciding of the case is greatly simplified, because the use by another of this trade-mark will of itself be sufficient for the determination that the one simulating it is defrauding the complainant. If, however, the complainant has not a technical trade-mark, the difficulty in determining his right to relief is not with respect to the principle of law to be applied, but to the question of fact involved. While courts often say that the first user of a word, phrase, or design such as is the proper subject of a trade-mark has a property right thereto, I incline to the view that this is an inaccurate use of terms. As is pointed out by Lord Herschel in the case just cited ([1896] A. C. 209; Eng. Rul. Cas. 202), although some of the rights of property attach to such a use, the same principles are applied and the same rights enforced where the user has no exclusive right and no property right in the mark or name. The whole doctrine rests upon the prevention of fraud. The advantage of not misusing the word "property" in connection with the right of the user of a trade-mark or trade-name is that the proper conception of the basis of the right, administered in favor of the complainant, reconciles the decisions respecting the subject-matter. The principle is universal in these cases that one may not palm off his goods as the goods of another, and this irrespective of whether that other has a technical trade-mark, is using his own name, or is using words to which he has no exclusive right whatever, providing he is using the name or mark to denote the origin or ownership of the named or marked goods. There is, of course, a distinction to be observed with respect to wholesalers and retailers.

The exact point of inquiry in the case in hand is whether the complainant so used the words "Eagle Shoes" that he is entitled to protection, and whether the defendant, Smith, will be prevented by injunction from selling from his store shoes named "Eagle Shoes." The proofs are full and clear that the complainant marked all of the shoes that he sold "Eagle Shoes." He obtained these shoes from manufacturers, from jobbers, and at auction sales. His shoes, therefore, were the product of many different manufactories. The stamp "Eagle Shoes" upon the shoes sold by Perlberg meant nothing, saving the fact that they had been previously purchased by Perlberg, and were marked, at the time of their sale by him, "Eagle Shoes." It did not in any way indicate the origin or source of production, or even, as the proofs show, any element of selection on the part of Perlberg.

It did not denote kind, brand, or make. Perlberg's own testimony shows that he purchased shoes at auction at cheap prices and resold them as "Eagle Shoes," and that they were sold cheap at auction because they had been unsalable in the regular course of trade. A fundamental principle is that the kind of trade-mark or trade-name that will be protected is only such as implies origin or ownership. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997, with note; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144. I do not mean to imply that a trade-mark will only be protected if placed upon an article manufactured by the user of the mark, because this is not the law. One who causes goods to be manufactured for him, or who selects goods manufactured by others, and places his trade-mark thereon, is entitled to protection with respect thereto; but I firmly hold the conviction that in each instance where the user is protected he must show that there is a particular thing upon which he has placed the mark, so that the appearance of the mark connotes that thing. If this is not so, then the whole basis of the law of trade-marks is without solid foundation upon which to rest. If the appearance of the mark upon the thing is not a guaranty that it is the thing, marked to differentiate it and distinguish it from other similar things sold by other dealers, then the trade-mark is deceptive and worthless. If, without regard to the source of manufacture or to any distinction of kind, brand, or make, this trade-mark of a retailer is placed indiscriminately upon every article of any given species, it can serve no other purpose than to show that the article is sold by that person; and, if a man is to be protected at all in this respect, he must lay a basis for such protection by adopting an arbitrary, fanciful designation of which he is the first user, and so obtain a technical trade-mark.

I do not decide, because it is not necessary, whether there could be such a thing as a technical trade-mark which did not denote kind, brand, or make, but merely did denote the fact that it was sold by a certain retailer. If Perlberg, by adopting the words "Eagle Shoes" to denote the shoes sold by him, sought to convey the impression to the public that he was retailing a particular kind, brand, or make of shoes under the name of "Eagle Shoe," then he was conveying a false impression, and, upon familiar principles, will not be protected with respect thereto. This undoubtedly was his intention, and in his bill in this suit he pleads that "he was the sole and exclusive agent for the sale of the said Eagle Shoes." If such was not his intention, then I am at a loss to conceive of any principle upon which he may prevent another from making use of the term "Eagle Shoes." He has, as has been before pointed out, no exclusive right to the words "Eagle Shoes." He cannot successfully put forward

any claim to prevent any one else from using those words. The utmost right which he may claim would be to prevent another from using those words in such a way as to palm off the goods of that other as the goods of Perlberg. This he may do if he shows the court that he has used these words in connection with goods in such a way as to identify the name and the goods; that is, that he used the name to denote a particular kind, brand, or make of shoes. This he has not done, because the proofs demonstrate that he applied the name indifferently and indiscriminately to all kinds of shoes, from every source, irrespective of their origin, kind, brand, or make, and that the term was meaningless, save to the extent that it meant the shoes sold in his store. Of course, if it were charged that the defendant so befogged the public by simulating the signs of the complainant's store, or changing the appearance of the exterior of his store to make it resemble the complainant's store, that people did not know into which store they were going, there would be some ground for action. In the case of *Van Horn v. Coogan*, 52 N. J. Eq. 380, 28 Atl. 788 (*Van Fleet, V. C.*; 1894), affirmed 52 N. J. Eq. 588, 33 Atl. 50, there will be found an instance of this kind. There the defendant placed out in front of his store a number which was not the number of his store but was the number of the complainant's store. The case just referred to contains, as nearly as does any other cited by the complainant, the most favorable application of the principles of law which the complainant invokes. In that case a dealer in stoves in Newark purchased from a manufacturer a particular kind of stove and caused it to be named "Portland." He was the only dealer in Newark to whom the manufacturer thereof would sell this kind of stove. The defendant placed the number of the complainant's store outside the door of his store, and changed the name of a stove that he had been selling theretofore under another name to the name of "Portland," and sought to sell that stove to the public under that name. He was restrained upon the ground that the proofs were adequate that he was endeavoring to palm off his article as the article of the complainant. If we apply the principle of that case to the case in hand, it will at once be seen how variant is the result. The defendant in the case at bar did not in any way endeavor to deceive the public with respect to the stores of himself and the complainant. He did not change the name upon any of the shoes in his store. The shoes which Smith was selling as "Eagle Shoes" were so marked by the manufacturer, without any procurement by Smith, and were sold by the manufacturer or his agent to any one in the open market. They had upon the sole a picture of an eagle and the words "Eagle Shoes," with the price, and they also had upon the back strap the words "Eagle Shoes," with the price. Any dealer in Jersey City or elsewhere throughout the entire world

could have purchased these shoes from the jobber, or, I presume, directly from the manufacturer.

No one, certainly, in buying these shoes from Smith, could have been deceived into the belief that he was buying them from Perlberg. Could the purchaser be deceived into the belief that he was buying from Smith the same thing which Perlberg was selling under the same name? The answer to this is "No," because Perlberg was not selling any particular kind, brand, or make of shoes under that name. He was selling every kind, brand, or make under that name. So that we come back to the principle previously stated, that unless the name adopted is used to indicate origin or source of manufacture, or in some way to designate that the particular thing upon it is placed is of a certain kind, brand, or make, the one using it is in no position to restrain others from using the same name upon similar articles. I do not think it necessary to indulge in numerous citations for so familiar a principle. If a complainant is shown to be deceiving the public, he cannot receive protection. *Manhattan Med. Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706; *Stirling Silk Mfg. Co. v. Sterling Silk Co.*, 59 N. J. Eq. 394, 46 Atl. 199 (Emery, V. C.; 1900); *Koehler v. Sanders*, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576; *Leather Cloth Co. v. Am. Leather Cloth Co.*, 11 H. L. C. 523, 11 Eng. Rep. 1435; *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 25, 31 N. E. 990, 27 Lawy. Ed. 942, and note, in which many cases are cited; same case, 17 L. R. A. 129, and note. The basis of the complainant's claim in this case must be that he had so used the term in controversy as to build up a trade in the thing to which the name was applied. Since he utterly fails to show that there was any particular thing to which this name was applied, he is without redress.

I will advise a decree dismissing the bill, with costs.

PERLBERG v. ROSENSTONE.

(Court of Chancery of New Jersey. Dec. 6, 1905.)

TRADE-MARKS AND TRADE-NAMES — UNFAIR COMPETITION — INJUNCTION.

The complainant, an owner of a shoe store, using the name "Eagle Shoes" on all shoes sold by him, could acquire no right in the name which would entitle him to enjoin its use by another person in the same city, who before complainant began business in the city had conducted the "Eagle Shoe Store," and who afterwards, by a statement on his sign and by his advertisements, published the fact that his store was not connected with any other.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 4-7, 78-84.]

Suit for injunction by Edward Perlberg against Abraham Rosenstone. Heard on

bill, answer, replications, and proofs in open court. Bill dismissed.

J. Merritt Lane, for complainant. Weller & Lichtenstein, for defendant.

GARRISON, V. C. By agreement between counsel this case was heard with the case of the same complainant against Samuel Q. Smith. The opinion in the case of Perlberg v. Smith, 62 Atl. 442, contains all that is needed to be said, saving the particular facts applicable to the case against this defendant. They are as follows: Rosenstone is shown to have commenced business, with his brother, in 1893, at Passaic, N. J., in a store which they called the "Eagle Shoe Store." He had the words "Eagle Shoes" impressed by a rubber stamp upon the back strap of each pair of shoes sold in his store, and had an iron stamp made with the words "Eagle Shoes" or "Eagle Shoe Store" upon it, and impressed this stamp upon the shank of each pair of shoes sold by him. After a year his brother sold out to him, and he continued in business in Passaic until 1900, when he came to Hoboken, N. J., and opened a store there which he called the "Eagle Shoe Store," but after he came to Hoboken he discontinued marking the shoes themselves in any way. About a year and a half ago Perlberg opened a branch store under the name of the "Eagle Shoe Store" in Hoboken, at a distance of some 10½ blocks from that of Rosenstone. Rosenstone's store was in the section of the city where the poorer class of customers lived, and Perlberg's was on the principal business street, where presumably the customers having more money would naturally shop. It is not shown that Perlberg knew of Rosenstone at that time, or that Rosenstone knew of Perlberg, or of each other's stores or use of the name "Eagle." Among the stock carried by Rosenstone were some of these shoes made by Young, which, as has been stated in the Smith Case, were marked on the strap "Eagle \$3.00 Shoes," and upon the sole with the representation of an eagle and under it "\$3.00 Eagle Shoes." Almost immediately after Perlberg opened his "Eagle Shoe Store" in Hoboken, and Rosenstone learned of it, he added to the banner, which was stretched in front of his store, upon which theretofore had appeared the words "Eagle Shoe Store," an additional strip, upon which he had painted the words: "This store has no connection with any other store in New Jersey." The sign of "Eagle Shoe Store" he did not change, but on the awnings he inserted the word "Original" before the word "Eagle," and when he moved across the street in the year 1903, and opened a new store, the large wooden sign covering the width of the building read the "Original Eagle Shoe Store." There was put in evidence a great amount of printed matter advertising Rosenstone's business, in every of which, after Perlberg came to Hoboken, there was language to

convey clearly the idea that this store of Rosenstone's had no connection with any other store, and had no branch. The case against Rosenstone rests entirely on the sale by him to one customer, who was sent there by Perilberg, of a pair of the "Eagle Shoes" jobbed by Young which have been heretofore described.

The complainant's contention is practically as it is in the Smith Case, that having appropriated the word "Eagle" in connection with the shoes sold by him, and made the same favorably known, he has a right to restrain Rosenstone from selling in the same city any shoes, wherever obtained, upon which the word "Eagle" appeared as a denomination of the shoes. Rosenstone's defenses are that he used the word "Eagle" in connection with shoes long before Perilberg did; had always called his store the "Eagle Shoe Store"; that since coming to Hoboken he had had occasionally shoes denominated in some way as "Eagle Shoes" which he purchased at auction sales, and which came to him thus denominated; that he never made any point of advertising them; that he never competed with Perilberg; and that there is no evidence of unfair competition in his case.

For the reasons heretofore given in the Smith Case, I will advise that the bill in this case be dismissed, with costs. I only think it is necessary to add, even if I am mistaken in my reasons for refusing relief to the complainant in the Smith Case, I should feel constrained to refuse it in this case. It seems so entirely clear that no charge of unfair competition was made out against this defendant that it would be but a waste of time to elaborate that conclusion.

BOARD OF HOME MISSIONS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA et al. v. DAVIS et al.

(Court of Chancery of New Jersey. Dec. 14, 1905.)

1. ASSISTANCE, WRIT OF—OPPOSING AFFIDAVITS—ADMISSIONS.

Where the occupant of premises after foreclosure makes an affidavit in opposition to a petition for a writ of assistance, setting forth the facts upon which her resistance to the writ is founded, and petitioner does not object to the affidavit in form, but consents to treat it as an answer, and admits that he cannot successfully deny the facts therein stated, the facts stated in such affidavit must be regarded by the court as true.

2. SAME—WHEN ISSUED—DOUBTFUL CASES.

The issuance of a writ of assistance rests in the sound discretion of the court, and such writ will never be awarded in a case of doubt; nor will a question of legal title be tried or decided in proceedings having in view the issuance of the writ.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assistance, Writ of, § 1.]

3. SAME.

Where defendant in foreclosure purchases a paramount title after the filing of the bill for

foreclosure and the decree of sale, and the title which he acquires proceeds from a source entirely distinct from that through which the purchaser under the foreclosure decree claims, and is one with which defendant was not vested when called upon to answer in the foreclosure suit, defendant stands in the same position as a stranger who purchases an outstanding title and enters into possession, and will not be ousted from possession under his paramount title by a writ of assistance.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assistance, Writ of, § 1; vol. 35, Cent. Dig. Mortgages, § 1573.]

Foreclosure suit by the Board of Home Missions of the Presbyterian Church in the United States of America and others against M. Eva Davis and others. On petition for writ of assistance. Dismissed.

George M. Shipman, for petitioner. Martin Wyckoff, for defendant M. Eva Davis.

BERGEN, V. O. William Davis mortgaged certain lands in Warren county, in this state, to the complainants, who instituted proceedings against the heirs at law of Davis, he having died intestate, to foreclose the equity of redemption. This defendant, M. Eva Davis, who was one of the heirs at law of William Davis, set up as a defense in the foreclosure proceedings that her father, William Davis, had no title to the premises when he gave the mortgage; but this defense was overruled and a decree was made directing the sale of the land to raise the mortgage debt, following the rule laid down in Mutual Building & Loan Association v. Batterson, 55 N. J. Eq. 610-612, 56 Atl. 703. The sale was made by the sheriff of Warren county, duly reported and confirmed, and a deed executed by the sheriff in due form was delivered to the petitioner, who now presents his petition for an order for possession. The usual formalities upon which such an application may be based have been observed, and the only opposition to the making of the order rests upon the allegation that the occupant is now in possession under a title superior to that vested in the mortgagor and now held by the petitioner by virtue of the foreclosure sale. The answer to the petition is in the form of an affidavit made by the occupant, which sets forth the facts upon which resistance is founded, and, while open to the objection that it is not in form an answer, this was not urged against it on the argument, and the petitioner consented to treat it as an answer, and also admitted, upon being offered an opportunity to submit answering testimony, that he could not successfully deny the facts stated. In this situation I must take the facts disclosed by the papers to be true. The petition is in usual form, setting forth the issuing of the execution, a description of the lands, the possession of the defendant, who was a party to the foreclosure proceedings, the exhibition of the sheriff's deed to her, with a demand for possession,

and her refusal. The affidavit presented by the defendant by way of answer shows that one Mary Weller, a lunatic, died intestate, in 1879, seised of the lands; that she had never married, and left as her only heirs at law collateral relatives, some of whom entered into possession of the lands; that since the decree foreclosing the equity of redemption under the mortgage given by William Davis was entered in this cause the defendant purchased, by good and sufficient conveyances, the title which some of these collateral heirs had in the premises, and charges that she now holds possession under such conveyances, so far as they have passed the title and as a tenant in common with such of the heirs as have not conveyed to her.

Under the proofs now before me, I must assume that the title of the defendant is paramount to that acquired by the petitioner in the foreclosure proceedings, for the answer alleges that Mary Weller died seised and intestate, and charges that the title of William Davis under which the petitioner claims is based upon a pretended devise from Mary Weller, which could have no lawful existence, because she died intestate, and as these claims are not disputed, it would appear that William Davis had no title to the lands which he mortgaged, unless he has acquired a title in some other manner which has not been disclosed in these proceedings. The only question I am called upon to consider is whether an order for possession, such as usually follows the result of a foreclosure sale, ought to be allowed against a defendant in foreclosure proceedings, who seeks to hold possession under a title confessedly superior to that of the purchaser at the foreclosure sale, when such paramount title was acquired after the decree was entered foreclosing the equity of redemption and directing a sale. The writ applied for is intended to aid in the execution of a final decree, in order that a purchaser may have the benefit of his purchase; but it will never be awarded in a case of doubt, nor will a question of legal title be tried or decided in proceedings looking to the exercise of the power of the court to put a purchaser in possession. *Schenck v. Conover*, 13 N. J. Eq. 227, 78 Am. Dec. 95; *Thomas v. De Baum*, 4 N. J. Eq. 41; *Barton v. Beatty*, 28 N. J. Eq. 412.

According to the settled rules of law relating to this subject, it would not be seriously asserted that if a stranger, not a party to the foreclosure proceedings, had purchased this outstanding title and entered into possession, this court would undertake, in the summary manner proposed, to settle the legal rights of the parties. But it is insisted by the petitioner that, because this defendant was a party to the foreclosure

proceedings, she is now estopped from asserting a title against the purchaser which she derived from an independent source having no relation to the mortgagor's title, and acquired after the making of the decree in which the rights and estates of the parties claiming under William Davis, the mortgagor, had been passed upon. In support of this contention the petitioner's counsel relies upon *Chadwick v. Island Beach Co.*, 43 N. J. Eq. 616, 12 Atl. 380, but clearly that case does not afford the petitioner any effective support. In the *Chadwick Case* it appeared that the defendant had acquired the independent title it relied upon before the filing of the foreclosure bill, and in passing upon this question Chief Justice Beasley said: "When a complainant alleges that he holds a mortgage in fee upon certain lands, and prays that a sale shall be made of such property, such a claim seems, *proprio vigore*, to include inferentially an assertion that a title paramount to such mortgage does not reside in any of the parties in the suit. By such an assertion the defendants are called upon to admit or deny the existence of such lien upon the property, and, plainly, if such lien exists, none of them can have a title superior to the right asserted in the bill." In that case it also appeared that the defendant company took its conveyance subject to the conditions contained in the mortgage, and it was held that it was not entitled to retain the possession against the rights of the mortgagee which it had covenanted to respect.

The conclusion I have reached is that the defendant, by purchasing a paramount title after the filing of the bill of the foreclosure and the making of the decree for the sale of whatever equity she might have in the property, stands in the same position as a stranger, when the title which she has acquired proceeds from a source entirely distinct from that through which the purchaser under the foreclosure claims and with which she was not vested when called upon to answer, and that the decree could not affect any rights which she did not possess when it was made. The exercise of the power to make this order rests in the sound discretion of the court, and is "only used when the right is clear and when there is no equity or appearance of equity in the defendant." *Van Meter v. Borden*, 25 N. J. Eq. 414. A very serious question may arise upon full proofs as to where the legal title to this property rests, and should not be disposed of in this summary way. The petitioner should be required to establish his title in a proceeding directed to that end.

The petition will be dismissed, and the order refused, with costs.

DAAB v. NEW YORK CENT. & H. R. R. CO.

(Court of Chancery of New Jersey. Dec. 22, 1905.)

1. EQUITY — JURISDICTION — GROUNDS — ACCOUNTING — DISCOVERY.

The jurisdiction of equity to decree an accounting cannot be sustained merely because the bill prays for a discovery.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 114.]

2. SAME—COMPLAINT.

The jurisdiction of equity to decree an accounting cannot be sustained on the ground that the complainant has a right to invoke the aid of equity for discovery, where the complainant, as authorized by Laws 1867, p. 166, and Laws 1902, p. 517, § 19, waives an answer under oath, and submits no interrogatory to be answered under oath, and elects to have the answer stand as a mere pleading.

3. SAME—INADEQUACY OF LEGAL REMEDY.

A bill in equity for an accounting, where complainant claims equitable jurisdiction because of the intricacy and complexity of the account, must do more than show a case which might in a court of law prove intricate and complex, and must show that the remedy at law is in fact inadequate.

4. SAME—FRAUD.

A bill for an accounting did not show equitable jurisdiction on the ground of fraud by allegations that defendant, in making settlements with complainant under a contract between them, endeavored to deceive complainant as to the amount of his earnings, where it appears from the bill that complainant was not deceived by such representations, but that he knew of their incorrectness and protested against the same during the course of the settlement.

Suit by Philip Daab against the New York Central & Hudson River Railroad Company for an accounting. Demurrer to the bill sustained.

Leon Abbett, for complainant. James B. Vredenburg, for defendant.

STEVENSON, V. C. The demurrer will be sustained.

1. The primary rights which the complainant seeks to enforce in this suit are all strictly legal rights arising from contractual obligations of the defendant, express or implied. The courts of law of the state have full jurisdiction of every item of the complainant's claim, and also have full jurisdiction of these items, when taken together in a mass, as constituting a single case for adjudication. A court of equity, on the other hand, has no jurisdiction whatever of any item of the complainant's claim when taken by itself alone, but, at most, can only acquire concurrent jurisdiction with the courts of law of the aggregated mass of items which make up the complainant's claim, in case it shall appear that this entire claim is so intricate and complex that the legal machinery of courts of law is not competent to deal with it, so that the remedy at law has become inadequate.

2. While the bill may be open to criticism, I think on a general demurrer it must be

taken as presenting a case, the trial of which may involve the proof of a very large number of items of various classes. The greater part of the claim is based upon a written contract between the parties, under which the complainant transferred freight of all kinds between the boats and barges of the complainant and its wharves and docks and other landing places. The contract specified as the complainant's compensation 25 cents per ton for hides and 10 cents per ton for other freight. The amount of freight thus handled was between 13,500 to 14,500 tons per week during five years. The term of the contract, five years, expired May 1, 1905, and the bill was filed on June 22, 1905. The entire claim of the complainant consists of the following elements: (1) A claim for money due under the contract for stevedore work done thereunder. (2) A claim for extra work amounting to \$3,601.09, of which both parties kept an account; the bill alleging "that the accounts of said extra work are complicated and intricate, being accounts of laborers' time in handling freight, sorting freight, and for other extra work on freight of said defendant." (3) A claim for damages by reason of the action of the defendant in giving work which the complainant was entitled to do under his contract to other parties. The contract excepted from its operation the transfer of freight "at the freight stations of the company." The bill alleges that the defendant established "new and additional freight stations for itself, and would not allow or permit" the complainant "to perform the stevedore work at said new stations," and thereby unlawfully deprived the complainant of large gains. A question of the construction of the contract, if there be any question, is here raised. The bill also sets forth that the defendant made deductions from the moneys due the complainant on account of damages which the defendant alleged it had suffered from negligent handling of goods by the complainant.

3. Inasmuch as the primary rights of the complainant for the enforcement of which this suit is brought are strictly legal, the mere fact that the bill prays for a discovery presents no ground for extending the jurisdiction of this court to compel the defendant to account. 1 Pom. Eq. §§ 223, 230; Brown v. Edsall, 9 N. J. Eq. 256 (1852); Little v. Cooper, 10 N. J. Eq. 275 (1854); United, etc., R. Co. v. Hoppock, 28 N. J. Eq. 261, 264 (1877); Foley v. Hill, 2 H. L. Cas. 28, 37 (1848). The allegations in the bill to the effect that the complainant kept no account, except for his extra work, and that the defendant has books and papers from which complete accounts may be obtained, but which it refuses to exhibit to the complainant, do not help out the jurisdiction in this case. The bill does not allege that the defendant was under any obligation to keep accounts for the complainant's informa-

tion, or that the complainant was not able to keep accounts for himself. The courts of law of New Jersey have ample power to give the complainant access to the defendant's books if those books are instruments of evidence in his case, and the complainant may file a bill in this court for discovery alone in aid of his action at law.

4. The bill prays for an answer without oath. If the jurisdiction of this court in a case like this could be extended because the complainant has a right to discovery, which I do not admit, such result would follow, it seems to me, only in case discovery in the ancient sense of the term were sought. Discovery means the production of evidence. Where the answer is without oath, the defendant's statements are not evidence in the cause against the complainant. They may be admissions, and as such evidence against the particular answering defendant who makes them. An answer in chancery originally had a dual capacity. It was a mere pleading to aid in defining the issues to be tried, and also a means of obtaining evidence not otherwise procurable. Our statute (Laws 1867, p. 166; Chancery Act 1902, § 19 [Laws 1902, p. 517]) permitting the complainant to call for an answer without oath gives the complainant the option to obtain from his adversary a pleading which has no force as evidence, except so far as the defendant may see fit to make admissions. This statute, however, expressly provides that the complainant while calling for an answer without oath may annex interrogatories to his bill, to be answered under oath with the same effect as evidence "as the responsive allegations in answers required to be sworn to." The statute plainly permits the defendant to procure an answer which is a mere pleading, and also to force the defendant to make discovery under oath in regard to any parts of the case concerning which he sees fit to call for such discovery. Notwithstanding this special provision for interrogatories to be answered under oath, the practice is established of permitting the complainant to submit interrogatories in his bill to be answered without oath, and this procedure is considered a mode of obtaining discovery. *Manley v. Mickle*, 55 N. J. Eq. 563, 37 Atl. 738 (1897). The last-mentioned decision of the Court of Errors and Appeals, however, in my opinion lays down merely a rule of pleading. The complainant, according to the doctrine of the case, has a right to present to the defendant the opportunity of making admissions, not only in regard to the allegations of the bill, but also in regard to matters of evidence which will be dealt with on the trial, which admissions, if made, may be useful to the complainant. If the defendant answers falsely, so as to deprive the complainant of an advantageous admission, the only penalty which he incurs would seem

to be a possible discrediting of his defense or an imposition of costs. When discovery fails, then jurisdiction also fails, as is conceded by those authorities which hold that jurisdiction for discovery founds jurisdiction for relief. 1 Story, Eq. Jur. § 455. Under no theory, in my opinion, can the jurisdiction of this court to decree an accounting be sustained on the ground that the complainant has a right to invoke the aid of the court for discovery, when the complainant waives an answer under oath and submits no interrogatory to be answered under oath, but abandons altogether the use of the answer as a means of putting the defendant under oath in the cause in advance of the trial, and thereby elects to have the answer stand as a mere pleading.

5. In determining whether the machinery of the courts of law is adequate to accomplish justice in a case like this, we must take into consideration that legal machinery as it exists to-day. We must look at the legal machinery which the law courts must set in operation for the purposes of this case, and not the legal machinery which the courts of law would have set in operation if a case like this had been presented to them a hundred years ago. *Bellingham v. Palmer*, 54 N. J. Eq. 136, 33 Atl. 199 (1895).

6. In the class of cases to which the present one belongs, it is said that the determination of the question whether a court of equity should intervene and investigate and enforce primary legal rights which have no color of equity is very largely addressed to the discretion of the court, a discretion which must be exercised largely according to the peculiar circumstances of each particular case. *Bellingham v. Palmer*, 54 N. J. Eq. 138, 139, 33 Atl. 199. In the case of *Cranford v. Watters*, 61 N. J. Eq. 284, 48 Atl. 316 (1901), Vice Chancellor Pitney, after examining a large number of cases, formulates the following rule or principle to guide the court in determining whether or not to take jurisdiction of cases of the class to which the present one belongs: "The test is, are the issues so numerous and so distinct, and the evidence to sustain them so variant, technical, and voluminous, that a jury is incompetent to intelligently deal with them and come to a final conclusion."

7. In the case last cited the point is brought out distinctly that this court may properly take jurisdiction of a case presenting a complex account, where the primary rights of the parties are strictly legal, after the inability of the machinery of the courts of law to meet the requirements of the case has been demonstrated by actual experiment, when, without such experiment, this court would refuse to act. It seems to me that this oftentimes is a safe and controlling principle. It is often dangerous in these days, when the remedial powers of courts of law are being expanded, not only by legislation, but

by natural development, for a court of equity to say in advance that a court of law is incompetent to do justice in any particular case of which it has jurisdiction. It is a good general rule, I think, that courts of equity in many kinds of cases should hold off until the actual test has been applied and the inability of the court of law to do justice has been demonstrated, unless such delay will cause irremediable damage. See *Kronson v. Lipschitz* (N. J. Ch.) 60 Atl. 819, 821.

8. In the case presented by this bill, while the trial apparently may involve a vast number of items, the propositions of fact to be established after all are few and simple. The questions seem to be: (1) What was the total amount of freight transferred of each of the two classes specified in the contract? (2) What was the total amount of money paid by the defendant to the complainant for this work? (3) What was the amount and value of the extra work of which the bill alleges both parties kept an account? (4) If the complainant was entitled to transfer the freight which the bill alleges he was prevented from transferring by the action of the defendant, what was the amount of such freight, and what was the profit which the complainant would have earned if he had been permitted to do this work? The alleged right of the complainant to do the stevedore work at the freight stations established by the defendant after the date of the contract, and the alleged wrongful deductions which the defendant made on account of goods alleged to have been damaged by the complainant, are matters included within the above specifications. The complainant insists that he cannot have these matters investigated satisfactorily in an action at law. The defendant denies that such is the case, and claims the right to have the experiment actually tried. This is plainly a case where, if both parties accepted this court as the tribunal for the trial of this cause, the jurisdiction of the court would be beyond dispute.

9. In determining this disputed question between these parties, I think the conduct of the complainant in permitting what he now claims to be a complex case to be piled up from year to year is a matter to be carefully considered. The contract provides that the defendant should pay the complainant "on Saturday of each and every week such moneys as may be due * * * for the work performed under this contract during the previous week." The inference from the bill is that these payments, accompanied by written statements of account, were made weekly for five years. The complainant accepted these payments but alleges that the defendant "did not during the continuance of said contract pay * * * on Saturday of each and every week such moneys as he had earned during the previous week." How many of these weekly payments the com-

plainant claims were short of the true amount is not alleged, but, assuming that all the allegations of the bill upon this subject taken together sufficiently show that large numbers of these payments were not up to the amount due, it still remains that the complainant received them and satisfied himself with "frequently" protesting. It appears, I think, from the bill quite distinctly that the complainant submitted to the numerous violations of the contract of which he now complains, contenting himself in some instances with protesting to an extent very vaguely described, and in some instances without protesting at all. The contract provides that the defendant "retains the right at any time to perform at the expense of the contractor any of the work herein specified, when, in the opinion of the manager of marine department of the company, the contractor is not proceeding with sufficient rapidity with the work," and "also that the contract may be terminated by the company at any time when the performance of any of the work hereinbefore specified is not satisfactory." These provisions perhaps suggest a reason why the complainant was willing to receive the benefits of the contract during the five years while he held in reserve and allowed to accumulate a mass of more or less minute legal claims which he now seeks to enforce in a single suit in a court of equity. It seems to me that a complainant who has allowed so many claims under this five-year contract to accumulate and to grow stale is at a decided disadvantage when he now asserts that the aggregate mass of his claims is too complex to be handled conveniently and justly by a court of law, in which each particular claim originally belonged. Each claim when it arose would have constituted the basis of a very simple action at law, but by allowing the claims to accumulate the complainant, it seems, has added to the whole the element of complexity, and has thereby founded the jurisdiction of a court of equity to compel the defendant to account. It would seem that the complainant, according to his theory of his case, by his own laches, by permitting a large number of strictly legal causes of action created during a period of five years to remain unprosecuted, has succeeded in founding an equity on his own behalf, viz., the right to compel his adversary to render an account in the Court of Chancery.

10. I do not admit that this court can take jurisdiction of an action for unliquidated damages for the breach of a contract, of which, if simple in character, the courts of law would have exclusive jurisdiction, on the ground that the items of damages are numerous and complex, or for any other reason impossible of accurate ascertainment by a court of law. See *Courter v. Crescent Sewing Machine Co.*, 60 N. J. Eq. 413, 45 Atl. 609 (1899).

11. The defendant argues that the bill

shows that there was a weekly account stated between the parties which bars any suit for an accounting in this court. *Brown v. Van Dyke*, 8 N. J. Eq. 795, 801, 55 Am. Dec. 250 (1853); 1 Story, Eq. § 526. I shall not set forth the allegations of the bill on this subject. I think the fair meaning of the bill is that the complainant "frequently"—i. e., from time to time—protested against the weekly statements rendered to him by the defendant as they came in. How many statements he objected to and how many he accepted and acquiesced in we are not informed. Two hundred and sixty statements must have been rendered in the five years. Perhaps only a dozen or two dozen were objected to. A large part of the complainant's complex and intricate claim may, for all that appears in the bill, be reduced to a state of extreme simplicity by the application of the doctrine of "account stated." It is evident that all evidence as to a very substantial part of the complainant's case, embracing very many details, may be excluded by a ruling of the trial court as to the construction of the contract. Taking every well-pleaded allegation of the bill to be true, I think the case exhibited is one which a court of law, with its modern methods of procedure, including orders for the production of books, examination of parties before trial, and the statement and settlement of accounts by references, may dispose of in as complete accord with all the principles of justice as would be possible in a court of equity. It seems to me in this peculiar class of cases, where the complainant is endeavoring to have an action at law tried in a court of equity, because of its alleged intricacy and complexity in respect of matters of fact, the bill must do more than show a case which might on trial in a court of law prove intricate and complex, so as to make the legal procedure applied to its determination inadequate. Where the defendant denies the right of the complainant to try his legal action or actions in the Court of Chancery, the complainant must show, at least presumptively, that the alleged intricacies and complexities will appear so as to embarrass, if not defeat, the useful operation of the machinery of the court of law in which the legal action might be brought. In such a case, in brief, I think the complainant must show that his remedy at law in fact is inadequate, and not merely that such remedy may in the end turn out to be inadequate. Of course, we are now concerned only about the correct rule to be applied to cases like this, where the sole foundation of the jurisdiction of the Court of Chancery is the inability of the courts of law to provide an adequate remedy. An entirely different rule may be applicable to cases where there is a fiduciary relation, or an element of fraud, or mistake, so as to give a court of equity

jurisdiction, apart altogether from the mere inadequacy of the remedy at law.

12. If this bill should be adjudged to present a case of equitable cognizance, I think that large numbers of actions of law on contracts of various kinds, which our law courts are constantly disposing of with complete recognition and enforcement of all the rights of the parties, could be transferred at the election of either party to the Court of Chancery. The prospect of such a transfer of jurisdiction is somewhat appalling.

13. The bill contains one charge of fraud which calls for some special consideration. This charge is set forth as follows: "That said defendant company did not during the continuance of said contract pay to your orator on Saturday of each and every week such moneys as he had earned during the previous week, but your orator charges and insists that the said defendant company, with the intent to and for the purpose of cheating and defrauding your orator, rendered to your orator incorrect and fraudulent statements of the amount of freight transferred and hauled by him, and paid your orator in accordance with said incorrect and fraudulent statements, and neglected and refused to pay him for freight actually transferred and handled by him under said contract. That your orator frequently protested to said defendant company in regard to said inaccurate and fraudulent statements of freight transferred and handled by him, but was informed by said defendant company that the said payments to him were made in accordance with the weight of said freight as the same appeared upon the waybills or receipts for said freight; but your orator charges and insists that said waybills or freight receipts did not correctly show the amount (or weight) of the said freight therein mentioned; that in many instances the weight or amount of freight as set forth in said waybills or freight receipts is not more than from 60 to 80 per cent. of the actual weight of said freight." There are several reasons I think why the foregoing allegations, which in a general way charge a fraudulent intent against the defendant, cannot in this case be deemed to give the court jurisdiction of the case presented by the bill. There is no charge that the defendant actually committed any fraud or even in any way deceived the complainant. On the contrary, it appears from the bill that the complainant was not deceived, but "protested to the said defendant company in regard to the said incorrect and fraudulent statements," and that upon such protest the defendant sought to justify itself by alleging that the payments were made in accordance with the weight of the freight as it appeared upon the waybills. The complainant thereupon "charges and insists" that the waybills were incorrect, and that in many in-

stances the true weight was far greater than that set forth in the waybills. The bill, however, does not allege that the complainant notified the defendant of what he now charges and insists as above set forth. Nor does the bill allege that the defendant was guilty of any fraud in respect of the waybills, or was in any way notified that they were incorrect, or that statements taken from them would be liable to mislead or deceive the complainant.

Notwithstanding the distinct charge that the defendant rendered incorrect statements with intent to cheat and defraud the complainant, there are strong grounds for construing all the allegations above set forth embodying this so-called charge of fraud as in fact setting forth a transaction in which no fraud appears. It is not a sufficient charge of fraud in a bill to allege that the defendant has done something with intent to cheat and defraud, when the thing charged appears on its face entirely innocent and free from fraud. It is necessary that facts should be alleged from which fraud may be inferred. If the defendants took the weights which they set forth in their weekly statements from the waybills, knowing that the waybills were false, or knowing that the complainant might thereby be deceived, the bill should have so alleged. On the contrary, as I have pointed out, it appears distinctly from the bill that the complainant was not deceived. But, if on demurrer, the bill must be deemed to contain a charge of fraud, such charge relates only to conduct of the defendant affecting the evidence of a part of the complainant's claim. The bill is not filed to recover damages on account of this alleged fraud, but to recover the amount of money earned under the contract. At most, the alleged fraud or attempted fraud was a deception practiced or attempted to be practiced by the defendant, with intent to conceal a portion of the amount which the complainant had earned. I do not think that such a mere effort, an unsuccessful effort to deceive the complainant as to the amount of his earnings, can give a court of equity jurisdiction of an action to recover the amount actually earned and unpaid. If such were the case, then it seems to me that the jurisdiction of a court of equity on the ground of fraud might be extended to a very large number of strictly legal litigations in which one of the parties has practiced some deception in the way of concealment or suppression of evidence. Courts of law are now equipped with extensive powers for the discovery of evidence in such cases, and in many such cases a bill for discovery pure and simple will lie in this court in aid of the appropriate action at law. It must be kept in mind that the bill does not allege that the defendant was under any obligation to keep accounts of the complainant's work, or had notice that he was not keeping accounts, or had notice that he relied on the accounts kept by the

defendant. Giving the greatest possible force to the allegations that the defendant rendered false statements, I do not think that the unsuccessful attempt of the defendant to deceive the complainant as to the extent of part of his earnings can justify this court in taking jurisdiction of an action at law to recover those and other earnings, which jurisdiction it would not assume if no such unsuccessful deception had been attempted.

14. My present conclusion is merely this: that the complainant's case as set forth in his bill is not one of which this court should take jurisdiction until the same has been subjected to the course of procedure which a court of law in New Jersey to-day can pursue for its determination. Whether, as in the case of *Cranford v. Watters*, after a court of law has attempted to dispose of the case, grounds will appear for transferring it to a court of equity, cannot now be determined.

VAN DER PLAAT v. UNDERTAKERS' & LIVERYMEN'S ASS'N OF PASSAIC COUNTY et al.

(Court of Chancery of New Jersey. Dec. 7, 1905.)

1. INJUNCTION — BOYCOTT — INJURY TO BUSINESS.

A complainant, who showed no establishment undertaking business or the ownership of any appliance used in carrying on such business, cannot obtain an injunction restraining an undertakers' and liverymen's association from boycotting him.

2. SAME — EXPECTED INJURY.

The mere fact that the constitution of an association of undertakers and liverymen contains clauses the obedience of which would result in a boycotting of complainant did not entitle him to an injunction restraining such a boycott.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 10, 11.]

Suit by Frank Van Der Plaat against the Undertakers' & Liverymen's Association of Passaic County and others. On order to show cause why an injunction should not issue. Heard on bill and affidavits. Order advised, discharging the cause.

Edward F. Merrey, for complainant. William B. Gourley, for defendants.

PITNEY, V. C. The object of the bill is to enjoin a boycott. The allegation of the bill is that the complainant is educated as an embalmer and undertaker, and has been, for two months prior to the filing of the bill, ready and willing to engage in that business in the city of Paterson in Passaic county, but has been prevented from doing so by the defendant association and its members. It will be observed at once that the complainant has not on his own show the least shadow of an established business. He does not own a single appliance necessary or convenient for the transaction of the business, but avers that he relies on purchasing coffins and other

supplies of that kind from persons engaged in the business of furnishing such supplies, and on hiring hearses, carriages, and horses from persons engaged in keeping those articles for hire for funeral purposes. He alleges that the defendant association comprises all the undertakers in the county of Passaic and most of the livery stable men, and, as I understand the bill, all of those owning hearses and funeral carriages in the county of Passaic. He further alleges that he recently applied for membership in that association and was refused. He asserts further that he tried to buy a coffin from the only manufacturer or dealer in that article in the city of Paterson, and was unable to buy one, and was informed by the dealer, Mr. Keasing, that he was unable to sell him any for the reason that the members of the defendant's association would not buy of him if he should sell to a member outside of the association. That he applied to two different liverymen who kept hearses, namely, Mr. Zabriskie and Mr. Ackerman, and they each refused to hire him a hearse and carriages except at a higher price than that charged to the members of the defendant's association, and put their refusal on the ground that he was not a member of the association. He does not state that on either of these occasions he actually had in hand a corpse to be disposed of. The attempt to purchase the coffin and the attempt to hire the hearse and carriages were each of them mere experiments.

He produces and points out clauses in the constitution of the defendant association, which are as follows:

"Art. 10. The members of this association shall not deal with any manufacturers of caskets or other funeral furnishings, nor with any jobbing house in undertaker's supplies, who shall sell, or offer to sell, to parties not in the business, or (after due notice) shall sell or offer to sell to any undertaker who persistently violates any of the provisions of this constitution, or to an expelled member of this association.

"Art. 11. The members of this association shall not loan, sell, hire or exchange, either directly or indirectly, any part of their equipments or supplies to an expelled member, or to any undertaker who has violated any of the provisions of this constitution, or to any undertaker doing business in the county of Passaic, N. J., who is not a member in good standing in this association."

"Art. 17. No undertaker or liveryman shall let or hire any hearse or coach to any private individual or person not an undertaker or liveryman, for less than the schedule adopted by this association; neither shall he or she hire to aid or assist any undertaker or liveryman not a member of this association to secure hearse or coaches for any funeral. * * * Neither shall any undertaker hire hearse or coaches from any liveryman who shall violate the schedule of prices or who shall hire

hearse or coaches to any undertaker of Passaic county who is not a member of this association after due notice has been given him."

The complainant's counsel cited a great number of adjudged cases in support of his argument that, upon the facts as above stated, he is entitled to relief in this court. Before coming to the affidavits in behalf of the defendants, I stop to say that I have found no case which warrants the interference of this court against a boycott against a person who has no established business to be subjected to a boycott. Coming now to the defendant's affidavits, they show that the complainant's applications for membership—there were two—were treated precisely as other applications were treated. The rules of the association require that the applicant should have certain qualifications as to moral character and financial standing, and should have served an apprenticeship of one year as assistant to a practicing undertaker. Two different committees were appointed, one after the other, to inquire into complainant's qualifications in these respects, and both found him deficient in the qualification of skill and familiarity with the conduct of the business, and that he had not served any apprenticeship as an assistant to an undertaker, and they were unable to find that he had been sufficiently, if at all, instructed in the process of embalming.

The only party—Mr. Keasing—in Paterson who makes a business of supplying coffins swears that he never was forbidden by the defendant association or any of its members to sell coffins or funeral supplies to persons in Passaic county other than members of the association, or threatened with the loss of trade if he did so. That in point of fact he has done so to an undertaker not a member of the association within a very short time. He gives a version of the interview with the complainant testified to by him, quite different from that given by the complainant. He denies emphatically that he gave as a reason for not selling the coffin that he was afraid of loss of business from the members of the association. Judging from his account of that interview, he (Keasing) was simply looking with proper prudence at the probability of his receiving payment for the coffin proposed to be purchased. The defendant's officers, ex-officers, and some of its members swear that its constitution was copied from that adopted by the Hudson County Society; that there never was any thought by any member of the association of employing the paragraphs above quoted to prevent anybody from doing business who was not a member of the association, and that those paragraphs never had been enforced against anybody; that there never was any occasion to enforce them, because every undertaker in the county of Passaic joined the association, and all are still members, except one, who withdrew from the association because he became in-

solvent and went through bankruptcy, and has lately been refused readmission, principally, if not wholly, on the ground of his insolvency. Notwithstanding his nonmembership, he has been doing business in Paterson as an undertaker in a small way without molestation by the defendant society. The officers and members of the defendant society swear that the attempt of the complainant to establish himself as an undertaker in Paterson did not excite any action on the part of the society, and did not receive or meet with any opposition on its part or any of its members.

With regard to the complaint that complainant was unable to hire a hearse and carriages, except at a rate higher than that charged to members of the society, it is to be remarked that the affidavits show, what is a matter of almost common knowledge, that it is the practice for the undertakers to make a profit of \$1 each from the hire of the hearse and coaches, and the complaint is, not that complainant could not hire the hearse and coaches at the price usually charged for those for funeral purposes, but that he was unable to exact from the proprietor the profit of \$1 each. But Mr. Zabriskie and the man, Van Houten, in charge of the stable of Mr. Ackerman, to whom the complainant applied, each give quite a different account of the interviews from that given by the complainant. Mr. Zabriskie swears that one evening, shortly before the bill was filed, the complainant came to him at his place of business just as he had returned from a business trip in the country, and asked him to let complainant have the use of a hearse and three coaches the following day. Mr. Zabriskie answered as follows, "I stated to him that I could not do that. I was busy the next day, and could not accommodate him." He proceeds to say he did not refuse to hire the hearse and coaches to him, on the ground that he was not a member of the defendant association. He also swears that the complainant did not offer to pay cash for the use of the articles, nor did the deponent refuse to take the money because none was offered. He further denies that he said to complainant that he could not do business with any one not a member of the association, nor did he tell complainant that at any time, and he swears that he never said that he was afraid to let complainant have the hearse and coaches by reason of a fear of a boycott by the association, or that they had threatened him. He swears that no such threat had been made to him, and adds: "I did not know anything about the financial standing of the complainant, and I decline to do business with any person, unless I have some reasonable knowledge of their ability to pay." With regard to Mr. Ackerman, his foreman, Van Houten, swears that the complainant called at Ackerman's stable and asked the hire of two coaches for the next day, and stated that he was an undertaker. Van Houten told him the charge was \$5 each.

Complainant did not offer to pay, but later in the day called up Van Houten on the telephone and stated that he desired to have a hearse and another coach, to which he was answered that he "could have the coaches, but he did not let the hearse to everybody." To which he replied "that if he did not get the hearse he need not send the coaches." He denies that he said that complainant could not hire a hearse from Ackerman at any price.

Generally the statements in complainant's affidavits of the principal facts relied upon on this motion are thoroughly met and denied by the affidavits of the defendants, so that I am not satisfied that he has been subjected to any boycott, even if he had a business which was liable to be injured by a boycott. What he may be able to establish on final hearing, when he will have the power to compel the attendance of witnesses and exercise the right of cross-examination, I cannot of course anticipate. In short, the complainant's case at present rests on the mere existence in the constitution of the defendant society of the clauses above set forth, without any proof which satisfies my mind that the clauses in question have ever been enforced or threatened to be enforced against him, or that their existence has been the least obstruction to his success. On this point I can find no judicial authority that the mere existence of such articles without their being actively enforced form any ground for the interference of this court. I conceive it to be a fundamental rule governing the action of this court that it exercises its restraining powers only for the protection of some threatened injury to a property right or a right in the nature thereof. The mere unlawfulness of an act or a series of acts, even though that unlawfulness amounts to criminality, does not excite the action of this court, unless it affects the personal or property rights of some individual who asks the aid of the court. It follows, that granting that I may conceive that the clauses in question are capable of being so enforced by the defendants as to work an unlawful boycott against some person, yet until a person who is threatened with such injurious action, and is likely to suffer pecuniarily from it, applies to the court, I cannot take action against the defendants. The case is not within the rule upon which I acted in *Martin v. McFall*, 65 N. J. Eq. 91, 55 Atl. 465. There Martin was a baker in full possession of an established business, and declined a request of a labor union to close his shop at 8 o'clock, and was threatened with a boycott and actually suffered in his trade by the refusal of his old customers to deal with him. The difficulty at the interlocutory hearing was to charge any particular person as an individual or the union as a body with having instigated the boycott.

I will advise an order that the order to show cause be discharged with costs.

**TRENTON TRUST & SAFE DEPOSIT
CO. v. ARMSTRONG et al.**

(Court of Chancery of New Jersey. Dec. 12, 1905.)

1. WILLS—CONSTRUCTION—INTEREST OF LEGATEES.

A will provided that upon the decease or marriage of testator's widow the estate should go to testator's three unmarried daughters, so long as they should remain unmarried, and in case they "all" should marry it should be equally divided between testator's five children or the issue of deceased children. *Held*, that the daughters took the use of the fund during the time they remained unmarried as joint tenants, with right of survivorship between them, and so long as any of the daughters remained alive and unmarried the trust continued for their benefit, although others had died unmarried, so as to make it impossible that "all" should ever marry.

2. SAME—VALIDITY OF BEQUEST—RESTRAINT OF MARRIAGE.

A provision in a will for the support of daughters so long as they continue unmarried and need support is a valid bequest, where the evident intention is, not to restrain marriage, but to provide support.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1533-1535.]

3. SAME—DESCRIPTION OF LEGATEES.

A daughter of testator, who was a widow at the time of the making of testator's will, and who was specifically included by testator in a bequest to his "three unmarried daughters," must be considered as unmarried in construing the will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1078.]

4. SAME—ESTATES CREATED—REMAINDERS.

A will provided that upon the decease or marriage of testator's widow the estate should go to testator's three unmarried daughters so long as they should remain unmarried, and in case they all should marry it should be equally divided between testator's five children or the issue of deceased children. *Held*, that the will created an estate for life or during maidenhood in testator's daughters, with a remainder over to the children in the corpus of the estate, which became a vested interest on the death of testator, and took effect in possession upon the determination of the interests of the daughters either by death or marriage.

Bill for the construction of a will by the Trenton Trust & Safe Deposit Company, administrator with the will annexed of Ephraim W. Blackwell, deceased, against Mary Frances Armstrong and others. Decree advised.

James Buchanan, for complainant.

BERGEN, V. C. The complainant, as trustee and also as ancillary administrator with the will annexed of Ephraim W. Blackwell, deceased, having in hand a trust fund, part of the estate of said decedent, has filed this bill for directions as to the manner in which it shall execute the trusts created by the will of its testator. The complainant has in hand about \$2,000, which it holds subject to the trust, if any, arising from the proper construction of the following paragraphs appearing in the will of the deceased, viz.:

"Item: I give, devise, and bequeath the net rents, interest, and income of all my estate, real, personal, and mixed, whatsoever and wheresoever of which I may die seised, possessed, or entitled, unto my beloved wife, Sarah Ann Blackwell, for and during the term of her natural life, provided she so long shall remain my widow, single and unmarried, but not otherwise; she paying all charges and taxes against said real estate.

And immediately upon the decease or intermarriage of my said wife, which shall first happen, I give, devise, and bequeath unto my three unmarried daughters, Sarah Elizabeth Thompson, Emily Blackwell, and Florence Blackwell, so long as they remain unmarried, to have all my property so long as they remain unmarried, in case they all marrying, to be equally divided between my five children, Mary Frances Armstrong, Sarah Elizabeth Thompson, Emily Blackwell, Theodore J. Blackwell, and Florence Blackwell, or the lawful issue of the same as shall then be deceased, or their respective heirs, administrators, and executors or assigns, forever, so, nevertheless, that such issue take and receive such part and share only as his, her, or their deceased parent would have taken if then living."

The widow, and also Sarah, one of the three unmarried daughters, are dead. Emily and Florence, two of the three daughters described in the will as unmarried, are still living. Sarah died after the testator, without leaving issue, having never married. Besides these three daughters the testator left a daughter, Mary Frances Armstrong, the wife of James C. Armstrong. She is still living, and also a son, Theodore, who survived the testator, and died, leaving three children. These persons are all of the parties interested in the present or future distribution of this fund. They have all been made parties defendant to this suit, and for want of answers a decree pro confesso has been taken against them.

The doubt as to its duty in the premises, which the complainant suggests, arises under the claim made by the two unmarried daughters that they are entitled to the whole of the income as survivors of their sister Sarah, and that such right will continue to the unmarried sister, should either of the present survivors marry or die, and that no distribution of the corpus of the fund can be made while either of the three live unmarried. Against this claim is the insistence on behalf of the children of Theodore that the three unmarried daughters took only an interest which was to be divested upon the death or marriage of either, and that upon the death of Sarah they became entitled to an immediate distribution of the whole fund between themselves, representing their father and their aunts, Florence, Emily, and Mary. The intentions of the testator are so inartistically expressed in his will as to

make it difficult to clearly ascertain and define them according to well-settled rules of construction; but it seems to me that the dominating purpose of the testator was to provide for the comfortable support and maintenance of such of the women of his family as were unmarried and dependent upon their own exertions for support. His estate was small, and he devotes its income at first to the support of his wife during her widowhood. After this purpose is served the income is to be devoted toward the maintenance of such of his daughters as remained unmarried, and, when all were married, the preference was to cease and the fund divided equally among all the children, because in the mind of the testator they had then reached a common level; and my understanding of this bequest is that it was the testator's intention that the fund was to remain undistributed and the income applied to the use of any of the daughters unmarried until all were married, or the happening of some event which precluded the possibility of the fulfillment of the condition. The time fixed for the distribution is when all are married. The death of one unmarried makes it impossible to have this condition met, if the word "all" is to be applied collectively to the donees as a class, and my interpretation of this clause is that the word "all" applies only to so many of the class as remain capable of marrying; that the death of one does not destroy the trust because all of the class cannot marry, but it continues for the benefit of the remaining beneficiaries so long as any of them are alive and unmarried. The class may be diminished by death or marriage, but it is not extinguished so long as one of them lives and continues within the description of those for whose benefit the trust was created. The devise is to three unmarried daughters, so long as they remain unmarried, with remainder over in the event of "all marrying." It is a legacy given to two or more persons by name, without words indicating an intention to confer distinct interests, and the three daughters take the use of the fund during the time they remain unmarried as joint tenants, with right of survivorship. *Noe, Adm'r, v. Miller's Ex'rs*, 31 N. J. Eq. 234-236; *Gordon v. Jackson*, 58 N. J. Eq. 166, 43 Atl. 98. It, therefore, follows that the complainant, as trustee, should hold the trust fund so long as any one of the three daughters remain unmarried, and pay the income to all, retaining the qualification established by the testator. A provision made for the support of daughters as long as they continue unmarried and need support, where the evident intention is, not to restrain marriage, but to provide support, is a valid bequest. *Graydon's Executors v. Graydon*, 23 N. J. Eq. 229-237.

On the argument the attention of the court was called to the fact that Sarah Elizabeth

Thompson, one of the three daughters, being a widow, did not properly fall within the description "unmarried"; but this condition does not change the situation. She was a widow at the time of the making of the will, and, as the testator expressly names her as unmarried, we must adopt the evident intention of the testator and give to this word a secondary, and perhaps a less-accustomed, meaning, which is, "not being married at the time in question"; that time here being the making of the last will.

The next question presented is, has the testator made any disposition of the corpus of his estate? The gift over, as expressed by the testator, is to take effect when all of the three unmarried daughters are married, and it is insisted that the gift of the corpus is liable to take effect or to be defeated by the occurrence or nonoccurrence of an uncertain event, viz., the marriage, not of one, but of all, of these unmarried daughters, and therefore falls within the definition of a conditional legacy, and, as one of the daughters died unmarried, the condition upon which distribution depends can never happen, and that therefore the testator died intestate as to the corpus. In my judgment this insistence has not the sanction of the true rules of construction to be applied to a case of this character, and I am of opinion that the testator intended to create, and, under well-established rules for the construction of wills, did create, an estate for life, which was subject to an earlier termination upon the marriage of all of his then unmarried daughters, and that the remainder over takes effect on the determination of the preceding estate, whether by death or marriage, and that, although the bequest over is in terms made payable upon the marriage of the life tenant, it is to be extended by implication, so as to take effect on the determination of that estate, whether by death or marriage.

What the testator undoubtedly intended was a provision for his unmarried daughters during their maidenhood, even if that condition continued until their death, and in the event of the destruction of that previous estate, either by marriage or death, then the corpus of the fund was to be divided among his living children, which might include these three daughters if the determination of their life estate had been caused by marriage, and also among the issue, per stirpes, of any of his children who might have died before the determination of the previous estate. This construction has the authority of well-adjudged cases. In *Eaton v. Hewitt*, 2 Dr. & Sm. 184-192, the court said: "It is a rule now well established that where a testator gives to a woman a life interest, if she so long remains unmarried, and then directs that in the event of her marrying the property shall go over to another, although, according to the strict language, the gift over is

expressed only to take effect in the event of the marriage of the life tenant, the gift over is held to take effect, even though the tenant for life does not marry." In *Browne v. Hammond*, Johns. Chy. (Eng.) 210, where the gift was to the wife, so long as she should remain the testator's widow, without being expressly for her life, the court held that it was concluded by the authorities, "which have determined that a devise or bequest over, though in terms made upon the marriage of the donee of the preceding estate, is to be extended by implication, so as to take effect on the determination of that estate by death." This case was cited with approval in *Underhill v. Roden*, 2 Ch. Div. 494.

The result I have reached is that the gift over of the corpus of this fund creates a vested interest, which took effect on the death of the testator, subject to the estate of the widow, which has now been disposed of by her death, and also subject to the joint estate of the three unmarried daughters during their maidenhood, or life if they never marry.

WILSON v. WEIGLE et al.

(Court of Chancery of New Jersey. Sept. 22, 1905.)

1. BANKRUPTCY — PREFERENCES VOIDABLE — INTENT OF DEBTOR.

Under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], providing that if a bankrupt shall have given a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value, the party receiving payment must have had reasonable ground to believe that it was intended thereby to give a preference before he can be held liable to refund.

2. SAME — ACTION TO RECOVER PREFERENCE.

In an action by a trustee in bankruptcy to recover a payment made by the bankrupt, on the ground that it was an unlawful preference, evidence held insufficient to show that defendants had reasonable ground to believe that a preference was intended.

Bill by Henry L. Wilson, trustee in bankruptcy of David Freedman, against Frederick Weigle and another, to recover a payment on the ground that it was an unlawful preference. Decree for defendants.

Frank Benjamin, for complainant. Egbert J. Tamblin, for defendants.

PITNEY, V. C. The complainant, Wilson, is trustee in bankruptcy of David Freedman, a bankrupt, of Chicago, Ill., a dealer in jewelry. The defendants, Weigle and Rose, are manufacturing jewelers of Newark, N. J., and prior to February 11, 1904, were creditors of Freedman in three several promissory notes maturing on the 10th, 15th, and 20th of January, 1904, and which were protested for nonpayment, and on the 29th

of January amounted, with protest fees and interest, to \$511.71. On the 3d of February, 1904, they settled with Freedman, and accepted from him \$200, a trifle less than 40 cents on a dollar, and gave a receipt in full for their claim. On the 7th of March involuntary bankrupt proceedings were instituted against Freedman, on the 22d of March he was duly adjudicated a bankrupt, on the 29th of April the complainant was appointed his trustee in bankruptcy, and on the 2d of May, having given his bond, was authorized to act as such and took possession of the bankrupt estate. He now files his bill in this court to recover back the payment of \$200 so made by Freedman to the defendants, on the ground that it was an unlawful preference. The special allegation of the bill on that behalf is this: That on or before February 3, 1904, Freedman was insolvent, and that his liabilities amounted to \$6,800, and his assets to \$2,000, which rendered him insolvent, and the defendants had due notice of it. That the assets in hand at the time of filing the bill, January 11, 1905, were only about \$400.

The facts which are admitted, or which clearly appear in evidence so as not to be open to dispute, are as follows: Previous to the month of January, 1904, Freedman was doing business as a dealer in jewelry in a room in the Masonic Temple in the city of Chicago. He had a safe, showcase, desk, and all the implements necessary for his business, and was undoubtedly solvent. He kept regular books of account, about the accuracy of which no serious dispute was made. They showed his indebtedness with substantial accuracy, and also the amount due him from his debtors. An important item of fact is that the character of goods in which he mainly dealt was what is known as staple goods, consisting mainly of gold rings and gold chains. The evidence is quite clear that for some time previously he had been arranging with his creditors in such manner that his indebtedness had taken largely the shape of promissory notes falling due in January, 1904. He swears, when called by complainant as a witness, that on the morning of the 6th of January he had on hand over \$3,300 cash in his safe. Mr. Rose, the defendant, who examined his books of account with care about the 1st of February, swears that his cashbook showed that he should have had on hand at that time the amount of cash which he claimed to have and swore in this cause that he did actually have. On that day, January 6, 1904, he claimed to have been forcibly robbed of about \$3,400 in cash, \$141 in a check of a customer not yet deposited, and \$500 or \$600 of merchandise, making a loss by robbery in round figures of \$4,100. On the 9th of January he caused to be prepared and mailed to his creditors a letter stating these facts, and showing his present financial con-

dition. By that he showed that his assets on that day were: Cash on hand, \$810; stock on hand, \$1,950; fixtures and safe, \$150; book accounts (both good and doubtful), \$2,265. If we add to this the alleged losses by robbery, \$4,100, we have \$9,275. In the same letter he states his liabilities at \$6,780, showing an ability, if his remaining assets were good as stated, to pay 76 cents on a dollar. He swears that his book accounts were worth at least 75 cents on a dollar, which would leave him able to pay 70 cents on a dollar.

Mr. Rose, shortly after receiving this letter, started out on a business trip, which brought him to Chicago toward the latter part of the month, when he set about looking into Mr. Freedman's affairs in a thorough and businesslike manner. He first heard his story about the robbery, and that of the witnesses. He had, in addition, read a second letter written by Mr. Freedman to his creditors, under date of January 14th, giving a detailed account of how he happened to have so much money on hand, and also the details of the robbery. This letter had reached the firm after Mr. Rose started out on his trip, and had been forwarded to him at Chicago. He then conferred with the police officials, with the result that he became satisfied that there had been no robbery, and he found the police officials, and all who had made any investigation of the affair, were of that opinion. He then examined into his actual financial condition and means. He took his word that he had on hand in cash, on the day the letter was written, the sum of \$810. He found satisfactory evidence that he had paid out some money since the 9th of January in settling with some of his creditors and in living expenses. He examined his stock of goods, made a careful inventory of them, which is produced, found them to consist mainly of rings and chains (with the value of which he was familiar, because he manufactured them), and appraised them at \$1,911.50, nearly the amount which Freedman claimed them to be worth in his circular. He found the fixtures and safe to be worth what Freedman claimed, \$150. He then examined the credits on his ledger. He had a list of those credits furnished him by Freedman, which amounted to \$2,265, and with the aid of his counsel went over Freedman's ledger and checked them off, and found the charges all there, and saw no reason to doubt that they represented an actual indebtedness as therein stated. He therefore concluded that his statement in the circular letter of his assets was substantially correct, and that, taking the value of the establishment as a going concern, it was worth about \$5,000, which would enable Freedman to pay 70 cents on the dollar or thereabouts. He also learned that the man Rosenfeld, who appears to have prepared the circular letter of January 9th, proposed to go into business with Freedman.

I should have stated that he found Freedman in complete control of the premises, and apparently doing business as if nothing had happened. He also learned from Freedman that, after conferring with his friendly creditors, he had made up his mind to try to settle with his creditors at 40 cents on the dollar; that he had already settled with some of them at that rate, and had made arrangements to raise money to settle with the rest on the same basis. Naturally Rose, believing as he did that Freedman had within his control over \$3,000 in cash of which he had pretended to have been robbed, did not feel any mistrust of his ability to raise the money to make the settlement; but he did inquire carefully into the probability of his being able to settle with all his creditors on those terms, and received from Freedman satisfactory assurances and information on that subject. Though he does not say so in so many words, I cannot but think, from a reading of the whole testimony, that he felt that Freedman would be willing to pay more than 40 cents if it were necessary so to do in order to settle. He finally concluded to accept the 40 cents and gave a receipt accordingly.

There is no proof before me as to what disposition was made by Freedman of his assets between February 3, 1904, and May 2, 1904, when the trustee took possession, nor as to the character of the assets which the trustee took into his possession. An ex parte affidavit made by the trustee on the 3d of July, 1905, states that the appraised value of the assets coming into his possession was \$1,902.15, and that the amount of assets then on hand, July 3, 1905, was \$184.11; over \$200 less than the amount in hand when the bill was filed January 11th. The parties in this settlement were entirely at arm's length. There is nothing to warrant the inference that Freedman intended to treat the defendants better than he at that time intended to treat his other creditors. The clear weight of the evidence is that he was financially able at that time to have settled with all his creditors upon the same terms, and so far as appears he was then quite willing to do so. There is nothing to explain his not doing so, except the inference that some of those creditors refused to accept his offer. Upon these facts the question is whether, under the bankrupt laws of the United States, the defendants should refund the \$200 received by them in full of their claim of \$511 on the 3d of February, 1904.

The object of the bankrupt law is to produce an equal distribution among his creditors of the assets of the insolvent, and to that end they provide against unlawful preferences made by the insolvent in anticipation of bankruptcy, and they provide for a recovery back by the trustee in bankruptcy of any unlawful preferences made within a certain period of the bankruptcy. Undoubtedly Freedman was insolvent in the sense in which that word is used in the bankrupt act at the

time he paid the money to Rose, because he did not have sufficient assets over and above those which Rose believed he had concealed to pay his debts in full. The first section of the act declares that a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts. Rose dealt with him as an insolvent, but he did not consciously accept the payment as a preference. I find as a fact that Rose thoroughly believed that Freedman was able and willing out of his unconcealed assets to pay each of his creditors considerably more than the 40 cents on the dollar, which he offered, and that he would, if pressed, pay more than that, and that Rose had no reason to believe but that every creditor would be able to receive, if he chose to accept it, the same rate of payment which he received on behalf of the defendants. Further, there is nothing in the case to indicate that Freedman intended to prefer Rose over his other creditors or supposed that he was doing so, so that the element of intentional or conscious preference of one creditor over another nowhere appears in the case up to the moment of the settlement with Rose. Further there is no reason to believe that, at that time, Freedman did not intend, in good faith, and was not able to settle with all his creditors at the rate mentioned. What may have been conceived and accomplished by him in the way of making further fraudulent disposition of his assets, between February 3d and March 7th, when he found that all his creditors would not settle on these terms, there is nothing to show. No proof was offered by complainant on that topic, for, as before remarked, the character of the assets which came to the hands of the trustee on the 2d of May has not been shown; nor has he shown what efforts he made, if any, to find other assets or to ascertain what had become of those which undoubtedly existed on the 3d of February.

Turning, now, to the statute (Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], we find the provisions governing the transaction as follows:

"(a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire

until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

"(b) If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

It appears by this legislation that the party receiving the payment must have had reasonable ground to believe that it was intended thereby to give a preference before he can be held liable to refund. The actual intention to give a preference on the part of the insolvent is a necessary ingredient and the creditor receiving it must have reasonable cause to believe in the existence of such intent. Counsel for complainant does not contend, in his ingenious argument, that there is any evidence in the case to warrant the existence of such intent, or to warrant the inference that Mr. Rose, or either of the defendants, had reasonable cause to believe that Freedman intended to give the defendants a preference over his other creditors or to show them any special favor. He boldly argues that every creditor of an insolvent debtor has a right, by the statute, to have his estate administered in the bankrupt court, and that a party who accepts a composition from an insolvent takes it with notice of that right on the part of the other creditors, and that no matter how fair the offer is, and how willing and able the debtor is to make it, yet if any one of the creditors shall decline to accept it, and throw the debtor into bankruptcy, and after the waste and wear and tear of a winding up in bankruptcy, the estate shall not pay as much to the nonassenting creditors as the debtor paid to those who did assent, the creditors who accepted the composition will be liable to refund. In other words, he construes the mere fact that the debtor is compounding with his creditors at a fair rate, is evidence "that it was intended thereby to give a preference." I am unable to follow that reasoning or adopt that construction. It seems to me that it necessarily involves a plain perversion of the clear meaning of the statute. One thought in that connection may be worth mentioning. An actual preference is fatal if made within four months of filing the petition in bankruptcy. A settlement with creditors may have been perfectly fair when offered, and may have been accepted by several of them, and before all of them have had the opportunity to consider it, and then before the lapse of four months, misfortunes may have overtaken the insolvent,

and the means which he had carefully preserved for the purpose of carrying through his original plan of settlement may have been swept away through no fault of his, nevertheless, according to the complainant's argument, all the creditors who had accepted would be compelled to refund.

Several cases were cited by the complainant's counsel, which were decided under the previous bankrupt act of 1867. The controlling language of those acts is different from that of the present act in stating the description of a debtor who is liable to be thrown into bankruptcy. The part of the act of 1867 controlling the present question is as follows: "Or who being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estates, rights or credits, or confess judgment, or give any warrant to confess judgment, or procure his property to be taken on legal process, with intent to give a preference to one or more of his creditors." And the liability of the creditor to refund is expressed as follows: "And if such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid, conveyed, sold, assigned or transferred contrary to this act; provided, that the person receiving such payment or conveyance, had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended." One case relied upon by complainant is *In re Hapgood et al.*, 2 Low. 200, 7 Am. Law Rev. 664, Fed. Cas. No. 6,044, decided by Lowell, J., in 1873. That was a petition by a dissatisfied creditor to throw the insolvents into bankruptcy after they had settled with the great majority of their creditors at 50 cents on the dollar and had assets enough left to pay the nonaccepting creditors in full, and a handsome surplus. The reliance of the petitioners was upon the bare act of compounding with their creditors and paying them a percentage without the consent of everyone of them. Judge Lowell held that there had been no act of bankruptcy. Some of his language and argumentative propositions may be construed as favoring the complainant's position; but, taken as a whole, the opinion does not seem to me to help the complainant. The head note in Lowell's reports is this: "Payment by an insolvent debtor of a percentage on claims of a part of his creditors which does not lessen the percentage which the other creditors will receive is not a preference." Another case cited is *Hackney v. Raymond Bros. Clarke Co.* (Neb.) 10 Am. Bankr. Rep. 213, 94 N. W. 822. The governing principle found in the headnotes is as follows: "The trustee in bankruptcy may recover money paid by the bankrupt as a preference only when the person receiving it had reasonable ground to believe that a preference was intended. If the creditor has reasonable ground to believe that the debtor is insolvent, and the obvious effect of receipt

of the money under those circumstances is to give him an advantage over other creditors, he is chargeable with notice of intent to prefer. Whether a creditor had reasonable cause to believe his debtor insolvent, within the purview of section 60, is a question of fact." If this be an accurate statement of the law it is fatal to complainant's argument.

I have examined most of the cases cited by counsel for complainant, and find none which go far enough to warrant a recovery in this case, and so, therefore, advise a decree for defendants.

DRIVER-HARRIS WIRE CO. v. DRIVER.

(Court of Chancery of New Jersey. Oct. 3, 1905.)

CONTRACTS—CONSTRUCTION—SUBSEQUENT INVENTIONS—DISCLOSURE OF FORMULA.

A contract for the purchase of defendant's stock in plaintiff corporation provided that defendant should not concern himself in the manufacture or sale of resistance or steel armature binding wire, etc., but might experiment in making such goods at his own expense, and, if the results of such experiments should meet plaintiff's approval, the latter would manufacture the goods, pay for selling the same, "and the profits thereon, after paying for the raw material," should be divided between the parties, etc. The contract also declared that such inventions and improvements subsequently made by defendant should belong to him, and, if plaintiff did not approve the same, defendant might make and sell the goods on his own account, paying 10 per cent. of the selling price to plaintiff. *Held*, that defendant, having invented a new wire, was not entitled to offer plaintiff as a compliance with the contract the material invented in a state ready to be drawn into wire, but was bound to disclose the formula and permit plaintiff to manufacture the same from raw materials.

Suit by the Driver-Harris Wire Company against William B. Driver. On exceptions to the answer to the supplemental bill. Sustained.

Edward A. Day, for complainant. Alfred F. Stevens, for defendant.

PITNEY, V. C. I am asked to give my reasons, for the purposes of appeal, for sustaining the exceptions to the answer to the supplemental bill. The object of the original bill, filed May 15, 1905, was to enforce by preventing the breach by the defendant of a contract entered into between the parties hereto on the 16th of February, 1905, and consummated on or about the 5th of April, 1905. The defendant was the president of the complainant corporation and largely interested in its capital stock, and by the agreement he conveyed to complainant all his stock for the sum of \$60,000, payable in installments, as specially provided in the agreement. Then follows an agreement on the part of the defendant that he will not "for a period of fifteen years, from April 1st, 1905, engage directly or indirectly, or concern himself in carrying on or conducting the business of making or selling resistance or

steel armature binding wire, sheet or strip, or any brass or copper wire, sheet or strip or so called Antique Bronze wire, or Bronze wire made approximately of seven (7) per cent. of tin and ninety-three (93) per cent. of copper and imported from Germany, in competition with the business of the said company in" certain of the states of the United States. Then follows this further clause: "But the party of the first part has the privilege of experimenting in the making of the above mentioned goods at his own expense, and if the products and results resulting from such experiments shall meet the approval of the said company, then the said company shall furnish the machinery and labor for the manufacture of such goods, and the party of the first part shall pay the expense of selling the said goods, and the profits thereon after paying for the raw material shall be divided equally between the said wire company and the party of the first part, it being understood that the party of the first part shall have the right to fix and determine the selling prices for said goods; but if the said company does not approve the said goods and is unwilling to manufacture them on the terms above stated, then the party of the first part may make and sell such goods on his own account, and agrees to pay ten (10) per cent. of the selling price to the said wire company, rendering a full and true account of all sales every six months to the said company. It being understood that all inventions, discoveries, developments and improvements growing out of the experiments of the said party of the first part shall belong to him and that the said company shall not attempt to infringe the same; and that the wire company will not experiment or attempt improvements in alloys for resistance wire, sheet or strip during the term of this agreement unless the party of the first part shall have abandoned his experiments in the making of such alloys and shall have so notified in writing the wire company. And the said wire company, in consideration of the sale of said stock as herein provided, and in consideration of the party of the first part refraining from competition as above provided, hereby agrees to pay to the said party of the first part the sum of twenty five hundred (\$2,500) dollars per annum for ten (10) years from April 1st 1905, in semi monthly installments, and the party of the first part agrees that he will do all in his power to assist the welfare of the said company by advice regarding business methods and customers at any time that he is consulted by the wire company or its officers." The bill charged specific breaches of this agreement commencing almost immediately after the 5th of April, 1905. An answer was filed on the 13th of June. Affidavits were annexed to each, and arguments were had thereon.

The supplemental bill was filed September 11, 1905, and the answer to it on September

20th. Exceptions were immediately filed to this answer for insufficiency, were promptly brought to hearing, and sustained on the 3d of October. The answer to the original bill and statements and admissions by counsel at the argument informed the court as to the meaning of the technical words used in the contract. The supplemental bill recites the original bill and the contract; and, after referring especially to the provision that the defendant might experiment as therein set forth and alleging that by the true meaning and construction of the contract any invention, discoveries, developments, and improvement by the defendant must possess substantial novelty and must be useful and new to the trade, it proceeds to state that since the filing of the original bill defendant had offered to complainant certain formulas for the making of resistance wire, giving the composition of those, and then contains this clause: "And also a resistance material composed of copper, nickel, and manganese in proportions unknown to your orator, which the said defendant claims gives a resistance of about 425 ohms per mil foot or about 40 times that of copper, and which will not rust, and has a higher resistance than any metal on the market which will not rust, which he claims to be improvements in resistance wire produced as the result of his experiments." The supplemental bill then charges that the defendant claims that any change in any of the articles, which by the contract defendant is prohibited from selling, however unsubstantial or unimportant it may be, gives to the defendant the right, under the contract, to join with the complainant in its manufacture and sale. The bill then alleges the continued breach by the defendant of the contract, and prays relief against the clause giving the defendant an annuity of \$2,500; and claims the right, pending the litigation arising out of the pleadings, to abstain from deciding whether to accept or decline the offers of defendant of new inventions. In its prayer for answer the complainant asks as follows: "And more especially that he shall set forth and discover the formula, alloy, and ingredients in their relative proportions of the resistance material of copper, nickel, and manganese which he claims gives a resistance of about 425 ohms per mil foot or about 40 times that of copper, and which will not rust, mentioned and set forth in the foregoing bill, and also mentioned in a letter from him to your orator bearing date on or about the 28th day of August, 1905." The defendant by his answer declines to answer this interrogatory in the following language: "And this defendant denies the right of the complainant to insist upon the disclosure of the proportions of copper, nickel, and manganese contained in the last product offered to it by this defendant, for the reason that the product, by the terms of the contract, is his, and, if it differs in the results it accomplishes from

the products of the complainant, so that it is demonstrated to be an improvement, he is entitled to offer the same as he has done in the shape of wire to the complainant, which can be tested and found to accomplish what he has stated it will accomplish."

The reason given by defendant in his answer and at the argument for declining to disclose the proportions of the composition of the alloy is that it is not necessary for the complainant, and it is under no obligation to furnish the "raw product," whatever that may mean, required for the manufacture of defendant's improved product, and, if defendant provides such product, there will be no necessity for complainant knowing its composition, and charges that complainant intends to disclose the secret of his goods and have them known to the public, and thereby the value of them will be lost to him. In his argument he further alleged that the value of his products could be determined by experiments in testing its power of resistance. Before measuring the value of this argument, I shall state that an examination of the pleadings, together with the statement and admissions of counsel made at the argument (and without relying upon the knowledge derived by me from a reading of the numerous affidavits presented to the court before the hearing on the exceptions, including the oral examination of witnesses on a motion for a judgment of contempt against the defendant, for a breach of the injunction issued against him), shows that the meaning of the words in the contract "resistance or steel armature binding wire, sheet or strip, or any brass or copper wire, sheet or strip" is some alloy of copper used in the manufacture of electrical apparatus which does not conduct electricity as freely as does pure copper, and hence is called a "resistance" wire, sheet, or strip. Copper is the best conductor of electricity, and is used in the art as a standard of least resistance, and different alloys of it are made with varying degrees of resistance. The different materials which produce these alloys are tin, zinc, steel, manganese, nickel, and, I believe, some others, and they may be mixed with almost infinite variety of relative proportions. The complainant claims in argument that the words above quoted include substantially any and every alloy of copper, since, unless it be in some manner alloyed, it will not be properly termed a resistance wire, sheet, or strip. I express no opinion on this claim at this time.

On the merits of the exception, the complainant claims that it cannot judge of the value of any new alloy presented to it without knowing the proportions of its ingredients; and that, if a sample be furnished, as it must necessarily be, it would have the clear right to analyze it to ascertain its component parts, and that it should not be sub-

jected to that expense and trouble. In answer to defendant's argument that it is not necessary for the complainant to furnish or provide the "raw product," since the defendant can do so and is willing to do so, the complainant says that the provision of the contract in question is that the complainant shall furnish the machinery and labor for the manufacture of such goods, and that that provision implies, not only a duty on the part of the complainant to manufacture, but a privilege on its part so to do, and thereby save all the profits that arise from the manufacture, which includes, of course, the mixing of the alloy and the putting it into the shape of thin billets or rods ready to be drawn out into wire or sheets or strips as may be demanded by the trade. Further, it argues that, if it manufactures the goods, it is responsible to the trade for their character and composition. To this the defendant answers in argument that the character and quality of the goods may be determined by complainant by actual test of its powers of resistance to the current of electricity. I thought at the argument, and still think, that the contentions of the complainant in this behalf were sound and unanswerable. The offer of the defendant—I so construe the answer—to furnish the "raw product," by which I understand he means the billets or rods ready to be drawn into wire, sheets, or strips, is clearly inadmissible, since it would put the complainant at the mercy of the defendant in the matter of price to be charged for it. The clear spirit of the agreement is that the complainant has the liberty to go into the original market and buy the raw material and combine it and manufacture it as cheaply as possible, and for that purpose it is quite clear that it is entitled to know what those raw materials are, and in what proportions they should be combined. And here certain language in the agreement is significant, namely, "and the profits thereon after paying for the raw material shall be divided equally," etc. Now the words "raw material" there undoubtedly mean the several articles of which the alloy is to be composed, and cannot mean the billets and rods ready to be drawn into wire, which I infer was intended by the words "raw product" used by the defendant. And, over and above all, complainant is entitled to know those proportions for the purpose of judging and determining whether they wish to undertake the manufacture or not.

In short, the practical result of adopting the construction claimed by the defendant would be to give him the opportunity to gradually enter into competition with the complainant in the manufacture of all sorts of "resistance wire, strips, and sheets" upon condition that he pay the complainant 10 per cent. of the selling price thereof.

WRIGHT et al. v. LEUPP et al.

(Court of Chancery of New Jersey. Dec. 15, 1905.)

1. TRUSTS — SPENDTHRIFTS — ASSIGNMENT OF INTEREST.

A provision of a spendthrift trust, requiring the trustee to hold the principal and income of the fund free from all claims of creditors and providing that the beneficiary shall have no power to anticipate, charge, or encumber the principal fund or the income, does not preclude the beneficiary from assigning to his wife a half interest in the income of the fund, as it may accrue and become payable, for her support and that of her minor children.

2. DESCENT AND DISTRIBUTION — RIGHTS OF SURVIVING HUSBAND.

A husband is not only entitled to the administration of his wife's estate, but is also entitled to the whole net personalty of such estate.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, § 153.]

3. SAME.

An assignment by a husband to his wife of one-half of the income of a trust fund as it may accrue and become payable, which provides that the wife shall support and maintain herself and the children of the parties without charge to the husband, and which makes no mention of the personal representatives of the wife, does not give the children any interest in the trust after the death of the wife, but after such event the husband is again entitled to the total income of the trust fund, free from any claim of the children.

4. PARENT AND CHILD — DUTY OF PARENT — SUPPORT OF CHILD — AGREEMENTS FOR SUPPORT — EFFECT.

An agreement by the wife to support the children of herself and husband without expense to the husband, in consideration of an assignment of the interest in a trust fund to the wife, does not relieve the husband, as between himself and his children, of the parental duty of supporting the children.

5. TRUSTS — ASSIGNMENT OF BENEFITS — LIMITATION TO BENEFICIARY'S LIFE.

Where a deed creating a spendthrift trust gives the body of the estate at the death of the beneficiary to his next of kin, without any right of testamentary disposition in the beneficiary, the latter cannot assign to his wife any interest in the income of the trust fund which may accrue and be payable after his death.

Suit by Henry J. Wright, as administrator of Hetty H. Furniss, deceased, and others, against William H. Leupp and another. Final hearing on bill, answer, and agreed statement of facts. Decree advised.

Frank Durand, for complainants. Willard P. Voorhees, for defendant Leupp. Randolph Perkins, for defendant Furniss.

PITNEY, V. C. The complainant Wright is the administrator, appointed by the surrogate of the city of New York, of Hetty McFarland Furniss, deceased, who was the wife of the defendant William P. Furniss. His standing in this court is acquired by having filed in the proper office a copy of his letters of administration. The complainants Clinton Furniss and Ruth Furniss are the children of the deceased, Hetty, and the said William P. Furniss. The defendant Leupp is the substituted trustee under a deed of trust made by the defendant William

P. Furniss and his sister, Grace Livingston Furniss, then residents of New Jersey, to Solon Humphreys, also such resident, which deed of trust was dated the 31st day of July, 1882. That agreement was before the court in *Furniss v. Leupp* (N. J. Ch.) 53 Atl. 374.

The present action is in effect brought by the administrator of the wife and the children of the husband and wife against their father. It is based on a post-marriage contract between the husband and wife, dated the 24th of February, 1895, which recites a marriage between them on the 25th of January, 1883; the birth of the two children above named—the son Clinton C. in December, 1883, and the daughter Ruth on the 17th of April, 1885; that they have lived separately since May, 1885; that the husband had commenced a suit for divorce against his wife in this court in February, 1894, and the wife had commenced a suit against her husband in September, 1894, in the Supreme Court of New York, for judicial separation and alimony.

The deed provided that both suits should be discontinued, and then provides in the third clause as follows: "Third: One-half of that part of the income, as it may accrue and become payable, of a certain trust fund, whereof Solon Humphreys is trustee for the party of the first part, and which is mentioned and described in the answer of the said Solon Humphreys in the action last above mentioned, is hereby assigned and transferred to the party of the second part, from and as of the first day of September, 1894, and the said trustee is hereby authorized and directed to pay over to the said party of the second part, or to her order, such half part of said income as shall have accrued since the said first day of September, 1894, and as may hereafter accrue during the lifetime of the party of the first part. During such period the party of the second part agrees to support and maintain herself and the said children without charge to the party of the first part."

The defendant Leupp, as substituted trustee, has answered the bill, setting up certain facts which are admitted for the purpose of the suit to be true, and has submitted himself to the direction of the court. The defendant Furniss defends on several grounds presently to be considered.

Neither of the parties complainant or defendant were present in person at the hearing. Counsel for defendant, before entering upon the actual trial of the cause, suggested that he had reason to suspect that an error had crept into the copy of the contract between the husband and the wife, and that there should be a production of the original instrument in order to verify its correctness, as set out in the bill. Neither party had the original in court, and the argument proceeded with a reservation of the right to the defendant Furniss to be consid-

ered as not waiving the objection, and to ask to be relieved from the admission, contained in his answer herein, of its accuracy as set out in the bill.

The first point made by the defendant Furniss is that the assignment made by the third clause of the agreement between the husband and wife, as set forth, is forbidden by one of the clauses of the deed of trust of July 31, 1882 (see *Furniss v. Leupp* [N. J. Ch.] 58 Atl. 374), as follows: "(1) The said trustee, party of the second part, shall hold principal, increase and income of said fund, free from all claims, attachments, judgments, executions and liens of every nature by creditors, against either of said parties of the first part, and the said parties of the first part shall not have, nor shall either of them have, any power to anticipate, charge or encumber the said principal fund or any part thereof, or the increase, interest or income thereof, or in any way defeat the intent of this instrument as herein expressed, which is to make provision for the support, maintenance and personal comfort of the parties of the first part, free from liens and claims of creditors." A careful reading of that clause fails to satisfy me that such contention can be sustained. The clause is what is known as a "spendthrift clause," and was intended to protect the cestui que trust against his own improvidence, and against directly or indirectly anticipating the income; that is, against spending it in advance of its accrual by running in debt, or mortgaging it for a sum at present in hand. Now, the providing for the support of his wife and children by assigning a portion of his income, as it accrues and no faster, to be paid to the wife, is not charging or incumbering it in the sense in which that language is used in the clause in question, nor did it defeat the intention of the instrument, unless I am to hold, which I decline to do, that its object was to provide for himself personally, to the exclusion of any wife or children he might have.

The next point made by the defendant, however, has more substance; and that is, that the clause in the contract between husband and wife above recited, relied upon by the complainants, became *functus officio* upon the death of the wife. The argument on this part of the case is that as, at the making of the contract, the children were still young, one 12 and the other 10 years old, and were by implication left in the custody of the wife, the provision was made for her support and that of the children during her lifetime, and for no longer, which would be as long as she could perform the covenant made by her, in consideration of the assignment, to support the children, and, of course, as long as she would need support herself. This view is strengthened by the circumstance that the personal representatives of the wife are not mentioned in the deed.

Moreover, by the common law, which prevails in New Jersey, and which, in the absence, as here, of contrary allegations and proof, is presumed to govern this case, the husband is not only entitled to administration of his wife's estate lying in this state, but, whoever may administer it, he is entitled to her whole net personalty. Hence any fund which might come to the hands of the complainant administrator must, after paying her debts, go to the husband defendant, unless an enforceable trust in favor of the children can be found in the contract of assignment. I am unable to find in the contract any such trust of which this court can take notice, or attempt to define or enforce. The only mention of the children, except the statement of their birth and age, is that found in the last clause of the section above recited: "During such period the party of the second part agrees to support and maintain herself and the said children without charge to the party of the first part." All that this amounts to is an assumption by the wife, in consideration of the assignment, of the whole parental duty of supporting the children. As between the father and those children, he was not relieved of that duty, and, as there is no proof that the father was ever possessed of any fund belonging to the children upon which a court could lay its hand, I am aware of no basis upon which any court could ascertain and determine how much of the fund assigned to the wife should be spent in supporting the children. Be that as it may, the wife died on the 12th of April, 1904, at which time the oldest child was of age and the second one 19 years old. All obligation on the part of the husband to support the son, the elder, had then elapsed, and his obligation to support the younger survived in full force, without any protection arising out of the covenant by his wife in that behalf.

But the complainant points out and relies upon the definition of the period found in the assignment: "As may hereafter accrue during the lifetime of the party of the first part;" and it is just here that counsel for defendant fancies a mistake has crept into the copy. He fancies it should read "during the lifetime of the party of the second part," the wife. But I am now considering it as it reads, and must construe it in connection with the terms of the trust as set forth in the answer of Solon Humphreys to the suit for support and maintenance mentioned in the contract between the husband and wife, and recited in the answer of the trustee herein; and that trust is the one created by the deed of July 31, 1882, which is still in force and of which the defendant Leupp is trustee. By that deed, as I interpret it, at the death of the defendant Furniss, the body of his estate will go to his next of kin. He did not therein reserve any right of any testamentary disposition, so that he

reserved only a life estate therein, and could not properly bind himself to pay anything to his wife after his decease. This situation accounts for the limitation of the husband's liability to his lifetime.

My conclusion is that the complainant administrator is entitled to recover a few dollars, which, by applying the doctrine of apportionment of time, will be found to be due to the wife at the time of her death; but the children are not entitled to anything, and as to them the bill must be dismissed, with costs.

DUKE v. DUKE.

(Court of Chancery of New Jersey. Dec. 21, 1905.)

1. DIVORCE—JURISDICTION OF SUBJECT-MATTER.

Under P. L. 1902, p. 508, § 4, par. 1, giving the Chancery Court jurisdiction of a divorce suit for adultery, where the adultery was committed without the state and complainant and defendant, or either of them, resided in the state at the time of the adultery and at the time of filing the bill or petition, mere residence in the state of either party at the times specified is enough to give the court jurisdiction of the subject-matter.

2. ABATEMENT—JURISDICTION OF SUBJECT-MATTER—PLEAS.

Though the question of lack of jurisdiction of the person can be raised only by plea, and the benefit of it is lost by general answer, the defense of lack of jurisdiction of the subject-matter need not be raised by plea, but may be set up in the answer to the merits.

3. DIVORCE—JURISDICTION—DOMICILE—EXTRATERRITORIAL SERVICE.

Evidence in a divorce suit held to show that petitioner at all times from before his marriage had his domicile in the state, which after the marriage became the domicile in fact of the wife, the matrimonial domicile so established continuing till the separation of the parties shortly before the suit was commenced, so that the married state exists within the territorial jurisdiction of the court, authorizing it to proceed against defendant, who has become a nonresident, by service out of the state.

Petition by James B. Duke against Lillian N. Duke for divorce. Hearing on plea to the jurisdiction by evidence in open court. Plea overruled.

R. V. Lindabury and A. A. Clark, for petitioner. Chauncey G. Parker and Samuel Kalish, for defendant.

PITNEY, V. C. (after hearing counsel for the defendant). I do not care to hear you further on the part of the petitioner.

This is a suit for divorce by a husband against his wife, commenced by petition, charging her with adultery committed in various places in the city and state of New York. It avers that the marriage took place in the state of New Jersey on the 29th of November, 1904, and that from that time up to the filing of the petition the parties have been, and now are, inhabitants and residents in this state. The plea avers that the court

has neither jurisdiction of the subject-matter nor of the person of the defendant, and alleges that the petitioner was not at the time of the marriage, and has not been ever since, a resident of, or a citizen of, or domiciled in, the state of New Jersey, but was a resident of, and a citizen of, and domiciled in, the city of New York, and that the matrimonial domicile and residence of the parties was at the time of the marriage, and thence until the commencement of the suit, in the state of New York, and not in the state of New Jersey. The plea further sets up that the defendant was not served with process within the jurisdiction of this court, and has not consented thereto, and that the proceedings are without due process of law. The plea then invokes the provision of the Constitution of the United States forbidding any state to deprive any person of life, liberty, or property without due process of law, etc.

The charge on the part of the defendant of lack of residence and domicile in New Jersey strikes at the jurisdiction of the subject-matter as well as of the person. This appears, when we consider that the subject of divorce is not within the general jurisdiction of a court of chancery. In this state it is wholly statutory, and in this case comes under the second part of paragraph 1 of section 4 of the act concerning divorces (P. L. 1902, p. 508), "where the adultery was committed without this state and the parties complainant and defendant or either of them resided in this state at the time of the adultery and at the time of filing the bill or petition." If, then, the party petitioner or defendant resided in this state during the period covered by the petition herein, this court, by our statute, has jurisdiction of the subject-matter. But, in order to obtain jurisdiction of the person of the defendant by extraterritorial service of process, it is possible that something more than a mere residence is necessary. I stop here to say that, in order to raise the question of jurisdiction of the subject-matter, it was not necessary for the defendant to plead as she has done. That defense may be, in my judgment, set up in her answer to the merits. It is the lack of jurisdiction of the person that can be raised only by plea, and the benefit of which is lost by general answer. According to all the authorities, in order to obtain jurisdiction of the person by extraterritorial service, there must be what is called a "res" within the territorial jurisdiction. In fact there can be no decree strictly in personam based upon an extraterritorial service of process. But the court may deal with the rights of parties residing out of the territorial jurisdiction in matters such as land and personal chattels within its jurisdiction. The foreclosure of mortgages, where the owner of the equity of redemption is not within the reach of domestic process, is an example. So with the enforcement of debts by attachment

against nonresidents levied on their property within the territorial jurisdiction.

In cases of matrimonial offenses the res or matter within the territorial jurisdiction, which, it has been held by the courts of all the states, except New York, and finally by the Supreme Court of the United States (reversing the Court of Appeals of New York), is sufficient to give the courts of a state jurisdiction to proceed against a nonresident on service out of the state, is the married state. If the married state exists within the territorial jurisdiction, the court of that jurisdiction may proceed to deal with it by extraterritorial service on the absent party. This arises out of the very necessity of the case, since, unless such jurisdiction could be exercised, the offending spouse who should be able to escape beyond the jurisdiction before service would thereby be able to deprive the other spouse of his or her just remedy. By our statute a mere "residence" in the state is sufficient, and it has never been here determined, as I am aware, whether that residence must be or have been a matrimonial domicile—that is, whether it is necessary that the spouses should have had their joint home in this state—or rather, I should say, that it has been held in this state that it was not necessary that there should be a matrimonial domicile here. But the Supreme Court of the United States has never, as I am aware, dealt with that precise question. In the Atherton Case, in which they held extraterritorial service sufficient, there was a matrimonial domicile in Kentucky, and the service was in the state of New York. However, in the present case the petitioner, who assumed the burden of proof, very properly undertook to show a domicile as distinguished from a mere residence at the time of the marriage, and from thence until the separation. He alleges that the county of Somerset, in this state, has been for several years before the marriage the chosen domicile of the petitioner, and that it continued to be such after the marriage, until the separation, which, by the evidence presently to be mentioned, occurred some time in July of the present year. And he argues that, in the absence of a separation, the domicile of the husband is the domicile of the wife, wherever they may have been actually sojourning. And he avers that it was the actual residence of the wife for a portion of the time between the marriage and the separation.

One other remark before coming to the facts: There may be a domicile without an actual present residence, and, vice versa, there may be a present residence without a domicile, as in the case of our foreign ministers who reside abroad without losing their domicile in the United States, and our Cabinet ministers and many of our members of Congress, who reside in Washington, but are domiciled in their respective states. Again, a man may have two or more residences, but only one domicile. He may have a country

residence and a city residence, and each with all the paraphernalia of a home. Such instances are very common, and then it becomes a matter of choice. He chooses which one of the residences shall be his domicile and his choice is final, if made in good faith, although he may spend less time at his domicile than at his residence. Now, the marks of the domicile are numerous. They include the character of the place, and the acts and declarations of the party in connection therewith, provided, of course, the declarations are made in good faith, sincerely, and ante litem motam. In this country one of the most important indications of a domicile is the exercise of the electoral franchise.

Let us now look at the facts of this case, and that includes many years of the life of the petitioner. He was born and bred in Durham, N. C., where his father was engaged in dealing in and manufacturing tobacco. The petitioner was interested with his father as one of the firm of W. Duke's Sons & Co. Twenty-one years ago, when he was 28 years old, in the year 1884, he came to New York City, and established a tobacco business there. He was a bachelor from thence until his present marriage, and he lived in New York City from 1884 for 10 years. He never voted there. His domicile of origin was, of course, in the state of North Carolina, and so remained until he determined to change it, and he had a right to retain that domicile, although living in New York. He admits that he did, as he supposed, change it some time before the end of the 10 years; but he is unable to fix the date when he did change it to New York, if ever. At the same time he was described in official and other documents as of the city of New York as early as the year 1890. In the year 1893 he purchased the old Veghte farm of 300 acres, lying just south of the Raritan river, near Somerville. On it was a large old-fashioned mansion house. In the conveyance, as originally prepared, he is described as of Somerset county, but that description is erased, and the words "New York City" inserted, so that we may conclude that at that time he considered his residence in New York, and had not finally determined to make Somerset county his home. But in the year 1894 he moved the furniture of his suite of rooms in New York City to the old Veghte house and set up housekeeping there. From that time on he has been described in all official and semiofficial papers as of the county of Somerset, N. J. He was the New Jersey director of the corporation or corporations in which he was interested. He commenced directly from 1893 on to purchase more land, and from time to time for the next six or seven years bought several tracts of varying sizes, nearly every one adjoining each other until he had acquired over 1,700 acres. He was shortly after (1894) enrolled by the official canvasser as a voter in the township of Hillsboro, in the county of Somerset, and was thenceforward taxed yearly upon his poll.

He actually voted there in the years 1896, 1900, and 1904, when he was sent by the congressional district of which Somerset county is a part to the Republican Convention in Chicago as a delegate. He always spoke of that place as his home. He first repaired the Veghte house, and set up a small home establishment. Later on he built a large and expensive addition to it, costing, as I recollect the evidence, some \$50,000 or \$60,000, erected in the most substantial manner, with all modern conveniences, with heating apparatus throughout, and with electric light. He furnished it throughout, at an expense of over \$60,000, with the most substantial and expensive articles, and hung its walls with oil paintings. He established a corps of servants, with a regular housekeeper and several maids and a man of all work. He provided a larder, which was at all times supplied and ready to entertain himself and his guests without warning. He built a stable at an expense of \$55,000, and installed it with horses and carriages, and later on with automobiles. In short, the establishment had all the paraphernalia of a permanent home. In the meantime he was spending enormous sums of money in beautifying the grounds, which were sufficient in acreage to make a parallelogram one mile wide and nearly three miles in length. These grounds he laid out in a park with macadam drives, artificial lakes, waterworks to supply his house and buildings, and planted a great number of trees and shrubs, such as rhododendrons and other expensive plants. Now, he swears that he all the time intended to make this his home.

We have, then, first, the buying of this property, and the shaping it into a solid, substantial, elegant, and expensive home, fitted for both summer and winter residence. We have it furnished as such, and provided with a housekeeper, corps of servants, and a larder, always ready for him and his friends, when they came, including heat in winter. We have him declaring over and over again to various individuals, when talking about the improvements he was making, that he was making a home for himself. We have him making that his place of voting, and nowhere else, and we have him swearing that he always intended that as his home. We have, further, no evidence that he had any other home besides that of his birth, unless it be in the city of New York. The defendant alleges that all this time, and up to the time of commencing this suit, his real home and residence was in the city of New York. Let us look what the proof is as to that. Petitioner was an assiduous and attentive business man, and his business was mainly in the city of New York. It really extended all over the United States, and the company of which he was and is the head had large factories and places of business in many of the large cities of the United States. These were all managed, however, from the central office in the city of New York. In that

office petitioner spent most of his business hours when in the neighborhood of New York. He usually, however, went out to Somerville on Friday evening, and sometimes, but not frequently, on Thursday evening, and remained over until Monday morning. Sometimes he went out for a night in the middle of the week. The proof satisfies me that he spent as many nights in the course of a year in Somerville as he did in the city of New York. He gave as a reason for not spending all of his nights in Somerville that his business cares were so exacting that he could not afford to spend the time, about two hours in the morning and two at night, required to go from his place of business on Fifth avenue, New York, to his farm. So he had a residence in the city of New York, where he could always go and had a right to go. He kept there horses and carriages and a coachman. That residence was with the defendant, with whom he lived as his mistress. I should not speak so plainly, but it was openly stated by her counsel in his able and ingenious argument, and abundantly appeared by a letter, written by the petitioner to the defendant in August, 1904, and offered in evidence by the defendant, in which he asked her to marry him and set at rest certain disagreeable rumors or scandals. The connection with the defendant commenced in 1892. He furnished her the money to buy a handsome and commodious house in a fashionable part of New York City, and also the money wherewith to furnish it, and there he always had a room and a home, if it be proper to call a residence like that, unsanctioned by marriage, a home. Some two or three years before the marriage ceremony took place the defendant sold the house previously occupied by her, and after a short vacation purchased another, No. 11 West Sixty-Eighth street, a fairly commodious house costing over \$40,000, and continued her residence there, and the petitioner went with her. To each of these houses he carried a night latchkey, and came and went as he pleased. On the 29th of November, 1904, the parties were married at the house of the defendant's aunt in Camden, N. J., and immediately took steamer for Europe on a wedding trip, from which they returned the latter part of January, 1905. Before their departure, however, wedding cards were sent out, in the name of the aunt, announcing the marriage of her niece, Mrs. Lillian Nannette McCready, to James Buchanan Duke. With that announcement card was sent a card in the following words: "Mr. and Mrs. James B. Duke will be at home after the first of February, at 11 West 68th St., New York."

Counsel for defendant laid great stress on the use of that phrase "at home." It is proper to say that Mr. Duke disclaims all responsibility for it. He says it was some of his wife's foolishness. But, charging him with full responsibility for it, what, after

all, does it mean? Why, simply that at that time and place they would be ready to see and receive visits from their friends. It would have been quite as appropriate if it had been used to invite their friends to call on them at some hotel in San Francisco or London or Paris, where they found it convenient to be shortly after their marriage. For instance, it might have read: "Mr. and Mrs. James B. Duke, at home at the Hotel Cecil, London, from the first to the tenth of February"—or it would have been equally appropriate, if the defendant had not owned or occupied a house in New York City, if they had made their home at the residence of Mr. Duke's brother, Benjamin N. Duke, which he then owned and shortly afterward occupied with his wife and two children in New York City. In short, it has the same significance, no more and no less, as the society phrase put in the mouth of the servant who opens the door to a casual visitor, and declares to that visitor that the lady of the house is not at home, and which is understood by everybody to mean simply, and no more, that she is not ready to receive visitors. It does not necessarily refer to a domicile.

Reliance was also placed by counsel on an expression found in the letter before referred to, written by petitioner to defendant in August, 1904, and addressed to her at a hotel in the White Mountains. He advises her to come home. When confronted with that letter, he said he meant her home, and I think that is the proper construction to put upon it. Not being then married, his Somerville home was not her home. But let us look at the movements of the parties after their return in January, 1905, to the United States from their wedding trip. They went together, first, to the Somerville house, and then to North Carolina to visit his father. From there they went to Florida; then returned to the defendant's house in New York City. The petitioner was, at or before that return, disabled with gangrene in his foot, and laid in bed under the doctor's care for six weeks, which brought them down to some time shortly after the 1st of May, when he took his wife out to his Somerville home, and they stayed there off and on until some time about the 1st of July, making their home there. The defendant was, indeed, restless and desirous to get away. The petitioner was insisting on her making her home there. She threatened to go back to New York. He told her he would sell off his stable belongings there, and cut her off from the use of the carriages. She said she would resort to livery. He said he would not pay the bills. Just when they ceased to cohabit was not shown, but they never did cohabit after he sailed for Europe on the 16th of July, 1905.

But in determining the value of the defendant's contention that, granting that petitioner's domicile was in Somerset county up to

the time of the marriage, yet that it was then changed to New York City, another important and well-established, and, in fact, admitted, fact is here to be noticed. About the time of the marriage, and probably for some time before and after, the petitioner was entertaining the intention of building an elegant and costly mansion on the Somerville farm. He was devising and studying plans for it. He started on a \$500,000 basis, and we all know what that means as to cost, and in all this his wife was consulted. And in the spring of 1905, when he was about to prepare the ground surrounding the site he had contemplated for this mansion, she was also consulted about that, and at her suggestion he changed the proposed site, and immediately put a large force of men, and I suppose machines, at work in grading and terracing for this new mansion. When, if ever, this work was stopped, did not appear, as far as I at this moment recollect. But, as before remarked, it is a well-established fact that while he was living with his wife on the farm—the place was called "Duke's Farm"—in the spring of 1905, he was actually engaged at great expense in preparing the ground for an elegant mansion for himself and his wife. Now, this I consider a very important and significant circumstance on the question of any change of intention on his part as to his domicile.

But the defendant does not stop there. When the petitioner returned from Europe in the latter part of August, 1905, just before the filing of the petition herein, he did not return to his wife's house, or, so far as appears, see her at all, but promptly set about providing a comfortable place and residence for himself in the city of New York. His brother, Benjamin N. Duke, a wealthy gentleman, with a wife and two half-grown children, was the owner of a handsome house in a fashionable neighborhood, which he had not yet occupied, or at least which was not fully furnished. Petitioner immediately set about having that house furnished. He brought in from Somerville, for the purpose of overseeing the placing of the furniture, his housekeeper, a very efficient woman. He managed to entice away from his wife all or nearly all of her housemaids and installed them in his brother's house. Asked why he did this, he said he wished to find out from them how his wife had been behaving herself during his absence, and his object in promoting the establishment in his brother's house was manifestly to keep within his reach and control those servants. Pressed on cross-examination, he frankly stated that there was no bargain between him and his brother on the subject, but he had no doubt that his brother would sell him the house and furniture and whole establishment at any time he might wish it, but that all the expense attending the setting up of the establishment was

borne by his brother, except the regular salary of his Somerville housekeeper. This provision for a new residence in New York City was made after suit brought, and the house, when furnished and prepared for habitation, was occupied by his brother Benjamin and his wife and two children, and petitioner had, as I understand the evidence, a comfortable resting place there, but he voted in Somerset county in the fall of this year. He must have known—and he was all the while provided with the most able counsel—that anything in the way of a change of residence might be fatal to the success of his suit already instituted in the state of New Jersey, and I cannot think that he at that time seriously contemplated for even a moment abandoning his thoroughly established domicile in New Jersey for New York, and I infer from the evidence that this work of preparing his brother's house was all done after the filing of the petition, which was on the 2d of September.

Now, with regard to the facts that have been recited, it is proper to say that they are substantially undisputed, except some altogether trifling and immaterial disagreements in the evidence of the parties as to the household establishment at Duke's farm. I recollect but two conflicts upon the real merits of the case. Defendant swore that petitioner never intended to make his farm his home, but that he intended, after spending enormous sums in turning the greater part of his immense holding of land into a beautiful private park, to make a present of it to the town of Somerville or the county of Somerset—I forget at the moment which. Now, the petitioner swears that he never heard of any such thing until he heard it from the defendant on the stand, and he denies her evidence in that respect in toto. Now, I believe him and not her. I think her story falls as proof of its own weight. Neither the town of Somerville nor the county of Somerset have either the authority to accept such a gift, or the power or financial ability to keep the park in order and properly maintain it, if accepted. The whole idea approaches the absurd.

The other matter is this. The defendant swore that the petitioner, during all these years, did not enjoy his visits to the farm, and did not enjoy remaining there any length of time, and declared that he did not like to be absent from New York, even a few nights at a time. Now, it would have been ungallant, to say the least, in petitioner not to express a desire to enjoy defendant's society continually; and as soon as the postnuptial journeyings were over, and he had recovered from the long and serious disability which he suffered from his gangrene, he immediately transferred his wife to his Somerville home, and apparently tried to domesticate her there, where he could enjoy more of her society. He testified that

he had been very much confined by the exactions of his business relations, but that for the last year or two he had made such business arrangements as to enjoy more liberty and have more time at his command, and to be able to be more at his farm. This fits in with his determination to build there a modern palace for his home life with his wife.

Upon the whole I conclude that the petitioner's domicile was for all these years in the state of New Jersey, that all his declarations in that respect were made in good faith, that whatever of a home he had in New York was not inconsistent with his actual domicile in New Jersey; and, granting that he had a residence in New York, he deliberately chose his domicile in New Jersey, and that choice was made in good faith at a time when its importance and consequences were not of consequence to any then immediate interests. I am further of the opinion that that domicile became, on their marriage, the domicile of the wife as a presumption of law, and that it became such domicile in fact when, in the spring of 1905, he took her out there to live with him as his wife. Thus we have here a matrimonial domicile actually existing up to at least a very short time before the commencement of the suit. Hence I doubt if the question which I mentioned during the argument is raised by the circumstances of this case. That question is whether, where spouses have their home in one state and there live together, and then separate, and one migrates to another state and there establishes a residence and a quasi domicile, which is not matrimonial, such residence or domicile will be sufficient, in the view of the Supreme Court of the United States, to create such a matrimonial status in that state as will justify the spouse so establishing it, and the state, in taking jurisdiction of the other spouse, not a resident in that state, by extraterritorial service of process. That question, as far as I am at present informed, though thoroughly settled in this state, has never been dealt with by the Supreme Court of the United States. It was on the supposition that this case, as finally developed, might raise that question that I expressed the hope that it might be carried to the Supreme Court of the United States. But while that question, if it had arisen, is one of great importance because of the numerous cases in this country where spouses are called upon to answer each other's complaints by suits in jurisdictions thousands of miles away, in this particular case it is of little importance. It seems to me that it makes little difference to the defendant whether she tries the merits of this case in New York or New Jersey. Indeed, I think the chances of actual justice are better in New Jersey than in New York, because there the issue must be tried be-

fore a jury all at one session, uninterrupted except by the hours of rest and holidays, and where either party is liable, especially in a case of this kind, to surprises in the matter of evidence, but which might be, but cannot be, successfully met for want of time, while here hearings may be put over, from day to day and time to time, till all the available evidence bearing on the issue has been produced. It may be said that the infidelity is charged to have taken place in New York City, and hence the witnesses are naturally to be found there, but, as the burden of proof is on the petitioner, that seems to me to furnish no cause of objection by the defendant, and whatever witnesses she may have in New York may be examined there, if unwilling to come to New Jersey.

There is no hint of lack of financial means on the part of the defendant to properly defend herself in this cause. If such lack of means exists, counsel for the defendant know how to remedy it.

I will advise a decree overruling the plea, and directing the defendant to answer within 30 days; and proper verblage must be added to preserve her right to prosecute her appeal, notwithstanding her answer.

DUKE v. DUKE.

(Court of Chancery of New Jersey. Jan. 2, 1906.)

1. APPEAL—FROM INTERLOCUTORY DECREE—STAY OF PROCEEDINGS.

Defendant in a divorce suit may not have proceedings stayed pending her appeal from an order overruling her plea to the jurisdiction, the court having no doubt as to the correctness of its ruling on the plea, the amount of business before the Court of Errors and Appeals being such that the appeal cannot be determined for some time, during which plaintiff's evidence might be lost; and it makes no difference that defendant has in mind the putting forth of a counterclaim against petitioner.

2. DIVORCE—CROSS-BILL—ALLEGING JURISDICTIONAL FACTS.

Defendant, in a divorce suit in which the court has ruled that it has jurisdiction, need not allege jurisdictional facts in her cross-bill, incorporated, as it may be, in her answer.

3. SAME—WAIVER OF APPEAL.

Defendant in a divorce suit, who by the order overruling her plea to the jurisdiction has been directed to answer in 30 days or suffer a decree pro confesso, with a provision that the filing of the answer shall not be taken as a waiver of her right to appeal from the order, having taken an appeal, will not by answering be considered to have appeared generally, and so to have waived her appeal.

Petition by James B. Duke against Lillian N. Duke for divorce. Defendant moves to stay proceedings pending appeal. Denied.

Chauncey G. Parker and Samuel Kalish, for the motion. R. V. Lindabury and Mr. Fuller, opposed.

PITNEY, V. C. This is a motion on behalf of the defendant to stay proceedings pending an appeal from an interlocutory decree. The order appealed from was one overruling a plea to the jurisdiction of the court, which was heard on the merits upon evidence adduced in open court. The order overruling it directed the defendant to answer within 30 days or suffer a decree pro confesso. A special clause, however, was added by my directions in these words: "The filing of said answer shall not be taken as a waiver of the right of the defendant to appeal from this order, or as a bar thereto." The general rule of practice of this court, which has not been disturbed by any statute, is that an appeal from an interlocutory order does not stay proceedings unless this court shall hold that they should be stayed for reasons applicable to the particular case. Many reasons can be imagined in special cases why this court should say: "Let us stay proceedings until we hear what the Court of Appeals has to say." But, I repeat, the unvarying practice of this court is to proceed on the idea that its orders and decrees are final and binding, precisely as if there were no appeal. If counsel will consider, they will perceive that it is quite impracticable to conduct the business of the court on any other basis. It is overlooked oftentimes because it is so easy to appeal, but it ought not to be overlooked. Now, I am asked to exercise the discretion of this court to stay proceedings pending this appeal, on, as I understand the arguments which have been addressed to me, three grounds:

First. Counsel insist that the decree which I advised on the 21st ult. was based upon such a doubtful set of facts that I ought not to subject the parties to the expense of a litigation on the actual merits of the case until the opinion of the Court of Appeals has been taken on the subject. Now, if I felt that the result at which I arrived is a matter of serious doubt as to its accuracy, and, further, that it would be a hardship for the parties to be compelled to litigate the actual merits of the case on which the petitioner has put himself in his petition, I might feel disposed, if there were not other serious considerations leading to an opposite conclusion, to grant the motion. But in fact I do not feel the least doubt about the correctness of my ruling the other day. Moreover I do not think that there is any hardship in compelling the parties to proceed. The petitioner, in exercising his rights in that behalf, proceeds at his risk. If he shall succeed and show that the defendant is guilty of the serious marital offenses with which he charges her, and she subsequently succeeds, either in our own Court of Appeals or in the Supreme Court of the United States, in showing that this court was without jurisdiction, or, what is the same thing, power, to proceed

against her, any decree that this court may have rendered in the meantime against her will at once become null and void, and it will be the duty, and I may add, the pleasure, of this court to so declare by its decree annulling the former decree. If, on the other hand, the petitioner shall fail to make good his charges, and the defendant shall be acquitted, and declared innocent thereof, then I feel quite sure that she will have no cause to complain. With regard to the expense of the litigation, I remarked the other day, in disposing of the plea on its merits, that there could be no difficulty on that score. If the defendant is in the least degree impecunious, her counsel are well aware of her remedy in that respect.

But there is another consideration of great importance in determining this matter. In the present unfortunate condition of business in our Court of Appeals there is little hope of this appeal being reached and determined within a year, and, if determined adversely to the defendant, her plea is so framed, and intentionally so framed, that she will be entitled to an appeal to the Supreme Court of the United States, if that court will take cognizance of an appeal from an interlocutory order of this nature before final decree, where another two or three years, at least, will elapse before it will be reached and disposed of. I think it would be oversanguine to expect it could be finally disposed of within five years. And the same reasons which the counsel now urge for a stay pending an appeal to our Court of Appeals, will be equally potent for a stay pending the appeal to the Supreme Court of the United States. Now, all that delay might possibly be incurred without serious prejudice to the parties, if the subject-matter of the litigation were of a nature which would not be seriously injured during the appeal, and if the evidence in support of the right of the party appealed against were of such a nature—say of record or of documents—as to be absolutely protected against danger of loss.

But such is not the present case. Notoriously, the evidence of matrimonial offenses rests in the memory of witnesses who are liable to die or wander beyond the reach of the process of the court, and whose memories fade, and who, after a lapse of years, when put upon the stand as witnesses, answer the questions put to them with a non mi ricordo. This consideration alone is, in my judgment, of very great weight against the exercise of the discretion asked by the defendant. Moreover, the subject-matter of this suit is the marriage relation. The evidence adduced before me on the hearing of the plea was of such a nature as to render it impossible to suppose that the petitioner was not and is not acting in good faith in prosecuting his suit. Now, pending this suit the petitioner is, of course, debarred from the privilege of entering into the marriage state, so that the

case resembles somewhat the exclusion of a life tenant from the enjoyment of his estate with no remedy for such exclusion. Every consideration, then, that I can conceive ought to influence the court in a case of this kind, is against granting that delay.

The second matter urged by the defendant is that she has in mind the putting forth of a counterclaim against the petitioner. The answer to that argument is that she is at liberty, quite irrespective of the present proceedings, to sue her husband for relief on any claim which she may have, and it is not necessary that it should take the shape of a cross-bill to his petition herein. She may bring an independent suit, either in New York or New Jersey, as she shall choose and be advised, for it abundantly appears that petitioner is amenable to process in either state, and she may, in that suit, entirely ignore the existence of the present suit. If, however, it be the object and desire of the defendant not to destroy, but to preserve, the marriage relation, and to use the charge, which she suggests that she has good ground to make against the petitioner, only and strictly as a defense to the present action for the purpose of enforcing the equitable doctrine of *in pari delicto*, I am still unable to see how she is prejudiced or embarrassed in setting up such defense any more than she will be prejudiced or embarrassed in answering by way of traverse.

It was suggested that it would be necessary for her, in order to file a cross-bill by way of defense, to allege therein the statutory grounds of jurisdiction, namely the residence of the petitioner (defendant in her cross-bill) in this state, and thereby admit the jurisdiction of this court in this cause. But I do not so understand the practice. Subject to her appeal, she is now, against her protest, within the jurisdiction of the court, and is entitled to make any defense which the law of the land and the practice of the court allows to her, and the defense of guilt on the part of the petitioner is one of those defenses, and, as it seems to me, it is a good defense, if simply set up in her answer without resorting to the machinery of a cross-bill, which seems to me to be necessary only in case she asks for affirmative relief against the petitioner, and that relief she can only get in case she proves in the end to be herself innocent. But in any aspect of the case her cross-bill, incorporated, as by the practice it may be, in her answer, requires no allegation of jurisdictional facts, because, as before remarked, the court has already entertained that jurisdiction, and it would be entirely inadmissible for the court to entertain a motion to strike out the pleading for want of that allegation.

Third. But the matter mainly relied upon by the defendant is this: That under a decision of our Court of Appeals, if she shall now answer the petition, she will thereby be deemed to have appeared generally to the

action, and will thereby lose the benefit of the appeal, notwithstanding the special clause added to the order above referred to. Counsel for the petitioner claims that her right to prosecute her appeal, notwithstanding her answer, was perfectly safe without that special clause. That may be, and its insertion at my suggestion may have been quite unnecessary. Be that as it may, I am unable to conceive that her answer under the specific direction of the court, accompanied, as it is, with a direct threat of a decree pro confesso against her if she fails, can possibly be held to be a waiver or abandonment of her appeal, or a bar to its prosecution, or a general appearance in the cause.

Counsel argued that the moment she answered the petition a motion would be made against her to dismiss her appeal, and that the court will dismiss it in strict pursuance of the doctrine of a case which they cite. I cannot so believe. The case relied upon is *Polhemus v. Holland Trust Company*, 59 N. J. Eq. 93, 45 Atl. 534, and, on appeal, 61 N. J. Eq. 654, 47 Atl. 417. There the complainant proceeded against the Holland Trust Company, by service upon an agent, in this state, as I understand the report, though it may be that the service was extraterritorial. Reading from page 98 of 59 N. J. Eq., page 536 of 45 Atl., I find that the learned Vice Chancellor uses this language: "In the second place, a plea to the jurisdiction of this court to take cognizance of the subject-matter of the suit was filed to the bill, and the ground of such plea was that the defendant was a foreign corporation not amenable to service of process in this state. The plea was overruled upon the single ground that if the person who, it was alleged in the bill, sold the bonds in this state, at the time he made the false representations set out in the bill, was the agent of the trust company to sell such bonds, then the cause of action arose here, and this fact conferred jurisdiction upon this court in this state. The court refused to try the question of agency under the issue raised by the plea, because it involved directly the whole merits of the controversy, and because the facts stated in the plea, being such as defeated the suit, could be pleaded as such, and therefore were not a fit ground for a plea to the jurisdiction of the court. *National Condensed Milk Co. v. Brandenburgh et al.*, 40 N. J. Law, 112. The plea being stricken out, the objection to jurisdiction was reserved in the answer." No appeal was at any time taken from the order striking out the plea. An answer was filed, and the cause tried on its merits, and the bill dismissed. An appeal was taken by the complainant, but none by the defendant, and came on for hearing, and the result is reported in 61 N. J. Eq. 654, 47 Atl. 417, and the decree of the Chancellor was reversed on the merits. The counsel for the defendant and appellee attempted to raise the question of jurisdiction of the person of the defendant trust company by virtue of a

clause inserted in its answer, setting up want of jurisdiction substantially as pleaded in the plea which was overruled. The Court of Appeals held that this could not be done under the well-settled practice of this court, and that the defendant should have appealed from the order overruling his plea, and, not having done so, its answer must be considered as a voluntary appearance, and an abandonment of its plea. This is the language used by the Court of Appeals on that subject: "If the plea was wrongly overruled, the remedy was by appeal; if rightly overruled, the answer still stood. The defendant did not appeal, but voluntarily submitted to a trial on the merits under its answer and a general replication. It could not, on final hearing, object to the jurisdiction to which it had submitted." The essence of that decision is that the appearance by answer was voluntary. But, in my judgment, it is quite plain that it would not have been voluntary if the defendant had appealed from the order overruling its plea. Instead of doing that, it acquiesced in the accuracy of the court in overruling its plea, and it was that acquiescence which was fatal to the defendant's objection. The Court of Appeals did not decide that if the defendant, before answering, had appealed from the order overruling its plea, the court would have refused to hear its appeal, and would have refused to give the defendant the benefit of any error found therein, which is the question here. The case is an illustration of what I said before about the presumption that all orders made by this court are absolutely just and right until reversed upon appeal, and it cannot be presumed or averred that any of them are wrong until they are reversed upon appeal.

Now, in the present case the defendant has appealed from the order overruling her plea, and thereby she protests against its accuracy and justice. If, notwithstanding that appeal and protest, she shall, under threat of a decree against her, answer the petition, I think it would be quite absurd to hold that she voluntarily appears to the action and loses the benefit of her appeal. She has in fact done all that she can to object to the jurisdiction of the court, and any further proceedings that she takes ought not to be treated as voluntary, but as compulsory. That was the view taken by the Supreme Court of the United States in *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237. There a party who had been subjected to extraterritorial service appeared specially for the purpose of setting aside the process as improperly served, and his motion in that behalf was overruled. He then answered, and went to trial on the merits. The Supreme Court of the United States held that such answer was not a waiver of the lack of jurisdiction. I read from page 479 of 98 U. S. (25 L. Ed. 237): "The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of

counsel for him to move the dismissal of the action on that ground, or, what we consider as intended, that the service be set aside, nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity. Nor is the objection waived when, being urged, it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived." The record shows that the defendant in this cause did in the first place move to set aside the service in this case because made out of the jurisdiction, and the motion was overruled, with leave to file a plea to the jurisdiction. I suppose that practice was adopted in order to enable the defendant to have the case put in shape to give her a right of appeal to the Supreme Court of the United States. It is further to be observed that in the Supreme Court of the United States there is neither writ of error nor appeal until final judgment or decree.

For these reasons I am entirely satisfied that the defendant is in no danger of losing the benefit of her appeal by answering the petition, and I shall therefore decline to grant a stay.

This motion for a stay was renewed to the Court of Errors and Appeals on Friday, January 5, 1906, and was refused.

LONG BRANCH COMMISSION v. TINTERN MANOR WATER CO.

(Court of Chancery of New Jersey. Nov. 1905.)

1. WATERS AND WATER COURSES—MUNICIPAL SUPPLY—CHARGES—REGULATION.

Where a water company was organized to supply certain municipalities, under P. L. 1876, p. 318 (Revision 1877, p. 1365), requiring the consent in writing of the corporate authorities proposed to be supplied, a municipality had power to impose terms as to the rates to be charged for both public and private consumption.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 292.]

2. SAME—CONTRACTS FOR SUPPLY—MODIFICATION.

Under P. L. 1876, p. 318 (Revision 1877, p. 1365), providing for the organization of a water company to afford supply to a municipality, and authorizing a municipality to make contracts for a period not exceeding 10 years, the municipality has power to revise its contracts with the water company as to rates for public and private consumption at the end of every decade.

3. SAME.

A municipality, independent of statute, has power and owes a duty to protect its inhabitants against extortion in the price charged for water supplied by a private corporation furnishing water to it for public and private consumption, and to compel the corporation, to furnish water at reasonable rates.

4. SAME—ESTABLISHMENT OF RATES—REASONABLENESS—METHOD OF DETERMINATION.

In a suit to determine reasonable rates at which a water company should be compelled to furnish water to a city for public and private consumption, such rates should be established as would enable the water company to derive a fair income, based on the fair value of its property at the time it is being used by the public, taking into account the cost of maintenance or depreciation, current operating expenses, and the right of the public to have no more exacted than the service in itself is reasonably worth, including a fair income to the stockholders on their investment.

5. SAME—REASONABLE RATES.

Rule for the establishment of reasonable rates to be charged by a water company for furnishing water to a city applied, and rates fixed for the various services performed.

Action by the Long Branch Commission against the Tintern Manor Water Company, to restrain defendant from cutting off water supply to the city of Long Branch and to fix reasonable rates for such supply. Decree for complainant.

Robert H. McCarter and C. G. Van Note, for complainant. William H. Corbin, for defendant.

PITNEY, V. C. The municipal government of the borough of Long Branch (the Long Branch Commission) by its bill, filed July 31, 1903, as originally framed, sought an injunction against the Tintern Manor Water Company, which for many years (under the name of the Long Branch Water Supply Company) had been, and was still, supplying Long Branch and its inhabitants with water, to enjoin it from carrying out a threat recently made in writing to discontinue its supply of water to the municipality for public purposes, unless the municipality should pay certain arrears of dues for water furnished it for about two years then last past. On the return day of an order to show cause why such restraint should not be granted, it appeared that the contest arose out of a dispute as to the rates to be charged by the water company, not only to the municipality for public purposes, but also to private consumers. In fact, it was practically a continuation, in another form, of the contest, instituted by a citizen, but in fact supported by the municipality, in the Supreme Court, of which a report is found in *Hicks v. Long Branch Commission*, 69 N. J. Law, 300, 54 Atl. 568, 55 Atl. 250. It further appeared that the dispute at the present moment, August, 1903, was not so much over the terms of the agreement which was defeated by the Hicks suit, and which was, as we shall see further on, sufficiently favor-

able to the municipality, as over the rates to private consumers which had been established by the water company on June 1, 1903, and which were an amendment and slight reduction of rates established on June 1, 1902.

At the argument on this order to show cause, August, 1903, the water company contended that the municipality had no right, or power, to interfere with the rates established by the water company for private consumers, or to make any terms for such consumers, and that the rates fixed by the water company, which was organized under the act of April 21, 1876 (P. L. 1876, p. 318; Revision 1877, p. 1365), were final under the thirteenth section of that act, which declares that the company may sell its water at such price as the company may think proper. But I held that the true construction of the last clause of the second section gave, by implication, authority to the municipality to impose terms upon the water company in limine. That section requires the nascent corporation to annex to its certificate of organization "the consent in writing" of the "corporate authorities" of any town or city proposed to be supplied "with water." And it has been held that the certificate of organization without such consent was null and void. See *Tyler v. Plainfield*, 54 N. J. Law, 528, 24 Atl. 493; *Hampton v. Clinton Water Supply Co.*, 65 N. J. Law, 158, 46 Atl. 650; *Franklin Tp. v. Nutley Water Co.*, 53 N. J. Eq. 601, 32 Atl. 381. This clause puts it in the power of the municipality to impose terms as to the rates to be charged to both the public and private consumers, and it has frequently been exercised. It was not, however, done in this case. But, further, a statute permits the municipality to make contracts such as that mentioned for no longer than 10 years, thus leaving it open to the municipality to revise its contracts with the water companies every decade. The result is, as it seems to me, that the municipality has the power either by statute or by the implication therefrom, over the whole subject. But, independent of such statutory provision, I think it is the province and the duty of the municipality, whenever opportunity offers, to exercise its power in the protection of its inhabitants against extortion, and to secure them a supply of water and of gas from corporations, assuming to furnish those commodities, at reasonable rates. I so held in *Public Service Corporation v. American Lighting Co.* (N. J. Ch.) 57 Atl. 482. And, see, *Davis v. Town of Harrison*, 46 N. J. Law, 79, at page 85; *Lake v. Ocean City*, 62 N. J. Law, 160, at page 162, 41 Atl. 427, and *Mayor v. City Trust Co.* (N. J. Sup.) 54 Atl. 815.

The water company is exercising a public franchise, which, from its nature, and mode of exercise, is necessarily, during its continuance, a practical monopoly, and it fol-

lows beyond all question that its charges for its supply must be reasonable. And it would be strange indeed if the municipal government, which, so to speak, imposes this monopoly upon its citizens, were powerless to protect them against unreasonable charges. However, the counsel for the defendant, at the hearing of the order to show cause, cheerfully acquiesced in my ruling, and it was at once agreed in open court that the bill should be amended by inserting a clause asking the determination by this court of the question of the reasonableness of the scale of charges demanded by the water company, as well those to the private consumers as those to the municipality. This amendment was made and the bill, as amended, was answered, and the jurisdiction of this court in the premises submitted to by defendant, and the cause brought to a final hearing and a mass of testimony taken on the issue so raised in the spring and summer of 1904, and again in September, 1905. In the meantime an injunction against shutting off the water from the municipality was granted on terms that it should forthwith pay to the defendant four-fifths of the arrears already accrued, and of the dues thereafter to accrue pending the suit. The rate to private consumers to stand and be enforced according to the scale of June 1, 1903, until the final decree of this court.

Coming, now, to the determination of the matters submitted, I find it necessary, for the full understanding of the affair, to give a short history of the water company which has been for years supplying Long Branch with water. The defendant, the Tintern Manor Water Company, is the successor by process of merger and consolidation (under sections 104-107 of the act of 1896, concerning corporations [P. L. 1896, p. 277]) of the Long Branch Water Supply Company, which was organized in 1882 under the act of April 21, 1876, *supra*. The declared object of the latter company was to supply with water "the township of Ocean" (Monmouth county) "and the seaside resorts of Long Branch, Monmouth Beach, and Seabright, and the places adjoining thereto." The only one of the places so mentioned then incorporated was Long Branch. Attached to its articles of incorporation was the formal joint consent of the municipality of Long Branch and of Ocean township to the incorporation by the gentlemen mentioned in the certificate for the purpose above mentioned, and to the laying of water mains throughout the territory mentioned, and operating its works therein. The language of the consents is full and ample. No terms were imposed. The territory of Ocean township covered by this certificate is about nine miles in length on the seashore, and varies in width from less than one-half a mile to upwards of two miles. Being bounded on its northwest side for about five miles by the Shrewsbury river

and Pleasure Bay. At the southwesterly end, at Elberon and Deal, it extends several miles into the interior. The Long Branch Commission covers about one-half of the southeasterly part of the ocean front of this tract. This company proceeded to supply the territory mentioned, and took its supply from the Whale Pond creek, a stream rising in the interior, and running at right angles to the coast, and emptying into the ocean in about the middle of the territory of the Long Branch Commission, and about a mile and a half southwest of the center of the old village of Long Branch. The point of diversion is about a half a mile from its debouche into the sea, and is called Takanassee. It there established a pumping station and a water tower about 80 feet high and laid mains throughout Long Branch and thence northeasterly along the beach to North Long Branch, Monmouth Beach, the old fisherman's village of Gallilee, Lowmoor, and Seabright, a distance of at least six miles. It also laid its mains southwest to Elberon and South Elberon, as rapidly as population demanded. In response to such demand, it, from time to time, added more mains of greater size, and, apparently, always kept well up to, if not in advance of, the demands of its patrons, and always served them, so far as appears, with entire satisfaction.

On September 21, 1891, it entered into a written contract with the municipality of Long Branch to continue for 10 years. By that contract the municipality gave the water company the exclusive right to furnish water for municipal purposes, also the right to extend its mains through any of the streets of the municipality, and agreed to pay it \$4,000 a year for the municipal supply, including street sprinkling and hydrant service, for hydrants then in use, with a further charge of \$40 a year for each hydrant thereafter to be added. The water company agreed to pay an annual tax, or whatever it may be called, of \$250 a year, and to furnish at all times a complete and adequate supply of water. The municipality further granted to the water company the exclusive privilege of furnishing water for private use to the residents of the community, upon condition that the rates charged for the use of water should not exceed the rates charged at the date of the contract, reserving the right to the water company to supply water to any premises through a meter at 20 cents per 1,000 gallons (equal 133 cubic feet).

In point of fact, there never was any scale of charges for unmeasured water established or enforced by the Long Branch Water Company until June 1, 1902, and a great inequality and lack of uniformity arose out of the absence of such an established scale. Very few, if any, meters were introduced, and none, I believe, for water used for ordinary domestic purposes. So great was this inequality of charges that at and before the attempt to establish rates on June 1, 1902,

in many instances private consumers were receiving for \$10 a year a supply of water for which others were paying \$40 per year. It was the attempt to adjust this inequality by raising the charges of those who had been served at a low rate which formed one of the causes of the previous and present contest. In the meantime in the latter part of the last century the growth of the population in the territory covered by the articles of association had grown from about 6,000 in 1880, including about 4,000 for Long Branch, to over 14,000 including about 9,000 for Long Branch, and the use of water had increased in a greater proportion. Such greater proportion was due, as we all know, to the somewhat modern lavish use of water for personal bathing, for lawn sprinkling and for street sprinkling. The result was that the officers of the Long Branch Water Supply Company found that in a very dry season their demand for several days was equal to the supply, and they took into consideration plans for increasing such supply.

Now this, I conceive it to be well settled, was their undoubted duty. It was so declared by Mr. Justice Van Syckel, speaking for the Court of Errors and Appeals in *Olmsted v. Morris Aqueduct*, 47 N. J. Law, 311, at page 329. A company, which seeks and obtains a franchise to supply a certain territory with water for public and domestic uses is under a moral, and, in my judgment, a legal obligation to furnish a supply which shall be equal to all emergencies which may be reasonably anticipated, including unusual droughts and unusual conflagrations, and to bear constantly in mind the prospective increase in population and a consequent increased demand for water. The evidence taken herein in September, 1906, showed that the Takanassee supply in the immediately preceding summer, was entirely inadequate and fully justified the necessity for some action on the part of the defendant company. The problem thus presented to the old company was not easy of solution. They could have built a reservoir to store the waters of Whale Pond brook above Takanassee which would have prolonged their supply, according to Mr. Sherrerd, upon whose opinion I place great reliance, for about 10 years. But the contour of the earth presented no favorable location for such a reservoir. It would consist mainly of very shallow water which is not desirable for storage purposes, and Mr. Sherrerd's approval of the plan I thought, and still think, was not very hearty. Its cost would have been about \$220,000, and at the end of 10 years, and I think sooner, as the evidence indicated, an insufficiency would still have arisen.

But, in addition to all that, the supply at Takanassee was not central. It was six miles away from Seabright, the northeasterly end of the territory, and the mains already laid for that populous resort were already worked to their full capacity, after having been once

more than duplicated. So that properly to supply Seabright would have required the laying of several miles of new mains. Then at the end of 10 years it was said that a supplemental supply could have been found by sinking in Long Branch City artesian wells a few hundred feet in depth, to tap the now well known layer of water-bearing gravel existing along the shore, precisely as predicted by Professor Cook many years ago, and from which several towns in Monmouth county derive their supply. But I am not able to say that I think this bed of water-bearing gravel, which seems to be a continuous one, has been so far tested or explored as to render it certain that its storage capacity will stand an unlimited draft upon it. For it must be borne in mind that it is a mere storage reservoir receiving its supply of water from rain falling on an outcrop in Monmouth county some miles inland from the seashore, and its storage capacity is undoubtedly limited. It appears that it has been tapped by a private individual in the city of Long Branch and water drawn therefrom.

This, however, can hardly be considered as a complete test of the reliability of the storage at that point. And if a plant had been established in the northerly part of Long Branch depending upon this subterranean supply it would have required, in order to make it available, the establishment and continuous maintenance of a complete additional pumping station, and would have required two pumping stations constantly in operation, thereby in some respects doubling the expense. The officers of the old water company looked elsewhere and fixed upon Swimming river, which rises farther in the interior, has a water shed ten times larger than that of Whale Brook pond and empties into the Navesink river, six miles northwest of Long Branch. They then united by articles of merger with a small water company which had been organized at Deal Beach southwest of Long Branch, and was in successful operation, a small one at Seabright, and two or three others which had only a paper existence, and with the Tintern Manor Water Company, then recently organized and adopted the name of the latter. Their pumping station is about one mile from Red Bank. From thence they laid a 36-inch main through Little Silver and Oceanport, about eight miles to the westerly suburbs of Long Branch, and there connected with a small 8-inch main of the old Long Branch system. This connection was merely temporary and quite insufficient to supply the town without the aid of the Takanassee plant until the new system could be continued into the middle of the main town, there to connect with the large mains of that system. Besides this, from the 36-inch main at Little Silver they laid a 16-inch main along the south shore of the Navesink river, through Fair Haven, Oceanic, then across Rumson Neck and the Shrewsbury river to Seabright, there connecting with the north-

erly end of the old Long Branch system. This last connection was an important one, in that it enabled the company to fulfill its implied contract to supply Seabright and the other shore towns between it and Long Branch, and at the same time to reach with its flow the northerly part of Long Branch.

At the time the bill was filed and at the hearing the two plants, Takanassee and Swimming river, were still in use, but the plan of the defendant was, and is, to abandon Takanassee as soon as it shall have laid in the town of Long Branch the proper mains to enable it to do so from the Swimming river alone. It is admitted that the new works are supposed to be amply sufficient, both as respects the supply of water and the size of the principal mains, to supply the region within its reach for 50 years to come. Indeed, the size and costliness of the plant is a matter of complaint by the complainant, and it insists that it should not be called upon or required to pay rates for water sufficient to pay a fair return for so great an expenditure. There is a measure of soundness and justice in this contention. The inhabitants of the borough of Long Branch ought not to be compelled to pay water rates adjusted to pay an income on a greater outlay in a plant than is reasonably needed for its supply. Just here I make the remark that the fact that the complainant is joined with the whole breadth of Ocean township, of which Long Branch covers only a part, is due to the facts that the municipal authorities of Long Branch voluntarily joined with those of Ocean Township in a scheme which embraced both. But I suggest that it is highly probable that it will be found in the end that the whole territory can be supplied to a better advantage as a whole by one plant than it could be if broken up into parcels and supplied by several distinct plants. I have said that a duty rested upon the old water supply company to furnish and maintain a sufficient supply for the territory embraced in its articles of association so long as it appeared that the municipalities within that range relied upon it to furnish them with such supply. I think it follows that so long as those municipalities and their inhabitants tacitly acquiesced in being so supplied it does not lie in their mouths to question the wisdom of the means adopted by the water company to fulfill its obligation in that behalf, provided the action of the latter is taken in good faith. The selection of these means, so far as relates to the choosing the source of supply, is somewhat speculative at best.

In the present case there is no reason to doubt that the water company acted in good faith in deciding to abandon the Takanassee plant, even if they made a mistake in judgment in so doing. I am unable to believe that the business men and capitalists who

owned and controlled the Long Branch Supply Company, deliberately abandoned, and, so to speak, threw away their pumping plant and property and rights of diversion at Takanassee without being thoroughly satisfied that it was wise to do so. But I do not think they did make a mistake in judgment, I do think that the evidence fully justifies them in their decision. And here intervenes an important consideration. Any municipality supplied with water under 10-year contracts and circumstances like the present, has the power, at the expiration of one of its contracts to take measures to supply itself, either by erecting completely new water works, or by taking by condemnation the whole or a part of those already in existence. They hold that power in reserve both as a weapon of offense and defense against oppression by the existing water company. In the present case there is no reason for the belief, nor was it contended, that the contemplated change, which was, in fact, undertaken a few months prior to the expiration of the contract of 1891, was concealed from the authorities of Long Branch, and that they were taken by surprise in the premises. In short, the complainant appears to have concluded, and wisely, as I think, to accept the situation, and to obtain the best terms it could from the water company for its future supply.

This explanation of the situation of the parties and their relative duties brings us to the consideration of the very matter submitted, viz.: First. What annual compensation ought the defendant to have for the supply of water which it is giving, and agrees to continue to give, to the inhabitants of the territory covered by the Long Branch Commission? Second. How shall that compensation be distributed between the municipality, as such, for public purposes on the one hand, and the private consumers on the other? Third. As between the private consumers themselves?

The principle governing the first question is plain enough, but difficult of application to particular cases. It becomes complex as soon as an attempt is made to apply it. The subject has received careful consideration in two very recent cases one of *Brymer v. Butler Water Co.* (1897, by the Supreme Court of Pennsylvania) 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, and later (1900) in *Kennebec Water Co. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856. In the former case the subject was brought under direct adjudication. In the latter, it arose incidentally, but received most exhaustive consideration, and the result is sustained by a wealth of authority. In the Pennsylvania case, Mr. Justice Williams, speaking for the Supreme Court, at page 251 of 36 Atl. (36 L. R. A. 260), says: "By what rule is the court to determine what is reasonable and what is oppressive? Ordinarily, that is

a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for. Then the interests of the owners of the property are to be considered. They are entitled to a rate of return if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable. This whole subject was brought to the attention of the learned judge by a request that he should find, as matter of law, that the reasonableness of the charges must be determined with reference to the expenditure in obtaining the supply, and providing for a fund to maintain the plant in good order, and pay a fair profit upon the money invested by the owners, and that a rate which did no more than this was neither excessive nor unjust. This the learned judge refused to find, saying, in reply to the request: 'We have no authority for such a ruling, and it would be unjust to the consumer, who would have to pay full cost of the water, provide a sinking fund, secure a reasonable profit upon the investment, and have no voice in the management of the business of the company. The act of assembly in this regard can bear no such construction.' This ruling cannot be sustained. The cost of the water to the company includes a fair return to the persons who furnished the capital for the construction of the plant, in addition to an allowance annually of a sum sufficient to keep the plant in good repair, and to pay any fixed charges and operating expenses. A rate of water rents that enables the company to realize no more than this is reasonable and just. Some towns are so situated as to make the procurement of an ample supply of water comparatively inexpensive. Some are so situated as to make the work both difficult and expensive. What would be an extortionate charge in the first case might be the very least at which the water could be afforded in the other. The law was correctly stated in the defendant's request, and the court was in error in refusing it." In the Maine case, which is largely relied upon by the counsel for the complainant herein, the following propositions were held: "The basis of all calculation as to the reasonableness of rates to be charged by a public service corporation is the fair value of the property used by it for the convenience of the public. At the same time, the public have the right to demand that the rates shall be no higher than the services are worth to them, not in the aggregate, but as individuals. Summarized, these elemental principles are the

right of the company to derive a fair income, based upon the fair value of the property at the time it is being used for the public, taking into account the cost of maintenance or depreciation and current operating expenses, and the right of the public to have no more exacted than the services in themselves are worth. The reasonableness of the rate may also be affected, for a time by the degree of hazard to which the original enterprise was naturally subjected; that is, such hazard only as may have been justly contemplated by those who made the original investment, but not unforeseen or emergent risks. And such allowance may be made as is demanded by an ample and fair public policy. If allowance be sought on account of this element, it would be permissible at the same time to inquire to what extent the company has already received income at rates in excess of what would otherwise be reasonable; and thus has already received compensation for this hazard. In determining the present value of the company's plant, the actual construction cost thereof, with proper allowances for depreciation, is legal and competent evidence, but it is not conclusive or controlling. The request that 'under no circumstances can the value of the plant be held to exceed the cost of producing at the present time a plant of equal capacity and modern design' should not be given. Among other things, it leaves out of account the fact that it is the plant of a going concern, and seeks to substitute one of the elements of value for the measure of value itself."

These propositions are sustained by elaborate reasoning and abundant authority. I do not think it worth while to cite the latter. The supplying company is, as we have seen, under obligation to keep in advance of the present demand and take liberal account of the probable increase of demand due to increase of population. I think the language of Mr. Justice Dixon, in *Slingerland v. Newark*, 54 N. J. Law, 62, at page 69, 23 Atl. 129, at page 131, is apt on this point: "It would, of course, be absurd for the city to construct water works adequate only for its present wants, and the prosecutor does not assert that the works now contemplated are unreasonably large in view of the city's prospective growth." This is in strict accord with what was said (and above referred to) by Justice Van Syckel, in *Olmstead v. Morris Aqueduct*, 47 N. J. Law, 329, as follows: "In a matter of extreme necessity all contingencies must be provided for, and the supply must be so ample that a lack of water cannot be apprehended." To the same effect are the more extended remarks of Judge Parker in the Supreme Court in the same case, reported in 46 N. J. Law, 500. The learned judges in these cases were discussing the question of necessity for the exercise of the eminent domain. The argument from such premises to the present is a fortiori.

These considerations lead to the conclusion that the water company when it starts with new works, or a large addition to the original supply, is entitled to an income therefrom somewhat greater than what is due to the cost of work sufficient merely to meet the present demands. I say "somewhat greater" for I do not mean to be understood as holding that capitalists ought to expect an immediate compensatory income from an enterprise of this character. But on the other hand it would be manifestly unjust to expect them to invest their money in a plant necessarily larger than present demands require and take as an income therefor such a sum as would satisfy an investment sufficient to meet present demands. For here comes in again, with great force, the consideration previously mentioned, that the municipality cannot bind itself for more than 10 years; and, in fact, need not bind itself at all for any period, and it holds in its hand the absolute power to oust the water company at any time it shall so choose and may exercise that power as soon as by the increase of population and demand, the investment by the capitalists shall have become actually profitable. This is one of the risks spoken of and provided for by the Supreme Court of Maine.

Now, let us inquire what is the cost or the fair value of the works of the defendant:

First. The Takanassee works. They were put into the new corporation at \$425,000 or rather \$325,000, subject to a mortgage for \$100,000 to secure outstanding bonds. That included the plant at Takanassee and all the street mains both within and without the limits of Long Branch. It was said by Mr. Sherrerd that the mains within the limits of Long Branch just before the date of the hearing, May, 1904, could be replaced at about \$115,000, but I think that was a very low estimate, even at the then very low price of pig iron, which, as we know, fluctuates largely. The mains, in fact, probably cost twice the sum mentioned. I think no estimate was made (none was given) on the value of the mains outside of the corporate limits of the commission. To the value of the mains is to be added the removal value of the pumping engines and the fixtures and apparatus at Takanassee which was considerable. Then \$71,000 was paid for the Deal waterworks.

This brings us to the cost of the new plant, in producing proof of which a large amount of time and space were occupied. They were commenced by a contracting company under specifications of the work given in detail and were to be paid for in \$1,200,000 in first mortgage bonds and divers shares of the capital stock of the par value of \$100,000. Difficulties were encountered in carrying out this contract according to its terms, and the plans were changed. The result of this was that the contractors were not held to their bargain, but were paid in bonds and stock according to the actual amount of their ex-

penditures. In order to ascertain these expenditures an inventory of the work done was taken, and the cost was ascertained by the vouchers and checks furnished by the contractors. The reliability of this mode of ascertaining the cost was fiercely attacked by counsel for the complainant, but I think this attack was not founded in justice. It is true that it was alleged, and I believe proven, that some of the persons who were interested in the construction company were also interested in the water company. But the committee of the water company who undertook to make up the cost of the new works were not interested in the contracting company, and they went about their work, and carried it through in the usual mode that business men would adopt under such circumstances. Of course, it was easy enough to measure up the 15 or more miles of water mains laid, and ascertain the sizes and the prices paid for it and the cost of laying them, and so with the cost of the pumping engines, filter plant, so far as finished, and the great dam across the Swimming river. Moreover, maps of all these works were laid before the court by defendant, and complainant had an opportunity to put experts upon it and give estimates of its probable cost, but did not avail itself of the chance. The committee to ascertain this cost consisted of Ex-Senator Blodgett, who had been connected for some time with the old company. Mr. La Monte, its engineer and superintendent, and Mr. Conant, who at that time was its secretary, and all of whom were watching the construction as it progressed. They found that the contracting company had expended \$936,000 and large sums were afterwards expended, and more yet have still to be expended so that its cost may be fairly stated at \$1,000,000. The contractors, however, paid for all their work in cash. The defendant estimates the cost including the Takanassee and Deal works at \$1,500,000 and upwards, without counting the shares of stock which were issued and which may be here treated as a mere bonus. Several distinct criticisms and objections are made to the details given of this valuation. First, it is said that the cost of the site for the reservoir, amounting to \$76,000 is too great. The land itself, consisting of several hundred acres, cost \$40,000 and the cost of clearing, \$35,500. In fact, only about one-third or one-half of this land has been so far covered with water, and much more than the amount covered has been cleared. The fact is that the original plan provided for a very large reservoir, including a very high dam, but in carrying it out a lower dam and smaller reservoir were adopted. It is admitted that the present supply is ample for many years to come. I shall deduct from the total \$25,000 on this account.

The next item criticised is the cost of the dam itself, the total cost of which was \$89,500. The objection to this is that it was

laid out and erected to its present height of a width sufficient for a dam two or three times as high, and that such construction cost nearly or quite twice as much as it would have done for a dam of its present height. I think this objection is well taken, but not to the extent claimed by complainants. I shall deduct \$30,000 on account of the excessive cost of the dam.

The next objection is to the size of the principal main laid, viz., about 42,000 feet of 36-inch main, which was much too large and expensive, and that complainant ought not to be charged with an income on so great an outlay. Defendant admits that its plans were adapted to a future estimated growth of 50 years. Mr. Sherrerd says, and I agree with him, that 50 years is too long for a forecast. He fixed 30 years as the usual limit. Now it is readily perceived that the difference in cost between a 36-inch main and a 24 or 30-inch main is, or may be, so great that if it be saved and invested it will with the accrued interest in a period of 30 years reach a sum sufficient to lay an additional main if the first shall at that time prove to be insufficient. I have estimated by the use of standard hydraulic tables the difference in the cost and carrying capacities of a 30-inch main and a 36-inch main. These items vary according to the squares of the diameters of the respective mains. The square of 36 is 1,296, and the square of 30 is 900. The proportion then in round figures is as 13 to 9. Applying that in practice I find that the tables give the carrying capacity of a 36-inch main with a head of 1 foot in 1,000 feet length to be 15,000,000 gallons in 24 hours, and the carrying capacity of a 30-inch pipe under the same head is 9,500,000 gallons. Now, taking the summer population of Long Branch at 50,000 (which is double what it actually is, as we shall see directly) and estimating its daily consumption, including street sprinkling, at 75 gallons per head (which in my individual judgment is 50 per cent. more than it ought to use) we have 3,750,000 gallons per day. But, supposing that consumption is confined (which, however, it is not) to 12 hours a day, and call the rate 7,500,000 gallons a day; and add to that for 10 fire streams at a rate of 3,000,000 gallons a day and we have a total maximum demand of 10,500,000 gallons to be supplied through 33,000 feet of 30-inch main, intervening between the Newman Springs pump and the city. Now, the tables show that a 30-inch main, 32,000 or 33,000 feet long will deliver water at the rate of 10,500,000 gallons per day under a friction head of 35 feet or 15 pounds to a square inch, which as we all know is a trifling pressure. If we add to this 40 pounds to the square inch as a proper pressure to be maintained, at the hydrants, we have a pressure at the pump of only 55 pounds to the square inch, which is also a very moderate water

piston pressure for a steam pump. The evidence is that the pressure at the works is maintained at 60 pounds to the square inch as a normal condition, and the works are arranged so as to maintain a pressure of 85 pounds to the square inch. By increasing the pressure at the water piston of the pump, we can easily and readily increase the carrying capacity to 20,000,000 gallons in 24 hours, and this can be done without improperly increasing the pressure on the steam piston by increasing the size of the steam piston as compared with that of the water piston. This is the familiar mode of arranging pumps to raise water to high altitudes, 1,000, 2,000, or 3,000 feet.

Here it is to be observed that while the old system limited the amount of pressure to the amount of head in the standpipe, the new system inaugurated at Newman Springs is not so limited. It is, in fact, the Holly system, which operates without a standpipe, in which a constant pressure is maintained automatically. That the estimate on a 10,500,000 gallons supply is liberal appears when we consider that the largest amount ever pumped in one day up to and including the year 1903, was 5,400,000 gallons, measured by the strokes of the pumps, from which it must be deducted the "slip" estimated by Mr. Sherrerd at 10 per cent. This was for the whole system including Seabright and the other smaller towns. I conclude, then, that a 30-inch main from the dam to the pumping station (nearly two miles), and from thence to the town (over six miles) is ample, flanked, as it is, by an 18-inch main from Little Silver to Seabright, each of these aiding the other in the case of an emergency of fire. Besides, I am entirely satisfied that the estimate for 75 gallons per head per day would be reduced below 50 gallons per day by the general introduction of meters, and such reduction of consumption, or rather of waste, will result in the saving of fuel for making steam. This I think it is the clear duty of the defendant to accomplish as soon as practicable. By the use of the same hydraulic tables showing the relative weights of 30 and 36 inch mains, and the difference in weight in lead used in joining the same, I conclude that the reduction of cost of the 36-inch main laid, if a 30-inch main had been used, would have been one-quarter. The total cost of the eight miles of 36-inch main with the appliances was \$300,000. One-fourth of that would be \$75,000 which I shall allow on that account.

The next objection is to the item of \$110,800 of interest and \$7,000 of coupons paid on bonds. It is argued that while an interest account in such cases is allowable the above-stated amount is too great for these works, but I think that the amount of excess, if any, is too trifling to be taken into consideration in this connection.

The next objection is to the amount paid,

\$425,000 for the old works. No reliable statement was made as to what those works originally cost the old company. All that was said was that the present proprietors would not sell them for less than \$325,000 besides the bonded debt, but then we must consider that there was not an actual sale for cash, but a merging into a new corporation. On the other hand there was some actual loss in the abandonment of the old plant and the amount spent in and about the dam and pumping station at Takanassee. I estimate it at \$100,000. I deduct then from the \$1,500,000 as follows:

Whole cost of works.....	\$1,500,000
Loss on Takanassee.....	\$100,000
Overcost of 36 in. main...	75,000
Overcost of dam.....	30,000
Overcost on reservoir.....	25,000
	<hr/> 230,000
Leaving	\$1,270,000

—as the amount upon which defendant ought to receive dividends.

The next question is, what proportion of that sum of \$1,270,000 ought to be charged, so to speak, to the defendant. The defendant suggests two-thirds. I heard from complainant no serious objections to this proportion. It accords with the present and recent proportion of consumption of water by the complainant as compared with the total consumption. This would require the complainant to pay a fair income on \$847,000. This seems a large sum of money, but let us see what the demands of Long Branch are at present and what they are likely to become in the future. It has about 73 miles of streets laid out on paper and ready to be improved and built upon, and which according to the evidence are gradually coming into use. Of these only 23 are at present piped and supplied with water. The population is steadily increasing by the building of country residences, villas, and small boarding houses, which latter are taking the place of the large caravansary hotels, which are going out of fashion *pari passu* with the destruction of the business of gambling. The permanent population was nearly 9,000 five years ago, and is at this time probably 10,000 or more. The summer population, which is also increasing, is variously estimated at from 25,000 to 100,000. The higher estimate was put upon it by Dr. Reed, formerly mayor, and a strong supporter of complainant in its present suit. His evidence is this: "It is estimated that we have a population of between 75,000 and 100,000 in the summer." He says the permanent population of Monmouth Beach is probably 300 or 400 in winter, and in summer possibly 4,000 or 5,000. He gives Seabright a permanent population of 500 and in summer it is variously estimated at from 25,000 to 30,000. The same great variation probably applies to Deal. Mr. Blodgett estimated the population of Long Branch in

summer at from 50,000 to 60,000. By virtue of his position as president of one of the railroads controlling two distinct lines of transportation carrying persons to and from Long Branch, I should think his judgment more reliable than that of Dr. Reed. Then we have the assessor of Long Branch who estimates the summer population at 25,000. His estimate is based upon observation of the capacity of the houses taken in making his assessment. These are all mere guesses, not made up from any recorded observations or reliable data, unless Mr. Blodgett's may be so considered.

There is, however, a mode of reaching a safer conclusion, and that is by comparing the recorded consumption of water (as shown by the numbers of the strokes of the pumps) in the winter months with that in the summer. Mr. La Monte has furnished us with a table for the years 1891, 1901, 1902, and 1903. The lowest number of gallons pumped in any month in 1891 was 15,502,769 in January, the greatest was in the month of August, 49,911,478. The average per day in January was 500,000, in July 1,658,687. This makes the consumption a little more than three times greater in summer than in winter. Whether the sewer system had then been introduced in the town has not been shown by the evidence so far as I recollect. A sewer system in general use, as is now the case, undoubtedly has the effect of increasing the apparent consumption in winter, for the reason that people are liable to allow their faucets to run in cold weather to avoid freezing.

Coming, now, to 10 years later, 1901, 1902, and 1903, we find that in 1901 the smallest flow was in the month of January, 40,214,260 gallons, an average of 1,297,234 daily, and the greatest consumption was in August, 104,727,946, or a daily average of 3,378,320 gallons, or a little more than $2\frac{1}{2}$ times that in January. In the year 1902 the smallest consumption was again in January, 42,063,518 gallons, or a daily average of 1,356,887 gallons, and the greatest was in July, 104,716,960 gallons, a daily average of 3,377,966 gallons a day, almost precisely the same as in the month of August in the previous year, and a little more than $2\frac{1}{2}$ times the minimum amount in January. In the year 1903 the smallest amount consumed was in the month of February, 51,000,850 gallons, or a daily average of 1,821,458, and the greatest consumption was in July, 129,090,408, or a daily average of 4,164,206 gallons per day. Here we have the summer flow just about $2\frac{1}{2}$ times the winter flow. Applying that ratio here, and counting the winter population of Long Branch at this time as 10,000, we have the summer population, for the purpose of consumption of water at least, at about 26,000 or 27,000. If this estimate be reliable, it greatly strengthens the conclusion at which I have arrived as to the capacity of a 30-inch main to supply the whole district.

Now, in fixing the share of the whole cost to be charged to Long Branch, one other consideration comes in. The municipality has acquired the habit of using a very large amount of water in sprinkling its streets in the summer months. It uses daily in summer, except just after a rain, 16 or 17 sprinkling carts which are going continuously, some of them early in the morning and late at night. Besides these are two or three maintained by the county on such streets as were improved by the county. These carts use an average of 550 gallons at a load and, except in case of rain, distribute from 26 to 32 loads each day. That will amount to nearly 300,000 gallons, or 4,000 cubic feet, of water a day, enough to supply a population, for domestic purposes only, of 6,000 persons. Taking the population to be served with water during the summer months at 30,000, which considering the amount used for sprinkling is small enough, I think the estimate of the cost of the plant to be charged to Long Branch is none too great. For it must be borne in mind that the size and capacity of the waterworks must be fitted to the highest population to be supplied, precisely as if that population were permanent and not fluctuating with the season. I also think that waterworks costing \$800,000, or more are none too great or costly for a town of that population.

The next question is, what is a fair income for the defendant to derive on that sum? I have intimated that the defendant ought not to expect, at the start, a compensatory income such as that stated by Judge Williams in the Supreme Court of Pennsylvania, and by the Supreme Court of Maine, above cited, but I do think they ought to get at the start a moderate rate of interest, say 5 per cent. on their investment after paying all expenses of operation and maintenance and a moderate allowance for depreciation in value. This latter item as applied to the water mains is slight. If originally laid of iron of proper quality and properly coated on the interior, they are practically immortal. They are, however, liable to diminution in carrying capacity, due to the growth on the interior of tubercles of rust. This is an unascertainable quantity, which varies materially with the quality of the iron, the character of the coating, and the characteristics of the water. The fire hydrants, steam pumps, boiler and filters, and buildings certainly do depreciate in value each year to an appreciable extent over and above the amount which may be expended upon them for reasonable and ordinary repairs. Mr. La Monte put this depreciation at 5 per cent. on all the mains and hydrants. I think that too great, and fix it at 1 per cent. on so much of the \$847,000 as is represented by the material so subject to depreciation. Just what proportion of the whole that represents must be a mere estimate; with insufficient data I put it at \$600,000.

It follows that the net income which the defendant ought to receive at the start from Long Branch should be 5 per cent. on \$847,000, which amounts to \$42,350, and 1 per cent. on \$800,000, making \$8,000, and a total of \$48,350. To this must be added the costs of maintenance and administration including ordinary repairs and taxes. Mr. La Monte had made up and submitted and been cross-examined upon a very careful estimate of those items showing the amount to be \$30,000. I have carefully scrutinized it and believe it to be a fair and just estimate. Allotting two-thirds of this to Long Branch, we have it charged with \$20,000 a year. This seems a large sum, but it must be borne in mind that the works must in their size and operation be gauged to the highest population in the crowded season, and to the extravagant use in which Long Branch indulges for street sprinkling. Taking those matters into consideration, I do not find it oppressive. The amount then which Long Branch should pay to the water company is as follows: Net income on investment \$48,000, add for expenses \$20,000, and we have \$68,000.

We come, now, to the proper division of this duty laid upon the municipality at large, between what is called service for public purposes, fire hydrants and street sprinkling, and what is properly called private service, enjoyed by the individual citizens. An equal distribution of this burden is a difficult problem, and one not capable of exact solution, and it may be stated thus: How much of the general cost of maintaining the water supply should be assessed against the property owners as other municipal taxes are assessed, without regard to the individual benefit by each therefrom, and how much should be distributed among the citizens according to the use each one makes of the water? While probably incapable of solution with any degree of exactness, yet, it is fortunate that a mistake in its solution is not serious, since it is quite certain that a good and reliable water supply tends materially to promote the general prosperity of the municipality and increase the value of all land within its limits whether or not it is served at present with water. Lands facing on the 40 or 50 miles of unpiped streets in Long Branch are benefited to a greater or less extent by the bare existence of the water supply and the certain availability of it for them in the future. The same remark applies with greater force to the vacant lots facing on streets already piped. I shall first consider the case of the municipal supply.

The contested contract of November 24, 1902, framed after the schedule of rates to private consumers of June 1, 1902, had been established and published by the water company, provides as follows: \$25 per year for each hydrant, then erected, or thereafter to be erected, and \$100 a year for each wagon engaged in sprinkling the streets, with liber-

ty to the municipality to put in use as many wagons over 16 as it saw fit without further charge, and the water company to pay a franchise tax of at least \$650 a year, which I feel sure is much less than the actual tax. It also contained a provision that the rates for private consumers should not be increased during the 10 years period of the contract. A new table of rates to private consumers was adopted, as we have seen, on June 1, 1903, which, in some respects reduces the rates of 1902. This contract of November, 1902, never went into effect, and at the hearing counsel for the complainant expressed his satisfaction with it as to the municipal rates, and asked the court to adopt it. This proposition was not acceded to by the counsel for the water company. He declared that if the water rates to private consumers established by the company, either those of June, 1902, or those of June, 1903, were to be disturbed and revised by the court he demanded that the rates of the unexecuted contract of November, 1902, should also be revived. In this I think the counsel for the defendant is entirely in the right. The offer, so to speak, of the water company in the fall of 1902 to enter into the contract in question was based on the condition that the scale of charges to private consumers of June 1, 1902, should stand unchallenged by the municipality. The income which the water company expected to derive was based upon estimates of income from the two sources combined. I shall, therefore, disregard the terms of that contract, except so far as they indicate what was in the minds of the parties at the time.

First. The annual rent of fire hydrants. There were on May 1, 1904, 148 fire hydrants placed and in use, as I understand, being located at intervals of an average of about 1,000 feet. I think a fair rental of these is \$25 each. That is about the average rental in the various municipalities whose rates were proven before me. In Plainfield they are charged at \$15 each, but are placed much closer together, and are therefore much more numerous in the same territory. This, in my judgment, is a wise plan, and economical in the long run, since it enables the firemen to reach a fire with a much shorter length of hose, and thereby relieves the hose from the severe strain upon it due to the pressure necessary to force a stream through a long line of it. If the fire hydrants in Long Branch were placed as close together as in Plainfield, I should feel inclined to reduce the rental. At \$25 each the rental for those in Long Branch will amount to \$3,650 a year. This seems a large sum of money to pay regardless of whether or not they are used for extinguishing fires. But the charge has a substantial foundation in reason. In the first place, the water company comes under a serious obligation, somewhat like that of an insurance company, to keep itself in a

continuous uninterrupted and unfailing readiness to furnish at each fire hydrant a sufficient supply of water under a reasonable and adequate continuing pressure. I stop here to say that some discussion arose at the hearing as to whether any decretal condition should be imposed upon the defendant as to the degree and extent of this pressure at the fire hydrants, and it was concluded, as I understood, that there was no occasion to impose any such condition, and it was remarked that there was no authority for any such action on the part of the court. To this I agree. But I make this further remark, that the examination which I made into the carrying capacity of the 36-inch main, the result of which, I have already stated, satisfies me that there is no appreciable danger that there will ever be a deficiency of pressure at the hydrants. As already remarked, the normal pressure at the pump is 60 pounds, and, under ordinary circumstances, with a 36-inch main, that pressure will not be reduced at the fire hydrants to a degree which will impair their usefulness. Moreover, the town very wisely has adopted and employs three very large steam fire engines, the successful operation of which will be affected very slightly, if at all, by a mere lack of back pressure at the fire hydrants, and these engines will always be well supplied if they find sufficient water in the main to fill them. A failure in that respect will indicate a complete failure of the water company's whole system. Speaking as an amateur engineer, I should say that it would not be necessary in a case of an alarm of fire to even stop the sprinkling carts. Another solid basis for the charge of hydrant rent is found in the fact that it is necessary for the water company, in order to maintain a sufficient flow at the fire hydrants, to install a much larger general system of street piping than is necessary, or at all valuable for the distribution of water for mere domestic supply. This I think they have done. The map indicates a range of sizes of mains much larger than would be required for mere domestic purposes. I find 8 and 6 inch mains laid where 6 and 4 inch mains would have been quite sufficient, but for the requisition for fire purposes. This surplus size must be continued in the future, and if the least defect in this respect is discovered, it must be promptly remedied by gridironing with cross-mains. I fix \$25 as a proper annual rental for fire hydrants and the water company is to keep the same in repair, except when injured by external violence.

I come, now, to the item of street sprinkling. This item is capable of more accurate treatment. The amount of water used is capable of approximate ascertainment and the only question is, what rate shall be paid for it? The capacity of the wagons in present use, it was agreed, would average 550 gallons each. The number of runs each would make,

in an ordinary day, when not stopped by rain, or drizzly weather, was also ascertained with reasonable certainty. Moreover, the amount distributed can be ascertained with absolute certainty by the introduction of a meter for each wagon. But I do not deem that exactness to be requisite unless both parties agree to it. The principal and important matter is to settle the rate which the municipality should pay. The evidence shows that the rates per 1,000 gallons for metered water in different municipalities varies all the way from 10 to 30 cents. The variation is due, first, to the general cost and value of the water at the point delivered; and, second, to the quantity delivered at a single outlet. The greatest variation in price is found in the quantity delivered, and that arises out of the difference between supplying goods at wholesale and retail. The lowest rate I have heard mentioned is that for the water furnished by the city of Perth Amboy to the municipal authorities of South Amboy by a single branch leading from its great main, through which it obtains its water from the south side of the Raritan river; and the water so taken by South Amboy is distributed to its citizens in the ordinary way. That rate is 7 cents per 1,000 gallons. It will be perceived that the seller of the water incurs no expense whatever in the cost of distribution of the water or collecting the money for its proceeds. I believe that it charges the same low rates for the very large quantities taken the year around by factories. The other instances of rates running from 7 to 10 cents per 1,000 gallons are those of factories taking very large quantities steadily the year around.

I do not think that Long Branch can put itself in the position of claiming rates on the basis of these year around takers of very large quantities, for the simple and sufficient reason that Long Branch takes only in the summer time. For the other months of the year the great plant necessarily arranged for the highest consumption is for present purposes lying idle. This last consideration is of the greatest importance, not only in this connection, but in others to be hereafter considered. Mr. Sherrerd tells us that the sale by the city of Newark to the street sprinklers is based on a rate of 15 cents per 1,000 gallons or at less rates on a sliding scale. His evidence is not definite, but the actual charge is \$6 per week for each wagon, which would be \$26 a month. I think, after a careful examination of the rates charged for measured water by other companies and cities, that those charged by the city of Perth Amboy to factories are the most reasonable and favorable to the complainant, and range from 7 to 25 cents per 1,000 gallons. Applying that here, after making allowance for the circumstances that the sprinkling is practiced only in summer, and mainly in the three or four months when the supply from the springs and streams is the

lowest, I think that 11 cents per 1,000 gallons is sufficiently favorable to the complainant. I make the average amount used by a sprinkling wagon in one month to be 372,000 gallons. In this I make no allowance for days on which sprinkling is omitted by reason of rain or mist, and I think no allowance on that account should be made, for the reason that the water company must make and keep up all its arrangements at the pumping station on a basis of the water being drawn every day, and it is doubtful if it will save during a rainy day any appreciable amount even in the quantity of fuel consumed. 372,000 gallons in one month at 11 cents per 1,000 gallons makes \$40.92. Counsel for defendant offered at the hearing to take \$40 a month for each wagon, or to join the city in the expense of a meter put on each wagon at such a rate per 1,000 gallons as the court should fix. I think this offer was reasonable, and I shall adopt it. At that price for four months the amount which the city would pay for 17 wagons would be about \$2,720. I say four months. As I interpret the evidence, the full equipment of 17 wagons is only maintained during four months in the midst of the season, and that for the one month on each side of the season a less number are used. I estimate for those extra months the probable income at that rate will bring the total amount paid for sprinkling up to \$3,400 a year. This makes the total paid by the city for the two items in question, viz., fire hydrants and sprinkling service, about \$7,000 a year, which I think remarkably cheap.

We come, now, to the rates to be charged to private consumers. Here I must repeat what I said before, that the rates must be so arranged that the defendant can have an income on a plant adapted to a population at its highest point in the course of 12 months. The only saving by reason of the diminution of population in the winter months arises from a saving in fuel. The same attendants at the pumping station are necessary. Then, again, the item of the cost of distribution intervenes and that depends upon the compactness with which the town is built, which affects the length of main necessary to furnish the supply. The complainant relied greatly upon several scales of charges for water furnished by towns and small cities, which own and operate their own works. Here, again, a consideration of some importance intervenes, and that is the item of profit and of a provision for a sinking fund referred to and approved in the authorities to which I have already referred. It is intended to cover the risk of such an enterprise. A private capitalist who undertakes to supply a town with water sinks his money, so to speak, in the earth in a shape that he cannot readily turn it into money, and he assumes the risk of the accuracy of his engineering and the durability of his works and the permanency of their need and the probability

of their requiring at some time in the future a recasting and a rebuilding either in whole or in part. This latter is an experience which all the great public works of the last century have undergone. Now, a municipality which erects its own public works assumes that risk, and sooner or later, in all human probability, it will go through the same experience of being compelled to rebuild and renew. The examples in this respect of the cities of New York and Newark are familiar to all. However fortunate the small towns in Monmouth county, whose present success is put forward as examples by the complainant, may have been up to this time, there is no certainty that they will not be compelled in the future to abandon and lose forever a good share of the expense already incurred. Some, in fact, have already had that experience. For these reasons I cannot accept the rates of any of those as furnishing a proper estimate for the present case. A municipality which permits a private company to undertake to supply it with water and gas must expect to appear, at least, to pay a little more for its supply than it might, at first, do if it undertook to furnish its own supply. Especially is this true when it is so fortunate as to have near at hand an abundant supply which is easily appropriated by simple methods. Then if we compare the rates established by the defendant with those established by private companies furnishing water to private consumers we find a great variation in the mode of making up the items. So that a comparison in that respect is not easy. I speak now, of course, for charges for unmeasured water.

My own decided opinion is, as expressed at the hearing, that the fairest and most satisfactory mode of charging for water is by measuring it and fixing a price by the gallon or cubic foot. But the defendants have made their scale of charges without measurement, and the system of charging by measuring has not become so general in its use as to warrant me in imposing it in this instance on the defendant, although I strongly recommend it. The defendants make two objections to selling their water by measuring: First, the expense involved in immediately installing 1,200 or 1,500 meters, which they assert, and I entirely agree with them, must fall on the water company, because it should own and control all the meters; second, that it would throw an unreasonable burden on the permanent residents by unduly favoring the summer residents who would pay for only three or four months' supply. This last, I am decidedly of the opinion, can be overcome by charging a high rate, say 25 or 30 cents a hundred cubic feet for four or five summer months and half that for the winter months.

Coming, now, to the rates they have established, and before examining them in detail I will notice the more serious objection to them which is, that the charge is precisely the

same to those takers who use water for only three or four months and those who use it the year around. It seems to me that this rule of the company works the hardest against the large country houses which are occupied, presumably, by persons who live in the style indicating that they can afford to pay high rates for water, and that it works in favor of the permanent resident, and this includes the majority of the citizens living in a more simple style. But the point is made by the municipality which may be supposed to have in view the interests of its permanent citizens and it must be considered. Here, again, I must remark that the only difference that I can perceive which will be experienced by the defendant by the closing of the large country seats and villas for eight or nine months in the year is in the single item of fuel, and this can only be considerable if the defendant can dispense with one or two of its pumps and clean out the fires from one or two of its boilers. But, nevertheless, I think some allowance should be made for nonuse in the winter. Here, again, a difficulty arises. The evidence tends to show that very few of the large country houses are entirely closed in the winter. A caretaker or housekeeper is frequently left in possession all winter. Then again, many of the large boarding houses are occupied by the proprietors in winter but the guests' rooms are entirely vacant and the extra water-closets and bathrooms are not used. I think these difficulties can be overcome by an actual disconnection and cutting off of the fixtures not needed in the winter season, and by reducing the charge on fixtures so disconnected to, say two-thirds of the regular rates for the length of time they are so disconnected. This will reduce the rates for the year on fixtures not used to about four-fifths of the rates charged for those used the year round. The expense of the disconnection and the reconnection in the fall and spring should be borne by the water takers.

Coming, now, to the details of charges: It will be found quite difficult to compare it with those of other water companies just as it is difficult to compare the charges of any other two companies. Mr. Robt. M. Kellogg, who is secretary and superintendent of the Middlesex Water Company supplying several towns in that county and of the Bergen Aqueduct Company, which supplies some towns in Bergen county, has adopted an ingenious mode of making a comparison. He collected and produced the rates of 36 towns and cities mostly in New Jersey, and many of whom own their own supply, and then took as a standard a dwelling with the following water taps, viz., one kitchen sink with hot and cold water, one water-closet, one bath tub, one washstand in bathroom and three laundry tubs. He found the Long Branch charges for such a house to be \$18. He found 11 of the 36 to be the same. He found 8 of the 36 to be more than \$18. He

found 14 less than \$18. The highest was \$25, in Flemington, N. J., and the lowest was \$14, in Vineland, Lambertville, and Rahway, N. J. The average cost was \$17.77. This result shows that I cannot interfere with the rates already established, except as hereinbefore provided, unless the result of their enforcement will produce more income than the defendant is entitled to. There is a rate by meter for laundries, liveries, and boarding stables, at 35 cents per 1,000 gallons with a provision for an unmentioned lesser rate where the consumption is continued during the winter months. I cannot say that I think this is too high, provided, a reasonable allowance is made for a large quantity used in the winter season.

Let us now inquire how these rates will work out in practice. The income of the defendant from private takers within the limits of the Long Branch Commission for the years ending June 1, 1903-05, was as follows: 1903, \$43,707.34; 1904, \$44,079.34; 1905, \$45,510.15. If we add to the latter for fire hydrants and street sprinkling, \$7,000 and estimating for use by the county at \$1,000 we have \$53,510.15. Deduct from this the cost of administration, taxes, etc., \$20,000, we have \$34,000 to be devoted to income and depreciation of the plant; a sum which would make the income between 3 and 4 per cent. upon the amount I have allotted to the Long Branch Commission. I believe the above statement does not include the amount paid by the city for water in its public buildings. Add \$500 for this item, we have a total of \$54,000. This sum is \$11,000 less than I have found is a proper income for defendant to receive yearly from complainant for water service. If, instead of allowing defendant 5 per cent. on the \$847,000 found to be complainant's share of the total cost of the works, we make it 4 per cent. free of taxation, the defendant will still be short \$3,000 of paying that moderate income. Or, to take another view. The defendant will receive between 4 and 5 per cent. from the cost of its works, without allowing anything for depreciation, except what is included in the estimate for repairs forming part of Mr. La Monte's estimate of annual cost of maintenance and administration. But then another element comes in. If, under the conclusions I have arrived at, the water takers are relieved of part of their annual payment by a deduction due to disconnecting fixtures in the winter time, the annual income will be somewhat reduced. Just how far of course, is a mere estimate. But it is quite manifest that the defendant will not under the rates which I have approved receive anything more than a fair income on their property even if the value of the works should be reduced considerably below the figure at which I have placed them. So that if I have erred against the municipality, I feel quite confident that that error has not gone so far as to injure it.

I believe I have now gone over all the questions submitted to me and I shall close with one remark. It is well nigh impossible to embody in a decree the rules and regulations and standard charges for the supply of water to a town, and it is quite impossible to so arrange them as to make the charges uniform, and at the same time distribute them equally among the different private consumers. Much must necessarily be left to negotiations in particular cases. Some towns, as shown by Mr. Kellogg, allow the amount of frontage of an establishment to affect the charge, and this I think is right for reasons previously stated. Then there is the element of vacant lots, and then when a new street is opened and partly built upon the cost of laying the mains is precisely the same as if it were immediately closely built up, and that cost, of course, enters into the cost of supplying the pioneer builders on the street. These and other matters must be taken into consideration, and dealt with in a spirit of accommodation and with a desire to treat all customers alike. The water company should at all times bear in mind that they are exercising a public franchise, which it is to use and not abuse. And the municipality must bear in mind that the stockholders of the water company are entitled to a fair income on their investment.

WRIGHT et al. v. WRIGHT et al.

(Court of Chancery of New Jersey. Nov. 15, 1905.)

1. EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF CLAIMS—JUDGMENTS.

Gen. St. p. 2368, § 58, providing that judgments entered against a decedent in his lifetime shall have a preference in payment of claims against the estate, has no application, where execution was levied on lands during the decedent's lifetime.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, §§ 157, 273; vol. 22, Cent. Dig. Executors and Administrators, § 957.]

2. PARTITION—PROCEEDS OF SALE—DISTRIBUTION—EQUITIES.

Gen. St. p. 2368, § 58, relating to the powers and duties of the ordinary, and the orphans' court and surrogate, provides that judgments of record against a decedent in his lifetime and funeral charges and expenses shall have preference and be first paid out of the estate of decedent. Execution on a judgment was levied on the judgment debtor's undivided interest in lands. After institution of partition the debtor died, and by decree the lands were sold, the judgment creditor being relegated to the proceeds of the sale, which were insufficient to pay his judgment, and after sale parties to the partition sought to have a claim for funeral expenses preferred over the judgment creditor. *Held*, that not having asserted their claim sooner, so that the judgment creditor might have protected himself by bidding at the sale, such parties were not entitled in equity to the substantial benefits of the statute.

Suit by L. Wright and others against D. P. Wright and others for partition, in which

certain defendants petitioned for preferential payment. Petition refused.

Thomas B. Hall, for petitioners. E. S. Fogg, for respondent Charles E. Allen.

GREY, V. C. The bill in this case is filed for the partition or sale of certain lands lying in the county of Salem between certain tenants in common, one of whom was Frank Wright, who, pending this suit and before the sale of any lands herein, departed this life intestate. In the lifetime of Frank Wright a judgment was entered by Charles C. Allen in the circuit court of the county of Salem, an execution issued thereon, and a levy made thereunder upon his undivided interest in the lands affected by this partition suit. On this judgment and levy \$778 remain unpaid. The judgment creditor, Mr. Allen, is made a defendant because of his lien under his judgment, execution, and levy on the undivided share of the defendant Frank Wright, and the master has reported in this cause, or it has been proven, that the judgment was entered and execution thereunder levied as above stated. Since the death of the defendant Frank Wright, the partition proceedings have been prosecuted to sale. Mr. Allen, the judgment and execution creditor, being a party defendant to this partition proceeding, has been cut off by the effect of the decree from any right or claim in the lands, and relegated for his judgment debt to the proceeds of this partition sale. This is the effect of the statute. Mr. Allen is now entitled to move this court in this partition suit to pay the proceeds of the partition sale of the defendant Frank Wright's share, on which Allen had levied his execution in Wright's lifetime to satisfy that levy.

The total proceeds of all the sales of land in this case amount to.....	\$1,850 00
From this must be deducted the dower sum in gross of Lydia P. Wright, widow of Lewis B. Wright.....	145 00
	\$1,705 00

Also the taxed costs of the suit and counsel fees, estimated at the sum of.....	\$175 00
The master's costs and expenses of sales estimated at.....	70 00
	245 00
	\$1,460 00

Divide this into shares of one-seventh to each tenant in common, to ascertain what is share of Frank Wright, deceased.....	\$ 208 57
Deduct sum in gross for Marie Wright, widow of Frank Wright.....	10 00
	\$ 198 57

The master has ascertained that there is due to Mr. Allen on his judgment the sum of \$778. It will be noted that there are less

than \$200 which can be applied to pay Mr. Allen's judgment and levy, on which \$778 remain due.

At this stage of the proceedings a petition is filed in this court by the sisters and mother of Frank Wright, who themselves are parties defendant or complainant in this suit, asking the court to make an order that they be paid nearly the whole of the share of Frank Wright, prior to Mr. Allen's judgment, to reimburse them the amount of money by them expended in and about the bringing of the body of the decedent, Frank Wright, from the state of Texas, where he died, and the expenses of his funeral and burial in this state.

The petitioners base this motion wholly upon section 66 of the orphans' court act, as revised in Laws 1898, p. 738, c. 234, which is as follows: "Judgments entered of record against the decedent in his lifetime, funeral charges and expenses, and the physician's bill during the last sickness, shall have preference and so be first paid out of the personal and real estate of the testator or intestate." That section is found in an act entitled "An act respecting the orphans' court and relating to the powers and duties of the ordinary, and the orphans' court and surrogates." Preferences to the payment of funeral expenses were recognized at common law (*Haines v. Price*, 20 N. J. Law, 483) and by early statutes prescribing the order of payment of claims against insolvent estates, and excepting certain claims from the operation of the rule staying actions within six months after the death of the decedent debtor (*Paterson's Laws*, p. 435; P. L. 1820, p. 169; Rev. Laws 1821, p. 766). This earlier legislation was enacted before the adoption of the state Constitution of 1844, which first introduced the provision that a statute should have but one object, which should be expressed in its title. Const. N. J. art. 4, § 7, par. 4. That legislation was all contained in statutes which in terms dealt with insolvent estates, and with the duties of executors and administrators in respect to the disposal of the property of the insolvent decedent which came to their hands. After the Constitution of 1844 required each statute to have but one object, and that such object should be expressed in its title, the older legislation was re-enacted under the title "An act concerning the estates of persons who die insolvent." Rev. St. 1846, p. 346, tit. 10, c. 6, § 2. This statute controlled the subject until the Revision of 1877, when it was repealed (page 1384), and the provisions relating to insolvent estates were re-enacted in the orphans' court act (Revision 1877, p. 770, § 81 et seq.). The section in the act which declares what claims against a decedent shall be preferred is section 58. As it is collated and expressed, it is a direction to executors and administrators regarding the order in which they shall pay claims

against the estates which they are settling. This provision, to be found in section 58 above cited, is not mere rearrangement of previous enactments by way of revision. It is new legislation, because the previous and repealed statute applied only to insolvent estates, and in the re-enacted statute section 58 has been so broadened in its scope that it extends to all estate, solvent as well as insolvent. The title of this act is "An act respecting the orphans' court, and relating to the powers and duties of the ordinary, and the orphans' court and surrogates." The same provision has been continued, under the same title, in the subsequent revisions (Gen. St. p. 2368, § 58; Laws 1898, p. 738, c. 234, § 66), where it appears in the language first above quoted.

It is, I think, a matter of some doubt whether provisions in the body of a statute, which by its title expressed its object to be legislation regarding the ordinary, the orphans' court, and the surrogates, can be held to be of constitutional force, when they affect the judgments of every other court in the state. It was declared by the Supreme Court, in *Evernham v. Hult*, 45 N. J. Law, 56, interpreting article 4, § 7, par. 4, of the Constitution of this state, that the scope of a statute is by that provision of the Constitution limited to the object of the act which is expressed in its title. In that case the title of the statute under consideration expressed its object to relate to the court for the trial of small causes. One of its sections, however, sought to affect the judgments of other courts. To this extent the Supreme Court held the statute to be unconstitutional and void. In the case at bar, the object of the legislation, as expressed in the title of the act here in question, relates to orphans' courts, the ordinary, and the surrogates. Nothing in the title refers in any way to judgments of other courts, but under the petitioners' contention as to the effect of section 58, any judgment of the Supreme Court, or of the circuit or common pleas courts, may be nullified by postponing the application of the property, upon which it is a lien, to the payment of the funeral expenses of the decedent defendant. The statutory provision refers only to judgments entered of record in the lifetime of the decedent, and does not seem to include cases in which execution has been issued on the judgment and levy made on the defendant's lands during his life, as in the case at bar. In 1824, in *Den v. Hillman*, 7 N. J. Law, 188, the case turned upon the question whether a judgment which had not only been entered of record in the lifetime of a decedent, but on which execution had been issued and levied on the defendant's lands, also in his lifetime, could be lawfully enforced to sale of those lands after the defendant's death, when his estate was insolvent. The provisions of the then existing statute above re-

ferred to were invoked as controlling the case, and preventing proceedings on the judgment and execution after the defendant's death. The Supreme Court (page 188) unanimously declared that where the judgment was entered in the defendant's lifetime, and execution was tested and levy made during the same period, the proceedings were unaffected by the statute in question, "because that statute was not intended to interfere with executions lawfully sued out. It relates only to judgments." In the case at bar execution was issued and levied on the lands in question, and the plaintiff's rights therein were fixed, all in the lifetime of the defendant. Under the principle declared by the Supreme Court in *Den v. Hillman*, the statute which the petitioners invoke to defeat the operation of the plaintiff's judgment has no application.

Aside from the control of the present proceedings by the interpretation given to the provision in question by the law court, it is worthy of inquiry whether it is equitable, under all the circumstances of this case, to grant the petitioners' prayer. The statute in question applies directly only when the decedent's estate is in the hands of an executor or administrator in process of application to the payment of claims against the decedent's estate. That is not the present situation. This proceeding is not a petition to the orphans' court that the executor or administrator of Frank Wright may be directed preferentially to pay his funeral expenses. All that the petitioners can possibly claim here is the equitable application of the provision they have invoked; that is, they may show that under the circumstances it is just and equitable that the substantial benefits of that statute should be allowed to them in this court in this cause. The proceeding which brought this fund under the control of this court is a suit in partition. The respondent held a judgment, execution, and levy (all undisputed) charged against the share of Frank Wright in the lands sold in this suit. By the decree of this court those lands were so sold that they were discharged from the respondent's lien. He was thus not only invited, but compelled, to see that the proceeds of the sale satisfied his levy, if he would secure any benefit therefrom. There is on file a decree for distribution dated September 16, 1904, directing payment of the portion raised from Frank Wright's share to the respondent, in whole or in part satisfaction of his levy. Apparently this decree is still in force. The petitioners are parties to this partition suit, charged with knowledge of its several steps. The sale has been had upon the above ascertainment of the position of the respondent's judgment, and the proceeds are about to be paid to satisfy the respondent's execution and levy. At this stage of the case, when the respondent has no longer a chance

to protect himself by bidding the lands to a higher price, the petitioners intervene, and ask that the money raised by the partition sale for the respondent shall be taken from him and given them, to reimburse them for expenses they incurred in burying the defendant Frank Wright, before any sale had been made.

The petitioners, if they had any preferential right to payment of Frank Wright's funeral expenses out of the proceeds of the sale of the decedent's lands, knew before the sale that they had such a claim. There is nothing to show that the respondent ever knew the petitioners asserted such a right. The petitioners were equitably bound to announce and assert their right before the sale, so that the respondent, having notice of this claim of preference for funeral expenses, might, if he chose to do so, protect himself by bidding up the property to such a price as would not only pay the amount of his levy, but also the alleged preferential claim of the petitioners for funeral expenses. In fact, the petitioners' claim is disclosed for the first time only after the respondent had been assured by the master's report and decree that the proceeds of sale should go to pay his levy, and after the sale of the lands had actually taken place under that report and decree. In my view it would, under such circumstances, be inequitable at this late day to order these proceeds of the sale to be taken from the respondent and given to the petitioners.

I think the petitioners' prayer for such an order for preferential payment should be refused, but without costs.

BARTOW v. ERIE R. CO. 737.1.17

(Supreme Court of New Jersey. Nov. 13, 1905.)
DAMAGES—ACTIONS OF TORT—LOSS OF PROFITS.

Loss of profits in business are recoverable as damages in actions of tort, when they are capable of being estimated with reasonable certainty; but, where the proof furnishes no data from which the jury may find with reasonable certainty the amount of the profits recoverable as damages as the result of the accident, it is error for the court to submit this element of damages to the jury.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 72-83.]

(Syllabus by the Court.)

Error to Circuit Court, Passaic County.

Action by James Bartow against the Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Argued June term, 1905, before GUMMERE, C. J., and REED and FORT, JJ.

Collins & Corbin, for plaintiff in error.
Peter J. McGinnis, for defendant in error.

FORT, J. There are a number of grounds for reversal assigned in this case, but a careful examination of them leads us to conclude

that there is but a single one that has substance. It is clear, under the proof, that the plaintiff could not have been nonsuited, nor a verdict directed for the defendant, upon the testimony.

There were no reversible errors in the rulings of the court upon the admissions of testimony excepted to, nor in the charge of the court, except in one respect, with relation to the allowance of damages for loss of profits in the business of the plaintiff. Exception is taken to the refusal of the court to charge the defendant's second request. That was as follows: "As there is no definite proof of the amount of the loss of profits sustained by the plaintiff in his business, no damages can be allowed for his loss of profits." And exception was also taken to what the court did say upon the question of the right of recovery by the plaintiff for loss of profits, and the leaving to the jury of the question whether, under the evidence, the plaintiff was making any profits from his business.

We think the second request should have been charged in this case in lieu of what the court did charge. There was no proof in the cause which would justify the jury in assessing any damages to the plaintiff for loss of profits. The only testimony given on the subject was that of the plaintiff himself, and that amounted to nothing more than a mere statement that he took in, in his business, from \$1,000 to \$1,100 per annum. This was proof only of the gross amount of his business. His books were not produced, nor was there given by him any estimate of the expenses incident to the conducting of his business, or of the proportion of the expenses to the gross income. To justify a finding of loss of profits as a part of the verdict in a cause, the proof must be such as will show the jury with reasonable certainty what the profits alleged to have been lost would have been, but for the injury to the plaintiff. Profits must be proved. They cannot be estimated by the jury without data to justify their finding. *East Jersey Water Co. v. Bigelow*, 60 N. J. Law, 201, 38 Atl. 631. There being no proof of loss of profits in the business of the plaintiff which the jury could, under the proof, arrive at with reasonable certainty, it was error for the trial judge to submit the question of this class of damages to the jury, and he should have charged as requested.

For this error, and this alone, the judgment is reversed.

NEW JERSEY SUBURBAN WATER CO.
et al. v. TOWN OF HARRISON.
SAME v. MAYOR, ETC., OF BOROUGH
OF EAST NEWARK.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1905.)

WATERS — LIABILITY OF CITIES — COMPENSATION FOR SUPPLY.

Each of the municipalities, which are defendants below, had, before these actions, been

possessed of mains and pipes for a supply of water for public purposes, and for distribution to private consumers for pay, and each had been receiving and using water transmitted through a pipe claimed by Jersey City, and had made compensation to Jersey City for water so supplied, but without express contract. Defendants in error gave notice to each municipality that they had acquired the right to water thus supplied, and should claim compensation therefor in the future. Jersey City also claimed the right to the water and compensation therefor. Each municipality continued to receive and distribute the water, and to collect pay from consumers. Each filed a bill of interpleader against the respective claimants, and afterward these actions at law were brought to recover compensation for the water so received and used.

Held that, although there was during the period covered by the actions no express contract between plaintiffs and defendants, an obligation to make compensation to the owners of the water will be implied from its reception and the conduct of the municipality receiving it.

(Syllabus by the Court.)

Error to Supreme Court.

Action by the New Jersey Suburban Water Company and the New York & New Jersey Water Company against the town of Harrison and the mayor and council of the borough of East Newark. Judgments for plaintiffs, and defendants bring error. Affirmed.

Michael T. Barrett, Edward Kenny, and George L. Record, for plaintiffs in error. Collins & Corbin, for defendants in error.

MAGIE, Ch. The judgments brought before us by these writs of error were entered in two separate actions, involving like questions. The cases have been argued together, and may be disposed of by the same opinion. The actions were for the recovery of compensation for water delivered to the municipalities, which are the plaintiffs in error, for public purposes, and for distribution to the inhabitants thereof. The declarations contained only the common counts, and the general issue was pleaded in each case. The issues were tried together by a justice of the Supreme Court sitting without a jury. The findings of fact were that plaintiffs below had furnished to each of the municipalities, during the periods respectively covered by the actions, certain quantities of water; that such water had been delivered to the municipalities by transmission from the point at which plaintiffs below received it, through a pipe originally laid by the city of Jersey in a public street of the township of Kearny, to the mains and pipes of each municipality; that the water had been received by each municipality and used for public purposes and also distributed to private customers at specified rates, which each municipality had collected, or was in process of enforcing and collecting; that moneys collected from such rates went into the municipal treasuries, and were used in maintaining the respective water systems, and any surplus was used for general municipal purposes; that the water which was thus fur-

nished to each municipality was the property of plaintiffs below, and its reasonable value as furnished was such as made up the respective amounts found to be due, and upon which the judgments were entered. It was also found that each municipality had filed in the Court of Chancery a bill of interpleader against the city of Jersey City and the plaintiffs below, whereby each municipality admitted its liability for the water supplied, but set up that compensation for the same had been claimed by the city of Jersey City, and also by the plaintiffs below, and that it was unable to determine to which one it was indebted.

There was evidence on which the trial justice could reach these conclusions of fact, and they are not open to review on these writs of error. The exceptions and assignments of error are conceived by counsel to raise two questions of law, which will be considered.

It is first urged that the use of the pipe laid in the township of Kearny, and claimed to be owned by the city of Jersey City, divested the water companies of any right to claim compensation for the water transmitted thereby. It is unnecessary to say more respecting this claim than that the unauthorized use of the vehicle for the transmission of water could not deprive the owner of the water of his property therein. He might be required to pay for the use of the vehicle, or possibly be compelled to cease its use. But so long as he had, in fact, transmitted the water and delivered it to persons who accepted it, so long he would be entitled to recover on a quantum meruit in all ordinary cases. This view was taken, and formed the ground of decision in *New Jersey Suburban Water Co. v. Harrison*.

It is next, however, insisted that a municipality cannot be held for such compensation, except by an express contract, which, it is conceded, had not been made at the time this water was furnished. Such a contract was afterward made, but these suits are for water furnished before. The insistence is that, where a municipality is entitled to make a contract, it must be an express contract, and none will be implied from the mere acceptance and use of materials or supplies. This contention is mainly supported in the argument on the authority of the case of *Swackhammer v. Hackettstown*, 37 N. J. Law, 191, and *Car Spring and Rubber Co. v. Jersey City*, 64 N. J. Law, 544, 46 Atl. 649. The first of these cases was decided in the Supreme Court, and Chief Justice Beasley, speaking for the court, held that a municipality having powers of local government and improvement, with power to raise money by tax for such purposes, possessed no implied power to borrow money. It having appeared in that case that money thus illegally borrowed had, in fact, been used for legitimate purposes of the municipality, and it being argued thereon that the law, on general principles, would compel repayment, the Chief Justice

disposed of the argument by declaring that to admit the application of such principles to an unauthorized municipal loan would render the doctrine he had laid down of little value, or, as he sententiously put it, "although repudiated in the abstract, it would be ratified in the concrete." The other case was in this court. It presented the question of the liability of a municipality for three separate bills for supplies ordered by employees and used by the city. The power to order such supplies and to contract for their payment was in a board. That board had formally ordered payment of one of the bills, and it was held by this court that thereby the board had adopted the act of the subordinates and ratified it, and recognized an enforceable contract. But it was further held that the other bills which had arisen from the ordering of subordinates without the knowledge of the board, and which had never been ratified or ordered paid, were not enforceable claims against the city, on the ground that there was no acceptance by the authority authorized to bind the city. There was an intimation, unnecessary to the decision, that such an obligation might not arise, even if the supplies in question had been ordered by the subordinates and used, with a knowledge of the board, without some formal action on its part.

Whether the doctrine thus intimated will be sustained when a case for its application arises need not be determined. The case now under consideration presents the counterpart of the bill for supplies furnished and used, for which Jersey City was held liable, because the board which had the power to order and contract for such supplies had recognized the transaction and ratified it by ordering payment for charges therefor. Here the municipalities in question had authority to contract for water for public and private purposes, and had for years trafficked in water obtained by contracts, and distributed it to customers for pay. While a supply was being furnished to them without any express contract, a contest arose as to the right to the water furnished and the compensation therefor. It was claimed both by Jersey City and by the water companies. As a great public injury would follow the rejection of the water while the controversy was being settled, it was allowed to flow, and each municipality continued to receive and to collect pay therefor which it put into its municipal treasury. These corporate acts of themselves justify the inference of ratification, and, when coupled with the further act of recognizing the liability to pay and invoking the aid of the court by a bill of interpleader, a case of ratification is plainly made out, and the finding for plaintiffs below is not open to the objection presented on this subject.

These are the only questions requiring consideration; and, both being solved in favor of plaintiffs below, the judgments under review are affirmed.

DIXON, J. This case was tried without a jury and upon a finding of many facts and rulings upon several questions of law. The only exception appearing in the record is "to the foregoing finding and ruling the defendant prays exception, and it is allowed accordingly." So general an exception presents no question for review on error. *Mills v. Mott*, 59 N. J. Law, 15, 34 Atl. 947; *Weger v. Delran*, 61 N. J. Law, 224, 39 Atl. 730.

I therefore concur in affirming the judgment.

CURTICE v. DIXON.

(Supreme Court of New Hampshire. Merri-mack. Nov. 7, 1905.)

JURY—RIGHT TO TRIAL BY JURY—EQUITABLE RELIEF.

A suit for the cancellation of a written contract by which it was claimed that defendant, through fraud and imposition, had obtained property from plaintiff's intestate, was within the exclusive jurisdiction of equity; and hence there was no absolute right to a trial by jury.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 47, 71.]

Transferred from Superior Court.

Suit by Grosvenor A. Curtice, as administrator, against Ida A. Dixon. A motion for the framing of issues for a trial by jury was denied, and the cause transferred to the Supreme Court on defendant's exception. Exception overruled.

Bill in equity, praying for a cancellation of a written contract by which it is alleged the defendant obtained a large amount of property through fraud and imposition practiced by her upon the plaintiff's intestate, who was of unsound mind by reason of age and infirmity. The bill also asks for an accounting. The defendant filed an answer denying the allegation of fraud and imposition, and moved that issues be framed for a trial by jury.

Streeter & Hollis and Matthews & Sawyer, for plaintiff. Martin & Howe and Sargent, Remick & Niles, for defendant.

WALKER, J. The defendant's motion raises the question whether, upon the cause of action alleged in the plaintiff's bill, she has a constitutional right to a trial by jury. It is admitted in the argument in support of the motion that if the subject-matter of the suit or the peculiar relief sought, as disclosed in the bill, is within the exclusive jurisdiction of equity, a jury trial cannot be had as a matter of substantive right; but it is urged that, if the jurisdiction in these respects is concurrent with that at law, issues of fact must be framed for trial by jury upon motion. But it does not appear to be necessary to decide this somewhat novel question, for there can be little doubt that the plaintiff has stated a case falling within the exclusive cognizance of equity.

Briefly stated, the allegations are that the defendant, by means of fraud and undue influence practiced upon the deceased, who was by reason of age mentally incapacitated from doing business, induced him to execute a written contract with her, by virtue of which she obtained from him a large sum of money, and a bankbook representing several thousand dollars. It is also alleged that by the same means she obtained from him a deed of certain real estate. Assuming the truth of these allegations, it would follow that the beneficial title to the property referred to remained in the deceased, and that the defendant held the same during his lifetime upon a constructive trust for his benefit, and since his decease for the use of his estate. Upon such a state of facts it is the peculiar province of equity to safeguard the rights of the defrauded party, upon the ground that no contract was in fact made, and that the possession of the property by the guilty party creates a trust by legal implication for the benefit of the unfortunate owner. "Equity watches with jealous care every attempt to deal with persons of unsound mind, and when, from the nature of the transaction, there is not evidence of entire good faith, or the undertaking is not seen to be just in itself, or for their benefit, it is set aside or made subservient to their just rights and interests."

* * * The same doctrine has been applied to persons of weak understanding, though not non compos strictly, yet unable to guard themselves against imposition, or to resist importunity or undue influence." *Roberts v. Barker*, 63 N. H. 332, 334. If, as is claimed, the defendant is holding property under and by virtue of the written contract, obtained by her by fraudulently taking advantage of the mental weakness of the deceased, equity may require the cancellation and surrender of the document and an accounting. The mere fact that an action at law for damages occasioned by the fraud might be maintained does not deprive equity of its otherwise exclusive jurisdiction. "Even when the controversy is concerning pecuniary claims and obligations, and the final relief is wholly pecuniary, the equitable remedies are administered by regarding the subject-matter as a specific fund, and by adjudging such fund to its single owner." 1 Pom. Eq. Jur. § 170. See, also, *Id.* §§ 138, 140, note 1; 1 Per. Tr. § 166. It is plain from the case presented in the bill that the defendant has no constitutional right to have issues framed for trial by a jury. *State v. Saunders*, 66 N. H. 39, 25 Atl. 583, 18 L. R. A. 646; *Parker v. Simpson*, 180 Mass. 334, 355, 62 N. E. 401. Whether some of the issues presented by the bill and answer are properly triable by a jury may not be open to serious doubt (*State v. Saunders*, *supra*), but the absolute right to such a trial, as insisted upon by the defendant, does not exist.

Exception overruled. All concurred.

LAMB v. KING.

(Supreme Court of New Hampshire. Cheshire.
Nov. 7, 1905.)

SALES—CONDITIONAL SALES—FILING—REGISTRATION.

Under Pub. St. 1901, p. 62, c. 2, § 2, providing that in the construction of statutes words and phrases shall be construed according to the common and approved usage of language, pianos are "household goods," within the meaning of Pub. St. 1901, p. 448, c. 140, § 28, providing that no lien reserved on personal property sold conditionally, and passing into the hands of the purchaser, "except a lien upon household goods," shall be valid against attaching creditors or subsequent purchasers without notice, unless the seller takes and records a memorandum witnessing the lien, etc.

Exceptions from Superior Court.

Replevin by Joseph H. Lamb against William W. King. There was a verdict for defendant, and plaintiff excepted. Exception sustained.

Replevin for a piano. Trial before Peaslee, J., at the October term, 1904, of the superior court, and verdict for the defendant. The piano was sold conditionally by the plaintiff to one Brown by a contract made in this state and not recorded. The defendant justified under an attachment by creditors of the vendee. The plaintiff excepted to the verdict, upon the ground that the piano belonged to the class of property excepted from the statutory provision requiring a record of the memoranda of conditional sales.

Hosea W. Brigham, for plaintiff. Edalbert J. Temple, for defendant.

CHASE, J. By section 23, c. 140, p. 448, Pub. St. 1901, "no lien reserved on personal property sold conditionally and passing into the hands of the conditional purchaser, except a lien upon household goods created by a lease thereof, containing an option in favor of the lessee to purchase the same at a time specified, shall be valid against attaching creditors, or subsequent purchasers, without notice, unless the vendor of such property takes a written memorandum, signed by the purchaser, witnessing the lien, the sum due thereon, and containing an affidavit as provided in the following section, and causes such memorandum to be recorded in the town clerk's office of the town," etc.

The sole question discussed by counsel and considered by the court is whether a piano is "household goods," within the meaning of this statute; a question that seems to have been suggested, but not considered, in *Batchelder v. Sanborn*, 66 N. H. 192, 22 Atl. 535. *McNally v. Bailey*, 65 N. H. 208, 18 Atl. 745, was decided in June, 1889, before the exception of household goods from the operation of the statute went into effect, namely, August 16, 1889. Laws 1889, p. 86, c. 69. Pianos are movable effects or personal chattels—"goods"—and if in use in a family, they pertain to the house and family, and so continue to be within the signification of the word "goods" when its meaning is qualified by the adjective

"household." In such case they are "household goods," "according to the common and approved usage of the language." Pub. St. 1901, p. 62, c. 2, § 2; *Webst. Dict.*; *Alsop v. Jordan*, 69 Tex. 300, 6 S. W. 831, 5 Am. St. Rep. 53. There are no words in the statute limiting the meaning of these words excepting those relating to the manner of creating the lien referred to, and they afford no aid in the present inquiry. There is no enumeration of articles in connection with the general terms, from which, as in some cases (*Tanner v. Billings*, 18 Wis. 175, 86 Am. Dec. 755, and *Sumner v. Blakslee*, 59 N. H. 242, 47 Am. Rep. 196), the intended meaning of the general terms will appear by an application of the rule of *alieni generis*. There is nothing whatever in the statute having a tendency to modify the ordinary signification of these words, excepting as above stated. The words have not acquired a "peculiar and appropriate meaning in law." They have been construed differently, according to the supposed intent of the user. In the construction of wills and contracts, "household furniture" (a phrase certainly no broader in meaning than "household goods") has been held to describe articles that are in the house for the common use of the household or for ornament, and that are not consumed in the using; such as china, plate, pictures, pianos, etc. *Sumner v. Blakslee*, 59 N. H. 242, 47 Am. Rep. 196; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Richardson v. Hall*, 124 Mass. 228; *Chase v. Stockett*, 72 Md. 235, 19 Atl. 761. See, also, *Von Storch v. Winslow*, 13 R. I. 23, 43 Am. Rep. 10. In the construction of statutes exempting property from attachment, there has been a tendency to give a narrower interpretation to the terms. In cases of this kind, where the question has arisen, the statutes construed contained material qualifications of the general phrase; as in *Dunlap v. Edgerton*, 80 Vt. 224, the exemption was of "such . . . articles of household furniture as may be necessary for upholding life," and in *Kehl v. Dunn*, 102 Mich. 581, 61 N. W. 71, 47 Am. St. Rep. 561, it was of "all household goods, furniture, and utensils not exceeding in value \$250." See, also, *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726.

No support is found in the history of the statute for a narrow interpretation of the phrase. An oral contract for the conditional sale of goods and chattles was formerly valid by the common law of the state. *Weeks v. Pike*, 60 N. H. 447. The danger of a person receiving undue credit from the appearance of ownership of personal property arising from possession, and the facility for the commission of fraud afforded by oral agreements respecting title, which are necessarily more or less secret, are supposed to have induced the passage of the act of 1885 (Laws 1885, p. 245, c. 30), the forerunner of the present statute. *Churchill v. Demeritt*, 71 N. H. 110, 111, 51 Atl. 254. At first the statute applied to all personal property sold conditionally and passing into the possession of the purchaser; but in

1889 a provision was introduced by which it was not to apply "to leases of household goods containing an option to purchase at a specified time." Laws 1889, p. 86, c. 69. This provision is incorporated into the present statute in the exception under consideration. By it the common law of the state was restored, so far as leases of household goods containing an option for purchase are concerned. Whatever may have been the reasons for the passage originally, it must be presumed that they were overcome or neutralized by reasons favoring the withdrawal of household goods from its operation. Attention has not been called to any circumstance in existence at the time of the passage of the act of 1889, and inducing its passage, which has a tendency to qualify the natural signification of its terms. A comparison of the terms of this statute with those of the statute exempting personal property from attachment and levy conclusively shows that the intention was to make the former statute broader than the latter. In the exemption statute certain articles of household goods are specified, such as beds, bedsteads, a cook stove, etc., and, in addition thereto, household furniture to the value of one hundred dollars is exempted. Pub. St. 1901, p. 701, c. 220, § 2. In the lien statute general words are used without any qualification or limitation. In fact, the comparison has a tendency to prove an intention to have the terms used in the latter statute understood in their broadest sense. If this had not been the intention, it seems highly probable that the limitations would have been fully and specifically stated, as they are in the exemption statute. Moreover, if there had been understood to be a relation between the two statutes, it would seem that contracts for the conditional sale of other chattels mentioned in the exemption statute—tools of a person's occupation, a hog, a cow, a yoke of oxen, etc.—would have been released from the operation of the lien statute.

No evidence has been pointed out by counsel or found by the court which shows, or tends to show, that the words "household goods" were used otherwise than in their broadest sense. Accordingly, it is held that the piano in question, if kept for use in the defendant's family, was an article of "household goods" within the meaning of the statute, and consequently was excepted from its operation. If the piano was not kept for such use, it would not be within the exception of the statute. The wording of the case and the interpretation given to it by counsel in their briefs seem to indicate that this question of fact was decided in favor of the plaintiff. If this is the correct interpretation of the case, the verdict should have been in his favor. The case being so understood, the order is:

Exception sustained; verdict set aside. All concurred.

WHITE et al. v. POOLE et al.

(Supreme Court of New Hampshire. Grafton. Nov. 7, 1905.)

1. EQUITY—PLEADING—BILL—AMENDMENT.

A bill for the specific performance of an oral contract to convey land, which does not allege the contract with sufficient definiteness, may be amended so as to make it sufficiently definite to enable a court of equity to grant relief.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 552, 553; vol. 44, Cent. Dig. Specific Performance, § 375.]

2. VENDOR AND PURCHASER—CONTRACTS TO CONVEY LAND—TIME OF PERFORMANCE.

Where in an agreement to convey land no time is fixed in which the conveyance is to be made, the grantor has a reasonable time in which to make it.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 118-121.]

3. SAME—CONSIDERATION—SUFFICIENCY.

A promise to convey land in consideration of the grantee promising to remain in a certain city, and to abandon her purpose to go to a foreign country and to induce her husband to do likewise, is supported by sufficiently definite consideration; the grantee and her husband being required to remain in such city for a reasonable time having reference to the nature of the contract.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 223, 231; vol. 48, Cent. Dig. Vendor and Purchaser, § 14.]

4. SPECIFIC PERFORMANCE—PAROL CONTRACT—PART PERFORMANCE.

Where a person was induced by another's oral promise to convey land to him to enter into possession of the land, to expend large sums in the way of improvements thereon, and to continue in the occupation thereof, managing and controlling the same as his own, there was such performance as to withdraw the case from the operation of the statute of frauds, and authorize the specific performance of the promise.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 128-134.]

Exceptions from Superior Court; Wallace, Chief Judge.

Writ of entry by one White and another, executors of William H. White, against Annie L. Poole and another, in which defendant Annie L. Poole filed a bill for the specific performance of an oral agreement to convey. A demurrer to the bill was overruled, subject to plaintiffs' exception. Exception overruled.

The bill alleges that the plaintiffs' testator, William H. White, promised the defendant that, if she would abandon her purpose of going to Cuba, remain in Hanover, and induce her husband to do the same, he would build and give to her a house in Hanover; that in consideration of this promise, and in reliance thereon, the defendant and her husband abandoned their purpose of going to Cuba, remained in Hanover, and continued there to the date of the filing of the bill; that White, in pursuance of the agreement, selected a lot satisfactory to her, paid for it, and took the deed in his own name, but in trust for the defendant, giving as a reason

his desire to transfer the complete property to her when he had built a house thereon; that shortly afterward White erected upon the lot a house, which was completed in 1900, and upon its completion the defendant, in pursuance of the contract, moved into the house, and has ever since occupied it, and with the knowledge and assent of White has regarded and treated it as her property, and has caused to be expended thereon \$500 in improvements and repairs; and that at the time of his death in 1903 White was arranging to convey the property to her.

Henry F. Hollis and Prescott F. Hall, for plaintiffs. Smith & Smith and Edward A. Lane, for defendants.

BINGHAM, J. The questions in this case arise on the plaintiffs' demurrer to a bill in equity filed as an answer to the writ of entry brought by the plaintiffs against the defendant to recover the possession of certain real estate in Hanover. The plaintiffs contend that the defendant is not entitled to the relief prayed for in the bill for the reason that the terms of the contract there set out are not sufficiently definite to enable a court of equity to decree specific performance, and that their demurrer should have been sustained. They say that, according to the allegations of the bill, the contract between the testator and the defendant was simply that he should build and give her a house in Hanover, without reference to any particular lot of land upon which the house was to be built. But we think the fair meaning of the bill is that the defendant made a parol contract with the testator, by which he was to convey to the defendant the land claimed in the writ of entry. If such contract is not alleged with sufficient definiteness, the defendant asks leave to amend the bill. Such amendment may be made, and will render unnecessary the consideration of this objection.

No time being fixed within which the testator was to give a deed of the property, he was entitled to a reasonable time in which to do so. *Brown v. Prescott*, 63 N. H. 61, 62; *Kidder v. Flanders*, 73 N. H. 345, 61 Atl. 675. The consideration to be given by the defendant seems definite enough. It was that she should abandon her present purpose of going to Cuba, and remain in Hanover, and that she should induce her husband to do the same. The time that they were to remain in Hanover would be a reasonable time, having reference to the nature of the contract.

It is alleged in the bill that the defendant, induced by the testator's promise, entered into the possession of the property, expended large sums in the way of improvements, and has continued in the occupation of the same to the present time, managing and controlling it as her own. These allega-

tions are sufficient to withdraw the case from the operation of the statute of frauds. *Tilton v. Tilton*, 9 N. H. 385, 390; *Seavey v. Drake*, 62 N. H. 393; *Brown v. Prescott*, 63 N. H. 61; *Stillings v. Stillings*, 67 N. H. 584, 42 Atl. 271.

Exception overruled. All concurred.

STANLEY v. PAYNE.

(Supreme Court of Vermont. Rutland. Dec. 7, 1905.)

ASSAULT AND BATTERY—RE-TAKING POSSESSION OF PROPERTY—JUSTIFICATION.

Where defendant, on the expiration of his lease of a farm, obtained the landlord's permission to leave a certain box in the barn, and thereafter defendant visited the farm and told the then tenant that the box was his and that he intended to take it, it was not sufficient to place the tenant in the attitude of a wrongdoer and justify defendant in the use of force and violence to get possession of his box.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, §§ 13-15.]

Rowell, C. J., dissenting.

Exceptions from Rutland County Court; Munson, Judge.

Action by John D. Stanley against J. R. Payne. Judgment in favor of plaintiff, and defendant brings exceptions. Affirmed.

Argued before ROWELL, C. J., and TYLER, START, WATSON, HASELTON, and POWERS, JJ.

E. H. O'Brien, for plaintiff. Butler & Moloney, for defendant.

TYLER, J. Trespass for assault and battery. Pleas, general issue, self-defense, and defense of property. Replication, *de injuria*.

The defendant had been a tenant of a certain farm, and it appeared that prior to April, 1, 1902, when his term expired, he and one Pratt, the owner of the farm, agreed that a certain grain box that belonged to the defendant should remain in the barn during that spring, and that the defendant might remove it at any time after that season. The plaintiff, who succeeded the defendant as tenant, knew nothing of this agreement, nor of the defendant's ownership of the box, beside what the defendant told him just before the assault. In September, 1902, the defendant drove to the farm for his box, when an affray took place between him and the plaintiff, of which they were the only witnesses, and their testimony concerning it materially differed. The plaintiff testified that the defendant drove up and stopped in front of the barn doors and said there was a box in the barn that belonged to him, and that he was going in to get it; that the plaintiff told him not to go into the barn because the plaintiff did not know whether the box belonged to the defendant or to Pratt; that, when Pratt came up, the plaintiff would inquire, and, if the box belonged to the defendant, the plaintiff

would draw it down to him and they would have no trouble; that the defendant said, with an oath, that he should go into the barn; that the plaintiff went into the barn and the defendant followed; that the plaintiff then told the defendant to leave the box where it was until Pratt came in, and, if it was the defendant's, he should have it; that the defendant took hold of the box and started to draw it towards the barn door, and at the same time the plaintiff seized hold of the opposite side of it and pulled it backwards; that the defendant pulled it along, and, as he pulled it, a little piece of it came off, which the defendant threw down and again took hold of the box; that the defendant pulled it along two-thirds of the way across the barn floor, when the plaintiff told the defendant that he was not going to pull it any further, but the defendant kept pulling it along, and the plaintiff said, "Now leave it alone," and then the defendant knocked him down and jumped upon him. The defendant testified that upon coming into the barn he told the plaintiff that the box was his, that he had a right to it and that he proposed to take it, whereupon the plaintiff pulled it back and broke a board off of it, and that the defendant continued to draw it toward the door; that the plaintiff then assaulted him, seizing him by the neck and shoulder, and that he resisted this assault, seizing the plaintiff and throwing him down upon the floor of the barn, and holding him there a short time, whereupon the plaintiff said he would cease fighting; and that the defendant then took the box and carried it home.

The defendant requested the court to charge as follows: "If the jury find that the box was the property of the defendant, and that it was left on the premises of Pratt for his accommodation, with the understanding and agreement that the defendant could go there and get it whenever he saw fit to do so, then he had the right to go into the barn and take it, and this would be so, notwithstanding any protest or notice on the part of the plaintiff not to do so." The court charged that neither the defendant's ownership of the box nor the plaintiff's occupancy of the barn was the controlling fact in the case; that a man who owned personal property, and was in possession of it, might justify an assault to maintain his possession, but, if the possession were in another person the owner could not justify an assault upon that person to enable the owner to obtain the possession. A more specific instruction was: "The box, being in the barn which was in the occupancy of the plaintiff, was in the plaintiff's possession to start with, and the defendant could not justify an assault to take it out of that possession, thus arising from the fact that it was in the barn which was in the plaintiff's occupancy. But if the defendant entered the barn without opposition or resistance on the

part of the plaintiff, and, so being in the barn, obtained complete manual possession and control of the box without committing any assault upon the plaintiff, the box would then be in the possession of the defendant, although still within the plaintiff's barn, and the defendant could then justify an assault upon the plaintiff to keep possession of it, if the plaintiff then undertook to take it away from him." Further, that: "If the defendant has failed to make out his justification, then the plaintiff will be entitled to a verdict because of the fact, conceded by the defendant, that he laid hands upon the plaintiff. The real question is whether he was justified in doing this because of the previous assault of the plaintiff, or for the protection of the personal property in his possession."

The defendant contends that there was error in the court's omission to charge as requested, and in the charge as given. The decisions upon the question here presented are somewhat at variance. In the notes to *Barnes v. Martin*, 82 Am. Dec. 670, Mr. Freeman says: "Whether the owner of personal property or the one entitled to its possession has the right under any or all circumstances to retake it, if it is wrongfully taken or detained from him, is an interesting question and one of some practical importance; but, strange to say, it is one to which the law as yet gives no certain answer." It is apparent, however, that many of the decisions differ from each other only in applying the rules of law to the circumstances of given cases. *Yale v. Seely et al.*, 15 Vt. 221, supports the defendant's contention. There the defendants went to the plaintiff's land with teams for the purpose of drawing away a quantity of poles lying upon the land. Both parties claimed to own the poles, but the decision went upon the ground that the defendants in fact owned them; and it was held that they had a legal right to enter upon the plaintiff's land to remove their property, and that, if the plaintiff attempted to hinder them in the enjoyment of the right, the defendants were justified in using as much force as was necessary to overcome the hinderance. *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80, is like *Yale v. Seely* in its facts, and sustains the same doctrine.

The defendant also claims *Richardson v. Anthony*, 12 Vt. 273, as an authority. In that case the defendant's cattle were in the plaintiff's close without the fault of either party. The plaintiff did not claim to hold them as estrays, and, as the court said, he did not and could not have owned them; yet he forbade the defendant breaking the close to get them, and claimed to own them himself. Held, that the defendant was justified in breaking the close and in taking his property, but no force was used. *Bennett, J.* dissented, and *Williams, C. J.*, remarked in the opinion that "the right of the

owner of personal chattels to enter on the possession of another to reclaim property may depend entirely on the manner in which the possession was obtained." Whether the court would have justified the defendant in using all necessary force to overcome the plaintiff's resistance, if he had resisted, or held that the defendant should have resorted to an action at law, is a matter of conjecture. This question was before the court in *Kirby v. Foster*, 17 R. I. 437, 22 Atl. 1111, 14 L. R. A. 317, and *Stiness, J.*, said: "Unquestionably, if one takes another's property from his possession without right and against his will, the owner or person in charge may protect his possession or retake the property by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession or larceny when he can stop it, and he is not guilty of assault, in thus defending his right, by using force to prevent his property from being carried away. But this right of defense and recapture involves two things: First, possession by the owner; and, second, a purely wrongful taking or conversion without a claim of right. If one has intrusted his property to another who afterwards honestly, though erroneously, claims it as his own, the owner has no right to retake it by personal force. If he has, the actions of replevin and trover in many cases are of little use. The law does not permit parties to take the settlement of conflicting claims into their own hands. It gives the right of defense, but not of redress. The circumstances may be exasperating. The remedy at law may seem to be inadequate, but still the injured party cannot be arbiter of his own claim. Public order and the public peace are of greater consequence than a private right or an occasional hardship. Inadequacy of remedy is of frequent occurrence, but it cannot find its complement in personal violence."

The general rule is that a right of property merely, not joined with the possession, will not justify the owner in committing an assault and battery upon the person in possession for the purpose of regaining possession, although the possession is wrongfully withheld. *Bliss v. Johnson*, 73 N. Y. 529; *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670. It was also held, in *Churchill v. Hulbert*, 110 Mass. 42, 14 Am. Rep. 578, that, though the defendant had an irrevocable license from the plaintiff to enter upon his land and remove certain personal property that belonged to the defendant, yet, if the plaintiff resisted the entry, under a claim that the defendant had already removed all the property that was his, he had no right to use personal violence to overpower the plaintiff's resistance and enforce his claim. In *Hodgeden v. Hubbard*, 18 Vt. 504, 46 Am. Dec. 167, the

plaintiff bought a stove of the defendant through false and fraudulent representations as to his solvency and means of paying for it. Held, that he acquired no right, either of property or possession, in the stove, and that the owner was justified in pursuing him and retaking the property in the highway, and in using as much force as was necessary in overcoming the purchaser's resistance. In *Johnson v. Perry*, 56 Vt. 703, 48 Am. Rep. 826, where the plaintiff went into the defendant's millyard and, without right or license, loaded the defendant's slabs upon the plaintiff's sled, it was held that the defendant might use such force as was necessary to retake his property. Neither of these cases is authority for the defendant, for in each the taking was wrongful. In the first trial of *Johnson v. Perry* both parties claimed to own the wood, but the defendant admitted that the plaintiff had peaceably entered his, the defendant's premises, and got possession of it by loading it upon his sled. This court correctly held in that case (54 Vt. 459) that, if the slabs were the plaintiff's, he, having possession of them, "had the right to maintain that possession against the defendant and every one else." Therefore that decision is not in point for the defendant. In both opinions in *Johnson v. Perry* the court referred to *Yale v. Seely* and *Richardson v. Anthony* as authorities, which, we think, was inadvertence, for the rule in these cases was applied to different facts from those that appeared in *Johnson v. Perry*, and went beyond what was necessary for the decision of that case. Judge Redfield, in his opinion in *Dustin v. Cowdry*, 23 Vt. 631, evidently doubted the soundness of the doctrine laid down in the two early cases above cited.

In the present case the plaintiff had not wrongfully taken nor wrongfully withheld the defendant's property when the latter undertook to recover it. The case does not even show a demand for it by the defendant and a refusal by the plaintiff to deliver it, but a declaration by the defendant that the box was his and that he should take it, which was not sufficient to place the plaintiff in the attitude of a wrongdoer, and justify the defendant in the use of force and violence to get possession of the chattel. In the opinion of a majority of the court the rule stated in the Rhode Island case should be applied to the facts in the case at bar, rather than the rule in *Yale v. Seely*. The request to charge was properly denied, and the charge as given was without error. *Yale v. Seely*, so far as it conflicts with the views herein expressed, is no longer to be regarded as authority upon this subject.

Judgment affirmed.

ROWELL, C. J., dissents.

GERRY et al. v. AMERICAN EXP. CO.
(Supreme Judicial Court of Maine. Dec. 1,
1905.)

1. CARRIERS—CONTRACT—LIMITED LIABILITY
THEREUNDER.

A common carrier may limit his responsibility for property intrusted to him by a notice containing reasonable and suitable restrictions, if brought home to the owner of the goods delivered for transportation, and assented to clearly and unequivocally by him, if it also appears that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 675, 691.]

2. SAME—RECEIPTS FOR FREIGHT.

In the case at bar the defendant furnished the plaintiffs a book of blank receipts, in which the plaintiffs entered their shipments. At the top of each sheet of these receipts there was printed the following: "The property hereinafter described to be forwarded subject to the terms and conditions of the company's regular form of receipts printed on the inside cover of this book." Below this were entered the date, amount, and destination of each shipment, and receipted by the defendant's agent when the goods were taken by him. On the inside cover was a notice to shippers, not involved in this case, and at the bottom, in larger type, the following: "The liability of this company is limited to \$50, at which sum the property is hereby valued, unless the just and true value is stated in this receipt." In the receipt for the shipment of the goods by the plaintiff in this suit no value of the goods was stated. The goods injured, however, were of a much greater value than \$50, and the loss by reason of the injury was more than \$50. The plaintiffs claimed that they did not read the terms and conditions in the shipping book given them by the defendant.

Held, that the receipt in this case incorporated into it the limitation of liability contained in the conditions printed in the books of receipts used by the plaintiffs. Upon that receipt, and under its conditions, the defendant received the goods, and upon it the plaintiffs delivered the goods. This constituted the contract between the parties, and, in the absence of fraud or misrepresentation, the plaintiffs are bound by its expressed terms. They cannot be permitted to say that, by their own inattention, they did not read the terms and conditions, and thereby impose upon the defendant a greater value than that expressed in the contract.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 687-692.]

3. TRIAL—DIRECTING VERDICT.

Further held, that the ruling of the presiding justice in directing a verdict for the plaintiffs based upon the limited liability of the defendant was correct.

(Official.)

Exceptions from Supreme Judicial Court, Penobscot County.

Action by Freeland J. Gerry and others against the American Express Company. Verdict for plaintiffs for less than the amount claimed, and they except. Exceptions overruled.

Argued before WISWELL, C. J., and EMERY, STROUT, SAVAGE, and PEABODY, JJ.

Calvin W. Brown, for plaintiffs. C. F. Woodard, for defendant.

STROUT, J. Plaintiffs shipped by defendant company 61 cans of cream from Belfast to Boston. Before delivery it became frozen and was injured, and plaintiffs claim damages therefor. Defendant admits a limited liability only, and on the 18th day of October, 1904, tendered plaintiffs \$55 in full for its liability, and brought the amount into court. Plaintiffs refused to accept it, and claims to recover the value of the cream, stated to be \$457.50, less amount realized from the butter made therefrom, which left a net loss of \$114.18, which plaintiffs seek to recover in this action.

Plaintiffs were presented by defendant with a book of blank receipts, in which plaintiffs entered their shipments. At the top of each sheet of these receipts there was printed, "The property hereinafter described to be forwarded subject to the terms and conditions of the company's regular form of receipt printed on inside cover of this book." Below this were entered the date, amount, and destination of each shipment, and receipted by defendant's agent when the goods were taken by him. Pasted on the inside cover of the book was a notice to shippers not involved here, and at the bottom, in larger type, the following: "The liability of this company is limited to \$50, at which sum the property is hereby valued; unless the just and true value is stated in this receipt." In the receipt for the shipment of this cream no value was stated. Defense claims that plaintiffs are bound by this limitation. The presiding justice ordered a verdict for plaintiffs for \$52.25, that being for \$50 and interest thereon from the date of shipment to the date of the tender. To this ruling exception was taken. There is also the general motion for a new trial.

It is well settled that a common carrier may "limit his responsibility for property intrusted to him by a notice containing reasonable and suitable restrictions, if brought home to the owner of goods delivered for transportation, and assented to clearly and unequivocally by him," and if it appears "that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered." *Fillebrown v. Grand Trunk Ry. Co.*, 55 Me. 468, 92 Am. Dec. 606. The limitation in defendant's receipts in this case cannot be considered unreasonable. The rate for transportation and the care to be bestowed upon them depends very largely upon their value, and the carrier may well require the value to be stated, if he is to be held responsible to the extent of the common-law liability of common carriers. Plaintiffs had been shipping cream by the defendant, and having their receipts in the same book of receipts almost daily from January 24, 1902, and in all, or nearly all, the

shipments the receipts were filled out by the plaintiffs or their agent, and signed by defendant's receiving agent. In no case did they give the value of the shipment to defendant. They say they did not read the terms and conditions in the shipping book, but it seems incredible that using that book almost daily for nearly two years, and filling in the blanks at every shipment, the eye could have failed to catch the distinct notice of limitation of liability. Lapse of memory is much more probable.

The receipt in this case in express terms incorporated into it the limitation of liability contained in the conditions printed in the book of receipts used by plaintiffs. Upon that receipt and under its conditions defendant received the goods, and upon it plaintiffs delivered them. That constituted the contract between the parties, and, in the absence of fraud or misrepresentation, which are not claimed, the plaintiffs are bound by its expressed terms. They cannot be permitted to say that, by their own inattention, they did not read the terms and conditions, and thereby impose upon defendant a greater liability than that expressed in the contract. *Squire v. New York Cent. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162.

The receipt did not state the rate for transportation. Consequently, the rate would be that agreed upon, if any; otherwise a reasonable rate.

But it is strongly urged that the rate per can for transportation had been specifically agreed upon by the parties, and therefore there was no occasion for giving the value. One of the plaintiffs rather vaguely says it was agreed, and the other plaintiff says the rate was asked for and given, and that was all. But this argument overlooks the consideration that upon the value of the goods largely depends the degree of care defendant would exercise to protect the property. If the value was large, and liability for loss great, defendant would naturally use much greater care to protect from loss than if the value was trifling.

It is the opinion of the court that the ruling was right, and the entry must be: Motion and exceptions overruled.

W. R. LYNN SHOE CO. v. AUBURN-LYNN SHOE CO.

(Supreme Judicial Court of Maine. Nov. 16, 1905.)

1. TRADE-MARKS AND TRADE-NAMES — ELEMENTS.

The general common-law proposition upon which all the courts unite is that any words, letters, figures, marks or devices, or combinations of any of these, affixed to a commercial article and used primarily to indicate the origin or ownership of it, either by its own meaning or by association with the article, and not employed merely as descriptive of such article to designate its quality or ingredient only, or

solely as a geographical name without any secondary signification, must be recognized as a valid trade-mark.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 4-7, 18.]

2. SAME—UNFAIR COMPETITION.

All the courts agree that one man shall not be permitted, by imitating such distinctive name or mark already employed by another to designate a commercial article, to impose upon the public an article of his own manufacture as the genuine article of another, for the reason that it would be a fraud upon the manufacturer first appropriating such mark, and also a fraud upon the consumers, who have a right to be protected against such imposition.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 65-72.]

3. SAME—GEOGRAPHICAL NAME.

But while it is undoubtedly the general rule that a geographical name, when used alone and affixed to a manufactured article for the purpose of designating the place of its manufacture or the address of the manufacturer, cannot be appropriated as a trade-mark, it has been held that a geographical name which has long been used to indicate a particular manufactured article may acquire a secondary meaning as the designation of a particular class of such articles, or the product of a particular manufacturer, and thus either become entitled to protection against infringement as a valid trade-mark or serve as the basis of a proceeding to prevent unfair competition.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, § 18.]

4. SAME—PARTICULAR DEVICE.

The leading characteristic which distinguishes the trade-mark under consideration in the case at bar from the ordinary appropriation of a personal name or geographical term alone as a trade-mark is the fact that, in the plaintiff's trade-mark, the geographical and personal names were both combined in an original device bearing the words "Auburn-Lynn Shoes, Auburn, Maine."

5. SAME.

This arbitrary composite name of the plaintiff's product, with the location of the manufactory expressly added, constituted an impersonal trade-mark. It was a trade-mark which others could not use with equal right and equal truth for the same purpose. The plaintiff had acquired the exclusive right to the use of it, and the adoption by the defendant of the phrase "Auburn-Lynn Shoe Co." as a trade-mark and corporate name was an unauthorized simulation of the plaintiff's trade-mark, and constituted an infringement of the plaintiff's property right, without other proof of a fraudulent intent on the part of the defendant.

6. SAME—INFRINGEMENT.

In contemplation of law, two trade-marks are substantially the same if the resemblance between them is so close that it deceives a customer exercising ordinary caution in his dealing and induces him to purchase the goods of one manufacturer for those of another. A critical comparison of two trade-marks placed side by side might disclose differences in both words and devices; but, if the similarity is of such a character as to convey a false impression to the minds of ordinarily careful purchasers, respecting the identity of the manufactory or of the goods, it is sufficient to afford ground for redress.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, § 64.]

7. SAME—UNFAIR COMPETITION—INTENT.

The defendant's aggressions upon the rights of the plaintiff prior to the change of its name to "Lynn & Lynn Co." constituted not only a violation of the general law covering unfair competition, but also a specific and positive infringement of the plaintiff's exclusive right to the use of a technical trade-mark and trade-name. The law of trade-marks, it is true, is but a special feature of the general law of unfair competition in trade, which rests upon the elementary principle that no person has the right to sell his goods for those of another; but there are important distinctions to be observed between them. Unfair competition, unlike the infringement of technical trade-marks, does not necessarily involve the violation of any exclusive right in the plaintiff to the use of the names or symbols employed by the defendant, but there may be unfair competition resulting from an unauthorized and improper use of such names and symbols, although the plaintiff has no property right in them as a trade-mark. Any conduct designed and having a natural tendency to deceive the public, and enable one man to dispose of his goods for those of another, may be unfair competition and be enjoined, although it is not expressly shown that any particular person was thereby actually deceived. Again, in cases of technical trade-mark, the fraudulent intent to deceive is presumed, while in cases of unfair competition, the plaintiff must prove this intent or show facts and circumstances from which it may be reasonably inferred.

Held, that the findings and conclusions of the justice of the first instance were justified by the facts reported. Therefore all of the provisions of the decree signed by the justice of the first instance are affirmed without modification, except the sixth paragraph in regard to the extent of the accounting to which the plaintiff is entitled.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 78-88, 104½.]

8. SAME—DAMAGES—PROFITS.

The rule which now prevails in the equity courts, respecting the wrongdoer's accountability for the "profits and damages" resulting from his unlawful acts, requires the master, not only to take an account of all profits made by the defendant, but also to make an inquiry in regard to all damages sustained by the plaintiff on account of the defendant's wrongful acts; and, since it cannot be ascertained with any reasonable certainty how much of the profit is due to the trade-mark and how much to the intrinsic value of the commodity, the whole will be awarded to the plaintiff. It is well settled that the profits recoverable in equity for unfair competition are governed by the same rule as in cases of infringement of trade-marks.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks, and Trade-Names, § 112.]

9. SAME—FORM OF RELIEF.

It is therefore further *held* that the plaintiff is entitled to an accounting, not only for the profits realized by the defendant company from sales of shoes upon which was impressed the trade-mark of the Auburn-Lynn Shoe Company, or any simulated trade-mark using the name "Auburn-Lynn," but also for the profits resulting from the wrongful acts committed by the defendant company in its unfair competition with the plaintiff between the time of its change of name to Lynn & Lynn Shoe Company and the date of the decree.

(Official.)

Exceptions from Supreme Judicial Court, Androscoggin County, in Equity.

Action by W. R. Lynn Shoe Company

against the Auburn-Lynn Shoe Company. From a decree for plaintiff, defendant appeals, and plaintiff prosecutes exceptions. Appeal dismissed, and exceptions sustained.

Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, PEABODY, and SPEAR, JJ.

Oakes, Pulsifer & Ludden and Enoch Foster, for plaintiff. George C. Wing, George C. Wing, Jr., and White & Carter, for defendant.

WHITEHOUSE, J. This cause in equity comes to the law court upon the appeal of the defendant corporation from a final decree enjoining it from an unlawful use of plaintiff's trade-mark and trade-name, and upon the plaintiff's exceptions to that portion of the decree respecting the extent of the liability of the defendant corporation to account for the profits of its business.

The material facts established by the finding of the court are as follows:

The plaintiff corporation has been engaged in business in Auburn, Me., since 1898, manufacturing ladies' boots and shoes under several styles, among which are "comfort" and "common sense." The corporation was named for W. R. Lynn, who was an experienced manufacturer of shoes, a stockholder in the company until about the first of 1903, and the superintendent of manufacture for several years. He continued his services with the corporation until June 5, 1903. In November, 1899, the corporation adopted the name "Auburn-Lynn Shoes" as the name of a part of its products, and that name was used as a general name for the entire product for two or three years prior to the bringing of this bill, and became the trade-mark of the plaintiff's manufactured product. In June, 1903, the plaintiff adopted a trade-mark in the form of the following device:

Auburn
LYNN
SHOES
AUBURN, MAINE.

A cut was made and the trade-mark printed in a booklet in the early part of 1903, and 5,000 copies of it were sent out for the use of the trade. The trade-mark stamp was applied to the plaintiff's shoes for the first time in June, 1903. The plaintiff also extensively used the term "Auburn-Lynn Shoes" upon its labels, postal cards, envelopes, bill heads, letter heads, orders, blanks, circulars, and slips, upon which the words "Auburn-Lynn Shoes, made by the W. R. Lynn Shoe Co., Auburn, Maine," were made very prominent. In the trade-mark and trade-name "Auburn-Lynn Shoes," the word "Auburn" signified the city of Auburn, the place of

manufacture, and the word "Lynn" signified W. R. Lynn, the superintendent of manufacture in the plaintiff corporation. The defendants Lunn and Reed were salesmen for the plaintiff, each having assigned to him certain territory in the western states.

July 9, 1903, the defendants, Lunn, Lynn, and one Sweet, organized the defendant corporation under the name of "The Auburn-Lynn Shoe Company." Lynn was president, Lunn treasurer, and Lynn, Lunn, and Sweet directors. The Auburn-Lynn Shoe Company entered into business in Auburn near the place of business of the W. R. Lynn Shoe Company. The names "Auburn" and "Lynn" in the name of the corporation were intended to represent the name of the city of Auburn, Me., and the name "Lynn," the defendant W. R. Lynn, who was known as a manufacturer. The defendant company, soon after its organization, adopted the following trade-mark:



and used it upon the first goods sent out under date of September 4, 1903. The Auburn-Lynn Shoe Company made styles of goods similar to those manufactured by the W. R. Lynn Shoe Company, under the names of "common sense" and "old ladies" shoes, etc., but they were not identical, though many styles were not readily distinguishable. The Auburn-Lynn Shoe Company, in July and August, sent letters to the old customers of the plaintiff, calling attention to the fact that W. R. Lynn had ceased to be connected with the plaintiff company, and that a new corporation had been formed. Reference was made, however, to the "improved styles" to be manufactured by the Auburn-Lynn Shoe Company. Circulars, made after this bill was filed and served, were put in the first cartons shipped by the defendant company, and were also sent by mail to the former customers of the W. R. Lynn Shoe Company. They were headed with the trade-mark of the Auburn-Lynn Shoe Company, and contained no reference to the fact that Mr. Lynn had ceased to be connected with the W. R. Lynn Shoe Company, or that the Auburn-Lynn Shoe Company was not the same manufacturer as the plaintiff. But they contained the following sentence: "Our common sense shoes are noted for softness and excellent wearing qualities, and have brought comfort to thousands of women troubled with aching and tender feet." At the time this circular was first issued, the

Auburn-Lynn Shoe Company had sold no goods.

As a result of these circumstances, the plaintiff in the fall of 1903 found unusual difficulty in selling in its old territory. Many of its old customers gave orders to the new company, and also much confusion arose in regard to the mail intended to be addressed to the plaintiff. Before the organization of the defendant company, letters intended for the plaintiff had been addressed to the W. R. Lynn Shoe Company and the Auburn-Lynn Shoe Company; but after the new company was organized, it claimed to receive and did receive and open all letters addressed to the Auburn-Lynn Shoe Company. When the Auburn-Lynn Shoe Company commenced business, it provided the old customers of the W. R. Lynn Shoe Company with envelopes addressed to the Auburn-Lynn Shoe Company, and apparently some of those envelopes were used by the customers of the plaintiff in sending orders and remittances. At least 32 letters, between August 4, 1903, and the time of hearing this bill in March, 1904, intended for the plaintiff, but addressed to the Auburn-Lynn Shoe Company, came into the hands of the defendant corporation. They contained orders, checks, and general correspondence, some of the defendant's printed, addressed envelopes, and some in writing. They were mostly from old customers, and from the letters the defendant company obtained information concerning the business of the plaintiff.

On the 15th day of September, 1903, after this bill was brought, the defendant corporation changed its name to the "Lunn & Lynn Shoe Company," but it continued to use the old stationery and copies of the printed trade-mark, substituting "Lunn &" for "Auburn" in red ink; the word "Auburn" being crossed, but not obliterated.

The defendant Reed was employed by the defendant company as salesman, and has covered practically the same territory as he did with the old company. It was the understanding that he should visit the old customers of the plaintiff, and he did so. The defendant Lunn acted as salesman for the defendant company from September until November, covering his old territory. After September 22, 1903, no goods were billed by the defendant company under the name of the Auburn-Lynn Shoe Company, but under the name of the Lunn & Lynn Shoe Company. After the change of name, one order only appears to have been taken by the defendant's salesman on the order blanks of the Auburn-Lynn Shoe Company.

The inference and legal conclusions deducible from the findings of fact are thus stated by the presiding judge before whom the testimony was taken:

"I rule that the term 'Auburn-Lynn Shoes,' adopted by the plaintiff and affixed by it to its goods, as a combination was a valid

trade-mark and trade-name, though it was in part geographical. I hold that the plaintiff had acquired by use an exclusive right to the name 'Auburn-Lynn Shoes' as a trade-mark and trade-name.

"I hold that the conduct of the defendant company, in adopting the phrase 'Auburn-Lynn Shoe Company' as its trade-mark, and in conducting a shoe business under that corporate name, manufacturing goods similar in style and character to those manufactured by the plaintiff and so nearly so as not to be distinguishable by ordinary observers, advertising and selling those goods in the territory covered by Lunn and Reed when they were acting for the plaintiff company in the sale of Auburn-Lynn shoes, constituted unfair competition. I think it was well calculated to mislead customers, notwithstanding the correspondence of the defendant company and its officers to the old customers, in which they stated that a new corporation had been formed, and that Mr. Lynn had ceased to be connected with the plaintiff company. And although the trade customers of the plaintiff might even generally be informed of the situation, the purchasing public, so far as it appears, was not informed, and could not well be informed, and were liable to be deceived, and the plaintiff, at the same time, injured thereby. Those who had been in the habit of dealing in and purchasing the Auburn-Lynn shoes might well understand that the product of the Auburn-Lynn Shoe Company represented the plaintiff's manufacture. And, even after the change of name to Lunn & Lynn Shoe Company, the use of the old literature, so changed as only to indicate that the Lunn & Lynn Shoe Company was the successor of the Auburn-Lynn Shoe Company, did not help the matter. If customers could be led to believe that the Auburn-Lynn Shoe Company was the manufacturer of shoes which they had formerly bought as 'Auburn-Lynn Shoes,' they would not be undeceived by seeing literature in which 'Auburn' was changed to 'Lunn &' in such a way as to give the impression that the Lunn & Lynn Shoe Company was a successor of the 'Auburn-Lynn Shoe Company.'

I do not, however, find that the use of the words 'Lunn & Lynn Shoe Company' is an infringement upon the plaintiff's rights, except so far as it may, by the manner of use, directly or indirectly give any impression that it is the successor of the Auburn-Lynn Shoe Company, or had, or has ever had, anything to do with the manufacture of the 'Auburn-Lynn shoes.' I think the defendant company may lawfully make use of the composite name Lunn-Lynn, although Lunn was formerly the salesman, and Lynn the manufacturer, of the Auburn-Lynn shoes, and although Lynn is the person for whom the Auburn-Lynn shoes were named in part. The defendant company must not use its

corporate name or conduct its business so as to convey to the trade the impression that its manufactured product is the Auburn-Lynn shoe product of the plaintiff, or that it is the successor of the plaintiff or of the Auburn-Lynn Shoe Company, and it must so conduct its business in this respect that persons of ordinary intelligence may not be deceived. I think the duty is upon it to take such measures as may be necessary to clearly avoid confusion.

"I think the defendant company, its officers, agents, and servants, should be enjoined from the use in any way of the trade-mark and trade-name 'Auburn-Lynn Shoes,' as applied to its product, and from the use of the name 'Auburn-Lynn Shoe Company' in the manufacture and sale of 'Comfort,' 'Common Sense,' 'Old Ladies,' and other similar shoes, or in business or correspondence connected therewith, and from the use of the name 'Lunn & Lynn Shoe Company' as the successor of the Auburn-Lynn Shoe Company, unless in each instance it states clearly that it is not the manufacturer of the Auburn-Lynn shoes."

Thereupon the presiding judge sustained the bill against the defendant corporation and entered the following decree:

"(1) That the plaintiff is entitled to the exclusive use of the name 'Auburn-Lynn Shoes' as a trade-mark and a trade-name.

"(2) That the defendant corporation, its officers, agents, and servants, be and are hereby perpetually enjoined from the use in any way of the trade-mark or trade-name 'Auburn-Lynn Shoes' as applied to its product.

"(3) That the defendant company, its officers, agents, and servants, be and are hereby perpetually enjoined from the use of the name 'Auburn-Lynn Shoe Company' in the manufacture and sale of 'Comfort,' 'Common Sense,' 'Old Ladies,' and other similar shoes, and from the use of said name 'Auburn-Lynn Shoe Company' in its business and its correspondence connected therewith.

"(4) That the said defendant company, its officers, agents, and servants, be and are hereby perpetually enjoined from the use of the name 'Lunn & Lynn Shoe Company' as the successor of the 'Auburn-Lynn Shoe Company,' unless in each instance it states clearly that it is not the manufacturer of the 'Auburn-Lynn Shoes.'

"(5) That the defendant company, its officers, agents, and servants, be and are hereby perpetually enjoined from the use of its corporate name or the conduct of its business so as to convey to the trade the impression that its manufactured product is the Auburn-Lynn shoe product of the plaintiff, or that it is the successor of the plaintiff, or of the Auburn-Lynn Shoe Company, and from so conducting its business in this respect that persons of ordinary intelligence would be deceived thereby.

"(6) That it be referred to John A. Morrill, Esq., of Auburn, a master in chancery, to take an account of all the profits of the business of the defendant corporation growing out of sales of shoes upon which was impressed the trade-mark of the Auburn-Lynn Shoe Company, or any simulated trade-mark using the name 'Auburn-Lynn,' from the 9th day of July, A. D. 1903, to the date of this decree, and ascertain and report the amount of such profits, together with all damages sustained by the plaintiff during said period by the wrongful use of the plaintiff's trade-mark and trade-name, and by the unfair competition of the defendant corporation during said period."

The bill was dismissed without costs as to the defendants Lunn and Reed.

It is the opinion of the court that these deductions and conclusions were clearly warranted by the findings of fact, and that the defendant's appeal must be dismissed.

It is contended in behalf of the defendant company that, as the word "Auburn" in the plaintiff's trade-name indicated the place of manufacture, and the word "Lynn" signified the name of the manufacturer, the phrase "Auburn-Lynn Shoes" could not become the subject of an exclusive property right of the plaintiff, and was therefore incapable of being a valid trade-mark. But this contention cannot be sustained.

It may be difficult to reconcile the conclusions reached by different courts upon the facts reported in the multitude of decisions relating to this subject, and impracticable to give an exact statement of what a trade-mark may consist under all circumstances, but an analysis of the leading cases shows that they are all in substantial accord upon the equitable principles and fundamental propositions respecting the nature and protection of trade-marks. "It is equitable," says Judge Putnam, in *Le Page Co. v. Russia Cement Co.*, 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354, "that a manufacturer who has given reputation to any article should have the privilege of realizing the fruits of his labors, by transmitting his business and establishment, with the reputation which has attached to them, on his decease to his legatees or executors, or during his lifetime to purchasers; and it is also in accordance with the principles of law and justice to the community that any trade-mark, including a surname, may be sold with the business or the establishment to which it is incident; because, while it may be that individual efforts give them their value at the outside, yet afterwards this is ordinarily made permanent as a part of the entire organization, or as appurtenant to the locality in which the business is established, and thence forward depends less on the individual efforts of the originator than on the combined result of all which he created." The general common-law proposition, upon which

all the courts unite, is that any words, letters, figures, marks, or devices, or combination of any of these, affixed to a commercial article and used primarily to indicate the origin or ownership of it, either by its own meaning or by association with the article, and not employed merely as descriptive of such article to designate its quality or ingredient only, or solely as a geographical name without any secondary signification, must be recognized as a valid trade-mark. All the courts agree that one man shall not be permitted, by imitating such distinctive name or mark already employed by another to designate a commercial article, to impose upon the public an article of his own manufacture as the genuine article of another, for the obvious reason that it would in the first place be a fraud upon the manufacturer first appropriating such mark, and, secondly, a fraud upon the consumers, who have a right to be protected against such imposition. In *Symonds et al. v. Jones*, 82 Me. 302, 19 Atl. 820, 8 L. R. A. 570, 17 Am. St. Rep. 485, the court say: "The public come to associate their names, labels, and marks with the products of some particular origin or ownership, or of some particular factory, farm, etc. It is clear that such names thus become convenient for the consumer and valuable to the producer, and that both the consumer and the producer should be protected against their use by other parties upon other similar products. They become valuable according to the familiarity of the public with them, and the excellence of the product designated by them. The law justly recognizes such names, labels, and marks as important attributes or appurtenances of a business, and as proper to be transferred with any sale or transfer of the business and its plant." See, also, *Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581; *Brown Chem. Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1114; *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365. In the last-named case, Chief Justice Fuller says in the opinion:

"The term has been in use from a very early date, and, generally speaking, means a distinctive mark of authenticity, through which the * * * commodities of particular merchants may be distinguished from those of others. It may consist in any symbol or in any form of words, but, as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade-mark, which from the nature of the fact conveyed by its primary meaning others may employ with equal truth and with equal right for the same purpose.

"And the general rule is thoroughly established that words that do not in and of themselves indicate anything in the nature of origin, manufacture, or ownership, but are

merely descriptive of the place where an article is manufactured or produced, cannot be monopolized as a trade-mark."

But while it is undoubtedly the general rule that a geographical name, when used alone and affixed to a manufactured article for the purpose of designating the place of its manufacture, or the address of the manufacturer, cannot be appropriated as a trade-mark, it has been held in numerous well-considered cases that a geographical name which has long been used to indicate a particular manufactured article may acquire a secondary meaning as the designation of a particular class of such articles, or the product of a particular manufacturer, and thus either become entitled to protection against infringement as a valid trade-mark, or serve as a basis of a proceeding to prevent unfair competition. In *American Waltham Watch Co. v. U. S. Watch Co.*, 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826, 73 Am. St. Rep. 263, it was held that, while the name "Waltham" on watches was originally used in a geographical sense, by long use in connection with the plaintiff's watches, it had acquired a secondary meaning as a designation of the watches which the public had become accustomed to associate with the name. In *Montgomery v. Thompson* [1891] App. Cases, 217, it was decided by the House of Lords that the term "Stone Ale," which had been applied to a particular quality of beer manufactured by the defendants at the town of Stone, was entitled to the protection of the court, and the plaintiff was enjoined from selling any ale not manufactured by the defendants under the name of "Stone Ale." In *Wotherspoon v. Currie*, L. R. 5 H. L. 508, it was held that the word "Glenfield," as applied to starch, had acquired a secondary meaning and indicated to the public the starch made by the appellants. It was therefore decided that the word "Glenfield" as a denomination of starch had become the property of the appellants. See, also, *Reddaway v. Banham*, App. Cas. (1896) 199; *Carlsbad v. Kutnow*, 71 Fed. 167, 18 C. C. A. 24; *Viano v. Baccigalupo*, 183 Mass. 160, 67 N. E. 641; *Metcalfe v. Brand*, 86 Ky. 331, 5 S. W. 773, 9 Am. St. Rep. 282; *Paul on Trade-Marks*, § 59, and cases cited.

It is also conceded to be a general rule that a personal name alone cannot be appropriated as a technical trade-mark, although it may receive protection from the courts when it is so used by another as to render him answerable to the charge of unfair competition. Every person has a right to the honest use of his own name in his business, but he will not be permitted by imitative and unfair devices to mislead the public in regard to the identity of the firm or corporation, or the goods manufactured by it. But a trade-mark that is originally personal, indicating that the article to which it is affixed is manufactured by a particular person, often comes by usage to indicate merely that the article was man-

ufactured in the establishment with which he was formerly connected.

But it has been seen that there is a leading characteristic which distinguishes the trade-mark under consideration in the case at bar from the ordinary appropriation of a personal name or geographical term alone as a trade-mark. In the plaintiff's trade-mark, the geographical and personal names were both combined in an original device bearing the words "Auburn-Lynn Shoes, Auburn, Maine."

This arbitrary composite name of the plaintiff's product, with the location of the manufactory expressly added, undoubtedly constituted an impersonal trade-mark. It will be found to respond to all of the recognized tests of a valid trade-mark. It did not describe the stock and different materials which entered into the manufacture of the shoes to which it was affixed. It did not necessarily signify that the shoes were the product of Lynn's personal skill, but, by a long use of the trade-mark in connection with the shoes, it had come to indicate that they were the product of the manufactory with which he was connected, and thus, through the reputation which they had acquired in the market, to operate as an assurance that they possessed certain general qualities and merits. It did not describe the shoes, but it indicated their origin and ownership. It was a trade-mark which others could not use with equal right and equal truth for the same purpose. The plaintiff had acquired the exclusive right to the use of it, and the adoption of the defendant of the phrase "Auburn-Lynn Shoe Company," as a trade-mark and corporate name, was an unauthorized simulation of the plaintiff's trade-mark, and constituted an infringement of the plaintiff's property right, without other proof of a fraudulent intent on the part of the defendant. *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S. 674, 21 Sup. Ct. 270, 45 L. Ed. 365; *Paul on Trade-Marks*, §§ 183-185. The prompt abandonment of the defendant's trade-mark with the change of its corporate name to "Lunn & Lynn Shoe Company," after the commencement of this bill, was a practical admission of this infringement. It is not indispensable that the words and devices of the two trade-marks should be in fact identical in order to constitute an infringement. In contemplation of law, two trade-marks are substantially the same, if the resemblance between them is so close that it deceives a customer exercising ordinary caution in his dealing and induces him to purchase the goods of one manufacturer for those of another. *McLean v. Fleming*, 90 U. S. 256, 24 L. Ed. 828; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 63, 25 L. Ed. 993. A critical comparison of two trade-marks placed side by side might disclose differences in both words and devices, but, if the similarity is of such a character as to convey a false impression to the minds of ordinarily careful purchasers respecting the identity of the

manufactory or of the goods, it is sufficient to afford ground for redress.

Again, it has been seen that the defendant corporation unnecessarily and without authority adopted the words of the plaintiff's trade-mark comprising the name of Lynn, for its corporate name. In *William Rogers Mfg. Co. v. R. W. Rogers Co.* (C. C.) 66 Fed. 56, the court say: "Although the case of a personal name as a trade-mark will not be protected against its use in good faith by a defendant who has the same name, the reason of the rule ceases, and the rule no longer applies, when the defendant, as in case of a corporation, selects its own name, especially where it appears that such name is selected with an intention to mislead." In *Holmes B. & H. v. Holmes B. & A. Mfg. Co.*, 37 Conn. 278, 9 Am. Rep. 324, it was held that, where a corporation has, with their consent, embodied the names of its principal stockholders in the corporate name, the right to use the name so adopted will continue during the existence of the corporation, and that the use of these names by a rival company subsequently formed and embracing such stockholders, in such a manner as to mislead customers into the belief that the two companies were the same, was in violation of the plaintiff's right and should be enjoined. See, also, *Royal v. Royal* (C. C. A.) 122 Fed. 337; *Bissell v. Bissell* (C. C.) 121 Fed. 355.

In the light of both principle and authority, it thus appears that the defendant's aggressions upon the rights of the plaintiff, prior to the change of its name to "Lynn & Lynn Shoe Company," constituted not only a violation of the general law covering unfair competition, but a specific and positive infringement of the plaintiff's exclusive right to the use of a technical trade-mark and trade-name. The law of trade-marks, it is true, is but a special feature of the general law of unfair competition in trade, which rests upon the elementary principle that no person has the right to sell his goods for those of another. But, as already indicated, there are important distinctions to be observed between them. In the first place, unfair competition, unlike the infringement of technical trade-marks, does not necessarily involve the violation of any exclusive right in the plaintiff to the use of the names or symbols employed by the defendant. There may be unfair competition resulting from an unauthorized and improper use of such names and symbols, although the plaintiff has no property right in them as a trade-mark. Any conduct designed and having a natural tendency to deceive the public and enable one man to dispose of his goods for those of another may be unfair competition and be enjoined, although it is not expressly shown that any particular person was thereby actually deceived. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Samuels v. Spitzer*, 177 Mass. 226, 58 N. E. 693.

Again, it is frequently stated that in cases of technical trade-mark the fraudulent intent

to deceive is presumed, while, in cases of unfair competition, the plaintiff must prove this intent or show facts and circumstances from which it may be reasonably inferred. But upon this question of intent there is a great diversity of opinion, or of expression, in different courts, and it has been held in some cases that there is no practical distinction in this respect between cases of trade-mark infringement and unfair competition, since the reasons often given for not requiring proof of fraudulent intent in cases of technical trade-mark are equally applicable to cases of unfair competition. *Am. & Eng. Enc. of Law*, vol. 28, 419, and cases cited. The rule adopted in the United States Supreme Court is thus stated by Chief Justice Fuller, in *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S. 674, 21 Sup. Ct. 274, 45 L. Ed. 365: "If the plaintiff has the absolute right to the use of a particular word or words as a trade-mark, then, if an infringement is shown, the wrongful or fraudulent intent is presumed, and, although allowed to be rebutted in exemption of damages, the further violation of the right of property will nevertheless be restrained. But where an alleged trade-mark is not in itself a good trade-mark, yet the use of the word has come to denote the particular manufacturer or vendor, relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of. *Lawrence Manufacturing Company v. Tennessee Manufacturing Co.*, 138 U. S. 537, 549, 11 Sup. Ct. 396, 34 L. Ed. 997; *Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; *Singer Man. Co. v. June Man. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118."

It has accordingly been held that a court of equity will enjoin the infringement of a technical trade-mark, which has been occasioned by accident or mistake, without proof of actual fraud on the part of the defendant; but it will not enjoin the imitations of labels, bill heads, and commercial names of a rival trader, unless it satisfactorily appears that such imitations are fraudulently designed and have a tendency to occasion damage. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828.

In the case at bar, after the plaintiff's bill was commenced, the defendant corporation changed its name to "Lynn & Lynn Shoe Company," but continued to use the old stationery and copies of the printed trade-mark substituting "Lynn" for "Auburn" in red ink: the word Auburn being erased but not obliterated. It has been seen that the presiding judge found and held that the "conduct of the defendant company, in adopting the phrase

'Auburn-Lynn Shoe Company' as its trade-mark, and in conducting a shoe business under that corporate name, manufacturing goods similar in style and character to those manufactured by the plaintiff, and so nearly so as not to be distinguishable by ordinary observers, advertising and selling those goods in the territory covered by Lunn and Reed, when they were acting for the plaintiff company in the sale of Auburn-Lynn shoes, constituted unfair competition. * * * Those who had been in the habit of dealing in and purchasing the Auburn-Lynn shoes might well understand that the product of the Auburn-Lynn Shoe Company represented the plaintiff's manufacture. And even after the change of name to the 'Lunn & Lynn Shoe Company' the use of the old literature, so changed as only to indicate that the Lunn & Lynn Shoe Company, was the successor of the Auburn-Lynn Shoe Company, did not help the matter. If customers could be led to believe that the Auburn-Lynn Shoe Company was the manufacturer of shoes which they had formerly bought as Auburn-Lynn shoes they would not be undeceived by seeing literature in which 'Auburn' was changed to 'Lunn &' in such a way as to give the impression that the Lunn & Lynn Shoe Company was a successor of the Auburn-Lynn Shoe Company."

It has been seen that, in the light of the decisions, the unauthorized simulation of the plaintiff's trade-mark and trade-name by the defendant corporation constituted an infringement of the plaintiff's exclusive right to the use of a technical trade-mark, without other proof of a fraudulent intent on the part of the defendant; but the decision of the presiding judge that such conduct on the part of the defendant corporation, prior to the change of its name to Lunn & Lynn Shoe Company, constituted unfair competition, involved a finding that there was in fact a fraudulent intent on its part to convey to the trade an impression that its shoes were the Auburn-Lynn shoes, product of the plaintiff. This finding was not required to authorize the injunction against the use of the plaintiff's trade-mark by the defendant corporation, but it was nevertheless relevant and material upon the question of damages; since the presumption of wrongful intent in cases of technical trade-mark may be rebutted upon the question of liability for profits and damages. *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S. 674, 21 Sup. Ct. 270, 45 L. Ed. 865.

But the presiding judge further found that, even after the change of the name to Lunn & Lynn Shoe Company, the use of the old advertising literature, with changes only indicating that the Lunn & Lynn Shoe Company was the successor of the Auburn-Lynn Shoe Company, "did not help the matter," for the reason that customers would continue to receive the false impression that the shoes placed on the market by the Lunn & Lynn

Shoe Company were the Auburn-Lynn shoes of the plaintiff. This was in effect a finding that the conduct of the Lunn & Lynn Company in using the old literature, unaccompanied by any explicit statement that this company was not the manufacturer of Auburn-Lynn shoes, still constituted unfair competition.

These findings and conclusions of the presiding judge were justified by the facts reported. The entire history of the conduct of the shoe business by the defendant corporation, after the retirement of W. R. Lynn from the plaintiff company, discloses a manifest intention and persistent effort on the part of the management to beguile the old customers of the plaintiff company into purchasing the defendant's shoes, under the impression that they were the Auburn-Lynn product manufactured by the plaintiff, and thereby to appropriate the value of the reputation which the latter had acquired. It shows a determination to continue such efforts until compelled by the courts to forbear. Its change of name to Lunn & Lynn Shoe Company, considered in the light of its subsequent conduct in the use of the old trade literature, indicated an ingenious attempt to disguise the true nature of its methods and conduct, rather than a genuine purpose to desist from the pursuit of its course of unfair competition. All of the provisions of the decree signed by the presiding judge are therefore affirmed without modification, except the sixth paragraph, in regard to the extent of the accounting to which the plaintiff is entitled. This question is raised by the plaintiff's exceptions.

It has been seen by the sixth paragraph of the decree the cause was referred to a master to take an account of all the profits of the business of the defendant corporation, "growing out of sales of shoes, upon which was impressed the trade-mark of the Auburn-Lynn Shoe Company, or any simulated trade-mark using the name 'Auburn-Lynn,' from" the time of the organization of the defendant corporation to the date of the decree, with all damages sustained by the plaintiff during that period by the wrongful use of the plaintiff's trade-mark and trade-name, and by the unfair competition of the defendant corporation during that period.

The words in quotation marks were introduced by the presiding judge in the decree filed by the plaintiff's attorney, and to this limitation upon his right to an accounting for the profits of the defendant's business the plaintiff took exceptions.

The rule which now prevails in the equity courts, respecting the wrongdoer's accountability for the "profits and damages" resulting from his unlawful acts, requires the master, not only to take an account of all the profits made by the defendant, but also to make an inquiry in regard to all damages sustained by the plaintiff on account of the de-

defendant's wrongful acts; and, since it cannot be ascertained with any reasonable certainty how much of the profit is due to the trade-mark and how much to the intrinsic value of the commodity, the whole will be awarded to the plaintiff. It is equally well settled that the profits recoverable in equity for unfair competition are governed by the same rule as in cases of infringement of trade-marks, and are not limited to such as accrue from sales in which it is shown that the customer is actually deceived, but include all made on the goods sold in the simulated dress or package, and in violation of the rights of the original proprietor. *Fairbank Co. v. Windsor* (C. C.) 118 Fed. 96; *Benkert v. Feder* (C. C.) 34 Fed. 534; *Williams v. Mitchell*, 106 Fed. 168, 45 C. C. A. 265; *Sawyer v. Kellogg* (C. C.) 9 Fed. 601; *Saxlehner v. Elsner & Mendelson Co.*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; *Graham v. Plate*, 40 Cal. 593, 6 Am. Rep. 639; *Avery v. Melkle*, 85 Ky. 435, 3 S. W. 609, 7 Am. St. Rep. 604; *McLean v. Fleming*, 96 U. S. 437, 24 L. Ed. 828.

In *Singer Mfg. Co. v. June Mfg. Co.*, supra, it was held that, on the expiration of the plaintiff's patent, the right to make the patented article and to use the generic name "Singer" passed to the public, but that the defendant was guilty of unfair competition in failing to indicate that the machines made by him were not the product of the Singer Manufacturing Company, and the defendant corporation was accordingly directed to "account" for any profits which may have been realized by it, because of the wrongful acts committed by it while engaged in such unfair competition, although there had been no infringement of a technical trade-mark.

In the case at bar it appears that between August 4, 1903, and the time of the hearing of the bill in March, 1904, 32 letters, intended for the plaintiff but addressed to the Auburn-Lynn Shoe Company, came into the hands of the defendant corporation. They contained orders, checks, and general correspondence, some in the defendant's printed addressed envelopes and some in writing. They were mostly from old customers, and from these letters the defendant company obtained information concerning the plaintiff's business. It expressly appears that, after the defendant's change of name, one order was taken by the defendant's salesman on the order blanks of the Auburn-Lynn Shoe Company.

It is accordingly the opinion of the court that the plaintiff is entitled to an accounting, not only for the profits realized by the defendant company from sales of shoes upon which was impressed the trade-mark of the Auburn-Lynn Shoe Company, or any simulated trade-mark using the name "Auburn-Lynn," but also for the profits resulting from the wrongful acts committed by the defend-

ant company in its unfair competition with the plaintiff, between the time of its change of name to Lunn & Lynn Shoe Company and the date of the decree.

Defendant's appeal dismissed.

Plaintiff's exceptions sustained.

Cause remanded for a modification of the decree in accordance with this opinion.

WRIGHT v. HOLMES.

(Supreme Judicial Court of Maine. Nov. 22, 1905.)

1. ADMINISTRATORS — ACTIONS TO RECOVER ASSETS—FRAUDULENT CONVEYANCE.

An administrator is the proper party to sue for the goods which once belonged to his intestate, but which were disposed of by him by a fraudulent and void transfer or gift.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 890, 1782.]

2. DESCENT AND DISTRIBUTION — CONVEYANCES BY WIFE—FRAUD AS TO HUSBAND.

In this state, prior to June 1, 1903, when chapter 160, p. 124, of the Public Laws of that year took effect, a married woman might make such disposition, by gift, voluntary conveyance, or otherwise, of her personal property during her lifetime as she wished, even though her husband was thereby deprived of the distributive share therein which would otherwise fall to him upon her death, and even if such disposition was made with intent to prevent his receiving such a distributive share.

3. SAME—GIFTS CAUSA MORTIS.

Whether this rule will apply as to gifts causa mortis, since chapter 160, p. 124, of the Public Laws of 1903, permitting a widower to waive the provisions of his wife's will and take his distributive share in her personal estate as if she had died intestate, is not decided.

(Official.)

Report from Supreme Judicial Court, Oxford County.

Trover by James S. Wright, as administrator of the estate of Emma M. Swift, deceased, against Laura I. Holmes, to recover damages for the conversion of deposits in three savings banks and one national bank, amounting to \$5,767.25, transferred by plaintiff's intestate to the defendant on the 9th day of May, 1903. Emma M. Swift, the deceased, died July 19, 1903, leaving a husband, Chandler Swift, to whom she was married August 5, 1902. Facts agreed upon and case reported to the law court, with the stipulation that the law court "should pass such judgment as the law and the facts warrant." Judgment for defendant.

Argued before EMERY, STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

James S. Wright and Alton C. Wheeler, for plaintiff. Robert F. Dunton, for defendant.

SAVAGE, J. The plaintiff's decedent, a widow possessed of about \$10,000 and living at Belfast, married Chandler Swift of Paris, August 5, 1902, and in the same month came

to his home to live with him. In the December following, being then ill and probably apprehensive of a fatal result, Mrs. Swift made a will by which she gave her husband \$500, and the income of \$2,000 more. Later she went to the hospital for treatment. After remaining there for 17 days, she returned to her husband's home, and stayed there until April 5, 1903, at which time she went back to Belfast, her former home. She continued to live in Belfast until she died of tuberculosis of the lungs, July 17, 1903. On May 9, 1903, she assigned to the defendant deposits in various savings banks amounting to \$5,767.25, and transferred to her her homestead, furniture, and certain other goods and chattels of small value. At the same time she gave away to others practically all of her remaining property, but she gave nothing to her husband. The will above referred to she then destroyed. Subsequently she caused the savings bank books representing the deposits assigned to the defendant to be surrendered to the banks. The deposit accounts were transferred to the defendant, and new books were issued in her name. These books were sent by the banks to Mrs. Swift, who delivered them to the defendant. So far as forms are concerned, these transactions constituted a valid transfer of the deposits to the defendant. The agreed case states that the transfers were "made in contemplation of death," and that Mrs. Swift died of the incurable disease from which she was suffering at the time the transfer was made. The parties are not agreed as to whether the transfer was a gift or a contract; and if a gift, whether it was absolute and irrevocable, although made in expectation of death, and so a gift *inter vivos* (*Dresser v. Dresser*, 46 Me. 48); or whether it was ambulatory and revocable, at her will, or in the case of her recovery, and so a gift *causa mortis* (*Bickford v. Mattocks*, 95 Me. 547, 50 Atl. 894; *Chase v. Redding*, 13 Gray, 418). As the ground upon which the case will be decided is applicable to both classes of gifts, it will not be necessary to scrutinize the gift closely to ascertain to which class it belongs.

The plaintiff, as administrator, brings this action of trover for the savings bank deposits, which were given to the defendant. And as the case makes no mention of debts, we assume that it is brought for the benefit of the husband, as statutory distributee. And as such a case, it has been argued by the learned counsel for the plaintiff.

The defendant presents various objections to the maintenance of the suit, and first, that the plaintiff is not the proper party. It is claimed that if the gift was fraudulent as to the husband, and hence void, as the plaintiff urges, the husband only was injured, and that he only can obtain relief in some appropriate form of action. But we incline to think otherwise. The title to an intestate's personal estate does not pass to his

distributees, except through proper probate administration. Distribution, or a right to distribution, presupposes administration. The distributee's share is his proportionate part of whatever fund is left after the debts and expenses of administration have been paid. The distributee is not entitled to a share of the specific rights and credits, and goods and chattels which came into the administrator's hands, but only to a share of the fund produced by administering them; that is, by reducing them to money. This conclusion seems to be sustained by *Dole v. Lincoln*, 31 Me. 422, where the court used this language: "The notes claimed in this suit were formerly the property of the intestate, and they must still be regarded as belonging to his estate, unless he made a legal disposition of them during life." The reasoning of the court in *McLean v. Weeks*, 65 Me. 411, also seems to support the right of the administrator in this respect. See *Abbott v. Tenney*, 18 N. H. 109; *Emery v. Clough*, 63 N. H. 552, 4 Atl. 769, 56 Am. Rep. 543.

The defendant further objects that trover will not lie in this case. The declaration in the case counts on the conversion of certain "large sums of money then on deposit" in certain savings banks. It may well be held that trover will not lie for "money deposited" in a savings bank. A depositor is not the owner of any specific money in the bank. He is simply the owner of a right and credit against the bank.

But we will not pursue these technical objections further. The case comes up on report, and we think it is wiser to decide the vital questions at issue between the parties, rather than to send the case off on a question of pleadings.

Upon the merits, the defendant contends that the transactions which we have stated between Mrs. Swift and the defendant are not to be viewed merely as a voluntary gift, but that they are to be supported rather as a contract based upon valuable consideration. The case states that the defendant "verbally agreed to take care of Mrs. Swift as long as she should live, pay her funeral expenses, do some cemetery work on her lot, and provide for the perpetual care of the same," but it does not state that the transfers to the defendant were made in consideration of her agreement to do these things, nor is there sufficient evidence to warrant a finding to that effect. We think the transfers must be treated as a gift.

We are accordingly led to inquire whether a married woman can give away her personal estate, when the obvious effect, and therefore the presumed intent, in part at least, is to deprive her husband of that share in her property which he would otherwise be entitled to after her death, as distributee. It cannot be doubted that under the "married women's statute of this state, a married

woman may own, manage, sell, dispose of, and give away her personal property as freely and absolutely as a married man may do. She may do so without her husband's assent to the same extent a married man may do so without his wife's assent. Rev. St. c. 63, § 1; *Allen v. Hooper*, 50 Me. 375; *Hanson v. Millett*, 55 Me. 189; *Haggett v. Hurley*, 91 Me. 552, 40 Atl. 561, 41 L. R. A. 362. It is obvious that the provision which first appeared in Rev. St. c. 63, § 1, is the general revision of 1903, that "such conveyance without the joinder or assent of the husband shall not bar his right and interest by descent in the estate so conveyed" is to be limited to conveyances of real estate. The phrase "right and interest by descent" was adopted in Pub. Laws 1895, p. 175, c. 157, to express the right which a surviving husband or wife should have in the real estate of a deceased wife or husband, in the place of a dower or curtesy. Rev. St. c. 77. It had no reference to the interest in the personal estate which comes through distribution. The same meaning is evidently intended to be given to the same phrase in Rev. St. c. 63, § 1. Besides, the revision of 1903 was not adopted until several months after the gift was made, and Mrs. Swift had died.

But the plaintiff contends that it is contrary alike to the dictates of justice and to the policy of the law to permit a husband or wife to make a voluntary gift of substantially all of his or her personal property, with the intent and necessary effect of depriving the surviving wife or husband of a distributive share. He claims that this gift was a *donatio causa mortis*, that it is to be likened to a will, and that it cannot be permitted to do what a will would be ineffectual to do. He argues that if Mrs. Swift had given the defendant this property by will, the husband nevertheless might have waived the will and received a distributive share, and he cites upon this point, *Jones v. Brown*, 84 N. H. 439; *Baker v. Smith*, 66 N. H. 422, 23 Atl. 82; *Hatcher v. Buford*, (Ark.) 29 S. W. 641, 27 L. R. A. 507; *Headly v. Kirby*, 18 Pa. 326; *Schouler on Wills*, § 63; 3 *Redfield on Wills*, 324. The doctrine of these authorities is stated in *Baker v. Smith*, *supra*, after citing the New Hampshire statute of wills, as follows: "What she cannot do in this respect by will she cannot do by another form of testamentary disposition [*donatio causa mortis*] which is of the nature of a legacy, and becomes a valid gift only upon the decease of the donor." *Redfield* doubts whether such a gift should stand "where the statute expressly provides that a widow may waive the provisions of the will and come in for her share of the personal estate under the statute by way of distribution."

Unfortunately, however, for this line of argument, in this state, prior to June 1, 1903, when chapter 100, p. 124, of the Laws of 1903

took effect, there was no provision of statute which gave a distributive share of the personal estate to a widower who had waived his wife's will. *Stewart v. Skolfield*, 99 Me. 65, 58 Atl. 58. Widows, but not widowers, were permitted to waive provisions of wills, and claim distributive shares, or to claim such shares, when left unprovided for in wills. The statute of 1903 was not in effect when this gift was made. What would have been the result, if that statute had been in effect, we have no occasion to consider. Prior to that statute, a married woman could, by will, place her entire personal estate beyond the reach of her husband. *Stewart v. Skolfield*, *supra*. Could she do so by a gift?

The cases in which this question has arisen, as might be expected, have usually been those where a widow has sought to have gifts made by her husband declared invalid. And those in which the question has been answered in the negative have generally been decided upon one or more of the four grounds following:

(1) That the gift, being *causa mortis*, was ambulatory and testamentary in character, and that it was against the policy of the law to permit a donor to override the law, and defeat his wife's claim upon his personal estate, by gift, when he could not do it by will. This ground we have already examined, and found it not applicable to this case.

(2) That the gift was colorable; a gift in form, but not in fact. Substantially all authority is to the effect that where the transfer is a mere device or contrivance by which the husband, retaining to himself the use and benefit of the property during his life, and not parting with the absolute dominion over it, seeks at his death to deprive his widow of her distributive share, it is to be regarded as fraudulent as to the wife, and void. *Brown v. Crafts*, 98 Me. 40, 56 Atl. 213; *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211; *Walker v. Walker*, 66 N. H. 390, 31 Atl. 14, 27 L. R. A. 799, 49 Am. St. Rep. 616; *Hayes v. Henry*, 1 Md. Ch. 337; *Dunnoch v. Dunnoch*, 3 Md. Ch. 140; *Tucker v. Tucker*, 29 Mo. 350; *Brown v. Bronson*, 35 Mich. 415; *Smith v. Smith* (Colo.) 46 Pac. 128, 34 L. R. A. 49, 55 Am. St. Rep. 142.

(3) That the husband is under a legal obligation to support and maintain his wife during his life, and therefore that it is his duty to provide for her as long as he lives. *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211. The force of this argument is lost, however, when, as in this case, the donor is the wife, and not the husband.

(4) That the gift was in fraud of the wife's right to a separate maintenance, or to alimony. *Draper v. Draper*, 68 Ill. 17; *Tyler v. Tyler*, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642; *Feigley v. Feigley*, 7 Md. 537, 61 Am. Dec. 375; *Bouslough v. Bouslough*, 68 Pa. 495; *Green v. Adams*, 59 Vt. 602, 10 Atl. 742, 59 Am. Rep. 761. This principle,

however, does not apply until the parties have separated and have assumed extra-marital relations towards each other. In such cases the wife may be regarded as a quasi creditor, and is to be distinguished from a widow seeking a distributive share. *Small v. Small*, 56 Kan. 1, 42 Pac. 323, 30 L. R. A. 243, 54 Am. St. Rep. 581.

Some courts have gone to the extent of declaring that a wife, because she is a wife, has a tangible and valuable interest in her husband's estate, springing from the marriage itself, which the law recognizes and protects (*Nichols v. Nichols*, 61 Vt. 426, 18 Atl. 153), and that a voluntary gift by the husband to a third party may be a fraud upon that interest, and upon her claim to a distributive share (*Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211; *Walker v. Walker*, 66 N. H. 390, 31 Atl. 14, 27 L. R. A. 799, 49 Am. St. Rep. 616; *Manikee's Adm'r v. Beard*, 85 Ky. 20, 2 S. W. 545; *Stone v. Stone*, 18 Mo. 389; *Murray v. Murray*, 90 Ky. 1, 13 S. W. 244, 8 L. R. A. 95).

But the almost overwhelming weight of authority is to the contrary. And we think that by that weight of authority the rule is established that the law places no restriction or limitation on the power of the husband to make such disposition by gift, voluntary conveyance or otherwise, of his personal property during his lifetime, as he may wish, even though his wife is thereby deprived of the distributive share therein, which would otherwise fall to her upon his death. He may by gift dispose of his personal property absolutely, without the concurrence and against the will of his wife, exonerated from all claim by her, provided the transaction is not merely colorable, and is unattended by facts indicative of some other fraud upon her than that arising from his absolute transfer, to prevent her having an interest therein after his death. To hold that a wife has a vested interest in her husband's personal estate that he is unable to divest in his lifetime, would be disastrous to trade and commerce. *Padfield v. Padfield*, 78 Ill. 16; *Hays v. Henry*, 1 Md. Ch. 337. He may even beggar himself and his family when he dies, and then only, do the rights of the wife attach to the personal estate. She then becomes entitled to her distributive share. *Lines v. Lines*, 142 Pa. 149, 21 Atl. 809, and note to same case, 24 Am. St. Rep. 490. It was tersely declared in *Small v. Small*, 56 Kan. 1, 42 Pac. 323, 30 L. R. A. 243, 54 Am. St. Rep. 581, that if the disposition by the husband be bona fide, and no right is reserved to him, though made to defeat the right of the wife, it will be good against her. *Hays v. Henry*, supra; *Cameron v. Cameron*, 10 Smedes & M. (Miss.) 394, 48 Am. Dec. 759. In *Holmes v. Holmes*, 3 Paige, 363, it is said that the owner of personal property as against everybody but creditors, may make such disposition thereof as he pleases, either by will or otherwise. He cannot,

therefore, commit a fraud upon his wife or children by disposing of it, before his death, in any manner he may think proper, by gift inter vivos or causa mortis, or by will. Neither the wife nor the children have any interest in the property, except as far as the husband or father may be liable for their support during his life. It is therefore impossible that he should defraud either by any disposition he may make of his property to take effect after his death. *Stewart v. Stewart*, 5 Conn. 317; *Williams v. Williams* (C. C.) 40 Fed. 521. The power of the husband over his personal property by gift inter vivos is absolute. A man's wife and children have no legal right to any part of his goods, and no fraud can be predicated of any act of his to deprive them of the succession. *Pringle v. Pringle*, 59 Pa. 281; *Dunnoch v. Dunnoch*, 3 Md. Ch. 140; *Tucker v. Tucker*, 29 Mo. 350; *Cranston v. Cranston*, 4 Mich. 230, 66 Am. Dec. 534; *Marshall v. Berry*, 13 Allen, 43. In the last case the court said: "In the absence of any provision of statute inconsistent with the right of the wife to dispose of her personal property in this manner [by gift causa mortis] we must hold that she has the power." "These gifts," say the court, in *Chase v. Redding*, 13 Gray, 418, "if confirmed and held good, do not impair the rights of the widow. Her right is to the property of which the husband died seised or possessed. These gifts have their full effect in the lifetime of the donor, and the property is not in his possession at the time of his decease, and does not come under the administration of the executor." A deed of real estate, reserving the life estate in the grantor, made principally for the purpose of depriving the wife of her statutory share in the grantor's estate, but also given in consideration of care bestowed and to be bestowed upon the grantor as long as he lives, was held valid as against the grantor's widow in *Leonard v. Leonard*, 181 Mass. 458, 63 N. E. 1068, 92 Am. St. Rep. 426. "The intent to defeat a claim which otherwise a wife might have is not enough to defeat the deed." The alienation or gift by a husband is held to be valid, even though his intent and purpose in making it was to deprive her of dower, provided there be no fraudulent participation on the part of the grantee or donee in such intent or purpose. *Rabbitt v. Gaither*, 67 Md. 95, 8 Atl. 744. Mr. Thomson in his work on *Gifts and Advancements* says in section 488: "A husband may make a gift of his personal property, and thereby deprive his wife and children of all interest therein. She and they have no interest in such property until his death, and therefore he may wholly disregard her and them, and make a gift of his property, either inter vivos, or mortis causa." To the same effect are *Richards v. Richards*, 11 Humph. (Tenn.) 429; *Smith v. Hines*, 10 Fla. 258; *Hatcher v. Buford*, 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507; *Lightfoot's Executors*

v. Colgin, 5 Munf. (Va.) 42; Ford v. Ford, 4 Ala. 142; Ellmaker v. Ellmaker, 4 Watts, 89; Poe v. Brownrigg, 55 Tex. 133; Samson v. Samson, 67 Iowa, 253, 25 N. W. 233; and Dickerson's Appeal, 115 Pa. 199, 8 Atl. 64, 2 Am. St. Rep. 547. These rules which have for the most part been applied in cases where gifts by the husband have been in question, must, we think, apply with at least equal force in this state to gifts by a married woman.

Applying these rules to which we agree, to the facts in this case, there is no room left for controversy but that the gift from Mrs. Swift to the defendant must be held valid as against her husband. The plaintiff has presented no other basis for his claim.

Judgment for the defendant.

BRADY v. MESSLER et al.

(Supreme Court of Rhode Island. Nov. 13, 1905.)

1. MONEY HAD AND RECEIVED—EVIDENCE—SUFFICIENCY.

In assumpsit for money had and received under an agreement to invest it, the evidence considered and held not to sustain a judgment against one of the defendants.

2. ACTION—CRIMINAL ACT—CONDITIONS PRECEDENT—PRIOR CRIMINAL PROSECUTION.

Under Gen. Laws 1896, c. 279, § 16, declaring every agent or person to whom any money or property is intrusted for any specific purpose who shall embezzle or fraudulently convert it to his own use guilty of larceny, and chapter 233, § 16, authorizing recovery of damages for injury occasioned by crime after complaint has been made to some proper magistrate for such crime and process issued thereon, no civil action can be maintained against a defendant for the larceny of a check intrusted to him as a messenger, for the specific purpose of transmitting it to a third person, before complaint is made to a magistrate and process issued thereon.

Action by John F. Brady against Matie C. Messler and others. Heard on petition of defendants for a new trial. Granted.

Argued before DOUGLAS, C. J., and DU-BOIS, BLODGETT, and PARKHURST, JJ.

Burbank & Brown, for plaintiff. John W. Hogan and Philip S. Knauer, for defendants.

PARKHURST, J. This is an action of assumpsit for money had and received and on the other common counts, brought by John A. Brady against Matie C. Messler and George Cooper, for the recovery of certain money. The plaintiff testified that he had an agreement with Mrs. Messler to invest some money for him in something in which she was investing and from which she was making considerable money; that she could not tell him what it was, since it was a family matter; that on the 26th day of October, 1899, George Cooper came to his office, and the plaintiff, supposing that Cooper represented Mrs. Messler, gave Cooper a check for \$1,000, payable to Cooper, which sum Cooper was to take to Mrs. Messler for investment by her under said alleged agreement; that

Cooper invested the money in stocks on margin and lost it. Mrs. Messler denied any such agreement, and further denied that she had any connection with this transaction, or any knowledge of this transaction whatsoever until long after the money had been invested and lost, and testified that it was first brought to her attention that Brady made any claim against her through a letter written by the plaintiff to the A. C. Messler Company, of which she was a clerk, in the fall of 1902. Cooper testified that Brady had an agreement with him to invest in a stock which he would not disclose to Brady, and that Brady understood that he was going into a speculation; that it was "out and out gamble," and that he took all chances of loss; that Cooper invested Brady's money on margin, as agreed; that the stock declined, and that he lost the money, losing at the same time considerable money of his own in trying to protect his margins. A verdict was returned for the plaintiff against both defendants for the full amount paid by the plaintiff to Cooper, with interest.

As to the defendant Matie C. Messler, the court, after full examination of the record, fails to find any evidence that she ever received the proceeds of said check, or any part thereof. The plaintiff himself does not know that she received it, but, on the contrary, introduces in evidence the admission of the defendant George Cooper, made at a former trial, that he received the check, cashed it, and used the money in speculation in stocks, and lost it all. The plaintiff seeks to hold Mrs. Messler liable by reason of some ratification or admission claimed to have been made by her at a later date, but the court does not find evidence of any such ratification or admission. The verdict of the jury, so far as it related to Mrs. Messler, had no evidence to support it.

As to the defendant George Cooper, if the plaintiff's testimony is true, to the effect that he had no agreement whatever with Cooper, that Cooper was simply a messenger intrusted with the proceeds of the \$1,000 check for the specific purpose of transmitting the same to Mrs. Messler, and that Cooper lost all the money in stock speculation, then Cooper was guilty of larceny, under Gen. Laws 1896, c. 279, § 16, which reads as follows: "Every officer, agent, clerk or servant or person to whom any money or other property shall be intrusted for any specific purpose, who shall embezzle or fraudulently convert to his own use or shall take or secrete, with intent to embezzle and fraudulently convert to his own use, any money or other property which shall have come into his possession or shall be under his care or charge, by virtue of such employment or for such specific purpose, shall be deemed guilty of larceny, and may be tried, sentenced and punished as for any other larceny." If this be true, then no civil action could have been commenced against defendant Cooper at the date of the

writ in this case (June 11, 1903), because no complaint had been made to any magistrate, and no process issued thereon against Cooper, under the provisions of Gen. Laws 1896, c. 233, § 16, then in force.

"Sec. 16. Whenever any person shall suffer any injury to his person, reputation, or estate, by reason of the commission of any crime or offence, he may recover his damages for such injury, either in an action of trespass, or in an action of the case, against the offender; but no such action, except as provided in the preceding two sections, shall be commenced for such injury until after complaint has been made to some proper magistrate for such crime or offence, and process issued thereon against the offender, excepting only those cases in which such actions may now be maintained at common law; and whenever any person shall be convicted of larceny, he shall be liable to the owner of the money or articles taken, for twice the value thereof, unless the same be restored, and for the value thereof in case of restoration." See *Baker v. Slater Mill & Power Co.*, 14 R. I. 531; *Arnold v. Gaylord*, 16 R. I. 573, 18 Atl. 177; *Struthers v. Peckham*, 22 R. I. 8, 45 Atl. 742.

If, on the other hand, the story told by the defendant Cooper is true, to the effect that he acted as he did upon a full and complete understanding with the plaintiff that the money was to be used in speculation, and that "it was out and out gamble;" that the money was used in buying stock on margin, as agreed; that the stock declined, and the money was all lost—then defendant Cooper was not liable, because he had done just as he agreed. Without attempting to decide whether the plaintiff or the defendant Cooper has told the truth (and it is manifest that either one or the other of them has committed perjury, because their stories are entirely inconsistent, and relate to matters about which they could not make an honest mistake), it is evident that in either event the plaintiff is not entitled to recover in this suit against the defendant Cooper.

As the foregoing is decisive of the whole case, it is not necessary to pass upon the defendants' exceptions or other grounds urged upon their petition for a new trial.

Defendants' petition for new trial is granted, and the case is remitted to the superior court, with direction to enter judgment for defendants for costs.

VERRONE v. RHODE ISLAND SUBURBAN RY. CO.

(Supreme Court of Rhode Island. Nov. 10, 1905.)

1. CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

It is not negligence per se for a passenger on a street car to stand on the running board, and hold the post or handle affixed thereto,

where the car is so filled that there is no room inside.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1379.]

2. SAME—OBLIGATION OF COMPANY.

A street railway company, accepting a passenger obliged to stand on the running board of the car because he cannot be accommodated inside the car, must do all that human vigilance reasonably can to prevent injury to him.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1101.]

3. SAME—NEGLIGENCE—QUESTION FOR JURY.

Where, in an action for the death of a street car passenger occasioned by his being thrown from the car, the evidence showed that decedent was obliged to stand on the running board of the car because of its crowded condition, and that he held onto the post with both hands, and that previous to the accident the car swayed violently, the question of the negligence of the company in operating the car was for the jury.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1318.]

4. SAME—ASSUMPTION OF RISK.

A passenger on a street car, who stands on the running board of the car, assumes only the risk of the ordinary motion of the car.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1379.]

5. EVIDENCE—OPINIONS—COMPETENCY OF WITNESS.

A witness who does not know the ordinary rate of speed of a street car on a particular route is not competent to testify that a car on a particular occasion on that route was run at an extraordinary rate of speed.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2202, 2270.]

Action by Quirino Verrone, administrator, against the Rhode Island Suburban Railway Company. There was a nonsuit, and plaintiff petitions for a new trial. Granted.

Argued before DOUGLAS, C. J., and DU-BOIS, JOHNSON, and PARKHURST, JJ.

James A. Williams, David S. Baker, Thomas F. I. McDonnell, and Lewis A. Waterman, for plaintiff. Henry W. Hayes, Frank T. Easton, Lefferts S. Hoffman, and Alonzo R. Williams, for defendant.

DOUGLAS, C. J. The plaintiff's intestate was a passenger on Labor Day, 1902, upon an open trolley car operated by the defendant. When he got upon the car at Crescent Park, the seats were filled, and passengers were standing between the seats, and he was able only to secure a position upon the running board. According to all the testimony, he grasped the post or the handle affixed to it with both hands as long as he continued on the car. As the car approached the hill north of Barrington station, while it was proceeding along a straight and approximately level track, he fell off, and was found a short time after lying dead in the road. There is no dispute that he was killed by the fall from the car. Several witnesses testified that just previous to the accident the car swayed violently, and was jerked sideways with considerable force. One witness testified, without objection, that the car was going at an

extraordinary rate of speed at the time of the accident. The question was asked of other witnesses how the motion compared with the usual motion of the car, and the defendant's objection to this question was sustained, and the plaintiff duly excepted. At the conclusion of the plaintiff's evidence, a nonsuit was granted. The plaintiff asks for a new trial on the grounds that it was error to exclude the testimony offered and to grant the nonsuit.

1. We think the nonsuit was improperly granted. The plaintiff's intestate occupied this position on the running board because there was no vacant seat in the car, nor standing room between the seats. This was not negligence per se. If the railroad company accepts passengers whom it cannot accommodate inside its car, it must do all that human care and vigilance reasonably can to prevent accident happening to them. *Brunchow v. R. I. Co.*, 26 R. I. 211, 58 Atl. 657. The court below seems to have based its decision upon the opinion in *Elliot v. Newport St. Ry. Co.*, 18 R. I. 707, 28 Atl. 333, 31 Atl. 694, 23 L. R. A. 203, where it is said: "A passenger who rides on the foot-board of a car necessarily takes on himself the duty of looking out for and protecting himself against the usual and obvious perils of riding there, such, for instance, as injury from passing vehicles or by being thrown off by the swaying or jolting of the car; *assuming, of course, proper management of the car and proper construction and condition of the road.*" The court interpreted this language as holding that a person riding upon the running board of an electric car assumed the risk of being thrown off by a jolt, whether of usual or extraordinary violence. But the words we have italicized modify the general statement, and introduce a new issue into the case. No doubt it is reasonable to impose upon a passenger the assumption of such risks as ordinarily attend the position he takes, but he has a right to suppose that the car will be run with due care, and this requires greater precaution when passengers are occupying the running board than when all are safely seated. A shock sufficient to throw from the car a strong man holding on with both his hands might well be taken by the jury as evidence that the car was not properly managed. We think, therefore, that the plaintiff had made out a prima facie case, and should have been allowed to go to the jury.

2. It is evident from what we have said that it was a substantial issue in this case whether the car was proceeding as usual when the accident occurred, or was propelled at an extraordinary rate of speed, which would be likely to cause more violent and dangerous jolting and swaying than common. The passenger, when he took his place on the running board, assumed the risk of ordinary motion, not of extraordinary violence. Testimony, therefore, upon this subject would be

admissible if offered by competent witnesses. The plaintiff in this case failed to qualify the witnesses whom he called on that question by first showing that they had traveled on this route, and knew the ordinary rate of speed at the place in question. For this reason, the exceptions to the exclusion of their testimony must be overruled.

The defendant cites *Moskowitz v. Brooklyn Heights R. Co.* (Sup.) 85 N. Y. Supp. 960. It was held in that case that where plaintiff elected to ride on the step of a crowded street car, and was thrown off by the oscillation or "greyhound motion" of the car as it was running at the usual rate of speed maintained on that portion of its route, and there was no evidence of any unusual or abnormal motion, due to any unusual condition of the car, rails, roadbed, or management, plaintiff assumed the risk of an injury so occasioned. The opinion of the majority of the court proceeds to distinguish other cases, where the accident was caused by unusual or abnormal motion of the car, from the one under consideration; and, while approving the cases reviewed, bases the decision in this case upon the fact that no unusual or abnormal motion was "proved, or attempted to be proved," by the plaintiff. In this respect the case differed from the case at bar.

The petition for a new trial is granted, and the cause will be remanded to the superior court for further proceedings.

DARY v. PROVIDENCE POLICE ASS'N. (Supreme Court of Rhode Island. Nov. 6, 1905.)

1. BENEFICIAL ASSOCIATIONS—SICK BENEFITS —WAIVER.

Plaintiff's intestate, an active member of a police association, on September 8, 1903, rendered a bill for sick benefits to July 31, 1903, which was returned for correction. The claim was withheld until April, 1904, awaiting the determination of a pending case involving the status of a pensioner, when it was returned corrected, with a new claim for benefits from August 1, to October 31, 1903, and was paid. Intestate continued sick, and died on September 26, 1904, and plaintiff, as administrator, sued for benefits from November 1, 1903, to intestate's death. *Held* that, the association having become acquainted with intestate's method of making his bills, and having the opportunity to ascertain his physical condition, the claim for the benefits was not waived by intestate's neglect to present them.

2. SAME—BY-LAWS—PROSPECTIVE OPERATION.

Providence Police Association By-Laws 1904, art. 11, § 2, providing that all applications for benefits by members on the pension list must be made within a week from the commencement of the sickness for which the benefit is claimed, is prospective in its operation, and does not govern claims for benefits for sickness originating prior to its adoption.

3. SAME—INTEREST ON CLAIMS.

A beneficial association is not chargeable with interest on claims for sick benefits prior to the date demand was made therefor.

Action by Frank A. Dary, administrator of the estate of George H. Dary, deceased,

against the Providence Police Association. Heard on agreed statement of the facts. Judgment for plaintiff.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Cooke & Angell, for plaintiff. Willard B. Tanner, for defendant.

DUBOIS, J. This is an action of assumpsit brought by the administrator of the estate of George H. Dary, deceased, against the defendant corporation, of which the decedent was a member up to the time of his death, to recover the sum of \$446 for sick benefits due to the plaintiff's intestate at the rate of \$2 per day from November 1, 1903, to May 5, 1904, and at the rate of 50 cents per day from May 6, 1904, to September 26, 1904. The plea of the defendant is the general issue, accompanied by an affidavit of valid defense, upon the ground that the plaintiff's intestate waived his claim to the sick benefits for which this suit is brought.

The case was submitted to the court upon the following agreed statement of facts: "The plaintiff's intestate was at the time of his death, and for more than two years prior thereto had been, an active member of the Providence Police Association, and was also on the list of the active police force, drawing forty-five per centum of the regular pay of a lieutenant of police, being on the pension list. Under certain conditions, the members of said Providence Police Association are entitled to sick benefits, according to the by-laws of said association, including the by-laws in force prior to May 5, 1904, and those in force subsequently thereto to the time of the death of the plaintiff's intestate, which are hereby made a part of said statement. On the 28th day of June, A. D. 1903, the plaintiff's intestate became sick. September 8, 1903, he rendered a bill to said association for benefits from June 28, 1903. This bill was for a dollar a day, and the association claimed it was incorrect, and asked him to amend it. A case was pending in court to determine the status of one on pension list under rules of association. Said association met monthly for the payment of bills and sick benefits. He rendered a bill from June 28, 1903, for sick benefits to October 31, 1903, less seven days omitted pursuant to the by-laws, which said bill was paid. A copy of said bill, marked 'Exhibit A,' is hereto annexed and made a part hereof. Said bill amounted to balance due him of \$249.50, and was paid by said association, after which time the said plaintiff's intestate rendered no bill to said association for sick benefits, or made any claim for the same during his lifetime. He died on the 26th day of September, A. D. 1904. Said plaintiff's intestate had diabetes from June, 1903, and from the time when he first claimed sick benefits to his death. He had also two cerebral hemorrhages, the last one being the im-

mediate cause of his death. The plaintiff in this case has testimony to prove, and the defendant has no testimony to contradict the same, that the plaintiff was sick enough to entitle him to sick benefits after said 31st day of October, A. D. 1903, and that it was known to Doctor Clifford H. Griffin, his attending physician, who was also the police surgeon of the city of Providence, R. I., during the entire time of said sickness, but it is admitted that these facts were unknown to the said defendant. Said plaintiff's intestate was under the care of Dr. Griffin from June, 1903, until the time of his death on September 26, 1904, as appears from a copy of the certificate of Dr. Griffin, the original whereof is in the possession of the said association, which said copy, marked 'Exhibit B,' is annexed hereto and made a part hereof. The plaintiff in this case has testimony to prove, and the defendant has no testimony to contradict the same, that from June 28, 1903, to October 31, 1903, and from the latter date until about a week before his death, the plaintiff's intestate was not confined to his house, but was during his entire sickness from June, 1903, to the time of his death, prevented on account of his sickness from doing any kind of remunerative work, and was during all that period under the professional care of Dr. Clifford H. Griffin; but it is admitted that the fact of said physician's care since October 31, 1903, was unknown to said association. The fact, if so, that the plaintiff's intestate was sick enough to entitle him to sick benefits after said 31st day of October, 1903, was unknown to the defendant, and the defendant took no steps to ascertain if this was so because of its said ignorance, although it is admitted that the plaintiff has testimony to prove that said plaintiff's intestate was sick enough to entitle him to said benefits from said last-named time until his death, and that the defendant has no evidence to the contrary. He was not mentally or physically unable to have claimed sick benefits during the period after said 31st day of October, A. D. 1903, except for a short time before his death, and his said sickness was not caused by any immoral or improper conduct. By the provisions of section 2 of said article 11, in operation until May 5, 1904, benefits were payable as follows: 'First. To active members of the police force, one dollar per day while receiving full pay from the city, and two dollars per day when full pay ceases.' On May 5, 1904, said section 2 of said article was amended so that benefits were payable as follows: 'First. To active members of the police association, fifty cents per day while receiving pay from the city, whether from the police pension fund or otherwise, and two dollars per day when such pay ceased.' By the last paragraph of 'second clause' of article 11 of said by-laws in operation until amended May 5, 1904, it is provided that all applications for benefits

under said article by honorary members must be made to the secretary in writing within two weeks from the commencement of the sickness or disability for which the benefits are claimed, and no such requirement by active members existed under the by-laws until the amendment thereof, adopted May 5, 1904, when it was provided for the first time by clause 3 of said section 2 of article 11 of said by-laws that all applications for benefits under said article by honorary or superannuated members, or members on the pension list, must be made to the secretary in writing within one week from the commencement of the sickness or disability for which the benefits are claimed. The claim made in this case is for sick benefits from October 31, 1903, to September 26, 1904, inclusive. The Police Manual and the by-laws of the Providence Police Association are introduced as a part of the evidence to be submitted to the court."

Exhibit A.

"Providence, R. I., Apr. 11/04.

"Providence Police Association, to George H. Dary, Dr.

To 9 quarters' dues @ \$2.00 (Jan. 1/02, to Mar. 31/04)...	\$18 00
By am't of legal dues (9 at 50c) 4 50	
	<hr/> \$13 50
To 33 days' sick benefits, June 28/03, to July 31/03 (inclusive), 33 days less 7 days, 26 days, at \$2.00.....	52 00
(Bill for this item rendered and returned for correction.)	
To 92 days' sick benefits, from Aug. 1/03, to Oct. 31/03, at \$2.00, inclusive.....	184 00
	<hr/> \$249 50

Exhibit B—Copy of Dr. Griffin's Certificate.

"November 11, 1904.

"This is to certify that George H. Dary was under my professional care from June, 1903, till the time of his death. He suffered from diabetes mellitus, and from that time till his death had two cerebral hemorrhages; the last one being the immediate cause of death. At no time during that period was he able to do any remunerative work. Respectfully yours, Clifford H. Griffin."

1. Most of the facts have been definitely agreed to by the parties, but as to several it is agreed that the plaintiff has testimony to prove them, and that the defendant has no testimony in contradiction thereof. This amounts to an agreement that the plaintiff can prove them, and is equivalent to an admission of their existence as facts. "Certum est quod certum reddi potest." Under this agreed statement of facts, the plaintiff is entitled to judgment unless his intestate waived his claim for sick benefits. Waiver has been defined to be the intentional relinquishment of a known right, with both knowledge of its existence and an intention to relinquish it. Bouv. Law Dict. The defendant's claim is that there has been both an implied and an express waiver by the plaintiff's intestate, acting by way of estoppel of the plaintiff's

claim: "First. The estoppel claimed is that the neglect of the plaintiff's intestate during his lifetime to make any claim for sick benefits for such a long time was not only evidence of the intention of the plaintiff's intestate not to claim such benefits, but that such neglect tended to the injury of the defendant, by causing it to omit to take the necessary precautions which it would otherwise have taken to investigate the extent of the sickness claimed by said plaintiff's intestate, and was the kind of claim of which the defendant would not ordinarily have any knowledge without notice from the claimant. Second. The fact that several months after the sickness for which the intestate did make a claim he put in his bill, but omitted to make any claim for the continuance of said sickness to the date of the bill, was an additional waiver of the claim beyond the time stated in the bill, and was actually misleading to the defendant as to the continuance of said sickness, and this estopped plaintiff's intestate from making any further claim for the continuation of said sickness; no notice being given to said defendant." Waiver is not, in the proper sense, a species of estoppel, unless the conduct of one party has induced the other to take such a position that he will be injured if the first be permitted to repudiate his acts. 16 Cyc. 805, and note. "The kind of waiver capable of being described as an estoppel should have the marks of an estoppel, by causing the innocent party to forego some right, or otherwise to change his position." Bigelow, Estoppel (5th Ed.) p. 660, note 1. It does not appear that the defendant was induced to take any injurious position by the alleged waivers, and the only right that the defendant claims it was deprived of was the right to investigate the extent of the sickness claimed by the decedent. If the deceased had never made claim for sick benefits, there would be great force in this position, but the facts agreed upon disclose the following state of affairs: September 8, 1903, the plaintiff's intestate rendered a bill to said association for sick benefits from June 28th to July 31st of that year, which bill was not paid, but was returned to him for correction; that no further claim was made until April 11, 1904, which, without explanation, would seem a long time for the sick claimant to wait, but it seems to be accounted for by the statement that a case was pending in court to determine the status of one on the pension list, as the plaintiff's intestate was, under the rules of the association.

The case referred to is evidently that of Nickerson v. Providence Police Association, 26 R. I. 40, 57 Atl. 1057, which was decided March 16, 1904. Within a month after the determination of that case, George H. Dary presented his bill, dated April 11, 1904, which included the former bill corrected and a new claim for 92 days' sick benefits from August 1 to October 31, 1903, and this bill was paid

by the defendant. If the doctrine of estoppel by waiver claimed by the defendant is sound, then by the first bill rendered September 8th for sickness from June 28th to July 31st, the claimant waived his claim for any sickness suffered by him in the 39 days which had elapsed between July 31st and September 8th, and when he rendered his later bill, which covered the time so waived, the defendant should have declined to pay the same upon that ground, which it did not do, but paid him the amount of the original bill, doubled by the decision of the court, and for 92 days more of continuous sickness in addition thereto. The defendant thus became acquainted with the claimant's method of making his bills, and also had the opportunity, which it is fair to presume it exercised, to make the proper and necessary examination of the decedent to ascertain his physical condition. If it did make such examination, it ascertained that he was suffering from diabetes mellitus, which is generally fatal; and, if it did not, then it did not take advantage of its opportunities, and cannot now be heard to complain. If the defendant made the investigation that it should have made when its attention was called to the matter by the bill introduced after the termination of the lawsuit, which defined the rights of pensioners to be much greater than the defendant had anticipated, then it discovered that the claimant was suffering from a progressive and fatal illness of a kind and character that would entitle him to sick benefits for the remainder of his life, under the by-laws of the association. In such circumstances, it was unnecessary for him to notify the defendant from time to time of the continued existence of his incurable disease, except for the purpose of laying a foundation for claims for interest. The defendant, however, maintains that article 11, § 2, cl. 3, of the by-laws, adopted May 5, 1904, *supra*, governs all claims for sick benefits which have accrued thereafter, irrespective of the time of the origin of the sickness upon which they depend, and insists that the fact that the illness of the plaintiff's intestate after that date was in continuation of a sickness which began before the adoption of the by-law did not exempt him from the obligation to give the notice therein required. We cannot assent to this proposition. There is nothing in the terms of the by-law indicative of an intention to make it retrospective in its operation. It clearly relates only to sickness or disability commencing thereafter. Even if the defendant association had the power to adopt by-laws which might operate retrospectively (a point not involved in the determination of this case), it did not attempt to exercise it in the by-law in question. There is no evidence that the decedent intended to relinquish his right to the sick benefits for which this suit was brought, and we do not think that an irresistible inference to that

effect arises from the manner in which he made out his bills. The burden of proving waiver rests upon the defendant, and in our opinion has not been maintained. The plaintiff claims that he is entitled to interest upon the amount of sick benefits due each month, from time to time, when the defendant met for the payment of bills and sick benefits.

2. Interest is allowable, though not stipulated for, as an invariable legal incident of the principal debt from the day of default, whenever the debtor knows precisely what he is to pay and when he is to pay it. *Spencer v. Pierce*, 5 R. I. 71; *Durfee v. O'Brien*, 16 R. I. 213, 14 Atl. 857. But a beneficial association ought not to be treated as a delinquent debtor before demand made upon it, followed by its refusal or neglect. While demand was unnecessary in the circumstances of the case for the purpose of keeping the claim alive, it was necessary for the purpose of creating the relation of debtor and creditor. There being no proof of demand earlier than the date of the writ, interest will be computed from that date.

Case remitted to the superior court, with direction to enter judgment for the plaintiff for \$446 and interest, as aforesaid, and costs.

LE MOYNE et al. v. WASHINGTON COUNTY et al.

(Supreme Court of Pennsylvania. Nov. 4, 1905.)

1. HIGHWAYS—CONSTRUCTION—APPROVAL BY COURT—COLLATERAL ATTACK.

An order of the court of quarter sessions, based on the finding of the grand jury approving the construction of a county road under Act July 26, 1895 (P. L. 336), can be attacked only on the ground of intentional fraud, practiced on the grand jury and the court by the county commissioners, or by some one in their behalf, and cannot be collaterally attacked on the ground that the estimate of the cost and expenses of the proposed improvement was grossly inadequate, or by a mistake made by witnesses examined before the grand jury in testifying to probable cost of the improvement.

2. SAME—CONFORMITY WITH PLANS.

Under Act June 26, 1895 (P. L. 336), providing for the construction of county roads and the approval of such construction by the court of quarter sessions, it is the duty of the county commissioners to construct the road in accordance with the survey and plans filed in court, but it is not necessary that such plans give the details of the proposed improvement.

3. SAME—DISCRETION OF COMMISSIONERS.

The county commissioners are vested with a discretion in determining whether to accept bids for a fixed sum to complete the road or for a schedule of prices for piecework.

4. SAME—COST OF ROAD—DISCRETION OF COMMISSIONERS.

Act June 26, 1895 (P. L. 336), providing for the construction of county roads, limits the levy that can be made in any one year, and the amount of bonds that may be issued for the construction of the road, but leaves to the discretion of the county commissioners the character of the road to be built and the cost per mile for building it, provided such commissioners act

in good faith and do not pay excessive or unreasonable prices for the work done.

5. COUNTIES—MEETINGS OF COMMISSIONERS—FORMAL REQUISITES—VALIDITY OF CONTRACTS.

While county commissioners should keep written minutes of the meetings at which they award road contracts, and such minutes should show when the matter was considered and how each commissioner voted, yet a bid or proposal for the construction of a road may be accepted by a full board after discussion and deliberation, although the agreement to accept it is not arrived at through parliamentary forms; and it is not essential to the legality of the acceptance of the bid that a motion should be formally made and seconded and voted upon.

Appeal from Court of Common Pleas, Washington County.

Bill for injunction by Julius Le Moyne and another against Washington County and others. From a decree in favor of defendants, plaintiffs appeal. Affirmed.

From the record it appeared that on July 17, 1903, the court of quarter sessions made an order approving the construction of a road as a county road, under the act of June 26, 1895 (P. L. 336), from Claysville to Burnsville, a distance of about three miles. This order was based upon the action of the grand jury in approving the construction of the road. The contract for the construction was awarded by the commissioners to Zelt & Bros. After the road was completed the complainants filed a bill in equity, in which they prayed as follows: (1) For an injunction from further carrying out said contract, or any part thereof; (2) that the county commissioners and county treasurer be restrained from issuing or paying any orders on said contract; (3, 4) that the contract be declared illegal and void; (5) that the commissioners be required to answer and to produce on hearing all bids received and the contract executed; (6) for other appropriate relief.

The court found, inter alia, as follows:

"(1) The written estimate of the engineer, John McAdam, of the cost and expenses of the contemplated improvement of this three-mile section of the road laid before the grand jury was \$2,739.86 per mile, or \$8,219.58 for the three miles of road. The actual cost under the Zelt contract is about \$12,600 per mile, or \$37,911.66 for the 3 miles and 60 feet. McAdam's estimate was evidently erroneous, not apparently so on its face, but on account of mismeasurements or mistake in calculation made by the person making the written estimate.

"(12) On June 11, 1904, the county commissioners and N. C. Hunter, a contractor, who was a successful bidder for one of the other seven sections of road, the improvement of which the grand jury approved, agreed on a case stated for the opinion of the court to determine whether his contract (and incidentally all the others that had been entered into by the commissioners under like circumstances) was illegal for the reason

that the improvement would cost greatly in excess of the estimate submitted to the grand jury. In an opinion and decree of this court on its law side, filed on June 22, 1904, to No. 61, August term, 1904, it was adjudged that the cost of roads constructed under the act of 1895 might legally exceed the estimate submitted to the grand jury, if no fraud was practiced upon the grand jury and the engineer was honestly mistaken in his estimate. Of this opinion and decree the plaintiffs had constructive notice, and no money was paid Zelt & Bros. until after the decree was filed.

"(13) The evidence in this case is not sufficient to show, and it does not show, that the county commissioners, J. F. McClay, S. F. Scott, and J. B. Gibson, either jointly or individually or in collusion with any other person, were guilty of any corrupt practices or actual fraud, or of consciously doing any wrong, either in the letting of the contract for the improvement of the road in question or in the carrying out and performance of that contract.

"(14) The evidence in this case does not show, and none was offered to show, that the sum of \$37,911.66 is an excessive and unreasonable price for the construction of the 3 miles and 60 feet of road constructed as the defendants, Zelt & Bros., were required to construct it, nor does it show that \$4.40 per cubic yard for putting down six inches broken stone foundation and three inches of ballast in place, when the stone had to be quarried in and near Washington, and transported the long distance to reach the place where they were used, was an excessive and unreasonable price therefor.

"Summary of Adjudication.

"For the convenience of those interested we give a summary of our decision. We hold:

"(1) That the decree of July 17, 1903, of the court of quarter sessions made the section of road in question 'a county road.'

"(2) That all proceedings which led up to that decree were regular in form.

"(3) That neither the validity of the finding of the grand jury on which the decree is founded, nor the decree itself, could be questioned in this proceeding, except on the ground that intentional fraud was practiced upon the grand jury and court by the county commissioners, who are defendants in this case, or by some one in their behalf, and there is no such allegation in the plaintiffs' bill.

"(4) The decree based on the finding of the grand jury, like a judgment based on the verdict of a petit jury, cannot at this late day be collaterally attacked on the ground that the estimate of the cost and expenses of the proposed improvement of this section of road was grossly inaccurate, or that some witness examined before the grand jury was mistaken in what he said or sub-

mitted to them as to the probable cost of said road improvement.

"(5) The section of road in question being decreed 'a county road,' the county commissioners had power, and it was their duty, to improve it, as indicated on the survey and plans filed in court and submitted to the grand jury, and it was not legally necessary that the plans give the details of the proposed improvement.

"(6) It was a matter in the discretion of the county commissioners whether bids be taken for a fixed sum, to complete the improvement or for a schedule of prices for the work to be done by the piece.

"(7) It was a matter in their discretion to determine to what bidder they would award the contract, and if they, after inquiry, believed that the lowest bidder was not responsible, they could reject him.

"(8) There is no evidence in this case that the county commissioners corruptly or fraudulently rejected the lowest bidder or abused the discretion vested in them.

"(9) County commissioners ought to keep written minutes of their meetings at which they award contracts to improve county roads, which would show when the matter was considered and how each commissioner voted, and they are censurable for not doing so; but a bid or a proposal can be legally accepted by a full board after discussion and deliberation by an agreement not arrived at through parliamentary forms. A motion formally made and seconded and voted upon is not necessary to the legality of the agreement of all the members of the board that the bid of a particular bidder shall be accepted.

"(10) That the bid of Zelt & Bros. was legally accepted by the full board after discussion and deliberation, and the written contract executed in pursuance thereof by affixing the seal of the county and the signatures of a majority of the commissioners thereto, is binding on the county.

"(11) The evidence shows that the commissioners went about the improvement of the roads that were decreed 'county roads,' not having in view any limit upon the cost of the improvement, but on the theory that the improvement must be made at whatever expense to the county they would cost at prevailing prices for work and material; but it does not show that they were guilty of any corruption or actual fraud in the matter, or had any intention of illegally spending the county's money.

"(12) The act of 1895, commonly known as the 'Finn Law,' puts a limit on the levy that can be made in any one year, and on the amount of bonds that may be issued, but it does not indicate the character of road that shall be built, or limit the cost per mile for building it. That is left largely to the discretion of the county commissioners, subject, of course, to the limitation that is upon all

public officers who are quasi trustees, that they act in good faith and do not pay excessive and unreasonable prices for the kind of work they have done. This makes it possible to have 'high-priced road' commissioners and 'low-priced road' commissioners; and whether \$3,000 per mile or \$13,000 per mile roads shall be built is not a question of law, to be settled by a court of equity in an injunction proceeding, but a political question or a question of public policy, to be settled by the taxpaying voters at the polls, when they elect county commissioners.

"(13) The evidence shows that Zelt & Bros. had completed the work under their contract before this bill was filed, and there is no evidence that they had any knowledge of any irregularity of action or misconduct on the part of the county commissioners, or that the prices they charged in the aggregate for the work they did is excessive and unreasonable; and the plaintiffs' remedy is, not to enjoin the payment of their claim by the county, but to pursue the county commissioners on the law side of the court, if they have done any wrong in the premises that makes them liable for mispending the county's money.

"(14) The plaintiffs delayed filing their bill until after the rights of innocent parties had intervened, and by their laches have lost their right to the remedy of injunction, if they ever had it."

The court dismissed the bill.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Boyd Crumrine, James P. Eagleson, E. E. Crumrine, and N. R. Criss, for appellants. T. F. Birch, for appellees McClay and Scott. Norman E. Clark, W. S. Parker, and Winfield McIlvaine, for appellees Zelt & Bros.

PER CURIAM. The decree is affirmed, on the summary of adjudication by the learned court below.

KREAMER v. VONEIDA et al.

(Supreme Court of Pennsylvania. Oct. 30, 1905.)

1. TAXATION—EJECTMENT—PROOF OF POSSESSION—NECESSITY.

Act March 29, 1824 (P. L. 168), provides that any person wishing to bring ejectment for unseated land which has been sold for taxes may serve the writ on the purchaser, and if the purchaser cannot be found in the proper county then the court may grant a rule on defendant to appear and plead, which rule shall be published, etc., and if no person appears the court may give judgment by default, but if the purchaser appears the cause shall be tried as though there was an actual occupation of the land. Held that, where plaintiff does not comply with the statute and defendant is not served with process or given notice to appear, but enters a voluntary appearance, the statute is without application, and plaintiff is entitled to judgment only on proof of title in himself and of possession of the lands by defendant.

2. EJECTMENT — RETURN OF PROCESS — PRESUMPTIONS.

A sheriff's return to a writ of ejectment which showed that the land was unoccupied, and that defendant did not reside in the county and had no agent therein, and that notice of suit was given defendant in another county, and a record showing appearance for defendant, but failing to show publication of a rule on defendant to appear and plead, in accordance with Act April 14, 1851 (P. L. 612), and Act April 13, 1858 (P. L. 256), raised no presumption that defendant was in possession of the land described in the writ.

3. ABANDONMENT—EFFECT.

A perfect title passing by the commonwealth's patent is not affected by the doctrine of abandonment, unless, in consequence of such abandonment, adverse possession is taken by another and held for the limitation period.

Appeal from Superior Court.

Action by J. L. Kreamer against William Voneida and others. From a judgment of the Superior Court, reversing a judgment for plaintiff, plaintiff appeals. Affirmed.

Argued before DEAN, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

A. O. Furst and J. C. Meyer, for appellant. John Blanchard, Edmund Blanchard, and Andrew A. Lelser, for appellees.

BROWN, J. The plaintiff below claimed title to the land in controversy—108 acres and 158 perches situated in Haines township, Center county—under a patent from the commonwealth to Henry Hess, issued December 12, 1821. On August 12, 1796, a patent was issued to Aaron Levy on a warrant granted to Joseph Henry July 24, 1792, for 400 acres and 52 perches, and it was admitted on the trial that the land called for in the Hess patent was embraced within the lines of the Levy patent. One of the defenses set up was this outstanding title granted by the commonwealth more than 25 years before the patent was issued to Hess. With nothing more, this was, as was properly held by the superior court, a complete defense, for the plaintiff could recover only on the strength of his own title. *Kreamer v. Voneida*, 24 Pa. Super. Ct. 347. Another defense was that the plaintiff had not proved possession of the land by Voneida, the real defendant. The writ had not been served on him; the return of the sheriff being as follows: "As to William Voneida, he not being found in the county of Center, and that the lands described in the within writ are located in said county of Center and are unoccupied, and that the said William Voneida does not reside in the county in which said lands are located and has no known agent or person having the charge or superintendency of said lands resident within the county of Center, and notice of said suit was given personally to William Voneida at Laurelton, Union county, Pa., as directed by the act of April 13, 1858, and a copy was given him of within writ." These two defenses, resting on undisputed facts, were made the subject of two points asking that a verdict be directed for

the defendants. The points were reserved and a verdict directed for the plaintiff. Subsequently judgment was entered on the verdict. The question of the plaintiff's right to recover, in the absence of any proof of the possession of the land by Voneida, was not considered by the court in the opinion directing judgment to be entered on the verdict, and, as to the other defenses, the trial judge was of opinion that the Levy title was derelict and abandoned, and that the defendants could not therefore set it up against the Hess title. On appeal to the superior court the judgment below was reversed and a new trial awarded. From this judgment the appeal of the plaintiff below is before us.

From the sheriff's return it affirmatively appears that Voneida was not an occupant of the land, and was not in the county at the time the writ was served. It was served on him in Union county, the return being that it had been served as directed by the act of April 13, 1858 (P. L. 256); but, as the directions of the act of April 14, 1851 (P. L. 612), to which the act of 1858 is but a supplement, had not been complied with, the service was ineffectual to bring the defendant within the jurisdiction of the court. This seems to be admitted by the appellant. On this appeal, however, the position is taken, and apparently for the first time, that as the defendant voluntarily appeared the plaintiff was not required to prove that he was in possession of the land, and the fourth section of the act of March 29, 1824 (P. L. 168) is cited in support of this. That section provides: "That any person wishing to bring an ejectment for land on which no person resides and which lands have been sold for taxes, may bring his action and serve the writ on the person who purchased the said lands; and if such person cannot be found in the proper county, then the court, after the return day of the writ, may, on motion of the plaintiff or his attorney, grant a rule on the defendant, describing the premises, to appear and plead, which rule shall be published for sixty days successively, before the return day thereof, in a weekly or daily newspaper of the proper county; and if no person appears, then the court, on proof of the publication, shall, on motion in open court, at the stated term, give judgment by default; but when the purchaser appears, or some person claiming under him, the court shall cause the person or his legal representative so claiming under the purchaser to be made defendant, and the cause shall be proceeded in and tried on respective titles of the parties as fully as if there was an actual occupation of the land." As the directions of the act of 1824 had not been complied with by the plaintiff, he is not in a position to ask for its application. The case as presented is one of a voluntary appearance by a defendant in an action of ejectment, without service of the writ upon him or notice given as directed by any statute to appear and plead to the action. The appear-

ance having been voluntary, he waived service of the writ, and would be bound by a judgment against him, to which, however, the plaintiff would be entitled only by proof of title in himself and possession by the defendant of the lands in controversy. The act of 1807 relieves the plaintiff from the burden of proving possession by the defendant, if there was a return of service by the sheriff; but, when there is no service and the defendant voluntarily appears, possession by him must be established by the plaintiff as a condition of his right to recover. *McIntire v. Wing et al.*, 113 Pa. 67, 4 Atl. 197. That case is conclusive that the plaintiff ought not to have been allowed to recover. There, as here, there was no service by the sheriff, but the defendants voluntarily appeared, and, in affirming the judgment of nonsuit entered because the plaintiff failed to show that the defendants were in possession of the land, we said: "There is no error in the refusal of the court to take off the compulsory nonsuit. The evidence wholly failed to show that the defendants were in possession of the land in question. They were not served with the writ by the sheriff. The presumption of possession created by the statute, when the sheriff makes return under oath that he has duly served the writ on the defendants, does not exist. While an appearance and plea by counsel may lead to a verdict and judgment against the defendants, yet on the trial it is necessary to prove that they were in possession of the premises. Failing in this, the nonsuit was properly entered. This view makes it unnecessary to consider the other questions."

The trial judge was of opinion that the Levy title could not prevail against the Hess patent, because the failure of Levy, or of any one under him, to assert his title for over 100 years, was such "dereliction" as would now estop any one claiming under him to set up the title as a valid and subsisting one. On this appeal the learned counsel for appellant zealously urges that the Levy title "has become derelict and is non-subsisting," and *Riland v. Eckert*, 23 Pa. 215, is cited and pressed upon our attention as conclusive of the contention that it cannot prevail against the Hess title. In that case the land belonging to the estate of Judge James Wilson, deceased, had been sold on a judgment obtained against his administrators, without notice to his heirs, and in an ejectment brought against the persons in possession they undertook to defend on the outstanding title, which they alleged was still in the heirs, as the sale by the sheriff had been on a judgment against the administrators alone, which did not divest their title. All that was decided in that case was that the defendants had no right to take the place of the heirs and avail themselves of an irregularity which the heirs might have chosen to waive. The plaintiffs, who purchased the land at the sheriff's sale, took a

title which was not void as to any except the heirs and the devisees of the deceased, and, if they did not question the sale, strangers could not. As to the heirs, who alone could have raised the question of the regularity of the sale, the title may have become abandoned or derelict, but as to them Woodward, J., says: "When a party shall present himself claiming under the heirs of Judge Wilson, it will be soon enough to consider the effect of the long delay and inaction which have attended their title, and to decide whether they are concluded or not, but until that happens the inquiry will be impertinent and superfluous." A different situation is presented here, and what is said in *Riland v. Eckert* has no application. A prior valid outstanding title from the commonwealth to another confronts the plaintiff, which has not been divested by any act of the original grantee, nor by any proceeding against him, his personal representatives, or any one claiming under him. Such a perfect title passing by the commonwealth's patent is in no danger from the doctrine of abandonment, unless, in consequence of abandonment, adverse possession is taken by another and held for the period of the statute of limitations. This abundantly appears in *Hoffman v. Bell*, 61 Pa. 444, *Bear Valley Coal Co. v. Dewart*, 95 Pa. 72, *Putnam v. Tyler*, 117 Pa. 570, 12 Atl. 43, and the other cases cited in the opinion of the superior court.

The evidence of adverse possession by the plaintiff was insufficient to establish title under the statute, and the superior court so held; but, instead of remitting the record with direction that judgment be entered for the defendant non obstante veredicto, a new trial has been ordered. As there is no appeal by the defendants from this order, we cannot interfere with it, though urged by them to do so, and the judgment of the superior court is therefore affirmed. On another trial the plaintiff may be able to present such a case as will entitle him to recover.

Judgment affirmed.

STRICKER et al. v. McDONNELL.
(Supreme Court of Pennsylvania. Oct. 30, 1905.)

1. MORTGAGES—SATISFACTION—DISCHARGE OF DEBT.

A mortgage is a separate obligation for the debt which it secures, and is only collateral security for the same; and suit, judgment, and satisfaction on it is not a discharge of the obligation of the mortgage bond, unless the debt is satisfied.

2. SAME—SATISFACTION OF DEBT.

Defendant gave a mortgage to secure a part of the price for land, which, after reciting the bond, provided that for the better securing the payment thereof, "and in discharge of the obligation above recited," have granted, etc. Held, that a sale under the mortgage was not a satisfaction of the bond.

Appeal from Court of Common Pleas, Cambria County.

Action by Clara V. Stricker and Oscar J. Stricker, executors of Julius Stricker, against J. J. McDonnell. From a judgment making absolute a rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Affirmed.

In October, 1892, J. J. McDonnell gave a bond and mortgage to secure payment of balance of purchase money due Dr. Julius Stricker. McDonnell defaulted in payment of amount covered by the bond and mortgage, a sci. fa. was issued upon the mortgage, a judgment entered thereon, execution issued, and the property sold for \$25. Subsequently judgment was confessed upon the bond. The plaintiff having died, his executors were substituted, and caused a sci. fa. to issue for the purpose of reviving and continuing the lien of said judgment. To this action an affidavit of defense was filed, in which it was alleged that the bond was canceled and the debt discharged by the sale had through proceedings upon the mortgage. The terms of the mortgage are stated in the opinion of the Supreme Court. The court made absolute rule for judgment for want of a sufficient affidavit of defense.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas J. Itell, for appellant. Frederick A. Sobernheimer, for appellees.

PER CURIAM. A bond and mortgage are separate obligations, though for the payment of the same debt. The mortgage, though in fact usually the more important item in the transaction, is in form and legal effect only collateral security for the bond; and suit, judgment, and satisfaction upon it is not a discharge of the obligation of the bond, unless the debt itself is satisfied. *Ayres v. Watson*, 57 Pa. 360.

The mortgage in the present case, which was for part of the purchase money of the same land conveyed by plaintiff's testator to defendant, after reciting the bond continued: "Now this indenture witnesseth that the said party of the first part, as well for and in consideration of the premises as of the aforesaid debt, * * * and for the better securing the payment thereof unto the said party of the second part, executors, administrators, and assigns in discharge of the said obligation above recited, * * * hath granted," etc. The appellant claims that the effect of the words "in discharge of the said obligation above recited"—i. e., the bond—is that a sale under the mortgage is a satisfaction of the bond. But there is nothing in the language to sustain such a departure from the presumed purpose in giving the double obligation, nor is any such intention of the parties set forth in the affidavit of defense, which rests the satisfaction on the claim as a conclusion of law that the sale under the mortgage "operates as a legal and just ex-

tinguishment and payment of the said indebtedness." But this is not the legal and usual operation of such a sale, nor, as already said, is the language such as to imply an intention of the parties to that effect. On the contrary, the words as already quoted are "in consideration of the premises [the recital of the debt and the bond] as of the aforesaid debt * * * and for the better securing the payment thereof." It is the payment of the debt which is to discharge the other obligation, to wit, the bond, to which the mortgage is legally only a collateral security. Though the wording is a little different, the purpose is the same that is expressed in the more common form.

Judgment affirmed.

McCULLOUGH v. FORD NATURAL GAS CO.

(Supreme Court of Pennsylvania. Oct. 30, 1905.)

1. CORPORATIONS — REPRESENTATION BY AGENTS — AUTHORITY OF AGENT — DISPOSITION OF ASSETS.

Where plaintiff company placed its supervising manager in charge of its gas well, he could not turn over to himself, as president of a competing company, without right or authority, the property confided to his care by plaintiff, without notice, and then claim that the company of which he was president held an adverse title.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1863.]

2. ACTION—CONTRACT OR TORT.

Where the manager of a natural gas company wrongfully turned into the line of a competing gas company, of which he was president, natural gas, the company of which he was manager could maintain assumpsit against the latter company for the gas.

Appeal from Court of Common Pleas, Armstrong County.

Action by R. A. McCullough, receiver of the Manufacturers' Natural Gas Company, against the Ford Natural Gas Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the opinion of Thomas, P. J., in the court below on the rule for a new trial:

"While a number of reasons, mostly with reference to the answers of points, are assigned for the granting of a new trial, but two were urged therefor upon argument. It was urged there, as upon the trial, that the plaintiff must first establish his title to the well from which the gas was produced by an action in ejectment before bringing this action for compensation for the gas taken; and, secondly, that the plaintiff had mistaken his form of action, as assumpsit would not lie. There is no doubt but that, if defendant were in adverse possession under a claim of title, that question must first be determined by an action of ejectment before an action for the gas taken would lie, and

such is the trend of all of the authorities cited by defendant upon this subject. The trouble with this case is that the facts do not meet the very necessary element of being in adverse possession.

"The fact is that the plaintiff company placed its supervising manager in charge of the property, and it never had any notice of any adverse claim of title until this suit was brought. The said manager happened to be the president of the defendant company, if, indeed, he was not the company itself. Now, the said manager could not turn over to himself, as president, without right or authority, the property of plaintiff without any notice, and then claim that the company of which he is president holds or claims to have an adverse title. John Wick, Jr., was the manager of the company that owned this well. If he, as president of the defendant company, undertook to acquire title or possession, or both, of the well, and did so without any authority of law, he got for the defendant no title, and the defendant company had ample notice thereof and was bound thereby. The defendant took no title and was bound to know that fact, and cannot set up such claim of title for the purpose of putting plaintiff to his possessory action. No such title is so acquired as to require an action of ejectment to try it. As well might a gas company enter a stranger's property and take gas therefrom, having first taken a lease from one of its own officers who assumed to act as attorney in fact for the real owner, but had no such authority conferred upon him, and then, when sued for the value of the gas taken, attempt to raise the question of adverse title. The knowledge of John Wick, Jr., was the knowledge of the defendant company, and, this being true, they were bound to know, as the testimony shows, that it had no claim of title which it could possibly interpose to prevent recovery and require a determination of by a possessory action. From their own showing as to claim of title there is nothing to be tried by ejectment.

"As to the second question raised, it will be readily admitted that assumpsit will not lie to try title to the product of real estate where defendant is in possession under a claim of title. That was not the question involved, and we trust defendants would more readily appreciate their position if they once came to see that they were not in adverse possession, but what actual possession they had was by the act or permission of plaintiff's manager and for the purpose of conveying the gas from the said well to its own line. It is true that the same man was defendant's president, and that seems to have been confusing enough to lead defendants to believe that the action taken by that individual was the action of the defendant company, without regard to the relation he bore to the plaintiff's company. John Wick, Jr., was plaintiff's manager, and

when he, as such and without any notice to the plaintiff that he was acting in any other capacity, turned the gas into the defendant's line, his conduct was not other as relates to the defendant, of which he was president, than if he had been an entire stranger to defendant, and only acting in the capacity of an officer of plaintiff. Indeed, the defendant is in a worse position, if possible, for it was bound by all the knowledge of the rights of plaintiff within the knowledge of its president, which knowledge was undoubtedly more extensive than defendant would ordinarily have been able to acquire with reference to a company whose members were all strangers.

"We really have the fact of plaintiff's manager turning its gas over to defendant, who receives and consumes the same, and in such case is liable to answer for the value thereof in assumpsit as on an implied or constructive contract. But, had defendant taken and consumed the gas without permission of plaintiff's officer, the plaintiff might waive the tort and sue in assumpsit. We find here the relation existing to be that of the plaintiff owning the well of the defendant using the gas, and in possession to no other extent than was necessary for the purpose of taking and using the gas. This is a state of facts from which the jury should imply a promise to pay. In the case of *Hertzog v. Hertzog*, 29 Pa. 463, the court says, after defining constructive, implied, and express contracts: 'The law ordinarily presumes or implies a contract whenever this is necessary to account for other relations found to have existed between the parties. * * * Every induction, inference, implication, or presumption in reasoning of any kind, is a logical conclusion derived from, and demanded by, certain data or ascertained circumstances. If such circumstances demand the conclusion of a contract to account for them, a contract is proved; if not, not.'

"The facts in this case were ample to support a contract by presumption or implication, without the proof of an express contract. The very transaction of defendant with plaintiff's manager in acquiring the gas was itself a promise, and would support an action of assumpsit. As was said in the case of *Adams v. Columbian Steamboat Company*, 3 Whart. 75: 'The transaction includes the promise to pay, if the article is obtained. I do not say it is inferred. Though nothing is said, the transaction is itself a promise, as distinctly understood as if uttered; but if it was an inference, still it was for the jury and not for the court.' Had the act of defendant been one purely of trover and conversion, it being shown that plaintiff converted the gas, plaintiff might have waived the tort and sued in assumpsit, the same as where there is a contract express or implied. 2 Ency. Pl. & Pr. p. 1022; *Boyer v. Bullard et al.*, 102 Pa. 555; *Bethlehem Bor-*

ough v. Perseverance Fire Company, 81 Pa. 445; Pryor v. Morgan, 170 Pa. 568, 33 Atl. 98.

"We are persuaded that both of these questions must be decided against the contention of defendant, and, as no other was raised upon argument, the rule is discharged and a new trial is refused."

Judgment was entered on the verdict. Plaintiff appealed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

M. F. Leason and C. E. Harrington, for appellant. H. A. Heilman and R. A. McCullough, for appellee.

PER CURIAM. This judgment is affirmed, on the opinion of the court below refusing a new trial.

SONTGEN v. KITTANNING & F. C. ST. RY. CO.

(Supreme Court of Pennsylvania. Oct. 30, 1905.)

STREET RAILROADS — INJURY TO CHILD ON TRACK.

Where a child five years old was playing behind a pile of earth about five feet from a street railway track, and suddenly ran out on the track when the car was not more than four feet away, a nonsuit in an action against the railway company was properly granted.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 202.]

Appeal from Court of Common Pleas, Armstrong County.

Action by Paul Henry Sontgen against the Kittanning & Ford City Street Railway Company. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

R. A. McCullough, H. A. Heilman, and J. D. Daugherty, for appellant. Ross Reynolds, James H. McCain, and W. J. Christy, for appellee.

PER CURIAM. The evidence failed to show any negligence on the part of the defendant. The only witness called who saw the accident testified that the child was playing behind a pile of earth about five or six feet from the track, and suddenly ran out on the track when the car was not more than four feet away. The case belongs to the class of *Chilton v. Central Traction Co.*, 152 Pa. 425, 25 Atl. 606; *Funk v. Electric Traction Co.*, 175 Pa. 559, 34 Atl. 861; *Kline v. Electric Traction Co.*, 181 Pa. 276, 37 Atl. 522; *Callary v. Easton Transit Co.*, 185 Pa. 176, 39 Atl. 813; and *Miller v. Union Traction Co.*, 198 Pa. 639, 48 Atl. 864. As this is decisive of the whole case, the other questions do not require notice.

Judgment affirmed.

BIDDISON et al. v. AARON.

(Court of Appeals of Maryland. Nov. 16, 1905.)

1. WATERS AND WATER COURSES — SURFACE WATERS—DRAINAGE—EASEMENTS.

A purchaser of a lot acquires no easement of drainage over other lands of his grantor used by the grantor to drain the lot conveyed, where such use of the premises by the grantor was neither visible and apparent, nor necessary to the enjoyment of the lot conveyed, which could be drained within its own lines.

2. EXECUTORS AND ADMINISTRATORS — SALES OF LAND—VACATION—GROUNDS.

An administrator's sale of a lot and building situated thereon will be set aside at the instance of the purchaser, where it did not include a tract of land and one-story building situated to the rear of the premises conveyed, which were used as a part of such premises, and which the purchaser, who had known the property for years, and had known that the one-story building was used as a part of the building conveyed, had reason to believe was included in the sale, and which was essential to the reasonable enjoyment of the premises for the purpose contemplated by the purchaser.

3. SAME.

The fact that the purchaser did not ask for information as to the one-story building was immaterial, where the administrators would have been unable to give such information.

Appeal from Orphans' Court, Baltimore County; Melchor Hoshall and Wm. Byerly, Judges.

Exceptions by George Aaron, purchaser, to the ratification of a sale made to him by John S. Biddison and another, as administrators of Frederick W. Koenig, deceased. From an order setting aside the sale, the administrators appeal. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

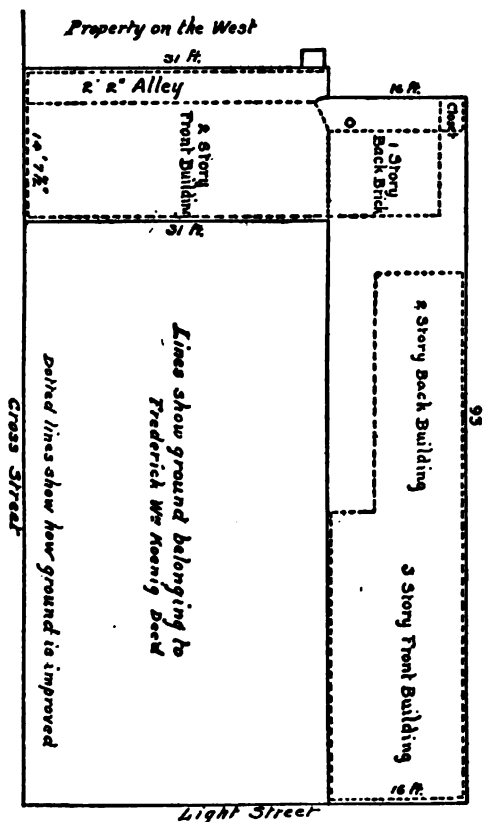
Edward L. Ward, for appellants. Charles Herzog, for appellee.

PEARCE, J. This is an appeal from an order of the orphans' court of Baltimore county refusing to ratify and setting aside the sale of a certain parcel of leasehold property in Baltimore City, made under the order of said court by John S. Biddison and John G. Rogers, administrators of Frederick William Koenig, deceased.

Exceptions were filed to the ratification of said sale, by the appellee as purchaser of the parcel designated as No. 48, East Cross street. The first ground of exception was that, while the advertisement read at the sale stated that the property in question was subject to a right of way and a right of drainage over an alley to be kept open on the western side of said lot for the benefit of said lot and the adjoining property on the west, the purchaser had discovered since the sale that the property was also subject to a right of drainage through said alley in favor of other property on the east, of which no notice was given at the sale and of which the purchaser had no knowledge, and that this drainage from the property on the east

brought such quantities of water as to overflow the cellar upon the lot sold and render the property unfit for the business of the appellee. The second ground of exception was that, if the sale as reported is ratified, the purchaser will not acquire what he believed and had reason to believe he was buying, because, in the language of the exception, "the visible property and improvements, as used and occupied, consist of a two-story brick store and dwelling, and a one-story back building, with an area about three feet wide along the said back building leading to the privy closet used in connection with the buildings to which the same is attached and appurtenant, and of which the same is a part; that the lot of ground reported as sold to this exceptant does not include the said back building, nor the areaway and privy closet, without which the building reported to be sold to this exceptant is altogether useless for ordinary purposes of habitation."

The facts of the case and the contention of the appellee will be made plain by reference to the following plat:



As to the first exception, there is not a particle of evidence in the record of any grant of the alleged easement or right of drainage by Koenig, as the owner of the Cross street lot, as well as of the Light street lot, or by any other former owner, in favor of the Light street property on the east. It

does appear that there is a drain pipe under the one-story back building in the rear of the Cross street lot, the mouth of which discharges into the areaway alongside of this back building, leading into the alley on the west side of the Cross street lot, and which is indicated on the plat by the small circle near the south end of the areaway; but there is absolutely nothing to show what property it was designated to drain, or actually does drain. Even if it did appear that it actually drained the Light street property of Koenig, there is nothing in the record to sustain the alleged easement as arising by an implied grant. In *Ellason v. Grove*, 85 Md. 225, 36 Atl. 845, it was said: "As long as one person owned both properties, it could not properly be said that an easement existed in favor of one of them, as the owner could not have an easement in his own land. But, whilst that is true, it is also well settled that if, during the unity of ownership, the owner of two properties uses one for the benefit of the other in such manner as would have given rise to the presumption that an easement existed if the tenements had been held by different persons, then, upon a conveyance of the property so used, an easement will be granted to the purchaser, provided the use has been such that the easement resulting from it would be of the class known as continuous and apparent, and would be necessary for the reasonable enjoyment of the property conveyed." And in *Burns v. Gallagher*, 62 Md. 471, it is said: "Such necessity cannot be deemed to exist, if a similar way or easement may be secured by reasonable trouble or expense, and especially not if the necessary way or easement can be provided through the grantor's own property." Here the existence of the alleged easement, or of the user of the two properties which might have given rise to the presumption of such easement, was unknown to the administrators of Koenig, whose duty it was to exercise reasonable care to acquaint themselves with, and to inform purchasers of, the situation and condition of the several properties they were selling. It was unknown to the purchaser of the Cross street property, who had known the property for over 20 years, and had been on the premises more than once during that period. No one testifies to its existence, and it cannot therefore be deemed visible and apparent as required by the authorities. There is no evidence that the Light street property cannot be drained to Light street within its own lines; and if it can be so drained, the easement over the Cross street lot cannot be deemed necessary to the enjoyment of the Light street property. For aught that appears, therefore, either upon the theory of actual or implied grant, the alleged easement is without pretense of authority, and this exception cannot be sustained.

Coming to the second exception, it is per-

fectly plain from all the testimony in the case that the exceptant cannot acquire under this sale the property he believed he was buying. The advertisement which he heard read at the sale describes this lot as fronting on Cross street 14 feet 7½ inches, with a depth of 31 feet, and improved by a two-story brick dwelling with store front, without any mention of a back building, and the plat shows that the one-story back building and the privy closet are not within the lines of that lot, but are within the lines of the Light street lot, sold the same day to Obrecht, which fronts on Light street 16 feet with a depth of 93 feet. It appears from the testimony that before the back building was put up, the closet in the rear of this lot was used in common by the occupants of this lot and of the adjoining lot on the west, and that after Koenig bought the Cross street lot he put up the back building on the Light street lot sold to Obrecht at this sale, joining it to the rear wall of the two-story building on the Cross street lot, and connecting it therewith by a door in the rear wall of the two-story building, and that ever since its erection, for over 20 years, it had been used as a kitchen to the Cross street building, and as a means of access for the occupants of that building to the closet in the areaway. The advertisement of the Light street lot is not in the record, but the testimony shows that the dimensions advertised were 16x93 feet, and the improvements were described as a three-story brick dwelling and store front with a two-story back building. Neither advertisement made any reference to the one-story back building within the lines of the Light street lot, and in the rear of the Cross street lot. Neither of the administrators knew when the property was advertised, nor at the time of the sale, of the existence of this one-story back building. Mr. Biddison testified that he did not know at the time of the advertisement and sale that there was a one-story building on the Light street lot, and that he did not know there was such a building in the rear of the Cross street lot. Mr. Rogers testified that at the time of the sale he did not know anything about this one-story back building, nor of the character of improvements on any of the lots, and that the preparation of the advertisements was left entirely to Mr. Ward, by whom they were sent to the administrators. Mr. Biddison also said that these titles were "mixed up," and that they thought it best to advertise by metes and bounds, so there would be no mistake, and that if they had known this one-story building was on the Light street lot he thinks they would not have so advertised it, and if they had known of its existence and that it had been used for 20 years as a kitchen in connection with the Cross street house, he does not think they would have mentioned it, in selling that lot, because of the fact that

those titles were mixed up, and that they thought they did all they could when they described the property by metes and bounds, so that bidders could determine what improvements were included within these respective metes and bounds. The Light street lot was sold first to Frederick Obrecht, as 16x93 feet, imposed by a three-story brick dwelling with store front, and a two-story back building. He testified that when he bought this property he did not think the one-story back building was in the 93 feet of ground, and that he did not think he was getting it in that purchase. The Cross street lot was offered next, and Obrecht bid \$1,500 for that, but testified that he then thought if he became the purchaser he would get the one-story building on the rear, and that if he had not already purchased the Light street lot he would not have bid at all upon the Cross street lot. The exceptant testified that he knew the property for years; that the front and back building had always been used as one property, and when he became the purchaser he thought he was getting the whole as used. His brother, who bid for him, testified that he thought he was bidding for the whole, and that if he had known the kitchen, the closet, and the yard were not going with it, he would not have bid at all for the exceptant.

This recital of the undisputed evidence makes it plain that this exceptant cannot secure under this sale what he thought he was buying, and what we think he had reason to believe he was buying. It is equally clear that what he cannot thus secure constitutes a very material part of the value of the whole, and is essential to its reasonable enjoyment for the purpose contemplated in the purchase, and we are forced to the conclusion that purchaser should not be required to take the property. It was argued in support of this sale that as the advertisement only mentioned a two-story brick building, and as the dimensions of the lot advertised did not embrace the one-story building, and as the administrators required the auctioneer to ask if bidders desired any information, that the exceptant should have asked for information as to this building, and that his predicament is to be imputed alone to his failure to do so, and therefore he should not now be relieved at the expense of those entitled to the proceeds of sale. But this argument cannot avail in this case, since the administrators, by their own statement, would have been unable to give information upon this point if it had been sought. This sufficiency appears from the testimony already referred to, but it is emphasized by Mr. Biddison in his cross-examination, who, when asked what he would have said if Mr. Aaron out of abundant precaution had asked if this back building went with the Cross street lot, replied, "I would have told him whatever the description covered goes with it,"

and that if asked by Obrecht whether that back building went with the Light street lot, replied, "I could not say, because I do not know." The principle which should be applied is stated in *Ellicott v. White*, 43 Md. 151, where it was said: "Any one examining the property and seeing the buildings standing upon a lot which abutted upon three streets and was completely inclosed by fences as one entire lot, would naturally and reasonably suppose that it constituted but one parcel, and that the whole was to pass with the buildings, unless informed to the contrary by the owner, whose duty we think it was so to inform the purchaser, or unless information to the contrary was derived from some other source." And in *Keating v. Price*, 58 Md. 534, this court cites the rule laid down by Chancellor Kent as follows: "The good sense and equity of the law on this subject is that if the defect of title, whether of land or chattels, be so great as to render the thing sold unfit for the use intended, and not within the inducement to the purchase, the purchaser ought not to be held to the contract." If the courts will not permit one individual, in contravention of this rule, to force a purchase upon another, they should be careful not to allow agents conducting sales for the court, to do so.

For the reason stated, the order of the orphans' court of Baltimore county will be affirmed.

Order affirmed, with costs to the appellee above and below.

BERNHEIMER BROS. v. BECKER.

(Court of Appeals of Maryland. Nov. 23, 1905.)

1. TRIAL—EXCEPTIONS—WAIVER.

The benefit of an exception to the court's refusal to take the case from the jury at the close of plaintiff's testimony is lost to defendant by proceeding with the case and failing to again raise the question by asking for the same instruction at the close of the whole testimony.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 983.]

2. FALSE IMPRISONMENT—WHAT CONSTITUTES.

Any deprivation of the liberty of another without his consent, whether by violence, threats, or otherwise, constitutes an imprisonment, within the meaning of the law.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. False Imprisonment, §§ 1-4.]

3. SAME—ACTS OF AGENT—LIABILITY OF PRINCIPAL—INSTRUCTIONS.

In an action for arrest and false imprisonment, an instruction requiring the jury to find, as a prerequisite to plaintiff's recovery, her arrest by an employé in defendants' store, and her detention and search by him in the presence and by the direction of one of defendant partners, as the agent and servant of the defendants, and within the scope of his authority, and in charge of the department of the store from which she was charged with stealing certain goods, but failing to mention the other partner, or requiring a concurrence in or ratification by him of the acts complained of, or instructing as to what state of facts would justify the conclusion that such employé acted with-

in the scope of his authority as agent of defendants in his conduct towards plaintiff, was error.

4. SAME—IMPLIED AUTHORITY OF AGENT.

An agent or employé about an ordinary business has no implied authority to arrest and search customers, suspected of stealing, in the store of his principal, so as to make the principal liable for false imprisonment.

5. SAME—IMPLIED POWER OF PARTNER.

A partner in an ordinary mercantile business has no implied power to bind his copartner by his acts in arresting and searching one suspected of stealing goods in the partnership store, so as to make the copartner liable with him for false imprisonment.

6. SAME—MEASURE OF DAMAGES—PUNITIVE DAMAGES—INSTRUCTIONS.

In an action for the arrest and false imprisonment of plaintiff, charged with stealing goods while in defendants' store, an instruction authorizing the awarding of such damages as would not only compensate plaintiff for the wrong and indignity sustained by her in consequence of defendants' wrongful acts, but also exemplary or punitive damages, following an instruction that any deprivation of the liberty of another without his consent constituted an imprisonment within the meaning of the law, was erroneous, in not requiring a finding, as a condition of awarding punitive damages, that the alleged wrongs to plaintiff were inflicted maliciously or wantonly, or with circumstances of contumely and indignity.

7. SAME—RATIFICATION BY COPARTNER—SUFFICIENCY OF EVIDENCE.

Where, in an action for the false arrest and imprisonment of plaintiff, charged with stealing goods from the store of defendant partners, it appeared that plaintiff was detained and searched by direction of one of the partners, evidence that after the release of plaintiff her husband complained to the other partner of the treatment accorded to the plaintiff, and that such other partner, after making inquiry as to the facts, ordered plaintiff's husband out of the store, was insufficient to prove a concurrence in or ratification by him of the alleged wrongful acts of his copartner and the employé acting under the latter's direction.

Appeal from Court of Common Pleas: George M. Sharp, Judge.

Action by Lena Becker against Bernheimer Bros. Judgment for plaintiff, and defendants appeal. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Randolph Barton, Jr., for appellants. Richard A. Miller, Jr., and John C. Kumpf, for appellee.

SCHMUCKER, J. The appellee, Lena Becker, sued the appellants, individually and as copartners, in the court of common pleas of Baltimore City for damages for an assault and battery and a false arrest and imprisonment. The two causes of action were alleged in separate counts in the narrative. The appellants, as defendants below, pleaded non cul. The trial of the case resulted in a judgment for the plaintiff, from which they appealed.

Two exceptions appear in the record. The first was taken to the court's refusal to withdraw the case from the jury at the close of the plaintiff's testimony, but the defendants lost the benefit of that exception by go-

ing on with their case and failing to again raise the question by asking for the same instruction at the close of the whole testimony. *Barabasz v. Kabat*, 91 Md. 53, 46 Atl. 337; *B. & O. R. R. v. State*, Use of Logsdon, 101 Md. —, 61 Atl. 189. The second exception brings up for review the rulings of the lower court on the prayers offered at the close of the case, and the special exceptions taken to some of them.

In order to properly pass upon the questions presented by this exception, it will be necessary to advert to the more important facts appearing in the evidence. It appears from the records that the appellants, Ferdinand and Herman Bernheimer, as copartners, conduct a department store in Baltimore City, and Leo Seligman is the manager of their shoe department. There is also evidence in the record tending to prove the following facts: On March 14, 1904, the appellee, having gone to the Bernheimer store to purchase shoes for her infant child, selected a pair from a lot of shoes exposed for sale upon a counter, and then started, with the pair she had selected in her hand, to go to a near-by counter to select another pair from the shoes thereon exposed for sale. As she was leaving the first counter, Seligman walked up, caught her by the arm, and compelled her, against her protest and attempted resistance, to go with him to the elevator and upstairs, and into a room into which Herman Bernheimer, one of the defendants, entered at the same time. Seligman said something, which the plaintiff did not hear, to Bernheimer, who replied to him: "You search her." Seligman thereupon, without her permission or assistance, took off her gossamer, opened her coat and took it off, and opened her skirt. Nothing having been found on her, Bernheimer said: "She is all right. Leave her go." She put on her clothing and went home and told her husband of the occurrences, and showed him bruises on her arm, which she said were made by Seligman's rough handling of her. Her husband went to Bernheimer Bros.' store, where he saw Mr. Ferdinand Bernheimer, and complained of what had happened to his wife. Mr. Bernheimer went upstairs and found out what he wanted, and came down again and ordered the husband off the premises, and gave him no satisfaction. There was, on the contrary, evidence directly contradicting the plaintiff's account of the treatment she received at the store, and tending to prove that she had taken the pair of shoes from the counter, put them under her cape, and started to walk away, not toward the other shoe counter, but toward the elevator. Seligman's attention having been called to her actions by an employé of the store, who had seen them, he followed her, and, when she got near the door, she turned and dropped the shoes. Seligman picked them up, whereupon she said to him: "I never did anything

like that before, I hope my husband won't find it out"—and voluntarily went with him to the office on the second floor, where she paid for the shoes and he wrapped them up for her, and she carried them away. Seligman and Herman Bernheimer both positively testified that neither they nor any one else had searched or even taken hold of her at any time at the store. At the close of the case the plaintiff offered eight prayers, of which the court granted Nos. 1, 2, and 3a, and refused the others. The defendants offered nine prayers, of which the court granted the fifth and refused the others. The plaintiff specifically excepted to two of the defendants' rejected prayers, and the defendants specially excepted to four of the plaintiff's rejected prayers, and also to her prayers 2 and 3a, which were granted, and their exceptions were overruled.

It is unnecessary for us to notice the special exceptions of the respective parties to prayers which were subsequently overruled. There was no error in granting the plaintiff's first prayer, which merely declared that any deprivation of the liberty of another without his consent, whether by violence, threats, or otherwise, constitutes an imprisonment, within the meaning of the law.

The plaintiff's second prayer, which was also granted, does not correctly state the law of the case in that it directs the jury that, if they find the facts therein stated, the plaintiff is entitled to recover generally, without limiting her right to a recovery against Herman Bernheimer. The facts which the prayer requires the jury to find are her arrest by Seligman, and her detention and search by him in the presence and by the direction of Herman Bernheimer, and, also, that Seligman, in the transactions mentioned, was "acting as the agent and servant of the defendants, and within the scope of his authority, and in charge of said shoe department" of their store. Ferdinand Bernheimer is not mentioned in the prayer, nor is any supposed concurrence in or ratification by him of the acts complained of mentioned or relied upon therein. The jury are not instructed as to what state of facts would, if found by them from the evidence, justify the conclusion that Seligman acted within the scope of his authority as agent of the defendants in his conduct toward the plaintiff. Even if we assume that the prayer was intended to designate, as authority for such a conclusion by the jury, the finding by them of the fact that Seligman was at the time in charge of the shoe department, or that some of the alleged acts were committed in the presence of Herman Bernheimer, one of the partners of the defendant firm, the instruction would still be erroneous.

The prayer mentions no facts tending to prove that the defendant firm conferred express authority on Seligman to arrest and search customers who came to the store, when

he suspected them of stealing. This court has repeatedly decided that an agent or employé about an ordinary business has no such an implied authority. *Carter v. Howe Machine Co.*, 51 Md. 298, 34 Am. Rep. 311; *Tolchester Imp. Co. v. Steinmeier*, 72 Md. 316, 20 Atl. 188, 8 L. R. A. 846. In *Central R. Co. v. Brewer*, 78 Md. 407, 28 Atl. 615, 27 L. R. A. 63, this court, in holding that an employé had no implied authority to do any acts not relating to his own particular duties, said: "In *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448, the question was whether a merchant, by employing a clerk to sell goods for him in his absence, or a superintendent to take the general charge and management of his business at a particular store, thereby confers authority upon such clerk or superintendent to arrest, detain, and search any one suspected of having stolen and secreted about his person any of the goods kept in such store. The court says: 'In examining this question it must be assumed that by the employment the master confers upon the servant the right to do all necessary and proper acts for the protection and preservation of his property to protect it against thieves and marauders, and that the servant owes the duty to so protect it to his employer. But this does not include the power in question. * * * The master would not, if present, be justified in arresting, detaining, and searching a person upon suspicion, however strong, of having stolen his goods and secreted them upon his person.' " The master could, of course, confer no greater power upon the servant than he himself possessed. *Brewer's Case* has been cited and relied on by us in the more recent cases of *Barabasz v. Kabat*, 86 Md. 36, 37 Atl. 720, *Turnpike Road v. Green*, 86 Md. 167, 37 Atl. 642, and *Carter v. Worcester Co.*, 94 Md. 625, 51 Atl. 830.

If the court below intended, by granting the plaintiff's second prayer, to authorize the jury to find a verdict against Ferdinand Bernheimer because his copartner, Herman Bernheimer, was present at and abetted the detention and search of the plaintiff, if they found the fact of such presence and abetting, that, also, was error; for a partner in an ordinary mercantile business has no implied power to bind his copartner in such transactions as those which form the basis of the present suit. In *Kirk & Son v. Carrett*, 84 Md. 409, 35 Atl. 1089, a case closely resembling the present one we distinctly held, upon a review of the authorities, that "one of several partners cannot drag the firm or his copartner into a trespass by giving authority for the doing of an unlawful act in the name of the firm of which he is a member, for one partner has no power to bind the partnership to the com-

mission of a wrongful act without the previous consent or subsequent concurrence of all of the partners."

The plaintiff's prayer 3a, which was granted, instructs the jury that, if they "find for the plaintiff, then they may award such damages as will not only compensate the plaintiff for the wrong and indignity she has sustained in consequence of the defendants' wrongful acts, but they may also award exemplary or punitive damages as a punishment to the defendant for such acts." That instruction, following the preceding two prayers of the plaintiff, was too broad, because it did not require the jury to find, as a condition of awarding punitive damages, that the alleged wrongs to the plaintiff had been inflicted maliciously or wantonly, or with circumstances of contumely and indignity. *Sloan v. Edwards*, 61 Md. 100. The court, by the plaintiff's first prayer, had instructed the jury that any deprivation of the liberty of another without his consent constituted an imprisonment, within the meaning of the law, and therefore the instruction to them as to the measure of damages should have plainly stated the further facts to be found by them as a proper ground for the award of punitive damages, in the event of their finding a verdict for the plaintiff.

We think, also, that the defendants' prayer 2½, which was refused, should have been granted. It instructed the jury that there was no legally sufficient evidence to entitle the plaintiff to recover as against the firm of Bernheimer Bros. or Ferdinand Bernheimer. The only testimony in the record directly connecting Ferdinand in any manner with the alleged wrongful acts of his brother, Herman, or Seligman, is that of the plaintiff's husband. He testifies that when he, being naturally mad and excited, complained to Ferdinand Bernheimer of the treatment which Mrs. Becker had received at the store, he (Bernheimer) "went upstairs, came down again, and ordered him [Becker] out of the store." This testimony, if true, undoubtedly convicts Bernheimer of rudeness of manner, but it does not of itself tend to prove a concurrence in or ratification by him of the alleged wrongful acts of Seligman and Herman Bernheimer.

Without discussing in detail the defendants' other rejected prayers, it is sufficient to say that we find no reversible error in their rejection. For the erroneous action of the court below in granting the plaintiff's prayers 2 and 3a and rejecting the defendants' prayer 2½, the judgment must be reversed, and a new trial awarded.

Judgment reversed, with costs, and a new trial awarded.

SAUTTER v. SUPREME CONCLAVE IMPROVED ORDER OF HEPTASOPHS.

(Supreme Court of New Jersey. Jan. 12, 1906.)

INSURANCE—MUTUAL BENEFIT INSURANCE—RIGHTS OF INSURED—CHANGE OF BY-LAWS.

A stipulation of a benefit certificate requiring insured to comply with the laws, rules, and regulations then governing, or that might thereafter be enacted for the government of, the association, does not authorize the association to limit its original contract with insured by a subsequently enacted by-law providing that no benefits shall be paid in case insured shall commit suicide, and an attempted limitation to that effect is nugatory.

Action by Margaret Sautter against the Supreme Conclave of the Improved Order of Heptasophs. On demurrer to plea. Judgment for plaintiff.

Argued November term, 1904, before GUMMERE, C. J., and GARRISON, GARRETSON, and REED, JJ.

Joseph A. Beecher, for demurrant. W. Holt Apgar, for defendant.

GUMMERE, C. J. This is an action upon a benefit certificate, issued by the defendant association to August Sautter, a member of its Newark City Conclave, on the 10th day of January, 1899, in and by which it promised to pay out of its benefit funds to his wife, the plaintiff in this action, the sum of \$1,000, upon satisfactory proof of his death, and the surrender of the certificate, provided he should be in good standing in the order at the time of his death. The plea demurred to sets up, as a defense to that action: That Sautter, in his application for the issuance to him of the benefit certificate now sued upon, expressly agreed to conform in all respects to the laws, rules, and usages of the order then in force, or which might be thereafter adopted by it. That the benefit certificate was issued to Sautter upon the following condition set forth therein, and accepted by him, namely, that he should comply in the future with the laws, rules, and regulations then governing the said conclave and fund, or that might thereafter be enacted by the defendant for the government of such conclave and fund. That the defendant, at its regular session held June 9, 1903, adopted the following rule: "No benefit shall be paid to the beneficiary, or beneficiaries, of any member committing suicide (sane or insane)." That Sautter, on or about the 27th day of March, 1904, committed suicide, while sane or insane, by deliberately taking carbolic acid with the purpose and intent of taking his own life. That by reason of the above stipulation in the application for insurance, and in the benefit certificate itself, the rule adopted by the defendant June 9, 1903, was binding upon Sautter, and vitiated the insurance.

The plea demurred to sets forth no facts which constitute a bar to this action. It

does not aver any violation by the insured of any law, rule, or regulation of the association, enacted by it for its government, or for the government of its funds; but, by way of argument, asserts that he, by entering into the stipulation which it recites, agreed that the association might, at will, so change the contract of insurance as to relieve it, to a material extent, from the liability created thereby. We think such a construction of the stipulation is not warranted by its language. To say that it confers upon the association the power to so alter the contract of insurance by an after-adopted by-law as to destroy the right of the beneficiary to be paid the amount called for by the certificate in case the insured shall die by his own hand, is equivalent to saying that it authorized the association to limit its liability to such extent as it chose, for instance, by providing that no benefit shall be paid in case the death of the insured result from an accident occurring through his own negligence, or from a disease which is epidemic in its character, or from any other cause or causes which it may designate. An agreement, by a person applying for membership in one of these fraternal organizations, and for insurance therein, that he will comply with such rules and regulations as the association may thereafter enact for its own government, or the government of its death fund, cannot be construed into a stipulation conferring any such power as has been suggested, without disregarding the plain meaning of the words of the agreement. In the case of *O'Neill v. Supreme Council American Legion of Honor*, 70 N. J. Law, 420, 57 Atl. 468, this court declared that such a stipulation on the part of a member was to be construed as referring only to reasonable by-laws and regulations adopted in furtherance of the contract; not to such as would overthrow it, or materially alter its terms; and the authorities cited in the opinion amply support the declaration. So construed, the stipulation of the insured in the present case conferred upon the defendant association no authority to alter the benefit certificate issued to Sautter, by inserting in it a provision that no benefit should be paid upon it in case the insured should commit suicide; and its attempt to make such alteration was nugatory.

The plaintiff is entitled to judgment on the demurrer.

YOUNG et al. v. PENNSYLVANIA R. CO.

(Supreme Court of New Jersey. Dec. 29, 1905.)

1. EASEMENT—CREATION BY DEED.

When one maps his land, delineates streets thereon, and conveys lots by reference thereto, the question whether he reserves a private easement of way in the soil of a street depends upon the language of the deed by which he conveys the same, read in the light of the circumstances attending its execution.

2. SAME—SUFFICIENCY.

At the time of the conveyance by the plaintiffs to the defendant an ejectment suit was pending to oust the defendant from a portion of the land conveyed and from the southerly half of the avenue on which it abutted, upon which the plaintiff claimed the defendant had encroached by laying tracks thereon. The conveyance was made in settlement of the suit for a valuable consideration paid by the defendant. The map upon which the avenue was delineated had been filed nearly 50 years, and numerous conveyances had been made with reference thereto.

Held, that a reference in the deed to the avenue as a boundary, was not sufficient to reserve a private easement of way, in the soil of the avenue.

(Syllabus by the Court.)

Bill by Mason Young and others against Pennsylvania Railroad Company. Verdict for plaintiffs. Rule to show cause made absolute.

The plaintiffs own lots in the town of Harrison, on Seventh street, Middlesex street, Somerset street, Hunterdon street, and Burlington street, as those streets are delineated on maps of a large tract of land, which were made in 1836 and thereafter by the predecessors in title of the plaintiffs and the then owners of the land. Conveyances were made by reference to these maps, but the streets have not been actually opened or worked—New Jersey Railroad avenue, at least, is not proved to have been used either as a public street or a private way—and no steps have been taken by the municipal authorities to accept the dedication of the streets, except so far as ordinances vacating portions of the streets may indicate an acceptance. In 1839 a strip of land 66 feet in width, and extending across the entire width of the tract from east to west, was conveyed in fee simple by plaintiffs' predecessors in title to the New Jersey Railroad & Transportation Company, afterward the United New Jersey Railroad & Canal Company, of which the defendant is lessee. This strip of land crossed all the streets in question in this suit, except New Jersey Railroad avenue, and followed the line of that avenue and within its bounds. The deed conveyed the land, together with the ways and appurtenances. In 1901 an agreement for the elevation of the railroad tracks was made between the town of Harrison and the defendant company. For the obstruction of the streets caused by the execution of this work, this action was brought. Different counts in the declaration present the question of the obstruction as of public streets, and as of private ways. The trial judge held that the deed of 1839, by conveying an absolute fee without reservation, did away with the effect of any dedication of the land conveyed, and that the plaintiff's action failed as far as it depended on private ways in the cross-streets; that the action could not be sustained by reason of any public right in those streets, because there was no evidence that the dedication had been accepted by the public. There was evidence of a later dedication

of a crossing at Sixth street by the railroad company itself; and the judge submitted to the jury the question whether a public right of crossing had been acquired at this point, and, if so, whether it had been obstructed. The railroad had been actually laid upon the strip deeded to the company in 1839, and followed the line of New Jersey Railroad avenue. The northerly half of the avenue was vacated by the municipal authorities by ordinance in 1891, and the portion of the southeasterly side of the railroad right of way by ordinance in 1895. The trial judge held that a private right of way in that street was created by the acts of the landowners in filing maps and making conveyances by reference thereto, and he left it to the jury to find whether that way was obstructed. The doubt in this respect arose from the difficulty of locating the street upon the ground. A question had arisen prior to 1885 between the plaintiffs and the railroad company, which led to a suit in ejectment in that year for certain land on the southerly side of the avenue and for the south half of the avenue itself at the point in question. The controversy was settled, and on August 12, 1885, the plaintiffs conveyed to the United New Jersey Railroad & Canal Company, the defendant's lessor, four tracts of land south of the avenue for \$7,000. Three of these tracts abutted on the avenue. The jury found that both Sixth street and New Jersey Railroad avenue had been obstructed, and rendered a verdict for the plaintiffs.

Argued June term, 1904, before the CHIEF JUSTICE and GARRISON and SWAYZE, JJ.

Edward A. & William T. Day, for plaintiffs. Vredenburgh, Wall & Vanwinkle, for defendant.

SWAYZE, J. (after stating the facts). We agree with the learned trial judge that the effect of the deed of 1839 was to cut off any right the plaintiffs might otherwise have had to cross the land thereby conveyed. We assume that the railroad company had dedicated a crossing at Sixth street; that that street, as well as New Jersey Railroad avenue, have been obstructed by the defendant; and that the plaintiffs' rights in the latter have not been barred by adverse possession. These facts must have been found by the jury to justify their verdict, and we do not think it necessary to review the evidence. The only questions we have found it necessary to determine are (1) whether the plaintiffs have shown any right to maintain an action by reason of the obstruction of the crossing at Sixth street; (2) whether the plaintiffs have a private right of way in New Jersey Railroad avenue.

1. The first question is settled adversely to the plaintiffs. *H. B. Anthony Shoe Co. v. West Jersey R. R. Co.*, 57 N. J. Eq. 607, 42 Atl. 279. It was there held that the injury sustained by the owner of land immediately

abutting upon a public highway from an obstruction of the street, was not different in character from that which every other citizen sustains. A fortiori, the injury sustained by those who are not abutting owners, as in the present case, is not different in character from that of the public and cannot be redressed by a private action for damages.

2. We think there was error in holding that the plaintiffs had a private right of way in New Jersey Railroad avenue. The fee simple of the land prior to the deed of 1885 had been in the plaintiffs and their predecessors in title, and an easement of way in favor of their other land would have no legal existence during the continuance of the unity of seisin of both tracts. *Fetters v. Humphreys*, 19 N. J. Eq. 471, 476. The reasons which have led the courts to hold that the grantees of lots shown on a map are entitled to an easement in the streets delineated thereon as distinguished from the public right arising from the dedication, are not applicable to the owners of the fee. The right of the grantees rests either upon an implied covenant or upon the principle of estoppel. *Clark v. Elizabeth*, 40 N. J. Law, 172, 175. But neither the theory of an implied covenant nor the principle of estoppel is applicable where the owner of the dominant and servient tenements is the same person. Until the severance of the title in 1885, the easement could have no existence. The deed of 1885 conveyed lots bounded on the street, and by legal presumption embraced the street to its center. *Salter v. Jonas*, 39 N. J. Law, 469, 23 Am. Rep. 229.

Although an easement would not arise either by implied covenant, or by estoppel it might be created by the express words of the deed, or perhaps implied from the situation of the property and the circumstances attending the conveyance. An easement of way is not an apparent and continuous easement and does not pass upon the severance of the tenement unless it is a way of necessity, or the operative words of the conveyance are sufficient to grant it *de novo*. *Fetters v. Humphreys*, 19 N. J. Eq. 471. The exception of a way of necessity has no application to the present case. At the time of the conveyance to the railroad company in 1885, the plaintiffs had access to their property by several other streets, which were not vacated until 1888, and then seemingly with the consent of the plaintiffs and upon a sale of a portion of their land to a steel company for a purpose which rendered such vacation necessary. No use seems to have been made by them at any time of New Jersey Railroad avenue. The other exception mentioned in *Fetters v. Humphreys* is the case where the words of the conveyance are sufficient to grant the easement *de novo*.

Although the opinion refers only to cases of grant, the same rule is applicable to a reservation. In *Booraem v. North Hudson County Railroad Company*, 40 N. J. Eq. 557,

5 Atl. 106, the way was held to have been reserved in favor of the grantor and in *White v. Tidewater Oil Company*, 50 N. J. Eq. 1, 25 Atl. 199, it was necessary to the decision to hold that the complainant not only acquired a right in the portion of the street conveyed to him, but also reserved a right in the portion conveyed by him. The solution of this question depends upon the language of the deed. In the *Booraem Case* there were express words in the deed which operated as a dedication of the street in favor of the grantor. The land was conveyed subject to the easement of Ogden avenue, and these words were added: "It being understood that Ogden avenue is extended for the same width across said premises and dedicated as a public highway. In *White v. Tide Water Oil Co.* the question arose upon demurrer to a bill which charged that the purpose of the conveyances was to square the boundary lines of the properties of the respective parties to them with the street, in order that the lands might be utilized in connection with the street as an approach to them, and that the lands owned by the complainants had no outlets, except through the street. The Chancellor said that the complainants' right must come by grant or reservation expressed in the deeds, or necessarily implied from their terms and language, when read in the light of the situation of the lands affected by them and the parties to them at the time when they were made. The circumstances of that case and the charges of the bill which were admitted by the demurrer led to the inference that the parties intended to reserve rights of passage in the land described as a street. The other cases to which we were referred by counsel are cases in which the grantees claimed rights by reason of the dedication, and are not applicable to the present case, where the claim is of a reservation by the grantor.

The deed of 1885 is to be read in view of the situation of the lands and the parties at the time it was made. *Cooper v. Louanstein*, 37 N. J. Eq. 284, 301. An ejectment suit was pending, the object of which was to oust the railroad company from the possession of a portion of the land conveyed and the southerly half of the avenue on which it abutted. The plaintiffs claimed that the railroad company had encroached upon the avenue and upon the abutting lands of the plaintiffs by laying tracks thereon. In settlement of this suit, the railroad company paid \$7,000 and took a conveyance of the land in question and something more. The very object of the conveyance seems to have been to relieve the railroad company from liability to action by reason of its occupation of the avenue. Under such circumstances it requires clear language in the deed to lead to a construction which would reserve a right of way to the grantors in favor of lots on other streets to which there were at the time other

and more direct means of access. The only language relied upon is the reference to New Jersey Railroad avenue as a boundary. This reference, however, indicates that the parties regarded it as a public street, rather than as a private way. The map had been filed nearly 50 years before, numerous conveyances had been made with reference thereto, and, although there is no proof of acceptance of the dedication by the public authorities, the plaintiffs may well have regarded the avenue as a public street. Within a few years thereafter it was so treated by the municipal authorities, who vacated a portion in 1891 and the rest in 1895. We think the reference in the deed merely recognizes New Jersey Railroad avenue as an existing public street, and was not meant to work a reservation of a private right on the part of the plaintiffs. The public right ended with the vacation of the street in 1895.

The rule to show cause must be made absolute.

MYERS v. FRIDENBERG et al.

(Court of Chancery of New Jersey. Dec. 19, 1905.)

1. GAMING — ILLEGAL STOCK TRANSACTION — RELIEF IN EQUITY—LIMITATIONS.

The bill demurred to seeks a decree requiring defendants to transfer to complainants certain shares of stock, which he had transferred and delivered to them in a transaction, claimed to be unlawful under the provisions of the "Act to prevent gaming." 2 Gen. St. p. 1606.

The bill was not filed until after the lapse of six months from the time of the delivery of the shares to the defendants. *Held*, that the bill cannot be maintained for any relief under the provisions of section 5 of that act.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, §§ 91, 92.]

2. EQUITY—ADEQUATE REMEDY AT LAW.

It is claimed that the bill can be maintained for relief under the provisions of section 2 of that act (2 Gen. St. p. 1606), and that there is no limitation to actions upon that section. Without considering, or deciding, upon this claim, *held*, that the bill discloses that complainant has a complete remedy at law, and shows no ground for equitable relief.

(Syllabus by the Court.)

Bill by Charles R. Myers against Samuel M. Fridenberg and others. Demurrer to bill. Sustained.

Joseph H. Gaskill, for demurrant. Clarence L. Cole, for defendants.

MAGIE, Ch. The prayer of the bill is that the defendants be enjoined from selling or disposing of certain shares of stock, or from collecting any dividends thereon, and that they may be decreed to transfer and assign the said shares to the complainant. The bill states that the complainant engaged with the defendants in a stock speculation upon margins, with no intent to accept stocks bought or deliver stocks sold, but only to gain or close by the rise and fall of the

market, which transactions, it is claimed, are unlawful, under the provisions of the first section of the "Act to prevent gaming" approved March 27, 1874. 2 Gen. St. p. 1606; *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308; *Van Pelt v. Schauble*, 68 N. J. Law, 638, 54 Atl. 437. The bill further states that in October, November and December, 1902, upon defendants making demand upon complainant for additional payments to secure his account, complainant delivered to defendants the shares of stock in question, as security and "to make good his marginal account" with the defendants, and that they have had said shares of stock transferred to their names on the books of the respective companies, and have procured certificates thereof in their own names, and that afterward and about February, 1905, defendants gave notice to complainant that unless he paid them a balance claimed to appear by the account, viz., \$19,936.71, with interest, they would sell the said stocks which they had thus acquired.

It was admitted in the argument of the demurrer to the bill that any right which the complainant has, or may assert, in this proceeding, is founded upon the act to prevent gaming above cited. If the right claimed by the complainant arises under the fifth section of that act, the bill discloses that the complainant's right has been lost by the lapse of six calendar months after the delivery of the stock; the bringing of such a suit within that period of time being a condition expressed in the proviso to that section. Where it clearly appears on the face of the bill that the complainant's right of action is barred by the statute of limitations, advantage of the statute may be taken by demurrer. *Partridge v. Wells*, 30 N. J. Eq. 176; *Wells v. Partridge*, 31 N. J. Eq. 362; *Bird's Adm'r v. Inslee's Ex'rs*, 23 N. J. Eq. 363; *Gutch v. Foadick*, 48 N. J. Eq. 353, 22 Atl. 590, 27 Am. St. Rep. 473. A like rule must apply upon this demurrer. The bill discloses on its face that complainant has no right of action upon the fifth section of the gaming act.

But an action is also given by the second section of the gaming act, and there is no expressed limitation of the time within which such action may be brought. It is contended that the proviso to section 5, limiting actions, is equally applicable to the action provided for by section 2. I deem it unnecessary to determine whether this contention can prevail. For assuming that this bill is founded upon a cause of action such as is given by section 2, and that the lapse of time has not barred the complaint, I think that the bill exhibits complainant's claim as one for which he has a complete remedy at law. The shares of stock which he seeks to obtain have been converted by the defendants. If the transaction in which the shares were delivered to the defendants was a gambling transaction, made unlawful by stat-

ute, an action of trover and conversion will give the complainant ample redress. *Van Pelt v. Schauble*, ubi supra. There is nothing disclosed in the statements of the bill, or in the nature of the transaction, to indicate any particular equity which would require the intervention of this court.

The demurrer must therefore be sustained.

WALL v. UTAH COPPER CO. et al.

(Court of Chancery of New Jersey. Oct. 2, 1905.)

CORPORATIONS—ISSUE OF BONDS—INCREASE OF CAPITAL STOCK.

The issuance of bonds by a corporation, with an option to the buyer to convert them into new stock at a certain price at any time within five years, is illegal, and will be enjoined as a deprivation of the right of stockholders to participate in any issue of new stock to an extent measured by the comparative amount of their present holdings and on the same terms with other parties.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 587-592.]

Suit by Enos A. Wall against the Utah Copper Company and others. On order to show cause why injunction should not issue. Heard on bill and affidavit, and affidavit in opposition thereto. Injunction granted.

Edward A. Day and Gilbert Collins, for complainant. Robt. H. McCarter and Thomas Thatcher, for defendant.

PITNEY, V. C. The complainant, Wall, a resident of Salt Lake City, Utah, is a holder of 80,000 shares (par value \$900,000) being one-fifth of the capital stock of the defendant the Utah Copper Co., and is one of the seven directors thereof, and also vice president thereof. The other defendants, six in number, are the other directors thereof, and the defendant MacNeill is the president thereof. On the 11th of September the complainant presented his bill, with one affidavit annexed, the object of which is to restrain the issuing by the corporation of \$3,000,000 of bonds, secured by a mortgage, which bonds shall contain a clause giving the holders an option to convert the same into the stock of the company on certain terms presently to be stated. An order to show cause with interim restraint was granted thereupon, returnable on the 22d instant. On the return day of the order the defendants appeared and filed one affidavit in answer to the allegations of the bill. That affidavit had not been previously served upon the complainant, and, upon being read by his counsel, it was discovered that it contained new matters not in direct reply to those set forth in the bill, and apparently not within the knowledge of complainant. The complainant did not ask for time to answer this new matter, but submitted to the argument being had upon the papers including the new

matter, upon the understanding, of course, that he was to have the benefit, if any, of the new matter, in all respects as if he had set it out and relied upon it in his bill, and the bill might be considered as amended accordingly. The facts are that the whole of the capital stock, \$4,500,000, provided for by the articles of association, was duly issued, and the proceeds invested in a copper mine and property near the town of Bingham in the county of Salt Lake in the state of Utah, and about 25 miles southwest of Salt Lake. The mine, so far as developed, has proved very promising and profitable in its working, and can be made still more profitable by a judicious expenditure of money in the erection of a large smelting works on the shore of Salt Lake and a railroad from the mine to it. The whole incumbrance at present is \$750,000.

The defendants MacNeill and Penrose are the largest holders of stock, except the complainant. On the 7th of July, 1905, MacNeill and Penrose, on the one part, entered into a written agreement with the Guggenheim Exploration Company, a corporation of New Jersey, on the other part, by which it was agreed that MacNeill and Penrose should cause the defendant corporation to authorize an issue of \$3,000,000 of the par value of its bonds of \$1,000 each, payable in 10 years, with interest at 6 per cent, and secured by a mortgage to the Morton Trust Company, each of which bonds "shall be convertible at the option of the holder at any time within five years from the date thereof, into fifty (50) shares of the par value of ten dollars (\$10) each of the stock of said copper company." The agreement further provided that MacNeill and Penrose should cause the defendant company and its stockholders forthwith to take proceedings to increase its capital stock to the extent required for the proposed conversion of bonds into capital stock, and to authorize the issue of such increased stock in exchange or in lieu of the convertible bonds. This, it will be seen, will require a provision for the issue of \$1,500,000 of new stock, increasing the total issue from \$4,500,000 to \$6,000,000. The contract further provided that the defendant corporation should agree in writing to give the exploration company the right to take the whole issue of bonds at 98 cents on the dollar. MacNeill and Penrose further agreed to give the exploration company the option to purchase from them 156,000 shares of the stock of the company (par value \$10) at \$20 per share. The result of this agreement so far, if carried out, would be to give to the exploration company the right, by virtue of its ownership of \$3,000,000 of convertible bonds, to acquire \$1,500,000 of the new stock of the company, which would thereby be increased to \$6,000,000 and by the delivery to it of 156,000 shares of present existing stock, to make it the owner of \$3,600,000, which will

be a majority of the whole issue of \$6,000,000. The contract contains the further provision that MacNeill and Penrose should have the right and option to take on their own account one-half (\$1,500,000) of the whole issue of \$3,000,000 of bonds, upon condition that, if they should exercise the option and convert the bonds into stock, they should sell and transfer a certain portion of the stock to the exploration company at \$20 per share.

In pursuance of this agreement the president, on the 14th of July, 1906, issued a call for a meeting of the directors of the defendant company, to be held on Saturday the 22d of July at Colorado Springs for the following purposes: (1) To consider the advisability of, and, if deemed advisable, to authorize, an issue and sale of \$3,000,000 par value bonds of the company, to be secured by mortgage on all of the property now owned by the company, and which may be acquired by it in the future, and to decide upon the rate of interest, time, and terms of said proposed issue. (2) In the event the bond issue, as above, be authorized by the board of directors, then to authorize the calling of a stockholders' meeting for the purpose of ratifying the action of the board of directors in authorizing and providing for the issuance and sale of the aforesaid bonds, if necessary; and to transact any and all other business connected therewith or incident thereto, which, in the judgment of the board of directors, or under the charter or by-laws of the company, or under the laws of the state of New Jersey, it is necessary to submit to the stockholders of the company. (3) To transact any and all business pertaining to the affairs of the company which may be brought to the attention of the board of directors.

Complainant in his bill alleges that he was unable to attend that meeting, "but that he protested in writing against the proposed action to be taken thereat, giving his reasons for his said protest." This written protest was not produced at the hearing, though it was not disputed that it had been received by the defendant officers of the corporation.

On the 26th of July a meeting of the board of directors, adjourned from the 22d, was held at the office of the company at Colorado Springs, at which meeting were present four of the directors, MacNeill, Hawkins, Babbitt, and Jackling; Messrs. Penrose, McLaren, and the complainant being absent. Mr. McLaren is the New Jersey director and holds only so much stock as to qualify him as such. At that meeting the minutes show that the president, MacNeill, laid before the meeting a proposed agreement to be entered into between the defendant company and the exploration company, and called attention to the fact that its performance would require the issue of bonds convertible into stock, and this would necessitate a proper increase in the stock, whereupon it was resolved that the agreement be approved and the officers of

the company authorized to execute the same. Then follows in the minutes a formal resolution, subject to the ratification of the stockholders, for the borrowing of \$3,000,000 secured by bonds, convertible into the stock of the company at the rate of \$500 par value of the stock of the corporation for each \$1,000 bond at the option of the holder. It was further resolved that it was advisable that the capital stock of the corporation should be increased from \$4,500,000 to \$6,000,000, and the fourth paragraph or section of its certificate of incorporation should be accordingly, specifying the amendment; and it was further resolved that a special meeting of the stockholders be called to be held at its office in Jersey City on September 5th to take action upon the increase of stock and the issuing of bonds. The proposed agreement to be executed, and which was in fact executed between the copper company and the exploration company, is in substance the same as that entered into on the 7th of July between MacNeill and Penrose and the exploration company, except that it does not mention those provisions of the first agreement which enabled the exploration company to become the holder of a majority of stock of the defendant company, and does not mention that provision which gives MacNeill and Penrose an interest with the exploration company in the new issue of convertible bonds.

Immediately after the meeting of the directors last stated, to wit, on August 1st, a notice was sent out to the stockholders for a meeting to be held on September 5th at Jersey City to take action upon the proposed increase of the capital stock from \$4,500,000 to \$6,000,000, and also upon the proposed issue of \$3,000,000 of convertible bonds of the character previously stated. Complainant received this notice on the 2d of August and had an interview as soon as practicable with the defendant MacNeill and protested to him personally against the proposed action, and was informed, as he understood, by MacNeill that he (complainant) would have no right to his proportionate share or any of the proposed increased stock or issue of convertible bonds unless he would join with MacNeill and the other stockholders of the company in giving an option of a purchase of 51 per cent. of his holdings of stock to the American Smelters Security Company at \$19.60 a share. So far as the case shows this was the first notice complainant had of the proposition to issue convertible bonds and to give some other company the control of a majority of the stock of the defendant company.

In order to protect himself complainant sent an attorney to the meeting of the stockholders held in pursuance of the notice and submitted a written protest there, the material parts of which are as follows: "The plan for the subscription to, and distribution of, the said proposed increase shares of stock, prevents any stockholders, myself included, from subscribing for his pro rata share thereof un-

less he shall agree to sell, assign, or exchange one-half of fifty-one per cent., or some share of his present holdings, for mortgage bonds of said company; whereas, I am advised that any stockholder, myself included, has the legal right to subscribe for such proportionate number of said increased shares as his present holdings of stock bear to the present number of shares in said company, unconditionally. I object to and protest against such proposed increase of said capital stock, for the further reason that the proposed plan of sale, distribution and exchange thereof compels a subscribing stockholder to pay more than the par value for shares subscribed for by him; whereas I am advised, any stockholder, myself included, has the legal right to subscribe for and have such increased shares at their par value the exercise of which right I respectfully insist shall be accorded me. I am now the holder of one-fifth, or 20 per cent., of the present number of shares of the company, and the proposed sale, distribution and exchange of such increased stock will diminish my holdings from 20 to but 15 per cent., as respects the whole number of shares in said company, thereby reducing the value of my shares by 25 per cent.; and said plan will, to the same extent, diminish the voting power of my said holdings in said corporation. I further object and protest against said proposed plan, because the proposed issue, distribution and exchange of said new shares is to be made upon the illegal consideration, that the company will thereby barter such increased shares of stock of the corporation, for the purpose of enabling the president and officers and other stockholders of the corporation, to make a sale and exchange of their own present holdings and stock in said company. I further object to and protest against the issue of said increased capital stock, and the borrowing of the sum of three million dollars upon the proposed plan, or at all, because the mine and mill of the company at Bingham are capable of earning, if the same are operated with ordinary skill and ability, sufficient money to meet the cost of the proposed improvements. I further object and protest against the proposed plan, because the fact is that the sum of \$3,000,000, after deducting the \$750,000 for paying the existing mortgage indebtedness, is far in excess of the requirements of said company for making such improvements. That said improvements consist mainly of two items, as follows: (1) The building of a railroad from the mine at Bingham to the site of the proposed new mill on the south shore of Great Salt Lake; (2) the building of said mill and its appurtenant power plant. That the said railroad can be built and equipped with rolling stock for a sum not to exceed \$350,000. That I have offered to, and do now hereby offer to, build and equip the same as aforesaid for said company for the sum of \$350,000. That said mill can be built and

equipped with first-class modern machinery and appliances adapted to all the uses required of it, for a sum not exceeding \$750,000, and I have offered, and do hereby offer, to construct the same in manner aforesaid for said sum. I further object and protest because the fact is, as I am informed and believe, that money to the extent of \$4,000,000 on the simple contract notes of said company can be borrowed at the rate of five per cent. per annum from a company financially responsible, to wit, the General Electric Company, conditioned only that the company will sell, at market rates, its copper product to the General Electric Company. The increased stock can be sold at par for more money than is needed to pay the expense of said improvements. I further protest and object against said proposed action by the company because I have been and am now ready, able and willing to contribute my share of one-fifth of the money necessary to pay the expense of said proposed improvements upon the plant of the company, as well as the payment of said mortgage indebtedness. That the notice of the directors' meeting, at which the issue of the bonds and stock now contemplated was recommended, contained no reference to or notification of the proposed increase of stock, and that therefore the proposed proceedings to increase said stock are illegal and void; and that there is no warrant at law for the issue of bonds of the tenor and effect set out in the notice of this meeting, and that such bonds, if issued, will be illegal and void."

Several objections are made by complainant to the proposed proceedings. First, it is objected that the notice of the meeting of directors sent to the complainant is insufficient in that it does not set forth truly and fully the business to be brought before the directors. It will be remembered that the notice is confined to specifying the mere issue of bonds to be secured by mortgage and the rate of interest and term of the bonds and to authorize the calling of the stockholders' meeting to ratify the action of the board. The other contents of the notice are quite general. There is nothing in it to indicate that an increase of capital stock was contemplated, or that it was proposed to issue the bonds and negotiate them in a mass to one party.

Now, it will be observed that the twenty-seventh section of the corporation act (P. L. 1896, p. 285), which authorizes an increase of capital stock, prescribes the mode in which it shall be done. The board of directors must pass a resolution declaring that such increase is advisable and calling a meeting of stockholders to take action thereon. Counsel for complainant draws a clear distinction between meetings of directors held for the purpose of supervising and directing the ordinary business transactions of the company, and providing for such emergencies and exigencies as may arise therein, and a meeting of di-

rectors to consider the matters provided for in section 27, and they contend, and I think rightly, that while little or even no notice is required to be given to each director of a meeting to transact business of the former character, a special notice is not only proper but necessary to be given in the latter case, and that such notice should state fully the object of the meeting, so that each director may be informed in advance and fully appreciate the importance of his personal attendance. The defendants seem to have felt the force of these considerations, for they did attempt to state the object of the meeting, and the complaint of Col. Wall is that they did not state it fully. It seems clear enough from the affidavits and the statements of counsel that he was aware of the desire of the other directors to increase the indebtedness of the company, and may have thought that it was useless, even if it were practicable for him to leave his home and place of business at Salt Lake City, near the works of the corporation, and travel several hundred miles to Colorado Springs to oppose the issue of bonds, and therefore contented himself with a written protest, while, if he had known that the scheme included the issuing of \$1,500,000 more stock and placing that stock under the control of a single corporation, he would have attended the meeting and exercised his influence by argument against it. This was his undoubted right, and it is no argument against his exercising it to say that it is quite clear that it would have been unavailing. The law presumes that the result of a meeting of a body of that kind cannot be determined with judicial certainty by canvassing the individual views of the members, but that in law it depends upon a conference of the several members met as a body after an interchange of views and of arguments. It is impossible to hold that the presence of Col. Wall at the meeting of directors here relied on might not have changed the result. I can see no reason why Col. Wall should not have been apprised not only of the proposed contract of July 26th between the copper company and the exploration company, but also of the previous contract of July 7th between MacNeill and Penrose and the exploration company. I do not deem it necessary at present to express any definite opinion on this objection.

The next objection is that the meeting of directors in question was invalid because not held by a quorum of directors competent to vote thereon on the matter before them. Only four were present, a bare quorum. Of these four, complainants contend that MacNeill was incompetent by reason of his personal interest in the question before the board. This allegation of interest is based on the sixth paragraph of the contract of July 7th heretofore mentioned. By that paragraph the exploration company agreed that MacNeill and Penrose may take the whole or any part of \$1,500,000 of the con-

vertible bonds, upon condition that they shall sell to the exploration company one-half of such stock as they shall receive from the company under the option of conversion to be inserted in the bonds. I may not have properly construed the section; but it certainly does give Messrs. MacNeill and Penrose a personal interest in the transaction, and complainant claims that it is fatal to the resolution in question upon the principle laid down in the books that "a director, who is disqualified by reason of personal interest in a matter before a directors' meeting, loses pro hac vice his character as director, and he cannot be counted for the purpose of making out a quorum." This principle was acted upon and approved by our Court of Errors and Appeals in *Met. Tel. & Tel. Co. v. Domestic Tel. & Tel. Co.*, 44 N. J. Eq. 568, at page 573, 14 Atl. 907, at page 910. The answer made by defendants to this position is that this reservation to MacNeill and Penrose was intended by them to be held in trust for the benefit of all the other stockholders who chose to come in and take a share of it and contribute towards making up the \$150,000 of stock which they had agreed to sell to the exploration company, in order to give them the majority of all the stock. Complainant's answer to this is that there is nothing in writing signed by either MacNeill or Penrose by which this trust can be established. So far as appears to the court, it is supported only by the affidavit of Mr. Babbitt, one of the directors, and the counsel of the company. It probably furnishes the explanation of the complainant's allegation that he was told by MacNeill, or some one representing him, that he could only obtain his share in the new issue of bonds by contributing shares of stock toward making up the 51 per cent. of the whole issue, required by the exploration company. I shall not express any definite opinion upon this point made by the complainant at this stage of the cause.

The next point made by the complainant is that there is no authority by the common law or by our statute for issuing convertible bonds of this character. They argue, and rightly, that the right to issue bonds and secure them by mortgage is not given by any statute, but rests entirely upon the common-law right of a corporation to incur indebtedness, and that right does not include a right to issue bonds convertible into stock. In this connection reference was made, at the argument, to the second section of the act of March 28, 1902 (P. L. 1902, p. 217). That section, as is well known, was supposed to have been passed at the instance of the great steel trust, and came under review in the case of *Berger v. U. S. Steel Corporation*, 63 N. J. Eq. 516, 53 Atl. 14, by Vice Chancellor Emery, and again at page 819, 63 N. J. Eq. 53 Atl. 68, by the Court of Errors and Appeals. But that act by its terms provides for convertible bonds issued by a corporation having certain qualifications and character-

istics which the present corporation in question does not possess. I do not deem it necessary to express any definite opinion at this time on this objection.

The last and most serious objection urged by complainant is that the proposed action will deprive him of a clear and indisputable right which he has by the law of the land to participate in any issue of new stock to an extent measured by the comparative amount of his present holdings of stock, and upon the same terms that other parties shall participate therein. In other words, that he is entitled to an opportunity to take and pay for one-fifth of the proposed new issue, and that the contract to dispose of all that issue to the exploration company infringes, on that right. This right, as I understand it, is based on two grounds: First. That the complainant became the owner of one-fifth of the property of this corporation with the full understanding that he would thereby have a voice and influence in its management due, among other things, to that share, and that an increase of the stock issued to other people will diminish his voice and influence just so much. Second. That at present he is entitled by law to one-fifth of the whole property of the corporation, whatever may be its value, and he is entitled to one-fifth of any increase of that value, whether such increase be due to the accumulation of actual earnings, or to anticipated increase as the effect of the knowledge, by physical development, of its present value, and any issue of capital stock is of necessity a diminution of his share in that increase, and that in order to protect him against an undervaluation of the new stock to be issued, however that undervaluation may arise, he is entitled to the privilege of taking a proportionate share of the new stock, and especially is he so entitled in the present case, where there is no present sale of the new stock at an appraised value, but where an option is given to purchase at any time within five years at a price now fixed, and which, when the option comes to be exercised, may prove to be entirely inadequate. Thus the holder of the option will have the whole of five years, during which the mining property is being developed, to ascertain and determine whether it is worth while for it to exercise its option. If the property does not improve in value and the stock is not worth \$20 per share, it will not exercise its option, but will enforce the payment of the bond. If, on the other hand, the property does, either by its development or by the addition of undivided earnings, increase in value so as to be worth, as it may, many times the price fixed, it will exercise its option and in such case it will gain at the expense and loss of the complainant. The complainant's contention is, in my judgment, thoroughly based upon justice and law.

The leading case, of course, upon the subject is *Gray v. Portland Bank* (1807) 3 Mass. 364, 3 Am. Dec. 156. There the bank was organized with \$100,000 capital with the privilege by its charter to increase it to \$300,000. After it had been in successful operation for several years and the stock was worth something more than par, the directors resolved to issue the remaining stock, as I read the case, at par. The plaintiff demanded the right to take his share, which was \$14,000 in the new stock, and was refused, whereupon he brought his suit against the bank for damages, and recovered. The case was elaborately argued and opinions delivered by two judges, putting his right on substantially the grounds above stated. That case has been followed with almost unbroken uniformity in most of the states of the Union. Mr. Morawetz, in his valuable work on Corporations, at sections 454, 455, states the rule as follows: "When a corporation declares a stock dividend in wholly or partially paid-up shares, the new shares are paid up in the whole or in part out of the profits which belong to the existing shareholders. It is evident, therefore, that each shareholder is entitled to share in the dividend, to the same extent as if it were paid in cash. It is equally clear that a corporation cannot issue new shares at less than their full market value, except by equal distribution among all the shareholders; for whatever the new shares are worth is represented by capital or profits belonging in equity to the existing shareholders. It seems that, if a corporation resolves to increase the amount of its capital by issuing and selling new shares, every stockholder has a right of pre-emption of a fractional part of the new issue, proportionate to his fractional share in the company's entire stock. Each stockholder is thus enabled to preserve unimpaired his voice in the management of the company's affairs." To the same effect is *Angell & Ames on Corporations*, §§ 554, 555; also 2 *Beach on Private Corporations*, § 473. Mr. Cook, in his book on *Stock & Stockholders* (section 286), lays down the same rule. To the same effect is Mr. Thompson's elaborate book (volume 2, § 2094).

Numerous adjudged cases were cited by counsel for the complainant in support of the general proposition, of which I will mention a few. One is *Jones v. Concord & Montreal R. R. Co.*, 67 N. H. 119, 38 Atl. 120. In the very recent case of *Electric Co. of America v. Edison Electric Illuminating Co.* (1901) 200 Pa. 516, 50 Atl. 164, the question came under consideration in the review by the Supreme Court of a learned opinion of the presiding judge of the common pleas of Blair county. He there cites the authority of several text writers and refers to previous decisions in Pennsylvania and holds to the rule as laid down by the text writers, and his decree was sustained on appeal by the Supreme

Court for the reasons given in the court below. The headnote is this: "Stockholders have a right to purchase a pro rata share of a new issue of stock, so that the directors may not provide that the new issue shall be sold to the one making the highest secret bid." There the complainants already held a majority of the stock but had only a minority in the board of directors. That body, by a majority vote, resolved to issue new stock and sell it to the person who would make the highest sealed bid for it. This action was restrained by the court. In our own state we have the case of *Way v. American Grease Co.*, 60 N. J. Eq. 263, 47 Atl. 44, decided by Vice Chancellor Grey in 1900. The headnote is this: "Directors of a corporation which is fully organized and in the active conduct of its business are bound to afford to existing stockholders an opportunity to subscribe for any new issue of shares of its capital stock in proportion to their holdings, before disposing of such new shares in any other way." In support of that proposition he cites (page 269 of 60 N. J. Eq., page 46 of 47 Atl.) *Gray v. Portland Bank*. It is true that there were circumstances of actual fraud found in that case, but the principle applies to the present case. I understand that the Court of Errors and Appeals acted upon the same principle in *Berger v. U. S. Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68. The first two headnotes are to that effect.

Against this doctrine defendants rely on the case of *Meredith v. Zinc Co.*, 55 N. J. Eq. 211, 37 Atl. 539, decided by myself and affirmed on appeal, 56 N. J. Eq. 454, 41 Atl. 1116, on my opinion. What is expressly relied upon is found upon page 220 of 55 N. J. Eq., page 542 of 37 Atl., and counsel seem to think that the interpolation of the words in parenthesis, "if there be such" after the words "general rule" manifested a doubt in my mind as to its existence. It is proper for me to say here that what I there said was the result of not more than 10 minutes of consideration, and the only study given to the question was the reading of the section referred to in 2 Beach on Corporations. And if I had then had at command time to give the subject proper consideration, I am not at all sure that I should have dictated the sentence which immediately follows the citation of the Massachusetts case, which was not necessary for the decision of the cause. But be that as it may, the reading of the whole case shows that it is quite different from the one in hand. In the first place, the complainants were the holders of less than 1 per cent. of the whole stock of the corporation. In the second place, the defendants offered at the hearing to give them an opportunity to purchase their proportion of the new stock at par. In the third place, the property purchased had been appraised in the most careful manner and bargained to be purchased between parties entirely at arm's length, excluding the least sus-

picion that the element existed of a party making a contract with himself. In the present case there is no purchase of property, no appraisal of value by disinterested parties, but a simple clear contract to give a third party the absolute right by way of option to purchase stock of a corporation at a price now fixed, if at a future day that party should feel it his interest to make the purchase. I think that not only is that in direct violation of the complainant's individual right as a stockholder, even if it were an issue of stock in present for a fixed price, but that the optional character of the contract is vicious in itself, and not warranted by that clause in the statute which authorizes the creation and issue of new stock.

Against the general line of authority above cited defendant relies upon the very recent case of *Stokes v. Continental Trust Co.* (decided by the Appellate Division of the New York Supreme Court) 99 App. Div. 377, 91 N. Y. Supp. 239. I might dismiss the case by saying that the point here involved was not before that court in that cause, and that a careful examination of the reasoning of the several judges tends to help the complainant herein rather than the defendant. It was a suit brought by Stokes against the trust company to recover damages against it for not issuing to him at par his proportion of a new issue of stock, such damages to be measured by the difference between the par value of \$100 per share and the price at which the new stock was actually sold, \$450 per share. At the time when the transaction occurred the book value of the stock was about \$310. At that time the firm of Blair & Co. proposed to buy 5,000 shares of new stock at \$450 per share, the result being a doubling of the amount of stock and increasing its book value considerably, and the market value was increased far beyond its book value. The plaintiff claimed the right to a proportionate amount of the new stock at par on the day of its issue. He never demanded the right to take any part of it at the price paid by Blair & Co., or offered to do so. The trial judge sustained the plaintiff's claim and directed judgment to be entered against the defendant for the difference between the par value of the complainant's 221 shares, namely \$22,100, and the actual market value fixed by stipulation at \$550 per share, which judgment amounted to \$115,151.07. It seems to me that such a judgment could not stand the test of reason for a moment. The mere statement of the case shows its utter indefensibility. The leading opinion of the Supreme Court was written by Justice O'Brien. He reviews all the cases in New York and expresses some doubt upon the soundness of much that has been written and decided upon the question, and then calls attention to the peculiar claim of the plaintiff to subscribe for the stock at par and his failure to offer to pay the same price as Blair & Co. paid,

and then proceeds as follows: "Much might be said, and considerable force may be derived from the view of text writers and from the expressions in opinions, in support of the proposition that a stockholder, as against an outsider, has a primary or pre-emptive right to subscribe for any increase of stock made by the corporation. This primary or pre-emptive right, however, to subscribe at par for increased stock which is to be issued at par, or, where the value of the stock is greater than its par value and it is proposed to issue it at its greater price, to subscribe for it at such price, in preference to outsiders, is quite different and distinct from the right here claimed, which is that of a stockholder to have at par stock which is worth or can be sold, in the interest and for the benefit of the corporation to others, for $4\frac{1}{2}$ times its par value. We do not think, in the absence of any statute of the state conferring such right, or provision in the charter of the corporation, or in the resolution authorizing the increase, or of fraud or illegality in making the increase, that this contention as to the right of stockholders which the plaintiff here asserts can be sustained either in law or in reason." In this opinion Van Brunt and Hatch, JJ., concurred, Patterson, J., concurred in the result, and Laughlin, J., gave his own reasons. Speaking of the power to issue stock where there is a minority against it, he uses this language, which seems to me to express the rule accurately and tersely: "In that event, I think the statute confers implied power upon the majority to determine whether the stock shall be issued at par or above par, at what may be deemed its actual value in view of the value of the assets of the existing corporation, the right to ultimately share in which the holders of the new issue of stock will thus acquire. The action must be taken, however, in a manner that will secure the existing stockholders an opportunity of exercising their pre-emptive right of subscribing for a share of the increased capital stock in proportion to their holdings of the original. I think, for instance, that the sale of the new stock to the highest bidder upon sealed proposals would be a violation of this right. A stockholder prior to the increase has a right to a voice in the management and to a share of the assets of the corporation, on final dissolution, in the proportion that his holdings bear to the entire outstanding capital. These rights are materially affected by an increase of the capital stock; and such increase must therefore be made in a manner to enable him to become the purchaser of such a proportion of the increased capital stock as will preserve his right to the same proportion in the assets on final liquidation as he originally had and also the same voice in the management of the corporation. Moreover, the immediate effect of an increase in the capital stock of a corporation, the value of which is

above par, would be to depreciate the value of the original stock, unless the new capital is issued and sold at a valuation equal to that of the original issue. It is therefore manifest that, if the holders of the original stock are not to purchase the entire new issue, it is to their interests that the increase of stock be issued not at par, but at what will be its actual value as near as the same may be ascertained."

For the reasons above set forth I am of the opinion that the last objection taken by the complainant to these proceedings is fatal, and, without expressing any opinion upon the other objections made, that an injunction must go until the time of the hearing.

HOBOKEN & M. R. CO. et al. v. JERSEY CITY, H. & P. RY. CO. et al.

(Court of Chancery of New Jersey. Dec. 14, 1905.)

1. STREET RAILROADS—LEASES—ULTRA VIRES ACT.

Plaintiff, a tunnel company, desiring to extend its tunnel under the North river, still further underground, leased from defendant street railway company the right to use certain of its land for that purpose for 999 years. The land so leased was vacant, except for an old storehouse, and it appeared that the use of the land for the extension of such tunnel would not interfere in any way with the exercise of the franchises of the lessor. Held, that such lease was not beyond the lessor's power to grant.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 123-127.]

2. INJUNCTION — TRESPASS — REMEDY AT LAW—INADEQUACY.

Where plaintiff under a lease from defendant was entitled to enter certain land for the extension of plaintiff's tunnel which had been constructed under the North river, but defendant intervened and with a strong hand refused to permit plaintiff to do the work contemplated, plaintiff's damages being uncertain, it had no adequate remedy at law, and was entitled to an injunction restraining such acts.

3. APPEAL—SUSPENSION OF INJUNCTION.

Where an injunction was granted restraining defendant from interfering with a strong hand to prevent plaintiff from constructing certain improvements under a lease, the injunction would not be suspended pending appeal under a statute declaring that no appeal from an order granting an injunction shall suspend or modify its operation without an order of the chancellor, and that a suspension or modification thereof shall extend only so far as may be necessary to preserve the subject of the appeal, and shall not in any case be allowed to destroy the right established or protected by the decree appealed from.

Suit by the Hoboken & Manhattan Railroad Company and others against the Jersey City, Hoboken & Paterson Railway Company and the Public Service Corporation of New Jersey for an injunction. Order to suspend a temporary injunction pending appeal. Order discharged.

Collins & Corbin, for complainants. Frank Bergen and William D. Edwards, for defendants.

PITNEY, V. C. (orally). I have thought this matter over seriously, and I will now state the reason for my action. The complainant is the Hudson Tunnel Company. The defendant is a trolley company, having a terminus near the southerly Hoboken ferry at Hudson Place. The tunnel company built a tunnel under the North river, ending on this side some distance—half or three quarters of a mile from the ferry—the terminus of the trolley. Its right of way continues to that terminus. Desirous of extending its business, and of intercepting the travel that is brought to the ferry by the trolley company from the high grounds about Hoboken, the tunnel company entered into a written contract with the trolley company for their mutual benefit. It was prepared with great care—it is not a loose contract—and there is no allegation or proof that there was any fraud or accident in connection with it. That contract, in effect, gives a lease by the trolley company to the tunnel company. And now, if you will, hand me one of those maps (the map indicated is handed to the court) of a certain tract of land in Hoboken, a map of which is exhibited and proven before the court, by which there appears to be a considerable piece of land, owned, but not all used, for its present purposes by the trolley company. That lease gives the tunnel company a certain right for 999 years, by clear and express language, in a part of that plot of land. The object was to extend the tunnel from its present terminus still underground until it reaches that point, and there to make a common terminal for passengers, so that passengers arriving at that point from the hill country and the body of the city to the west can conveniently take the tunnel and cross to the city of New York without taking the ferry, and, vice versa, passengers coming from New York to Hoboken would come to the surface from the tunnel and take the trolley. That was understood to be a matter of mutual benefit to each party; otherwise, we must presume they would not have entered into it. When the time came for going to work on the construction of the tunnel near that point, and especially for the tunnel company to excavate, in order to sink their shaft and start their work on the underground connection between this terminal and the present terminus of the tunnel, some half a mile distant, there seemed to be a reluctance on the part of the trolley company to do as they expressly covenanted to do. The tunnel company thereupon started the work. They entered upon this piece of land, which is vacant, except as a storehouse for worthless rubbish, and began to dig. There they were met by physical opposition. The trolley company did not take the course which litigants generally take, and which this court thinks they ought in all cases to take, and never to resort to the strong hand; but it interfered by the strong hand, and arrested

and drove out the workmen of the tunnel company.

The tunnel company thereupon prepared its bill with some care, addressed to this court, setting forth those facts, setting forth the contract and the correspondence, and setting forth that they had attempted to go to work, as by the language of the contract I think they had the right to do, and obtained an order to show cause why an injunction should not issue. By their bill they pray that the court will undertake to see that this contract was carried out under its supervision, and, incidentally, they asked for an injunction, not to restrain the defendants from doing anything, not to restrain the trolley company from breaking or damaging anything, but to prevent them by the strong hand from interfering with the complainants in their legitimate work under that contract, where the trolley company had agreed under seal that they should work. On the return day the bill was presented to me with a mass of affidavits and maps which rendered the matter quite clear. When these had been read, I asked Mr. Bergen and Senator Edwards, counsel for the trolley company, if they had any affidavits in reply, and they said they had an answer and a plea. The answer handed up was by the Public Service Corporation, in which it was declared it had nothing to do with the contract. The plea was by the trolley company, and it simply set up that the contract was beyond their power—that it was *ultra vires*. It further added that two of its stockholders had objected to it, and had filed a bill to have the whole contract set aside. There were no proofs establishing the status of the two men who had objected to the contract. There were no new facts proven that the court could act upon in the matter of granting, or refusing to grant, an injunction, and the facts upon which I must act must be shown either by record or affidavit.

But there was not an affidavit produced. It was simply stated that the execution of the contract was opposed. All they really said was: "It is *ultra vires*, and we want that matter settled before anything is done." No contention was made that the letter and spirit of the contract did not authorize what the complainant was doing. I thought then, and I think now, that the plea was perfectly futile for any purpose whatever, except to act as a demurrer to the bill, and the whole question then and now is, did the bill, with the affidavits, set up a case? I thought then, and I think now, that it does. The complainants were in possession, peaceably, trying to work under a deed and contract which gave them the land in the strictest language, and they were proceeding to carry out that particular purpose; and I think they had a perfectly clear case at law, requiring no adjudication at law to bring it within the jurisdiction of this court, and the defendants

were stopping them by force. They did not come to this court by bill and ask this court to restrain the complainants or their workmen. They did not take that course, nor would they suggest anything by way of defense at all, except that they wanted the question first settled as to whether the contract was *ultra vires*. I think that, under the pleadings and the affidavits, it is not *ultra vires*. I do not think there is the least doubt about it. It is simply a lease of an easement in a certain tract of land, because it appears clearly by the map that it is not all used for the tracks of the company, and it is a matter of vision that it is not all necessary for the present use of the railroad company, and the idea of *ultra vires* does not apply at all to such a case. I know of no reason why any man who wishes to buy the property leased should hesitate to take title to it. The lease under which complainant claims does not interfere with the exercise of the defendant's franchise in the land. It is clearly property which is subject at law to the ordinary disposition of the owner, and the title includes the right to convey. It may be that the railroad company could not lease its whole tracks without some legislative authority, but that is not the question here, and it has been well remarked by Mr. Corbin that there is nothing about the use of this piece of land, as indicated by the proofs, to show that it is *ultra vires*. I have no doubt about it.

The next point is, shall the matter be treated as a mere trespass? The ground on which I went the other day is that this company has this contract, and had presumably acted upon it. It has finished its tunnel under the Hudson river on the strength of it. I do not recollect the date of the contract.

Mr. Corbin: More than a year and a half ago—April, 1904.

The Court: And it is held up now in the operation of carrying out the enterprise. Nobody could ever ascertain what the damages are or will be to it. And one ground for this court interfering in cases of trespass is that the damages are uncertain, and that the remedy at law is entirely inadequate. This bill, however, asks the court to go further and superintend the carrying out of this contract, something in the nature of specific performance, and, as has been stated by Mr. Corbin, and shown by the authorities, it is the duty of the court in such cases to prevent violence and to supervise the carrying out of such a contract. So, independent of preserving to these parties the right to work under that contract, there is a prayer in their bill which certainly calls for something this court should and ought to do, even though it does not go as far as Mr. Corbin would like. An order for restraint was made on Monday last. An appeal was taken, and on Tuesday evening Mr. Bergen and Mr. Edwards called at my study at Morristown, and said to me that an appeal was taken, and asked that the opera-

tion of the restraint be suspended. I heard their application, and, without arriving at any judgment in the matter, I granted an order to show cause why the operation of the injunction should not be stayed pending the appeal, returnable here this morning, so that for one day I stayed the operation of the injunction, during which time the defendant has been at liberty to go on with a gang of men and interfere, if it could, with the operations of the complainant.

Senator Edwards: Nothing was done.

The Court: Reference has been made to the rule, the fundamental rule, that the disposition and desire of this court is to preserve things, and not destroy them, *pendente lite*, especially where an appeal is taken, pending the appeal, the subject-matter of the suit should be preserved in *statu quo*, so that the party appealing can receive the benefit of the appeal. That is an ideal and desirable object, but every lawyer who has thought of it will tell you it is absolutely impossible. It is a thing which cannot be done in every case. I will put it to you in this way: A man thinks he owns a house and lot. Another man claims that two feet of it is his, and he commences to cut away the two feet. The gentleman whose house is going to be destroyed asks for an injunction. The Chancellor thinks there is no case for an injunction. He has not shown title, and he refuses an injunction. An appeal is taken, the appellate court takes a different view, and, when he gets his decree of reversal, the house has been cut down. That is one case. There are plenty of other cases which can be imagined where it is quite impossible to preserve the thing in *statu quo*. I have heard that question discussed over and over again by the bar, and the opinion generally expressed is that the ideal of the late Chief Justice can never be attained.

However, that is the principle on which courts ought to go as far as practicable; and after the decision of the Court of Errors and Appeals in the famous National Docks Case our friend here, Mr. Corbin, who is famous for his work in that line, drafted and had this act passed, and it has now become part of our Code. The section declares, in its first half, that "no appeal taken from an order or decree granting an injunction shall suspend or modify the operation of the injunction without an order of the Chancellor," etc. That part of the section does not help the defendant, and counsel will hardly contend that their appeal has modified the injunction. Hence they ask a special order of this court. And that brings us to the latter part of the section, which declares that a suspension or modification by the court shall extend only so far as may be necessary to preserve the subject of the appeal, and shall not in any case be allowed to destroy the right established or protected by the order or decree appealed from. That amounts

to a direction to the Chancellor, if he sees fit, to modify the injunction, and to so do it as to preserve and not destroy the right protected by the order or decree appealed from.

Now, what is the right here protected by the order appealed from? It is simply the right to be on those premises and to work there without being physically obstructed in that work. Now, that right I am forbidden to disturb or destroy, and I conceive it to be a continuing right, running from day to day. All that I determine is this: the defendants have shown no answer to the complainant's case. It is open to them to do it. If they have an answer, let them put it in, or present a bill of their own, and then they will bring the case within the scope of this act. But the only thing here in question is the right of these people not to be dealt with by the strong hand. That is all. I have not protected them in anything else. I think they have shown a prima facie case, which has not been answered. They have a right to go on that ground and work under that contract. That is the right I protected by the order, and that right ought not to be taken away from them pending the appeal. They ought not to be subjected to treatment by the strong hand. This court is against that sort of thing at all times. It deprecates that kind of thing. Go to the law, if you do not want these men to dig there. The courts are open. But do not drive them out by force and come here and say, "We have reasons, but we do not want to tell them." The courts say you must not do it.

I will not suspend the injunction in this case for that reason. I refuse to suspend the operation of the injunction, and will advise that the order be immediately discharged.

MILLS v. HENDERSHOT et al.

(Court of Chancery of New Jersey. Dec. 23, 1905.)

1. CORPORATIONS—INSOLVENCY—TRANSFER OF ASSETS TO OFFICERS—VALIDITY.

The directors of an insolvent corporation ordered that corporate property should be transferred to two of their number, who assumed to pay certain creditors. The remaining property was insufficient to pay the corporate debts. The transfer to the two directors was made in contemplation of the corporation suspending business by reason of its insolvent condition. *Held*, that the transfers were void under Corporation Act (Laws 1896, p. 293, c. 185) § 64, providing that, when a corporation shall become insolvent, neither the directors nor officers shall convey any corporate assets, and the receiver of the corporation was entitled to recover from each transferee the value of the property transferred to him.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2154-2158.]

2. SUBROGATION — PAYMENT OF CORPORATE DEBTS—RIGHT TO SUBROGATION.

One of the transferees paid debts of the corporation in consideration of the transfer. *Held*, that he was entitled to be subrogated to the rights of the creditor to the extent of the

debts paid, and have them included as a part of the claims against the corporation.

3. CORPORATIONS—INSOLVENCY—TRANSFER OF ASSETS—LIABILITY OF OFFICERS PARTICIPATING THEREIN.

Directors of an insolvent corporation transferred corporate property to two of their number in consideration of their paying certain creditors. The transfers were made in contemplation of the corporation suspending business. The remaining property was insufficient to pay the debts. *Held*, that, as the transfers were in violation of the duties of the directors and were participated in by all, each was liable for the diversion of the assets so far as necessary to pay the debts.

4. SAME — PAYMENT OF DIVIDENDS OUT OF CAPITAL—RECOVERY ON INSOLVENCY.

Dividends paid out of the capital of a corporation are recoverable by the receiver of the corporation on its insolvency, as far as may be necessary for the payment of debts.

5. SAME—PAYMENT OF EXCESSIVE SALARIES.

Officers of a corporation, misappropriating its assets by receiving excessive salaries, are liable to refund the same in an action by the receiver of the corporation to recover assets to pay debts.

6. SAME.

Where the stockholder of an insolvent corporation did not continue business for the purpose of giving an officer a salary, and the officer drawing the salary acted in good faith, and but for a division of opinion between him and other holders of the stock who controlled the corporation the business would have been closed up several years earlier, the receiver of the corporation, seeking to recover assets to pay debts, could not recover the reasonable salary received by the officer after the insolvency of the corporation.

7. SAME—INSOLVENCY—ACTION BY RECEIVER—RIGHTS OF RECEIVER.

Three persons, contemplating the formation of a corporation, entered into an agreement which provided for their salaries as officers of the corporation, and declared that they should be paid from the profits of the business and that the stockholders should be paid dividends before salaries were paid. The certificate of organization did not refer to the agreement, nor was it adopted at the first stockholders' meeting to organize the corporation. The three persons were elected directors, and at their meeting adopted a resolution providing that the dividends and salaries should be paid as specified in the agreement. *Held*, that the receiver of the corporation, seeking to recover assets to pay debts, was not entitled to the benefit of the agreement, and could not recover salaries paid from the capital with the acquiescence of the stockholders.

8. SAME—RECOVERY OF DIVIDENDS—TIME TO SUE.

A stockholder, receiving in good faith dividends declared by the officers of a corporation, without knowledge that they were paid out of the capital instead of the profits, holds them under a constructive trust, and an action by a receiver for their recovery to make assets to pay debts is barred in six years.

9. SAME.

Equity will not interpose the bar of limitations to prevent a receiver of a corporation from recovering from the directors and officers of the corporation dividends paid to them out of the capital of the corporation; such acts being in fraud of the corporation and its creditors.

10. SAME—STATUTES—CONSTRUCTION.

Corporation Act (Laws 1896, p. 296, c. 185) § 30, making directors liable for dividends declared and paid out of the capital of the cor-

poration, does not affect the liability of officers of a corporation receiving as stockholders thereof dividends paid out of the capital.

11. SAME — AGREEMENT BY INCORPORATORS — ENFORCEMENT.

Three persons contemplating the formation of a corporation, entered into an agreement which provided for their salaries as officers of the corporation, and declared that they should be paid from the profits of the business after the stockholders had been paid dividends. The corporation was formed and became insolvent. In a suit against the three by the receiver of the corporation to recover assets to pay debts, two of them filed cross-bills against the third, and claimed the right to enforce the agreement by declaring a primary liability to the receiver on the part of the third on account of salary received by him, without asking a decree against him for the payment to themselves for the amount withdrawn by the third as salary, in violation of the agreement. *Held* that, as the receiver was not entitled to enforce the agreement, the decree in his favor could not establish the order of liability between the three defendants, based on the agreement.

12. SAME.

Three persons, contemplating the formation of a corporation, entered into an agreement providing for their salaries as officers of the corporation, and declaring that they should be paid out of the profits of the business. The corporation was formed, and one of the three received a salary as officer, paid from the capital. The other two knew that there were no profits and assented to such payment. *Held*, that the two could not recover the salary received; the payment allowed by themselves being a breach of the agreement.

13. SAME.

H., S., and W., officers of an insolvent corporation, directed the transfer of corporate property to H. and S. under an agreement whereby H. agreed to pay a certain creditor and S. a part of a note held by another creditor, and whereby S. and W. agreed to pay the balance of the note. In a suit by the receiver of the corporation, H. sought to enforce the agreement by directing a primary liability on the part of S. and W. to pay a decree in favor of the receiver. *Held* that, as the suit by the receiver was based on the invalidity of the contract, any right H. had against S. and W. under it was a matter of enforcement by an independent suit only.

14. ACTION—NATURE—LEGAL.

A contract entered into between the officers of an insolvent corporation on a distribution of a part of the assets thereof, whereby two of the officers agreed with the third to pay a note held by a creditor, creates, if established, a legal liability, and the persons liable thereon are entitled to have it established in a court of law.

15. WITNESSES — TRANSACTIONS WITH DECEASED PERSON.

A person seeking to enforce a contract entered into between him on the one hand and a decedent and a third person on the other is, under the express provisions of section 4 of the evidence act (P. L. 1900, p. 363), incompetent to testify as to transactions between himself and decedent, resulting in the contract.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 664.]

Action by John M. Mills, as receiver of the F. D. Stephens Company, against Charles B. Hendershot and others. Heard on bill, answers and cross-bills, replication, and proofs. Decree ordered.

Charles Stillwell, Jr., for complainant. Elmer King, pro se. Albridge C. Smith, for defendant Hendershot. Joseph Hinchman, for defendant Welsh.

EMERY, V. C. The receiver of an insolvent corporation files this bill against the defendants Hendershot, Welsh, and Downs, three of the four stockholders of the company, and the administrator of the only remaining stockholder, F. D. Stephens, who is deceased. For the purpose of paying the debts of the insolvent corporation a recovery is sought upon three classes of alleged liabilities. Against the two defendants, Hendershot and the administrator of Stephens, the receiver claims the value of goods of the corporation taken by Hendershot and Stephens on a partial division of its assets, made between them after its insolvency, and on an agreement between Hendershot, Welsh, and Stephens, the only officers and directors of the company, for closing up its business and affairs without legal proceedings. The second claim is a several claim against all of the stockholders, including Downs, for the dividends received by them on their respective stock from the year 1895; it being alleged that the company from that time was insolvent, and that the dividends were paid, not out of the profits, but out of the capital of the company. The third claim of the receiver is against the defendants Hendershot and the administrator of Stephens for a return of their respective salaries since the year 1895. The liability to return the salaries is based partly on an agreement (set out in the bill) made prior to the formation of the company between the three proposed stockholders, Hendershot, Welsh, and Stephens, and partly on the claim that, since 1895, the business was continued and their salaries drawn with full knowledge of the insolvency of the company, and that it is liable to the extent of this further depletion of its assets by continuing the business, instead of closing up its affairs, in insolvency or otherwise. The agreement between Stephens, Hendershot, and Welsh was made for the purpose of taking over a general plumbing, heating, and tinware business previously conducted by Stephens, and of continuing the business, with its good will, as the F. D. Stephens Company; Stephens contributing stock, plant and good will, for which paid-up stock was to be issued to the amount of \$8,000, \$5,000 on the formation of the company and \$3,000 by subsequent purchase. Hendershot and Welsh each paid in \$2,500 in cash for their subscriptions to that amount. As to salaries, the agreement provided that Stephens, as secretary and salesman of the company, and Hendershot, as treasurer and bookkeeper, should each have an annual salary of \$1,000, for which each should give his whole time and attention to the business. Welsh, the presi-

dent, was to have no salary as such officer, but was to be paid for other services. The agreement contained these further provisions, on which the claim of the receiver is based: "Said salaries are to be paid from the profits of the business. The stockholders are to be paid a dividend of 10 per cent before anything is paid in salaries, and next in preference shall be the salary of C. B. Hendershot before any other salaries are paid." The certificate of organization did not refer to this agreement, nor did it contain the agreement in reference to the payment of dividends and salaries. Nor was the agreement referred to or adopted at the first stockholders' meeting to organize the company. But at the first meeting of the stockholders Welsh, Hendershot, and Stephens were elected the three directors, and at the first directors' meeting a resolution was passed that the dividends and salaries should be as specified in the article of agreement, which was placed in the book of minutes of the company. Cross-bills are filed by the defendant Stephens' administrator against Hendershot, and by defendant Welsh against both Stephens' administrator and Hendershot. The general object of each cross-bill is to establish against Hendershot a primary liability for the claims made by the receiver, or some of them, if established. This primary liability was claimed at the hearing as arising out of the contract relating to the postponement of salaries to dividends, and it is claimed that by reason of this agreement Hendershot should be held primarily liable for the salaries received, so far as necessary to pay debts, before any decree for the payment of dividends.

The evidence shows the company, whose business had been unprofitable since at least 1897, was in serious financial difficulty in the spring of 1903, and that in August, 1903, the Pierce, Butler & Pierce Company, its largest merchandise creditor, with a claim of about \$2,100, was pressing for payment and threatening proceedings in bankruptcy. In consequence of this, and for the purpose of closing up the business without the appointment of a receiver, an arrangement was made by which Hendershot and Stevens, with the consent of Welsh, the president, and the other director, each took over at an appraisement or valuation, stock and goods of the company—Hendershot to the amount of \$1,846.48, and Stevens to the amount of \$1,530.86. Hendershot, under the agreement for division (which was made in August, 1903), was to pay the purchase price for the goods taken by him, to the Pierce Company on account of their claim, and shortly after making the agreement, and before actually taking the goods or consummating the agreement, Hendershot did, from his own money, pay \$1,800 to the Pierce Company on account. After this payment disputes arose between the parties in reference to carrying out the agreement, and it was not until September 26, 1903, that Hendershot took the goods assigned to him, and

on that date this receipt, signed by Welsh as president, and Stephens as secretary, was put on the inventory or bill of sale of his goods: "Received payment of the F. D. Stephens Co., the same to be applied to account of Pierce, Butler & Pierce Mfg. Co." Stephens was to pay his purchase price of \$1,530.86 toward the reduction of notes of the company amounting to \$3,000, held by the Clinton National Bank, on which Stephens and Welsh were indorsers. The balance of the stock not taken by Hendershot and Stephens, inventoried at a few hundred dollars, and which neither party desired to take, was to be sold by either of them and applied to the debts of the company. The assets were finally divided and the business taken over about September 26, 1903; Hendershot from that time carrying on the steam-heating business, and Stephens the other business of the company. Hendershot also undertook the completion of the company's outstanding contracts for putting in heaters, and has carried these out, paying the expenses and realizing a small profit, which has been used toward paying some of the company's debts. Hendershot also paid from his own money to the Pierce Company \$1,800 on account of their claim, leaving about \$300 still due, for which claim has been presented to the receiver. Stephens, although he took possession of the stock assigned to him, did not pay anything therefor, either to the company or by paying the price on the note held by the Clinton Bank or on any other claims. He died in November, 1903, and his estate is insolvent. Some of the goods not taken on the division were in the actual possession of Stephens at the time of his death, and his administrator has sold them, retaining the proceeds in a special account. The Clinton Bank's claim is over \$3,700, and other valid claims for over \$500 have been presented to the receiver, who has realized from the assets (including the stock not divided between Hendershot and Stephens) less than \$600. At the time the assets of the company were taken over by Hendershot and Stephens the company was clearly in an insolvent condition. Its assets were not sufficient to pay its debts, and, the stockholders not being willing to make further advances, its credit was exhausted. The transfer to these two directors was made in contemplation of the company suspending its business by reason of this insolvent condition, and must, so far as the receiver representing creditors is concerned, be considered as having been made in contemplation of insolvency. The transfers were therefore void under the sixty-fourth section of the corporation act (Laws 1896, p. 298, c. 185), and the receiver is entitled to recover from each transferee the value of the property respectively assigned to him. The section saves only bona fide transfers, without notice and for present valuable consideration, and these transfers were in fact substantially arrangements be-

tween the stockholders, by which they agreed with each other to prefer two of the creditors by paying to them the money which was due to the company for the equal payment of all its creditors. Had the transfers been made to the creditors direct, they would have been utterly void under the statute, and if arrangements of this kind for disposition of a company's assets, on the brink of insolvency, are to be sustained, the law has been circumvented. The fair value of the property taken is admitted to be the inventory value, and the receiver is entitled to a decree against Hendershot and the administrator of Stephens for the amounts respectively taken, with interest. Hendershot, however, having paid debts of the company in consideration of the assignment, is entitled to be subrogated to the extent of the debts paid, and to have these debts included as part of the claims against the company. If the estate of Stephens, by reason of insolvency, does not satisfy the decree against him, then for the balance both Welsh and Hendershot are in the second place equally liable, and Welsh is secondarily liable on the decree against Hendershot for the value of the stock taken by him. The reason is that all three were the only directors and officers of the company, and the division of the assets in contemplation of insolvency, in violation of the statute and of their duties as directors, was made and concurred in by all. Each of them, in his proper order, is liable for the diversion of the assets, so far as necessary to pay the debts, and the value of these assets is the primary source of payment of the debts of the company.

But these values, together with the assets in the receiver's hands, applicable to that purpose, are not sufficient to pay the debts (including in these the amount of the Pierce Company claim, to which Hendershot is entitled to be subrogated if he satisfies the decree), and the next question is the right of the receiver to recover for that purpose sufficient of the dividends or salaries. This involves also the question of the order of liability as between the recipients of dividends and salaries. The fact relating to the receipts of dividends and salaries are that from March 1895, the dividends were paid, not out of the profits, but from the capital of the company. At this time Hendershot and Stephens, on account of the condition of the business, agreed to reduce their combined salaries from \$2,000 to \$1,000; Hendershot receiving \$600, and Stephens \$400. The payments of dividends continued up to March, 1900, and the amounts received by the defendants, respectively, were Stephens, on 45 shares, \$2,475; Hendershot, on 25 shares, \$1,375; Welsh, \$1,375; and Downs, on 5 shares, \$275. Within the six years prior to the filing of the bill (August 25, 1904) Stephens received \$675, Hendershot \$375,

Welsh \$375, and Downs \$75. For salaries from and after March, 1895, Stephens received \$800, nothing later than April, 1896, and Hendershot received \$7,100, of which all except \$2,400 was received prior to August, 1898. From 1895 to 1899 Hendershot received salary at the reduced rate of \$600 yearly; in 1900 and 1901, after payment of dividends ceased, \$800; and in 1902, and to October, 1903, at the rate of \$1,000.

Stockholders are liable to the receiver for dividends paid out of the capital, so far as necessary for the payment of debts (*Williams v. Bolce*, 38 N. J. Eq. 364 [Runyon, Ch., 1884]), and for the same purpose officers are liable to refund excessive salaries, as being misappropriation of the assets (*Hayes, Receiver, v. Pierson* [Stevens, V. C.] 65 N. J. Eq. 353, 58 Atl. 728, affirmed on appeal [N. J. Err. & App.] 45 Atl. 1091; *Davis v. Davis Co.* [N. J. Ch.] 52 Atl. 717 [Reed, V. C.; 1902]; *Lillard v. Oil, Paint & Drug Co.* [N. J. Ch.] 56 Atl. 254 [Emery, V. C.; 1903]). From April, 1896, Stephens stopped drawing salary or rendering service, and Hendershot from that time seems to have managed the entire business, charging for three years \$600 a year besides receiving \$250 a year as dividends. The proofs as to the work actually performed by him would not justify the conclusion that \$800 was an excessive salary. There was, however, no justification or excuse for the increase of his salary from \$800 to \$1,000 while the company was becoming more deeply involved every year, and his present explanation of it, that he drew the increased amount because Welsh and Stephens insisted on carrying on the business, and that he was entitled to \$1,000 under the agreement, is altogether unsatisfactory as a justification of the increase. For the excess over \$800 a year he must account to the receiver. So far as the receiver alone is concerned, there would be no liability (independent of the agreement between the stockholders) for the repayment by Hendershot of any of the salary beyond this excess, unless it be considered that the mere continuance of the business after the company's capital became impaired created such liability on his part. There is no evidence to sustain a conclusion that the business was continued by the stockholders for the purpose of giving him the salary, or in any bad faith on Hendershot's part; and, on the contrary, his evidence shows that, but for a division of opinion between him and the other holders of the stock who controlled the company, the business would probably have been closed up several years earlier. Independent of the agreement, therefore, the receiver, as representing creditors, has no right to recover any further portion of the back salaries from either Hendershot or the Stephens' estate. Does this agreement give him, as receiver, any right of recovery for that purpose? I think not. The agreement was made for the pri-

mary purpose of regulating, as between these individual stockholders themselves, and *inter sese* only, the disposition of the profits of the business while these stockholders continued to manage the business and draw salaries, and to define *inter sese* what should be profits. By force of this agreement salaries, which are ordinarily expenses of the business, were not (as between the stockholders entitled to dividends and to salaries also), to be considered as expenses. Reasonable salaries are in fact expenses to be deducted before any profits or dividends are payable, and the receiver, as representing creditors, is, in my judgment, not entitled to the benefit of this contract between these individual stockholders, for the purpose of recovering back the salaries which have been paid to them. From April, 1900, no dividends were paid, and to the knowledge of both Stephens and Welsh Hendershot took his salary without objection on their part. The contract might perhaps have been enforceable against either Hendershot or Stephens, drawing salaries as managers, on the application of any of the other stockholders while the company was a going concern, and if the payment had been objected to; but, the other stockholders having for over three years acquiesced in the payment of the salary before dividends, it is questionable whether they could require the return for their benefit as stockholders of a going company. The receiver, as representing creditors merely, occupies a less favorable position, and has no claim to recover the salaries, either directly or by way of adjusting any supposed equities between defendants. The decree to which he is entitled on his bill for the payment of debts must therefore be that he is entitled to recover, first, the value of the assets diverted in the manner above indicated by the defendants Hendershot and Stephens; secondly, the salary received by Hendershot after 1901 in excess of \$800 a year; and, thirdly, the amounts of dividends. This includes all dividends paid within six years from the time of filing the bill, and the next question is whether the dividends paid prior to this date can be recovered, or whether the statute of limitations is applicable to the claim.

Against defendant Downs there can be no recovery for dividends received more than six years prior to the filing of the bill. He was not an officer of the company, and there is no proof that at the time of the receipt of the dividends before that time he had notice that the dividends were paid out of the capital of the company, instead of the profits. The dividends, when received, were received as his own money, and the receiver can be entitled to their return only on the equitable doctrine that, being in fact paid from the capital, a fund held by the company in trust for the payment of debts, the money received for dividends, being in fact capital, was impressed with this trust. But this trust, so raised by

the doctrines of the court of equity, belongs to the class of implied or constructive trusts, and as to such trusts the general rule is that, in the absence of fraud, the statutes of limitations are applicable. In *McLane v. Shepherd*, 21 N. J. Eq. 76, 79 (1870), the rule was stated and the authorities cited by Chancellor Zabriske. The case, however, was one where the remedies at law and equity for the alleged trust were concurrent, it being a case of agency, and in that class of cases the validity of the defense is settled. *Smith v. Wood*, 42 N. J. Eq. 563, 569, 7 Atl. 881 (Van Fleet, V. C.; 1887), affirmed on appeal 44 N. J. Eq. 603, 17 Atl. 1104 (1888). In *Hayden v. Thompson*, 71 Fed. 60, 69, 17 C. C. A. 592, the leading federal authorities for the general rule that the statute is applicable to implied or constructive trusts are collected by Sanborn, J., and a suit in equity by the receiver of an insolvent national bank against a stockholder for the recovery of dividends unlawfully paid out of the capital was held to be barred by the statute; the stockholder having innocently received the dividends in good faith, and without notice of any fact which would lead a reasonably prudent man to learn that the dividend was not earned. The opinion of Chancellor Runyon in *Williams v. Bolce*, 38 N. J. Eq. 372 (1897), is relied on as holding the statute not applicable. That was a bill by the receiver of an insolvent bank to recover dividends alleged to have been paid out of capital, and on general demurrer to the bill this question of the application of the statute, although not raised either in the demurrer or at the argument, was considered by the Chancellor, and the statute declared inapplicable. As the bill was filed to recover all dividends paid after a certain date, and included (as I read the case) dividends paid within six years, the decision of the question whether the statute applied was not necessary or involved on a general demurrer. Under these circumstances I think I am justified in considering the question as not conclusively disposed of by the opinion. On examining the ground upon which it was based it appears that the decision of Justice Story in *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944, was mainly relied on. This case was one where the stockholders of a bank, for the purpose of liquidating its affairs, divided the capital without reserving sufficient to pay the debts, and the right of recovery was placed expressly on the ground that, the capital stock being a trust fund, might be followed by the creditors into the hands of any person having notice of the trust attached to it, and that, as to the stockholders themselves, there could be in the case no pretense to say that both in law and in fact they were not affected with the most ample notice. Justice Story held that, under the charter of the company, the capital stock was a trust fund for the creditors, and the stockholders, upon the division, took it, subject to all equities attached to

it, as impressed with the trust and cum onere. Such division of the capital among stockholders on liquidation is plainly a very different transaction from the receipt by the stockholder of dividends of a going company in the ordinary course of business, and legally declared, as he supposes, from the profits, and not from the capital. As to such innocent stockholder, who is liable only by reason of a constructive or implied trust which arose by reason of his receipt of the dividends, and which arose also at the time of the receipt, I think the statute should be held applicable. The other stockholders, however, Hendershot, Welsh, and Stephens, who were also the sole directors and officers of the company, as early as March, 1895, knew that the dividends were not paid from the profits, but from the capital. Their receipts of the dividends were, therefore, in fraud of the company and of its creditors, and a court of equity will not, on their behalf, interpose the bar of the statute. The circumstance that, under the corporation act (Laws 1896, p. 286, c. 185, § 30), they are not liable as directors after six years, does not affect their liability as stockholders for the amounts actually received in fraud of the company, for the liability of each of the directors under this statute is for the return of the whole dividend paid to all of the stockholders during the administration of the directors, a liability different in its character from that arising from the actual receipt of funds. Hendershot, Welsh, and Stephens are liable for the amounts received by them, respectively, as dividends since March, 1905, and Downs, since August, 1898, so far as necessary to pay the debts of the company, including the expenses of administration. As stockholders they are not liable beyond the amounts respectively received, but the liability is not merely for a proportionate share of the indebtedness; and therefore the solvent stockholders must make up, so far as they are chargeable with dividends, the deficiency of the insolvent estate of Stephens to pay its share of the debts. The bill is not framed to enforce any liability as directors, and no decree can be made on that basis.

The defendants Welsh and Stephens' administrator file separate cross-bills, based on the agreement of April 1, 1892, relating to the payment of dividends before salaries. The cross-bill of Stephens' administrator is filed against Hendershot, and that of Welsh against both Hendershot and Stephens' administrator. Neither the receiver nor the company is a party defendant to either cross-bill. Both bills make charges against Hendershot, relating to the management of the business, but the whole relief claimed at the hearing rests on the enforcement of the agreement, by declaring a primary liability to the receiver on the part of Hendershot on account of his receipt of salaries under the agreement. Neither of the cross-complainants asks in this suit a decree against Hen-

dershot for the payment to themselves of the amounts withdrawn by him, or claim that there were any profits applicable to either dividends or salaries, under the agreement after 1895, or at least 1898. For the reasons above given the receiver is not at all entitled to an account of the salaries under the agreement for the purpose of paying debts, and there should be on his decree no provision for this indirect recovery of the salaries, by establishing an order of liability between the defendants themselves, based on an agreement which he cannot enforce. If the receiver was entitled, as he claimed in his bill, to a decree for the return of all salaries paid under the agreement, as well as all dividends, then a settlement of the order of liability, as between dividends and salaries, might be proper. The cross-bills must therefore, on the evidence be disposed of as independent suits in equity against Hendershot and Stephens' estate for an accounting for the salaries. Considered on this basis, they must both be dismissed.

Stephens received no salary within six years from the time of filing the bill, and any claim of Welsh against him is outlawed. Hendershot's salary was received with the assent of both Welsh and Stephens, who knew the financial condition of the company, but desired the continuance of the business by Hendershot, the only manager of the business for six years before the bill was filed. Neither of them, therefore, is entitled to recover back from Hendershot the salary for conducting the business which they together controlled, and which salary both understood he was receiving. These payments, made by consent and with full knowledge of the condition of the company, cannot be recovered or brought into account, on the ground that the payment allowed by themselves was a breach of the contract with them. Treating the payments of salaries as coming within the scope of the contract, the contract must, as to these payments, be considered as waived or abandoned. But I think that the sounder view is that these payments of salaries (at least those made after dividends ceased in 1900) were not considered as payments controlled by the dividend clause of the agreement. For, by the agreement, neither dividends nor salaries were to be paid, except from profits, and from 1900, at least, all parties knew that there were no profits to pay either dividends or salaries. And from this time, at least, the salary was by common consent treated as part of the expense of carrying on the business. If this view be correct, it cannot now be recovered on the theory that it was intended by the parties as a payment out of profits under the agreement relating to the division of profits. Both cross-bills must therefore be dismissed.

On behalf of Hendershot the claim is also made, by answer, but not by cross-bill, for the enforcement of the contract, alleged to

have been made with him on the division of the assets, that Stephens should pay \$1,500 on the Clinton Bank notes, and that Welsh and Stephens should take care of the balance due on these notes, if the assets were insufficient. This enforcement is also sought by the indirect method of directing a primary liability on their part to pay any decree to the receiver. The receiver does not seek the enforcement of this contract or any rights thereunder, for his decree is based on the repudiation of its validity. Any right, therefore, which Hendershot has against either Welsh or Stephens under such contract, is a matter for enforcement by an independent suit, and not by a direction as to the order of liability for the receiver's decree. The contract, moreover, if considered to be proved by Hendershot, establishes a liability which is purely legal and not equitable, and both Welsh and Stephens' administrator are entitled to its establishment in a legal tribunal. In *Headley v. Leavitt* (Err. & App. 1905), 60 Atl. 963, a claim under a similar contract was sent to a court of law for settlement. It should be further stated that, as against the administrator of Stephens, there is no evidence of his intestate's contract to pay the balance due on the Clinton Bank notes after paying thereon the value of the goods taken by Stephens, except that of Hendershot as to transactions between the intestate and himself. The evidence was objected to at the hearing, and, being inadmissible under the evidence act (P. L. 1900, p. 383, § 4), cannot be considered. On the answer of Hendershot, therefore, there can be no direction, in the decree in the receiver's bill, that a primary liability, either for the Clinton Bank notes or any other debt of the company, must be first satisfied by either Welsh or the Stephens' estate, because of this alleged contract on the division of the assets.

Decree will be advised in accordance with this opinion, and on the settlement of the decree I will hear parties as to a reference.

LENGYEL et al. v. MEYER et al.
(Court of Chancery of New Jersey. Dec. 28, 1905.)

1. EASEMENTS—LIGHT AND AIR.

Where a deed with full covenants of warranty conveyed certain property, including a party wall containing windows overlooking defendant's adjoining property, and provided that such wall should remain a party wall and that both parties should be entitled to rights therein, the grantee in the deed acquired an easement over such adjoining property of the right to keep such windows open and receive light and air therefrom, which was determinable only on the use of the wall for building purposes by the adjoining property owner.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, §§ 35-39.]

2. COSTS—EQUITY SUIT—APPORTIONMENT.

Complainants sued to reform a deed for fraud and to restrain the violation of their

easement of light and air through windows in a party wall. Defendant, the grantor, and his grantee of the adjoining property defended the whole case jointly, under circumstances indicating that the grantor was interested in defeating complainants' claim. A large part of the expense was caused by the charge of fraud alleged by complainants, which was not sustained; but complainants were successful in restraining the violation of their alleged easement. Held that, each party having partially succeeded, no costs were to be allowed to either.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 98-101, 111-114.]

Bill by John Lengyel and another against Julius Meyer and others to establish an alleged right to the use of windows and light and air through the same. Decree for complainants.

Harry Meyer and Peter Backes, for complainants. David H. Bilder, for defendants.

STEVENSON, V. C. 1. The allegations in the bill to the effect that the covenant in relation to the party wall was fraudulently inserted in the deed to the complainants without their knowledge or consent, are not only not proved to be true, but are proved to be false. Counsel for complainants on the argument abandoned all claim that the deed from Julius Meyer to the complainants should be reformed so as to excise the above-mentioned covenant. The claim of the complainants in this cause remaining for consideration is confined to the question whether under the facts proved, allowing the deed to stand unimpeached, on the ground of fraud, and containing this covenant relating to the party wall, the complainants are entitled to an injunction against the defendant Lobsenz.

2. In December, 1899, the complainants were the equitable owners of a lot in the city of Passaic, 25x100 feet, situate on the corner of Second and Bergen streets. Their title was created by an agreement with one Samuel Weinberger, who in turn held a similar agreement with Julius Meyer, the then owner of the property. The lot was covered for a distance of 90 feet from the front of a four-story brick building. Julius Meyer, from whom this equitable title in the complainants had come, was the owner of a lot 25x100 feet adjacent on the south to the lot which the complainants had contracted to buy. This adjacent lot was vacant, except so far as it was occupied by the small one-story building hereinafter mentioned. 'As a matter of fact the southerly wall of the brick building throughout its entire length, extending back 90 feet from Second street, rested almost equally upon the complainants' lot and the lot retained by Julius Meyer. The stone foundation wall is 2 feet thick. For a certain height the brick wall resting upon the stone foundation is 16 inches thick, and the upper portion of the brick wall is 12 inches thick. The position of the wall and its thickness, which is quite beyond the requirements of a single building, indicate that it was constructed by Mr. Meyer as a party

wall, to be used for the purposes of a building on each lot. The first story of the complainants' building was constructed for use as a store or place of business and is now used for such purpose. The three upper stories are divided into apartments for families. In order to supply light and air to the apartments situate on the southerly side of the building, as the bill alleges, "the said Julius Meyer caused to be constructed in the southerly wall of the said building 22 windows overlooking the adjoining premises belonging to the said Meyer, and at the same time the said Meyer caused to be erected and constructed on the adjoining property on the south a one-story brick building to be used and which is now used for store purposes." The proofs show that with all these windows opening upon his practically vacant lot, Julius Meyer agreed to sell the corner lot with its building, and the equitable title created by this agreement became vested in the complainants. The contract between complainants and Samuel Weinberger, under which the complainants acquired their title, expressly provides for the conveyance of the land "with the building thereon erected"; and further provides that upon the stipulated payments being made Weinberger would procure a proper deed to be made by Julius Meyer conveying the property to the complainants free from all incumbrances, with full covenants including warranty. Whether the contract between Meyer and Weinberger was the same, *mutatis mutandis*, as the contract between Weinberger and the complainants, it is unnecessary to inquire on account of the subsequent carrying out of both contracts.

When the complainants made their contract with Weinberger upon which they made a substantial payment, they supposed that the entire wall rested upon the 25-foot lot, which by the contract they were to acquire. Their counsel, however, discovered what the situation of the wall was, and thereupon he informed the complainants, and a survey was made which showed all parties the true location of the wall, that the wall stood manifestly as a party wall. What relief the complainants would have been entitled to in a court of equity on the ground of mistake or on the ground of fraud if they had made complaint immediately upon making this discovery, we need not discuss; nor need we discuss the nature and extent of the rights which the complainants and Julius Meyer, respectively, would have enjoyed in respect of this wall, and particularly in respect of the windows therein, in case the deed from Julius Meyer to the complainants had followed the agreement and had conveyed the corner lot 25 feet by 100, with the brick building erected thereon. What the complainants might have done, what rights they would have enjoyed, whether the complainants did or did not place themselves in a worse position by accepting the deed which finally

they did accept, or whether that deed with its covenant in reference to the party wall merely expressed what would have been implied in case such covenant had not been inserted in the deed. These are all questions which may be dismissed without consideration. What the parties with full knowledge of the facts did, was this: They met with counsel and an interpreter, and the result was that the deal was closed, and the warranty deed from Julius Meyer to the complainants was delivered, to which deed, however, was added the following covenant: "It is hereby stipulated and agreed by the said parties for themselves, their heirs, executors, administrators, and assigns, that the wall on the southerly side of the building on the lot herein conveyed, which wall is 16 inches wide at the first story, 8 inches on the lot herein conveyed, and 8 inches on the lot adjoining, and 12 inches above the first story, 7½ inches on the lot herein conveyed, and 4½ inches on the lot adjoining, shall be a party wall, and both parties entitled to rights therein; the party of the first part owning the said lot adjoining."

Subsequently Julius Meyer conveyed the vacant lot to the defendant Lobsenz, who confessedly occupies with respect to this controversy the same position that Julius Meyer would have occupied if he had retained the ownership of the vacant lot. The dispute between the parties in this cause has not arisen from any attempt on the part of either Meyer or Lobsenz to use the wall in question as a party wall, and by such use to obstruct the passage of light and air through the complainants' windows. The defendant Lobsenz claims the right to block up these windows with thin brick walls, erecting the same upon the window sills, without trespassing upon the land of the complainants. The complainants allege that Lobsenz has sought to compel them to pay him for the privilege of maintaining the windows. Lobsenz alleges that the tenants of the complainants have thrown articles out of the windows upon his lot, and have also trespassed upon the roof of his one-story building causing the roof to leak, etc. These matters, however, seem to be of no importance. If the complainants are entitled to an easement of light and air, the defendant Lobsenz cannot be permitted to interfere with that easement by blocking up the windows for the purpose of protecting his property from trespass through the windows. *Bloom v. Koch*, 63 N. J. Eq. 10, 50 Atl. 621 (1902). Excluding from consideration both the fact that this wall from its position and size appears to have been designed as a party wall, and the express covenant relating to the wall contained in the deed, there can be no question that under the settled law of New Jersey the conveyance of this lot and building to the complainants created by implication an easement of light and air for the benefit of the existing windows. These windows plainly are "neces-

sary" to the enjoyment of the upper stories of the building within the meaning defined, so far as such meaning has been defined by the decisions of the courts of this state. *Sutphen v. Therkelson*, 38 N. J. Eq. 318, 323 (1884); *Johnson v. Hahne*, 61 N. J. Eq. 438, 441, 49 Atl. 5 (1901); *Tooth v. Bryce*, 50 N. J. Eq. 589, 594, 25 Atl. 182 (1892).

It may be that the doctrine under which the easement of light and air is created by an implied grant or an implied reservation ought not to be extended. The rule which permits an implied reservation of this easement has been criticised by Vice Chancellor Pitney (*Tooth v. Bryce*, 50 N. J. Eq. 589, 25 Atl. 182 [1892]), in which criticism Vice Chancellor Stevens seems to concur. *Denman v. Mentz*, 63 N. J. Eq. 618, 616, 617, 52 Atl. 1117 (1902). To many minds the rule prevailing in Massachusetts and in other states that in cases like the present one the easement of light and air can only be created by an express grant, or an express reservation, may seem more consistent with the American view of this easement and less liable to produce situations of hardship and injustice than the rule which prevails in New Jersey. See *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80 (1874). But the duty of this court; whatever may be the views of individual judges, is to fairly apply the established law of the state. That law, leaving out of view the party wall, gives the complainants the easement which they claim, and entitles the complainants to the remedy of an injunction to protect the enjoyment of their easement from the conduct of the defendant Lobsenz in blocking up their windows. The narrow question is whether the existence of the party wall under this express covenant in the deed makes the case an exception to the general rule, so as to prevent the deed in which the covenant appears, from creating the easement of light and air by implication by an implied grant.

There seems to be two ways in which an express covenant in a deed may have the effect to prevent the creation of an easement by an implied grant. One of these ways is exhibited where the express covenant and the implied grant relate directly to the same subject-matter. The rule to be applied in such cases is contained in the maxim "*expressum facit cessare tacitum*." *Greer v. Van Meter*, 54 N. J. Eq. 270, 33 Atl. 794 (1896); *Bloom v. Koch*, *supra*. It is quite evident, I think, that the express covenant in this case does not relate directly to the reception of light and air through the complainants' windows. In making the covenant the minds of the parties were engaged in dealing with the status of the wall as an appurtenance to the existing building, and as an appurtenance to a building which might thereafter be erected upon the adjacent lot. The covenant ignores the existence of the windows, and apparently is in the same form in which it would have been cast if no win-

dows in fact had been in existence. The other way in which an express covenant may operate to prevent the grant of an easement by implication is exhibited where the rights created by the express covenant are inconsistent with the enjoyment of the easement. The maxim "*expressum facit cessare tacitum*" also applies to this class of cases but manifestly for a different reason from that which sustains its application to the class of cases first above mentioned. In *Denman v. Mentz*, 63 N. J. Eq. 618, 52 Atl. 1117 (1902); an express covenant against incumbrances was held to prevent the creation of an easement of light and air for the benefit of the grantors' building by an implied reservation. A covenant on the part of the grantor that the granted land was free from all incumbrances was held to be inconsistent with an implied provision to be read into the instrument creating an incumbrance.

I do not find that the existence of this party wall and of the express covenant in relation to it contained in the deed is inconsistent with the establishment of an easement of light and air in some form. Let it be assumed that the covenant gives the defendant Lobsenz the right to close up all the windows so as to make the entire wall solid at all points and equally capable at every point of holding beams and performing the functions of a party wall. It is not necessary to decide that the correct construction of this covenant leads to any such result. The matter may all be left open, so far as this case is concerned. The above assumption, however, establishes a condition which gives the argument against the existence of the easement in any form the greatest possible force. We may note in passing that the covenant was made with reference to an existing wall, which in fact had windows, and that it is plainly possible to use the wall to a large extent as a party wall without entirely blocking up all these windows. It may be, also, that owing to some other conditions which appear from the evidence, but which I have not described, the right of the defendant Lobsenz to use this wall as a party wall in the ordinary way is subjected to modification. I do not pause to consider these matters because upon the extreme supposition that under this covenant the defendant Lobsenz may at any time erect a building upon his lot and use the entire length and height of this wall as a party wall to sustain his beams and constitute one side of his building, placing his beams wherever he may see fit and rendering the wall at all points uniformly strong and thick, my conclusion is that if our New Jersey doctrine of easements of light and air by implied grant is fairly applied, it must be held that the complainants' building has at least a modified easement which only the actual use of this wall by the owner of the adjacent lot as a party wall can interfere with or destroy. There seems to be no reason why an ease-

ment of light and air may not be created, which shall be determinable upon the happening of some condition within the control of the parties to the instrument, by which expressly or impliedly the easement is created.

The easement in its ordinary form is liable to prove a somewhat uncertain and even transient form of property. In order to its continued enjoyment the windows to which it relates must be maintained without change of location. The value of the easement may depend upon the maintenance of a frail and ruinous building or the ability of the owner of the dominant tenement to replace such building with another having windows in the same places. *Johnson v. Hahne*, supra; *City National Bank v. Van Meter*, 59 N. J. Eq. 32, 45 Atl. 280 (1896). It may be observed, also, that even though the easement of light and air may not be acquired by prescription, the owners of buildings frequently open windows upon their neighbor's land in order to receive light and air through them, to the same extent as if they had an easement, although they are well aware that at any time their windows are liable to be closed. The reception of light and air through windows may be of great practical value to the owner of a building, notwithstanding the fact that this light and air may be cut off at any time when the owner of the adjacent land may so elect. There is no reason why an easement of light and air cannot be expressly granted, so as to endure for the benefit of windows through a party wall until such party wall shall be applied to the use of an adjacent building. This, I think, is precisely what these contracting parties did. The implied grant of the easement of light and air is modified by the express covenant to the extent that the accomplishment of all the objects of the covenant—the enjoyment of all the rights created by it—imposes such modification. The complainants, I think, have a right to the enjoyment of this easement until the defendant Lobsenz, in the exercise of his right to use the wall as a party wall (whatever the extent of that right may be), shall necessarily modify or destroy the complainants' right. Inasmuch as the defendant Lobsenz has threatened to wall up the complainants' windows, not for the purpose of any use of the wall by him as a party wall, but merely for the purpose of shutting off the complainants' light and air, and blocking up openings through which persons may go, and objects may be discharged from the complainants' building onto his (Lobsenz's) premises, the complainants, I think, are entitled to an injunction. The decree will not attempt to construe this covenant, so as to define the extent of the defendant Lobsenz's right to use the wall as a party wall because this court in this case has no jurisdiction of that matter. The conduct of the defendant com-

plained of, which will be restrained by the injunction, has no possible relation to any right which he claims to use the wall as a party wall under the covenant.

3. Counsel for defendants urges that the defendant Julius Meyer is entitled to have the bill dismissed as to him with costs inasmuch as the charge of fraud in respect of the covenant relating to the party wall contained in the deed from him to the complainants has been disproved and abandoned. Julius Meyer, however, has defended this whole case jointly with the defendant Lobsenz, a single joint answer being filed. Moreover, it appears that Meyer conveyed the servient tenement to Lobsenz and for all that appears he may have given a covenant against incumbrances. However, that may be, Meyer has defended the whole case precisely as Lobsenz has defended it, and there are indications that he was interested in some way in defeating the complainants' claim, not only to a reformation of their deed, but to the remedy of an injunction. On the other hand, a large part of the expense of this cause has been caused by the false charge of fraud contained in the complainants' bill on which they founded their prayer that their deed from Meyer should be reformed.

Under the circumstances, each party having partly succeeded, no costs will be allowed to either.

In re FERDON'S ESTATE.

(Prerogative Court of New Jersey. Oct. 13, 1905.)

GIFT—EVIDENCE TO ESTABLISH—EXECUTORS—ASSETS.

A note payable to an intestate had been inventoried as an asset of her estate. A person not a party to the note by petition to the orphans' court asked an order directing the administrator to deliver the note to him. On an order to show cause, petitioner's proofs tended to show that the note took the place of a previous note made by the same maker to a person previously deceased, which petitioner claimed had been given by her to the intestate for life and on her death to petitioner.

Held, that the orphans' court properly refused the order sought (1) because there was no sufficient proof of the gift which petitioner claimed, and (2) because, if sufficient proof had been made, the court had no jurisdiction to determine the equitable ownership in the absence of parties who might contest that claim.

(Syllabus by the Court.)

Appeal from Orphans' Court, Bergen County.

In the matter of the estate of Louisa Ferdon, deceased. From a decree of the orphans' court on petition of Stephen B. Ferdon, he appeals. Modified.

Charles B. Dunn and Michael Dunn, for appellant. Cornelius Doremus, for respondent.

MAGIE, Ordinary. This appeal challenges the correctness of a decree of the orphans' court of Bergen county, made upon the petition of Stephen B. Ferdon, the appellant.

The petitioner represented that Louisa Ferdon, the mother of appellant, had died intestate, and that letters of administration had been granted upon her estate to Clarence Mayble, who had included in the inventory of the assets of the estate a note made by L. L. Conklin to the order of the intestate for \$500. The petition avers that the note was not the property of Louisa Ferdon, but of appellant. Thereupon the petitioner asked an order requiring the administrator to show cause why the note should not be delivered to appellant. Upon the petition and affidavits annexed, a rule to show cause why the note in question should not be delivered to Stephen B. Ferdon, the petitioner, was allowed and brought to hearing. Thereupon the order appealed from was made, decreeing that the note in question was an asset of the estate of Louisa Ferdon, deceased, for which her administrator should account.

Appellant's evidence presents the following case: One Jane Berdan, who died at a time not specified, but long before the date of the note in question, had, in her lifetime, a note made to her by Lewis L. Conklin for \$500, with interest. There is some evidence that she left at her death written directions respecting that note, but the directions are not produced, nor is it made to appear that they were testamentary in character. But it does appear that after her death Stephen Berdan, her husband, had possession of the note and dealt with it as if it was held by him upon a trust to pay to Louisa Ferdon the interest thereof during her life and after her death to pay the principal to Stephen B. Ferdon the appellant. It appears that Stephen Berdan continued to pay the interest on \$500 to Louisa Ferdon until August 1, 1870, when, pursuant to an agreement executed by Louisa Ferdon and her husband and Stephen B. Ferdon, the appellant, Stephen Berdan delivered the note to Louisa Ferdon and was released and discharged from all liability therefor by the said Louisa Ferdon and her husband and Stephen B. Ferdon. The note thus delivered was the note given by Conklin to Jane Berdan. Appellant testifies that he left that note with his mother so that she might collect the interest. He asserts that he never knew, until after his mother's death, that a new note had been made by Conklin to the order of his mother. Conklin is now dead. Appellant insists that the note inventoried represents the note originally made by Conklin to Jane Berdan, and lays his claim upon the gift of Jane Berdan to his mother Louisa Ferdon for life, and to him upon her death.

The court below refused the relief prayed, upon the ground that appellant had not established his claim by proof. The order may well be supported upon the grounds stated in the orphans' court. The money due upon the original note to Jane Berdan is not shown to have been disposed of by her by any testa-

mentary disposition, nor by any proof of a gift inter vivos. Until such proof is presented, it remains the property of the representative of Jane Berdan. But, if proof by the appellant could raise the question he seeks to have solved, it is manifest that he has resorted to a tribunal incompetent to give relief. The relief he asks, namely, delivery of the note to him, would leave him as far from effective relief as when he filed his petition. His claim, if he has any claim which can be sustained, is to be pursued in a court of equity, and as against the maker of the note or his representatives. They are not parties to this proceeding. If the note inventoried represents the original note, the administrator of Louisa Ferdon would also be a necessary party, as well as the representatives of Jane Berdan, deceased. On such a proceeding the appellant, if his proof were sufficient, might obtain relief.

The decree of the orphans' court, however, adjudicates that the note in question is an asset of the estate of Louisa Ferdon, to be accounted for by the administrator. This action may embarrass, and possibly prevent, petitioner from asserting his equitable right in a proper proceeding with proper parties. The proper order would have been to discharge the order to show cause and to dismiss the petition.

The decree appealed from will be thus modified, and affirmed as modified.

BOLAND v. KAVENY.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1905.)

APPEAL AND ERROR — DISMISSAL — INSUFFICIENCY OF BOOK.

Where a book furnished the Court of Errors and Appeals on a writ of error contains no transcript of the proceedings, no pleadings in the court below, and no statement of the case, there is nothing upon which the court can act, and the writ of error will be dismissed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2721, 3126.]

Error to Supreme Court.

Action by Matthew Boland against John Kaveny. There was a judgment of the Supreme Court (58 Atl. 99), affirming the judgment of a district court for plaintiff, and defendant brings error. Dismissed.

James N. Trimble and Elvin W. Crane, for plaintiff in error. Charles C. O'Connor, for defendant in error.

PER CURIAM. The writ of error was returned with a judgment of the Supreme Court (58 Atl. 99), affirming a judgment of a district court. The book furnished the court contains no transcript of the proceedings, no pleadings in the court below, and no state of the case. There is, therefore, nothing upon which the court can act, and the writ of error will be dismissed.

In re POLLEY'S ESTATE.

(Prerogative Court of New Jersey. Dec. 14, 1905.)

1. WILLS—CONSTRUCTION—SUBSTITUTION OF WORDS.

A testatrix bequeathed and devised to her infant daughter all her residuary estate absolutely, with the following proviso: "Provided, however, that if my said daughter should die before attaining the age of 21 years, or without disposing of the same or all of it, or without having made a last will and testament," then over. *Held*, that in construing the proviso "and" cannot be substituted for "or," as such substitution would express a sense contrary to the plain intent of testatrix.

2. SAME.

Considering the incapacity of the infant to make a will or dispose of property during minority, an intent is disclosed to make applicable the first contingency to the period of minority, and the two other contingencies to the infant's life after coming of age.

3. SAME—GIFT OVER.

Upon this construction the power of disposal given to the first taker will not avoid the gift over, if the first contingency, viz., death of the infant during minority, shall happen. Whether, if the infant survives to be 21, the power of disposal thus given will not avoid the gift over—*quære*.

(Syllabus by the Court.)

Appeal from Orphans' Court, Passaic County.

In the matter of the estate of Eva R. Polley, deceased. From an order holding that a certain provision of the will was void, Rose Ryerson and Laura Watson appeal. *Reversed*.

Pitney & Hardin, for appellants. Horton & Tilt, for respondent.

MAGIE, Ordinary. Eva R. Polley, by her will probated May 11, 1900, appointed her mother, Rose Ryerson, and her sister, Laura Watson, executrices, and directed them to pay debts and funeral and testamentary expenses, and then provided as follows: "I give, devise and bequeath to my daughter Viola Polley all my estate, both real and personal, of every kind and nature whatsoever, to be hers absolutely, provided, however, that if my said daughter should die before attaining the age of 21 years, or without disposing of the same or all of it, or without having made a last will and testament, then and in such case I give, devise and bequeath the same to my said mother and sister, share and share alike." By an order made March 30, 1905, the orphans' court of Passaic county, after adjudicating that the proviso of the will above quoted was void, directed that certain chattels, which comprised the residue of the personal estate of the testatrix in the hands of the executrices, should be delivered to Robert H. Fordyce, the guardian of Viola Polley (who is a minor), on his paying certain sums which, by the account of the executrices previously allowed by the court, were due them from the estate. Notwithstanding the

adjudication that the proviso was void, which adjudication seems necessarily to deny any contingent interest of Rose Ryerson and Laura Watson in the residue of testatrix's personal estate, the order directed the guardian to give security to protect their interest. The appeal before me is taken by Rose Ryerson and Laura Watson from the order above stated, and they claim, first, that the orphans' court possessed no jurisdiction to pass upon the meaning of the will and make such an order as was made, and, second, that if there was jurisdiction in the orphans' court, it erred in its construction of the proviso, which was adjudged void.

By the opinion of the learned judge of the orphans' court it appears that his conclusion was reached, upon the ground that the three distinct contingencies, on the happening of which the gift over was to take effect, were coterminous, so that death before 21 years, and death without having disposed of all the gift, or death without having made a will, were all contingencies applicable during the minority of the infant. Upon such construction, the inference was that a power of complete disposition having been disclosed, the gift was absolute, and the proviso for a gift over was unavailing. If the learned judge correctly divined the intent of testatrix as disclosed by the clause above set out it would seem that his deduction is in accord with the well-known rule that an absolute gift with unlimited power of disposition, will not be limited by a gift of what has not been disposed of, because of an incompatibility of the gift over with the absolute gift. *Borden v. Downey*, 35 N. J. Law, 74; *Downey v. Borden*, 36 N. J. Law, 460; *McClellan v. Larchar*, 45 N. J. Eq. 17, 16 Atl. 269; *Rodenfels v. Schumann*, 45 N. J. Eq. 383, 17 Atl. 688; *Dobson v. Sevars*, 52 N. J. Eq. 611, 30 Atl. 477; *Id.*, 53 N. J. Eq. 347, 33 Atl. 388; *Annin's Ex'rs v. Vandoren's Adm'r*, 14 N. J. Eq. 135; *Benz v. Fabian*, 54 N. J. Eq. 615, 35 Atl. 760. But I am unable to attribute to the words of the proviso the meaning which the court below gives to them. In my judgment the words disclose a different intent on the part of testatrix. The three contingencies, on the happening of all or one of which the gift over is to take effect, are not connected by the copulative "and," but by the disjunctive "or." In support of the order appealed from it is argued that "or" may be, and in this case should be, read as if it were "and." There is no doubt that such substitution has been made in many cases. *Nevison v. Taylor*, 8 N. J. Law, 43; *Den v. Mugvay*, 15 N. J. Law, 332; *Holcombe v. Lake*, 24 N. J. Law, 688; *Id.*, 25 N. J. Law, 609.

In the Court of Errors it was declared that, when there is a devise with a limitation over in case the devisee die under 21 or without issue, the word "or" must be construed "and," unless there are words in the will man-

festing a contrary intention. *Holcombe v. Lake*, 25 N. J. Law, 613. With such a limitation over, the inference of an intent which could only be expressed by the use of the copulative, is so persuasive as to require that use, unless other words in the will forbid it. But where the limitation over is on contingencies which indicate in their language a particular intent which would not be expressed by the substitution of "and" for "or," then no such substitution should be made. To do so would be to thwart the will of the testatrix. In this case, the substitution of "and" for "or" would be contrary to the manifest intention of the testatrix in my judgment. At the time of the execution of the will, the primary beneficiary was an infant of a few years of age. She could make no will until she became of age. During minority, she could not dispose of her property. When her mother, by this proviso, made a gift over upon one contingency, viz., death of the infant during minority; and then added two other contingencies, viz., death without having disposed of the property and death without having made a will, it seems to me clear that her intent was that the latter two contingencies were only to take effect on the gift after the infant became of age, and was capable of making a will and disposing of the property. It should be read thus: "Provided however that if my said daughter should die before attaining the age of 21 years, or 'if after attaining such age she should die' without having disposed of the same, or all of it, or without having duly made a last will and testament, then * * * I give," etc. Upon this construction, the first contingency is the only one operative during the infant's minority. When the other contingencies come into operation upon the infant's arriving at full age, it may be questioned whether, since a complete power of disposition is then given, they will not be wholly void. But that question is not now presented.

It results that it was erroneous to adjudicate that the proviso is void. On the contrary, that part which provides for a gift over if the infant dies before 21, is effective, and while the residue may be taken by the infant's guardian, the court may require security to be given to those who will succeed if that contingency happens, pursuant to the proviso. This result renders it unnecessary to determine whether the orphans' court had jurisdiction to make such an order. It is conceded that its power in that respect arises solely from legislation which is now contained in section 173 of the act entitled "An act respecting the orphans' court and relating to the powers and duties of the ordinary and the orphans' court and surrogates," approved June 14, 1898. Laws 1898, p. 715. Whether such legislation is within the constitutional power of the Legislature, has been questioned. *Adams v. Adams*, 46 N. J. Eq. 298, 19 Atl. 14. In *re Lippincott's Estate* (N. J. Prerog.) 59 Atl. 884. It may be

further observed that the transcript discloses no application on the part of the guardian, such as is required by the act. As this legislation seeks to transfer to the orphans' court the jurisdiction which the court of chancery always possessed over suits for the recovery of legacies, and the incidental jurisdiction over the construction of wills, it is not possible to conceive that the Legislature intended that the orphans' court could be moved to act without some formal petition setting out the applicant's claim. If the legislation is effective, it has been determined that an order or decree made thereon will have no force as to a person interested, unless notice to him has been given of the application. *Adams v. Adams*, ubi supra.

It therefore seems clear that a formal application should be made in such cases, and the parties in interest should be brought in by some process or notice. But upon the erroneous construction of the will in question, I conclude that the order appealed from must be reversed.

WHITEHEAD et al. v. AMERICAN LAMP & BRASS CO.

(Court of Chancery of New Jersey. Dec. 29, 1905.)

1. GUARANTY—CONSTRUCTION—DURATION.

Where a letter of a guaranty was dated August 1, 1903, and recited that the writer would guaranty purchases made by a third party during "this year," the guaranty should be construed as limited to the remainder of the year 1903.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guaranty, §§ 46, 47.]

2. SAME—PAST INDEBTEDNESS—CONSIDERATION.

A guaranty of past indebtedness of a third person without a consideration passing to the guarantor is unenforceable.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guaranty, §§ 13-60.]

3. CORPORATIONS—INDEBTEDNESS OF THIRD PERSONS—GUARANTY—ULTRA VIRES—ESTOPPEL.

Where defendant corporation, engaged in a manufacturing business, agreed to guaranty the indebtedness of a third person for materials to be used in the manufacture of goods for such corporation, which could not have been obtained but for such guaranty, it was estopped, after obtaining the benefit thereof, to deny its liability on the ground that the contract was ultra vires.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1556-1561, 1815.]

Action by William R. Whitehead and others against the American Lamp & Brass Company. From an order of a receiver of defendant company disallowing the claim of the Fostoria Glass Company, it appeals. Reversed in part.

E. C. Long, for appellant. F. S. Katzenbach, for the appellee receiver.

BERGEN, V. C. The Clark Bros. Glass Manufacturing Company, a partnership, was

engaged in the business of manufacturing glass, and assembling parts of lamps with which they made the completed article. The lamps were made for the insolvent corporation, which had been organized under the laws of this state and carried on its business in the city of Trenton. The Fostoria Glass Company, prior to August 1, 1903, had sold to the Clark Bros. Company a considerable quantity of goods, and applied to its debtor for a guaranty of the payment, not only of the amount due, but of all future purchases by the Clark Bros. Company. In reply to this application, which was referred to the defendant company, it wrote to the Fostoria Company, the following letter, signed by its proper officers: "Trenton, N. J. Aug. 1, 1903. Fostoria Glass Company, Moundsville, West Va., W. A. V. Dalsell, Pres.—Dear Sir: The Clark Bros. Glass Manufacturing Company of Elwood City have referred to us your letter of July 30th regarding your account against them, and, as the goods which they buy of you are used in the manufacture of lamps for our account, we are willing to guaranty to you the ultimate payment of all purchases from you up to date, as well as any future purchases during this year, regardless of whether the account is an open one or has been closed by their note. As this letter is a standing guaranty covering all transactions, it will obviate the necessity of indorsing any note sent you from time to time, so that settlement need not be referred to us for specific guaranty in each instance." The appellant company shipped to the Clark Bros. Company goods as ordered by them until the month of February, 1904, when that partnership was declared insolvent and an assignee appointed for them in the state of Pennsylvania, and about the same time the defendant in this cause was declared to be an insolvent corporation, and Robert S. Woodruff was appointed its receiver by this court. At the time of the insolvency of the Clark Bros. Company it was indebted to the appellant in the sum of \$5,229.52, and it is for this debt that the claim of the Fostoria Glass Company was presented to the receiver of the defendant company; payment being claimed from it, based upon the guaranty alleged to be contained in the foregoing letter. This claim the receiver has rejected, and from such determination this appeal has been taken.

The Clark Bros. Company and the defendant company kept separate books of account, and at the time of the adjudication of insolvency of the Clark Bros. Company the defendant company was their creditor to an amount exceeding \$27,000. That the power to guaranty the payment of the past and accruing indebtedness of a third party is not within the chartered powers of the insolvent corporation is the ground upon which the receiver bases the disallowance of this claim.

Whether an indemnity to one who is to furnish material to another for the purpose of being used in the manufacture of goods for the account of the guarantor is beyond the corporate powers of a manufacturing company organized under the laws of this state, it is not necessary here to determine, because I am of the opinion that the corporation is estopped from setting up the plea of ultra vires to so much of this claim as accrued during the year 1903, after August 1st, the date of the guaranty. The written indemnity is limited to "any future purchases during this year," the proper interpretation of which is, during the year 1903. The guaranty of payment of past indebtedness was without any consideration to the guarantor (so far as this case shows), and such action was plainly beyond the purposes for which the corporation was organized, as it does not appear that it received any benefit or consideration. A different rule might be applied if it appeared that the future conduct of the business of the guarantor depended upon the furnishing of goods, which could only be had from a vendor who refused to supply, unless his accrued account was made secure by a guaranty, and that such continued supply was necessary to save the business of the guarantor from ruin, but such a condition is not shown to exist in this case, and no opinion is required or expressed on this point. My conclusion is that so much of this claim as accrued before August 1 and after December 31, 1903, is not provable against the insolvent estate and should be eliminated, and that the residue of the claim should be allowed.

The defendant company was engaged in a manufacturing business, to carry on which certain articles were being manufactured for its account by the Clark Bros. Glass Company, to produce which the materials furnished by the claimant were essential. They could not be had from the claimant without the guaranty of the defendant company, which was given for the purpose of continuing its own business, and resulted in a direct benefit to it in the prosecution of the business it was chartered to carry on, and, if the act of guaranty was beyond its expressed powers, it is not prohibited by the corporation act of the state under which it was organized, still, if the act was in excess of its authority, it having induced the claimant to part with its property relying upon the promised "ultimate payment," and being benefited by having the material manufactured for its account, it would be unconscionable to now permit it to interpose the plea it offers. The weight of modern judicial authority favors the rule that where a private corporation enters into a contract in excess of its granted powers, but not expressly prohibited, and has received the benefits contracted for, it will be estopped from pleading

a want of power to make the agreement for the purpose of escaping performance on its part. The strict rule applied to a quasi public corporation to prevent it from doing an act which may disqualify it from discharging its duties to the public is not enforced as to private corporations to such an extent as to permit them to do an injustice. *Bowman v. Foster & Logan Hardware Co.* (C. C.) 94 Fed. 592. In *Chicago, R. I. & P. Ry. Co. v. Union Pac. Ry. Co.* (C. C.) 47 Fed. 16, Mr. Justice Brewer, referring to such a distinction, said: "But a milder rule applies when a corporation seeks to repudiate a contract into which it has formally entered. It is not seemly for a corporation, any more than for an individual, to make a contract and then break it; to abide by it so long as it is advantageous, and to repudiate it when it becomes onerous. The courts may well say to such corporation: 'As you have called it a contract, we will do the same. As you have enjoyed the benefits when it was beneficial, you must bear the burden when it becomes onerous.'"

The principal cases bearing upon the question of ultra vires are considered in *Camden & Atlantic R. R. Co. v. Mays Landing, etc., R. R. Co.*, 48 N. J. Law, 530, 7 Atl. 523, and its application to quasi public and private corporations distinguished in an exhaustive opinion by Mr. Justice Van Syckel, who, speaking for the Court of Errors and Appeals, said: "The true rule is that when the transaction is complete, and the party seeking relief has performed on his part, the plea of ultra vires by the corporation, which has acquiesced in it, is inadmissible in an action brought against it for not performing its side of the contract, in all those instances where the party who has performed cannot, upon rescission, be restored to his former status." The right of a manufacturing company to loan its credit for the express purpose of fostering its legitimate business is sustained in *Holmes et al. v. Willard*, 125 N. Y. 75-81, 25 N. E. 1083, 11 L. R. A. 170, by Judge Earl, as follows: "A corporation dealing in manufactured goods, and needing them for sale, may, as a proper incident to its business, extend financial aid to a manufacturer by advancing him money to enable him to furnish the goods. This aid may be extended by a loan of its own money, or it may take his notes, and by its credit raise money thereon, and advance such money, looking for reimbursement out of goods to be manufactured and delivered to it." The rule thus laid down is properly applicable to this case, for here the defendant loaned its credit to a manufacturer in order to enable it to procure goods to be manufactured for the defendant's account, and the loan of its credit can be as well justified as the loan of its money, when used to advance its legitimate business. It has

not been shown that either the directors or stockholders of this corporation were ignorant of the fact of the guaranty upon which the claimant relied, and it is therefore "the just inference" that the directors and stockholders had so far acquiesced in the action of its officers as to bring the act of indemnity within the business of the corporation. *Holmes et al. v. Willard, supra.*

The receiver will be advised to allow as a claim against this insolvent corporation so much of the indebtedness guarantied as arose during the year 1903, after August 1st, and only so much of the interest items as relate to that part of the account which falls within those dates. If the parties cannot agree as to the proper amount to which the claim should be reduced, a reference to a master may be taken. As the claimant has only succeeded in part, no costs will be allowed.

IN RE ACKER'S WILL.

(Prerogative Court of New Jersey. Dec. 29, 1905.)

1. APPEAL—RECORD—CONTENTS.

On an appeal from an order denying an application to appoint petitioner as the executor of an estate, it was improper for appellant to annex to the record the argument of counsel prior to the examination of the witnesses.

2. SAME—PRESUMPTIONS.

Where no appeal was taken from an order allowing probate of a will, it will be presumed, on appeal from an order denying appellant's application for his appointment as executor, that the court was satisfied by proof that the paper was testator's last will and was executed in due form.

3. EXECUTORS — APPOINTMENT — NONRESIDENCE.

That the person named in a will as executor was a nonresident was no ground for the court's refusal to grant letters testamentary to him.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 33.]

4. EVIDENCE—RECORDS.

On an issue as to antagonism between a person named in a will as executor and the legatees, a final decree, in the absence of the record of the cause to which the decree related, was without evidential force.

5. EXECUTORS — APPOINTMENT — PROOF OF WILL—DELAY—WAIVER.

Pub. Laws 1898, p. 724, § 27, provides that if the executor named in a will neglects for the space of 40 days after testator's death to prove the testament, administration with the will annexed shall be granted to the next of kin or to such other person as will accept it. Held that, where testator's legatees and next of kin neglected to assert the executor's failure to probate the will within the time prescribed until after the executor had presented the will for probate and was endeavoring in due form to probate the same, they waived their right to have administration granted to the next of kin.

Appeal from Orphans' Court, Middlesex County.

Application for the probate of the last will and testament of Philip Acker, deceased. From an order denying the application of Joseph B. Acker to be appointed executor and appointing another to act in that behalf, he appeals. Reversed.

John A. Coan and George S. Silzer, for appellant. Theodore Strong, for appellee Sarah A. Breece. C. T. Cowenhoven, for appellees Catherine Decker and Margaret Martin.

BERGEN, Vice Ordinary. By the decree of the orphans' court of the county of Middlesex, bearing date the 25th day of July 1905, a paper writing alleged to be the last will and testament of Philip Acker, deceased, was admitted to probate, and in the same decree letters testamentary were refused to the appellant, although nominated in such last will and testament to be the executor thereof, and letters of administration with the will annexed were directed to be issued by the surrogate of the county of Middlesex, to a stranger, against the protest of the appellant, who had offered the will for probate and was present in court offering to qualify as executor when the decree was made. From so much of this decree as denied to the appellant the right to qualify as executor, and ordered the appointment of a stranger in his place and stead to administer the estate, this appeal is taken.

The record brought up, as certified by the clerk of the orphans' court, has annexed to it 12 printed pages containing the argument and discussion of counsel prior to the examination of the witnesses. It is proper that such a practice should be condemned. It forms no part of the record, and in no way aids the court or affects the merits of the case. So much of this record as it is proper the court should consider shows that a caveat was filed against the probate of this will; that the will was not probated by the executor until about one year after the death of the testator; that, as the result of litigation during that period between the legatees and this executor with regard to the property of the testator, a decree was made by the Court of Chancery, adjudging that a certain deed made by the testator to the executor should be set aside as a deed, but be allowed to stand as a mortgage to secure an indebtedness which that court adjudged to be due to the executor from the testator. The will was then offered for probate by the executor, upon an application made by him verified in due form, and citations were thereupon issued to all persons interested. The application was made on the 5th day of May, 1905, and the hearing of the controversy continued by order of the orphans' court from time to time, until the

25th day of July next following, when the decree complained of was made. There is no evidence showing how the caveat was disposed of; but as all presumptions should be in favor of the regularity of the decree, and no appeal being taken from the order for probate, it must be assumed that the court was satisfied by due proof that the paper admitted to probate was the last will and testament of the testator executed and published in due form.

The only witness sworn on the question of administration was Sarah A. Breece, one of the daughters of the testator, who testified that the executor named in the will resided in Brooklyn, N. Y., and that he had the possession of the property of the testator. She also testified that one of her sisters was feeble-minded, and not a fit person to whom the administration should be committed. There is not a particle of testimony to show that the executor named in the will, the appellant here, had changed in condition, financially or mentally, from the time he had been selected by the testator to act as the executor of his last will and testament, or had committed any act which would, in law, disqualify him from serving in that capacity. The fact that he is a nonresident is not sufficient, and the security which the statute requires from a nonresident executor was expressly waived by the testator in his last will. There is nothing in this record, beyond one point, to which I shall hereafter refer, which presents the slightest justifiable reason for refusing to this appellant the performance of the duties which this testator committed to him.

On the argument it was alleged, in support of this decree, that because of the litigation referred to the appellant had unfairly sought to secure the whole estate, and, being defeated in the attempt, occupied a position so antagonistic to the rights of the legatees that he would not fairly administer the estate. While the only proof presented was a copy of the final decree, and, in the absence of the record of the cause to which the decree related, has no evidential force, we may assume that such antagonism existed, and yet find that it worked no disqualification. In the Matter of the Application of John S. Maxwell, 3 N. J. Eq. 611, the executors named in the will of John Maxwell, deceased, were John S. Maxwell and William H. Sloan. A caveat was filed by several persons, John S. Maxwell being one of them. Upon appeal to the Prerogative Court, the paper writing against which Maxwell had filed a caveat was admitted to probate, and thereafter he claimed to be admitted as executor with Sloan. It was objected to because it was claimed he had disqualified himself by joining in the caveat. The Ordinary, in a well-considered opinion, determined "that, where a will is admitted to probate, an executor named therein, if capable in law, is not to be

excluded, unless he has, by some act of his own, deprived himself of the executorship." He held that such an act did not amount to a renunciation, and that, until it was shown that there was a will, it did not appear that there was an executorship to renounce, and said: "It seems to me not difficult to reconcile the denial of the existence of a will with a willingness to serve as executor if a will exists and is established." The case just cited, so far as I have been able to discover, has never been questioned by the courts of this state.

The point most seriously relied upon by the appellees in support of this decree arises under the proper construction of section 27 of our orphans' court act (P. L. 1898, p. 724), which enacts, among other things, that, if the executor named in any testament neglects for the space of 40 days after the death of the testator to prove such testament, then administration with the will annexed shall be granted to the next of kin if they will accept it, and, if not, then to such other person as will. The appellees claim that, as this executor neglected for more than 40 days after the death of the testator to prove the will, he forfeited his right. If this contention was correct it would not support this decree, because it does not appear that the notice required by rule 2 of the orphans' court has been given to the persons in interest. But, aside from the question of notice, the statute in question has no application to the matter under review; for in my judgment it can only be called upon to aid a party who shall institute proceedings under it prior to the application of the executor. The act, if read literally, requires the executor to "prove" the will within 40 days. That he could not do in this case, because of the interposition of a caveat. The object of the law is to provide for a prompt administration of the estate of deceased persons, and when, as in this case, neither creditor, legatee, nor next of kin made any move until after the executor had filed in due form his petition for probate, the reason for committing administration to another—that is, promptness in the settlement of the estate—disappears; for, after the executor has instituted proceedings for probate, the presumption is that he will proceed with all necessary promptness to carry out the wishes of the testator. The next of kin and legatees, having neglected to promptly avail themselves of the alleged neglect and waited until this executor was endeavoring in due form to probate his testator's will, have waived any right they might have had to administration.

In my judgment, so much of this decree as refuses to the appellant the right to such letters testamentary as naturally followed the probate of the will is erroneous, and should be reversed, in order that the administration may be committed to him according to law.

SCHMIDT v. EITEL et al.

(Court of Chancery of New Jersey. Jan. 2, 1906.)

MECHANICS' LIENS—CONTRACT—FAILURE TO FILE—OWNER'S LIABILITY.

Where an owner of land failed to file an improvement contract in the office of the clerk of the county in which the lands were situated, as provided by the mechanic's lien law of 1898 (Laws 1898, p. 538, c. 226), she was not entitled to limit the liability of the lands for liens of workmen and materialmen to the funds in her hands belonging to the contractor.

Action by Margaretha Schmidt against Frederick Eitel and others. On demurrer to the bill. Sustained.

J. P. Manning, for complainant. Frank Benjamin, for demurrants.

MAGIE, Ch. The bill demurred to appears to be one of strict interpleader. The relief it seeks is founded on the statements that complainant made a written contract with Eitel, one of the defendants, for the erection of a house upon her lands for \$2,685, and that Eitel has been paid by her \$2,285, and there is now due him on the contract \$280.56, and that the Empire Sash & Door Company, James Huggan, Frank J. Brohm, and Fred Buhl (also made defendants) have at specified times served on complainant what the bill calls "lien claim notices," to the effect that Eitel was indebted to them, respectively, for materials furnished and used in the erection of the building, and that each of these defendants claims a prior lien on the funds in complainant's hands, which she is ready and willing to pay to any person lawfully entitled to receive them. The prayer is that defendants may interplead, and that complainant, on paying into court the amount she asserts to be due, may be discharged from any liability to the defendants. Eitel, the alleged contractor, and Brohm and Buhl, alleged claimants upon the fund, have severally demurred to the bill.

It is first claimed by both demurrants that the bill is defective, because it fails to show that the contract, which complainant avers she made with Eitel, was filed in the clerk's office of the county in which the lands were, so as to protect complainant's lands from the lien claims under the first and second sections of the mechanic's lien law of 1898. Laws 1898, p. 538, c. 226. If in fact the contract was not filed, obviously, upon the statements of the bill, each one of these defendants may file his lien upon the house and lands of complainant, and enforce that lien by the proceeding provided for by the mechanic's lien law. The lien claimants are entitled, in that proceeding, to recover the full amount of their respective claims, which are proved. They cannot be restricted to the amount due to the contractor on a contract not filed under section 2. When the contract is filed, workmen and materialmen

are provided with a means to enforce their claims upon moneys due the contractor by the provisions of section 3. But to entitle complainant to limit the claims of workmen and materialmen to funds in her hands, and to seek relief of that character, she should have averred that the contract she made with Eitel had been duly filed. On this ground the demurrer must be sustained.

This result renders it unnecessary to consider other causes also assigned upon the demurrer.

McMASTER v. DREW et al

(Court of Chancery of New Jersey. Jan. 2, 1906.)

1. CORPORATIONS — INSOLVENCY — RECEIVERS — ACTIONS.

Where a petition by the receiver of an insolvent corporation showed that certain shares of stock of the corporation had been issued by it in payment for property conveyed to it, which conveyance was thereafter judicially declared void, so that the consideration for the shares of stock issued in payment wholly failed, and that the shares had been transferred to various persons, it was within the court's discretion to grant leave to file a bill in behalf of the parties interested to determine the rights of such stockholders.

2. SAME—BILL—SUFFICIENCY—DISCLOSURE OF ASSETS.

A bill by the receiver of an insolvent corporation to determine who the stockholders are need not disclose whether the assets the receiver has reached or may reach are sufficient to satisfy the creditors.

3. SAME—DEMURRER TO BILL.

On demurrer to a bill by the receiver of an insolvent corporation to determine who the stockholders of such corporation are, the court will not consider whether, by the proceedings in the original cause, it has been made to appear that there are no assets sufficient to satisfy creditors.

Bill by John S. McMaster, receiver, against Charles H. Drew and others. On demurrer to bill. Demurrer overruled.

Norman Grey, for complainant. Charles D. Thompson, for defendants.

MAGIE, Ch. The bill in this cause asserts that in a cause in this court wherein the Denver City Waterworks Company was complainant, and the American Waterworks Company was defendant, the last-named company was decreed to be insolvent, on the 20th day of July, 1892, and that by subsequent proceedings, John S. McMaster was appointed its receiver. It further asserts that, upon a petition of the complainant in said cause, an order was made on July 12, 1904, permitting the receiver to file the bill now before me, upon his being furnished security to protect him and the fund from the costs and expenses of the suit. The receiver thereafter filed the bill, and on the 3d day

of October, 1905, an order to show cause why a preliminary injunction should not issue, was made. Defendant's counsel appeared in opposition to the allowance of the injunction, and also moved that an order be made requiring the receiver to show cause why the order permitting him to file the bill should not be set aside. The motion was denied and the preliminary injunction was allowed.

The petition on which leave to file the bill was granted showed that certain shares of stock of the insolvent corporation had been issued by it in payment for property conveyed to it, and that afterward a competent court had decreed that the conveyance of the property was absolutely void, and of no effect, so that the consideration for the shares of stock issued in payment therefor had wholly failed. It was also made to appear that the shares had been transferred by the company by which the conveyance had been made, and to which the shares had been issued, to various persons. Under those circumstances, leave to file the bill was asked in behalf of parties interested, to determine the rights of such stockholders. It does not admit of doubt that such a bill could have been filed by the corporation, but for the fact that it had become insolvent. By reason of its insolvency, no proceeding involving this matter could be taken by any one except the receiver, and by him only by leave of the court. I judged that it was proper to allow the receiver to act, although I required security to be given to protect him and the fund. The propriety of the course adopted has again been challenged upon this argument, and I have reviewed the question. I remain convinced that the order for leave to file the bill was within the discretion of the court. The bill filed by the receiver exhibits the same state of facts, and its prayer is for the return to him of the shares of stock, the consideration for which has wholly failed. This involves the same question presented by the petition for leave to file the bill.

The receiver of an insolvent corporation holds its property and franchises for the benefit of the creditors, and if a surplus after satisfying the creditors and the expenses of the receivership remains, then for the benefit of the stockholders. He may therefore seek to find out who are the stockholders to whom he may eventually be liable. It is not necessary that his bill seeking to have determined who the stockholders are, should disclose whether the assets he has reached or may reach are sufficient, or insufficient, to satisfy the creditors; nor can it be considered, upon a demurrer to the bill, whether, by the proceedings in the original cause, it has been made to appear that there are no assets sufficient to satisfy creditors.

The demurrer to the bill must therefore be overruled.

WHITE et al. v. SMITH et al.

(Court of Chancery of New Jersey. Jan. 4, 1906.)

1. PARTITION — SALE OF PREMISES — WHEN ORDERED.

Where premises described in a bill for partition are so situated and of such character that they cannot be divided among the owners according to their several shares without great prejudice to the interests of such owners, the property will be ordered sold and the proceeds divided among the several owners according to their respective interests.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, §§ 216, 219, 220.]

2. SAME — ALLOWANCES — TAXES AND IMPROVEMENTS.

In a suit for partition, allowance from the gross proceeds of sale will be made to parties for taxes paid by them, for the value of permanent improvements of a necessary or suitable character placed by them upon the property at their own expense, and for lawful interest on the sums so expended.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, §§ 236-246, 253.]

3. SAME — ACCOUNTING FOR RENTS AND PROFITS.

In a suit for partition, complainants will not be required to account for rents or profits resulting from their possession of the premises, where it does not appear that they excluded their co-tenants from the enjoyment of the premises, nor that they received any rents or profits from letting the premises, nor that in occupying the same as a farm they actually made any profit.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, §§ 247-252.]

4. SAME—CLAIMS FOR DAMAGES.

Unliquidated claims for damages done to premises by complainants are not cognizable in a suit for partition of the premises.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, § 228.]

Bill for partition by Josiah White and others against Ella Etta Smith and others. Heard on bill, answer, cross-bill, and proofs. Decree advised.

See 60 Atl. 399.

C. L. Cole, for complainants. L. G. Morton, for defendants Ella Etta Smith and others. J. J. Crandall, for defendants Josephine Maud Lake and Frank Lake.

GREY, V. C. In this case the proofs satisfy me:

First. That the premises described in the bill of complaint are so situated, and of such character that they cannot be divided among the owners thereof, according to their several shares, without great prejudice to their interests resulting from such division, and that for this reason, the property must be sold and the proceeds divided among the several owners according to their respective interests.

Second. That a proper allowance should be made to the complainants for taxes by them paid, and for the value of permanent improvements by them placed upon the property at their own expense, which were of a character consistent with the nature of the property, and either necessary or entirely suitable and

justifiable for its development, which allowance should be paid from the gross proceeds of sale, with lawful interest. That like allowance and payment should be made to such defendants as paid taxes on said property.

Third. That it has not been shown that the complainants received any rents or profits from the letting of the premises in question, and that it does not appear that they excluded their co-tenants from the enjoyment of the premises in common with themselves; the premises consisting of a small farm which the complainants occupied and conducted at their own expense. Nor is there any showing that in so doing they actually made a profit, and that therefore the complainants should not be required to account for rents or profits, etc., as prayed in the cross-bill. That there is no showing of damage done to the premises by complainants as alleged in the cross-bill, and that such unliquidated claims are not here cognizable.

Fourth. That the proofs show that the original complainants or their grantees are seised of and entitled to an equal undivided one-third part of the premises, that the defendant Ella Etta Smith is seised of and entitled to another equal undivided third part of said premises, and that George H. Weaver and Josephine Maud Lake, are each seised of and entitled to an equal undivided one-sixth part of the same.

A decree will be advised according to these conclusions.

In re HARTMAN'S ESTATE.

(Prerogative Court of New Jersey. Jan. 4, 1906.)

1. TAXATION — INHERITANCE TAX — WILLS — TRANSMISSION OF PERSONALTY.

Where a testatrix at the time of her death, was a resident of the state, her personal estate passed to collateral legatees under her will, subject to the assessment for succession taxes as personal property is transmitted or bequeathed by wills and descendible by inheritance according to the law of the domicile.

2. SAME—SITUS OF PROPERTY.

The situs of the personal property of a testatrix, for the purpose of assessing a legacy or succession tax, is the domicile of the testatrix at the time of her death; and this, regardless of the statutes of a foreign state subjecting to similar taxation such portions of the testatrix's personal estate as was located therein.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1685, 1686.]

3. DOMICILE—HUSBAND AND WIFE.

Where a husband and wife resided together most of the time at her house in New York City, but spent the week ends at the husband's domicile in New Jersey, where he was engaged as a clergyman, the wife's domicile was that of her husband in New Jersey.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Domicile, § 25.]

4. WILLS—TRANSMISSION OF PROPERTY—PROBATE.

Legacies bequeathed to collateral relatives pass on the death of the testatrix, and are not postponed or suspended for want of probate of the will.

5. TAXATION — INHERITANCE TAX — ASSESSMENT.

Where testatrix was domiciled in New Jersey at the time of her death, the inheritance tax was properly assessed on legacies bequeathed to collateral relatives as of the date of testatrix's death, regardless of the fact that her will was not probated in New Jersey.

Application for the assessment of a collateral inheritance tax against legacies bequeathed by the will of Georgiana E. Hartman, deceased. From an order making such assessment, the executors appeal. Affirmed.

John R. Hardin, for appellants. E. D. Duffield, Asst. Atty. Gen., and Theodore Backes, for appellees.

BERGEN, Vice Ordinary. The decedent, Georgiana E. Hartman, was the wife of Charles Harvey Hartman; they having married on the 5th day of April, 1899, in New York City. At the time of the marriage the husband was the rector of the Episcopal Church in the city of Dover in this state, and occupied with his mother the rectory of his parish. The furniture in use belonged to the mother, who managed the house, had the entire charge thereof, and remained in the rectory after the marriage upon the same terms. It is admitted by the appellants that the legal residence of the husband never changed, and that he has, since his settlement in Dover, continued to be a resident there. The decedent was a wealthy woman, and at the time of her marriage owned and resided in a valuable property on Madison avenue, in New York City, and until her death maintained her establishment at that place, living in the liberal manner her wealth justified. It appeared in the cause that the wife had repeatedly declared that she would never remove to Dover for the purpose of establishing her home there; that after the marriage the husband lived with his wife in New York City during the week, she going with him to Dover at the end of each week, where they remained until the beginning of the next week, in order that the husband might officiate during the Sunday services; that the wife also went to Dover with her husband to attend occasional entertainments arranged for the benefit of the church; that it was her practice to spend about two weeks in the spring and a like period in the autumn of each year at the rectory in Dover; that these visits were a part of her summer vacation, the residue of which she usually spent with her husband at Long Branch, to which place she took her servants, horses, and carriages; that in the month of May, 1903, the decedent accompanied her husband to Dover for the purpose of attending a church entertainment, expecting to remain but a day or two, and while there was taken suddenly ill and died, and her remains were at once taken to her residence in New York City, the funeral services being held at the residence, and also at

St. Thomas Church, in that city. It was further made to appear that the will of the decedent was admitted to probate by the surrogate of the county of New York, and that in the application for probate her residence was described as being in New York City; that the decedent had no property of any kind or description in the state of New Jersey, and never at any time obtained a residence therein, beyond such as the law imputes to a wife of one whose domicile is within this state; that her property consisted of real and personal estate, the personal remaining in the custody of the decedent in the state where she resided at the time of her marriage, and all of the real estate being located in the same place. The executors of the decedent proceeded to administer the estate under the laws of the state of New York, paying to the proper authorities of that state collateral inheritance taxes levied against legacies to collaterals upon \$77,500. In January, 1905, one Elmer King, having been appointed appraiser by the surrogate of the county of Morris, proceeded to, and did, appraise so much of the estate of the decedent as would be liable to a tax under the laws of this state making subject to a tax "estates, gifts, legacies, devises and collateral inheritances in certain cases." The appraiser so appointed having made his report, the surrogate of such county assessed against the collateral legatees an inheritance tax of the precise character and amount levied and collected by the authorities in New York City, and it is from this order of the surrogate that this appeal has been taken.

The appellants insist that, although the domicile of the husband of the testatrix was in New Jersey at the time of the death of the decedent, the usual rule which makes the domicile of the husband the domicile of the wife does not apply in cases of this character, and that for the purpose of levying a succession tax, a decedent, being a wife, may have a residence for the purpose of taxation separate from the legal domicile of the husband. The appellants also insist that, as this will was probated in a foreign jurisdiction, within which all of the property which passed by the will was located, succession taxes were due and payable only to the authorities of the state within which all of the property was located, and, further, that the right to levy a tax of this character against collateral legatees is subject to the fact of administration, and that, if property within a foreign jurisdiction is not brought within the state for distribution among legatees, the surrogate is without authority to make the assessment complained of. That the personal property of this testatrix was subject to the law of New York regarding succession taxes has been so often determined as to place the question beyond useful argument. *Matter of Houdayer*, 150 N. Y. 41, 44 N. E. 718, 34 L. R. A. 235, 55 Am. St.

Rep. 642, where funds deposited in bank, subject to draft at will, were held liable; *Matter of Estate of Romaine*, 127 N. Y. 80, 27 N. E. 759, 12 L. R. A. 401, where securities kept in a safe deposit vault by a nonresident were, after his death, subjected to such a tax. It is thus apparent that, if this assessment be sustained, the result will be the requirement of the payment of two taxes of like character by the same legatees for the right of succession to the gifts of the testatrix; but this unfortunate situation cannot control the determination of the questions presented, for such a condition frequently arises, and, while its presence always induces most careful consideration on the part of the court to find some legal method to prevent it, it must be submitted to unless it can be avoided under settled rules relating to the subject. *Golding v. Chambersburg*, 37 N. J. Law, 258; *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439. If this testatrix at the time of her death was a resident of this state, her personal estate passed to these collateral legatees under her will, subject to the assessment for succession taxes, the order for the assessment of which is here complained of; for "it is still the law that personal property is sold, transmitted, bequeathed by will, and is descendible by inheritance according to the law of the domicile. *Eldman v. Martinez*, 184 U. S. 578, 22 Sup. Ct. 515, 46 L. Ed. 697. The law of New York on this subject is for all practicable purposes identical with the law of this state, and in construing it Judge Gray, in *Matter of the Estate of Swift*, 137 N. Y. 77, 32 N. E. 1006, 18 L. R. A. 709, presents very strong and cogent reasons in support of his opinion that the tax provided for is only enforceable as to property which, at the time of its owner's death, was within the territorial limits of the domiciliary state; but the majority of the court were not convinced by his reasoning, and held that personal property of a resident decedent, wheresoever situated, whether within or without the state, was subject to the tax imposed by the act. The great weight of authority favors the principle adopted by the New York Court of Appeals, holding that the tax imposed is on the right of succession under a will, or by devolution in case of intestacy, and that as to personal property its situs, for the purpose of a legacy or succession tax, is the domicile of the decedent, and the right of its imposition is not affected by the statute of a foreign state which subjects to similar taxation such portion of the personal estate of any non-resident, testator, or intestate as he may take and leave there for safe-keeping, or until it should suit his convenience to carry it away. *Thompson v. Advocate Gen.*, 12 O. & Flin. 1.

The remaining question relates to the residence of the testatrix. Her abiding place was undoubtedly in the city of New York,

but the legal domicile of her husband was in this state, and it must be conceded that the established rule is that, where the husband and wife are living together as members of one family, the residence of the husband is considered, in law, as the residence of the wife. *Baldwin v. Flagg*, 43 N. J. Law, 495; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *McPherson v. Housel*, 13 N. J. Eq. 35. The exception in favor of a married woman in proceedings for divorce against her husband, he having abandoned her and acquired a residence in another state, is founded upon a rule which does not apply where the husband and wife are living together. The neglect to probate the will in this state was urged as depriving the surrogate of jurisdiction, but in my judgment the authority of the surrogate does not depend upon the probate of the will, which speaks from the death of the testatrix, and in my opinion the property passed to these collateral relatives by this will upon the death of the testatrix, and was not postponed or suspended for want of probate. The tax is to be assessed as of the date of the inheritance, and the amount of the assessment is not affected by the increase or depreciation of the estate between the death of the testatrix, and the probate of the will, which in cases of contest may cover a long period; for the act provides that all taxes imposed "shall be due and payable at the death of the testator." P. L. 1894, p. 320, c. 210, § 4.

The result is that this petition must be dismissed, with costs.

FEINBERG v. FEINBERG.

(Court of Chancery of New Jersey. Jan. 4. 1906.)

1. EQUITY—PRACTICE—REHEARING.

An application for a rehearing before a vice chancellor is governed by principles applicable to motions for new trials after verdict in cases at law.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 884-851.]

2. SAME—GROUNDS—IMPEACHMENT OF WITNESSES.

A rehearing in an equity case will not be granted to enable the applicant to impeach the credit of witnesses who testified on the original hearing.

3. SAME—NEWLY DISCOVERED EVIDENCE.

In order to justify a rehearing in an equity case for newly discovered evidence, the new matter must be of such a character that, if it had been heard on the trial, it would probably have altered the result.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 846.]

4. DIVORCE—DECREE—REHEARING—SUFFICIENCY OF AFFIDAVITS.

On petition for rehearing after final decree for divorce on the ground of adultery, affidavits containing alleged newly discovered evidence held insufficient to authorize the granting of the petition.

Suit for divorce by Hazer Feinberg against Anna Feinberg. On petition for rehearing. Denied.

For former opinion, see 59 Atl. 880.

A. J. King, for petitioner. J. W. Wescott, for defendant.

GREY, V. C. This cause was heard on January 9 and 18, 1905; the issue being the charge of the petitioner, Hazer Feinberg, that the defendant, his wife, Anna Feinberg, had committed adultery with one John Myers, for which reason the petitioner prayed a divorce. On January 23, 1905, a final decree was made, granting the prayer of the petitioner for divorce because of the adultery of the defendant with Myers, as charged in the petition. On July 24, 1905, the defendant, Anna Feinberg, filed her petition in this court, alleging that the vice chancellor, in ordering the decree for divorce, rested his conclusions upon the evidence of one Bertha Schindle, and that, since the hearing, the defendant has discovered "new and material evidence tending to discredit the evidence of the said Bertha Schindle," and praying "that the decree of divorce heretofore ordered against her may be opened, and that she may be permitted to offer before this court the witnesses and affidavits attached to her petition." The petition for a rehearing is supported by affidavits thereto annexed, which, it is contended, exhibit sufficient grounds to open the final decree and try the cause over again. The petitioner, Anna Feinberg, insists that they show newly discovered evidence, which, if presented to the court, is of sufficient weight and credibility to lead to a different conclusion.

The affidavits address themselves to several different phases of the case, in substance as follows: The first two affidavits recite parol statements said to have been casually made by the husband, Hazer Feinberg. One witness swears that in July, 1904, Feinberg said "he was going to try to get rid of his wife, and that he had a girl who would say anything that he wanted her to say; that he didn't care what it would cost him." The next witness declares that Feinberg, one day last summer (1904), told her that "he did not want his wife to leave him; that she went away because of the influence of her mother, who persuaded her to leave him; "that her mother took her away and made all the trouble between them." It will be noticed that the first affidavit imputes to Mr. Feinberg a purpose to be rid of his wife, the other a desire to keep her. Nothing identifies the girl mentioned by Feinberg, as one "who would say anything he wanted her to say," as the witness Bertha Schindle. These alleged statements, even if correctly understood and repeated in the affidavits, have neither that certainty or force as evidence which should affect the judgment of a court to open a decree for rehearing.

The next affidavits are given by John Myers, the paramour of the defendant, by Mrs. Annie Myers, his wife, and friends who visited at their home. These persons attempt to prove an alibi by showing that on Christmas Eve, 1903 (December 24th), the paramour, Myers, was not at the Feinberg house, as was proven on the hearing of the cause. Myers says in his affidavit that he had understood that the time of the alleged adultery was fixed as on Christmas night of 1903 (December 25th), and that the first he knew that it was claimed to have been on Christmas Eve (December 24th) was at the trial. Both Myers and his wife then testify that on December 24, 1903 (Christmas Eve), he was elsewhere. The petition for divorce expressly names December 24, 1903, as one of the days on which the adultery was committed. At the hearing of the cause the accusatory testimony of the witness Bertha Schindle was given on January 9, 1905, and was followed by an adjournment until January 18, 1905, on which day both Mr. and Mrs. Myers were called to the stand as witnesses for the defendant. Myers was shown by undisputed testimony to have discussed his relations with Mrs. Feinberg, long before the hearing, with the utmost freedom of speech. He knew before the trial that he was accused of adultery with Mrs. Feinberg. He went on the stand nearly 10 days after the testimony was given which accused him of adultery on Christmas Eve. The incriminating admissions of Mr. Myers, proven against him at the hearing despite his denials, while not forceful to show the guilt of the defendant Mrs. Feinberg, go far to impeach Myers' own veracity as a witness. He assiduously attended at the hearings. I cannot believe that he took so little interest in the cause that he mistook the date when he was charged to have committed the adultery.

Other affidavits annexed to the petition (Mrs. Vaughn's and Mrs. Naylor's) state that Mr. Feinberg several times visited Bertha Schindle at houses where the latter was a servant between December, 1903, and March, 1904; and this it is claimed contradicts Bertha's testimony at the hearing, when she was questioned, "Have you seen Mr. Feinberg since the suit commenced?" and she answered, "No, sir," and shows a conspiracy between Feinberg and Schindle to present a false case and to conceal it. I am unable to give such proof so great importance.

The last affidavit is that of David Wudlauskus, who signs with a Hebrew signature a manuscript written in English. This affidavit recites a conversation alleged to have taken place in September, 1904, between Wudlauskus and Feinberg. The affidavit states that Feinberg said "he had a girl in Hamonton who would tell of his wife's conduct with the policeman [meaning John Meyers]; that he had this girl fixed, and knew how she would testify; that Feinberg then and there told deponent that you could do any-

thing with money, and that he (Feinberg) was sure to get his divorce." It is claimed that this must be held to be an admission that the petitioner corruptly suborned the witness Bertha Schindle to testify falsely. Although it is an *ex parte* affidavit, presumably expressed most favorably to the purpose for which it is presented—the securing of a rehearing—the words used do not justify the contention. Bertha Schindle is not named nor in any way identified by any other incident than the fact that she testified to the wife's adultery. It does not follow that the unnamed girl would testify falsely because Feinberg knew how she would testify. That he had her "fixed" does not necessarily mean that she was corruptly fixed to perjure herself; nor does the allusion of the power of money imply its wrongful use to suborn witnesses.

A verbal admission, alleged to have been made by a party to a suit, says Mr. Greenleaf, should be received with great caution. "Consisting, as it does, in the mere repetition of oral statements, it is subject to much imperfection and mistake. It frequently happens that the witness, by unintentionally altering a few of the expressions used, gives an effect to the statement completely at variance with what the party actually did say." 1 Greenl. Ev. § 200. The oral admissions ascribed to the husband in the affidavits annexed to the petition for rehearing are open to this criticism. The husband's alleged admissions which they present do not themselves show that he had contrived a plan to set up a false case. In order to give this effect to them, the existence of a criminal purpose on his part must be presumed.

It cannot, I think, be maintained that the testimony of the witness Bertha Schindle was a surprise to the defendant or her paramour, Myers, or that her testimony as to the date of the offense misled them, for the time when Bertha testified she saw the incriminating act accorded with that long before alleged in the petition for divorce. Nor can they say that they had no opportunity to refute Bertha's evidence, for there was a period of nine days after they heard it before they were themselves called as witnesses. They directly contradicted in every essential particular the evidence which she gave, but their testimony, in view of all the proofs, was deemed unworthy of belief, and hers to have accorded with the trend of that given by the other witnesses. It is not newly discovered evidence, introducing a new point which has come to light since the trial, but only new witnesses who attempt to discredit Miss Schindle. The position disclosed on the hearing of the cause directly prompted the impeachment of Miss Schindle's testimony by the defendant, if that were possible. The issue of her veracity was directly before the court.

A rehearing ought not to be granted to

enable the defendant to impeach her credit. 2 Danl. Chan. Prac. 1120, note "b." The rule on application for a rehearing before a vice chancellor is governed by the principles which are recognized in the law courts in cases of motions for new trials after the verdict of a jury. *Warner v. Warner*, 31 N. J. Eq. 549; *Burrows v. Wene* (N. J. Ch.) 26 Atl. 890. Those courts declare it to be settled that "a new trial will not be granted upon the new discovery of witnesses who will swear against the credit of those sworn upon the trial." *Price v. Ward* (Sup. Ct.) 7 N. J. Law, 127; *Den v. Geiger* (Sup. Ct.) 9 N. J. Law, 240. The Court of Appeals has declared that, in order to justify a rehearing because of newly discovered evidence, it must be shown that the new matter offered must be of such a character that, if it had been heard on the trial, it would probably have altered the judgment. *Watkinson v. Watkinson* (N. J. Err. & App.) 60 Atl. 932, 69 L. R. R. 397; *Richardson v. Hatch* (N. J. Ch.) 60 Atl. 52, affirmed on appeal, June term, 1905, without opinion. The affidavits supporting the petition for a rehearing, setting forth the alleged admissions of the husband, are in no way forceful to show even a probable subornation of the witness Bertha Schindle. Those of Myers and his wife, attempting to prove an alibi for Myers, are in no proper sense newly discovered evidence, and, so far as that of Myers is concerned, cannot be accepted, because the evidence at the hearing entirely satisfied me that his denials were unworthy of belief.

In my view the defendant has had her day and full opportunity to present her defense. The supposed new evidence set forth in the affidavits annexed to her petition for a rehearing, had it been offered at the trial of the cause, would not have changed the result.

The petition for a rehearing should be dismissed.

BURNS v. JOHNSTOWN PASS. RY. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. CARRIERS—INJURY TO PASSENGER—ASSUMPTION OF RISK.

Where a passenger stands on the running board of a summer car when there is room inside, he assumes the risk.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1375-1379.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Where a passenger, with knowledge that the running board of a summer car was in close proximity to the poles near the track, stood thereon after warning other passengers of the danger, and was subsequently hit by a pole and killed, he was guilty of contributory negligence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1375-1379.]

Mestrezat, J., dissenting.

Appeal from Court of Common Pleas, Cambria County.

Action by Margaret J. Burns against the Johnstown Passenger Railway Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Donald E. Dufton and Robert E. Creswell, for appellant. Percy Allen Rose, Forest Rose, and W. Horace Rose, for appellee.

ELKIN, J. Even if it be conceded that the defendant company was negligent in constructing and maintaining the poles supporting the trolley wires in too close proximity to the tracks, it does not necessarily follow that there can be a recovery in this case. The real question in dispute is whether the testimony shows such contributory negligence on the part of the deceased as will defeat plaintiff's claim in this action. The learned trial judge in the court below directed a compulsory nonsuit, which, on motion made, he refused to take off, from which rulings this appeal is taken.

The deceased was standing on the running board of an open summer car at the time the accident occurred. We have frequently said that the running board of a car is not intended for the use of passengers, except as a convenience in getting in and out of the car. A passenger who stands on the running board when there is room inside, or when it is reasonably practicable to go inside the car, assumes the risk of his position. *Bard v. Pennsylvania Traction Co.*, 176 Pa. 97, 34 Atl. 953, 53 Am. St. Rep. 672; *Thane v. Scranton Traction Co.*, 191 Pa. 249, 43 Atl. 136, 71 Am. St. Rep. 767; *Bumbear v. United Traction Co.*, 198 Pa. 198, 47 Atl. 961. It follows, therefore, that a passenger who is injured while standing on the running board must show by affirmative testimony that it was not practicable for him to go inside the car before he can sustain an action for damages.

We have some doubt whether the evidence offered by appellant has met this standard of requirement, but, even conceding under the circumstances as disclosed by the testimony it was a question for the jury to determine whether it was practicable for the deceased to go inside the car, still there can be no recovery because of the negligence of the deceased in another respect. The danger, if any, from the poles could have been avoided by the exercise of reasonable care. Did he exercise the reasonable care required under the circumstances? The learned trial judge held that he did not. In this there was no error. The deceased had placed himself on the running board, where he assumed the risk of his position, unless he relieved himself by showing that it was not practicable for him to go inside, and, in addition, he knew of the close proximity of the poles

to the tracks, and warned other passengers of the danger. Three or more passengers standing in front of him and one or more back of him passed the pole without being injured. These passengers were standing on the same running board, and were subject to the same danger, if such it was. They all avoided the danger of the poles about which the deceased had warned them, and it is clear he could have avoided it by the exercise of reasonable care. If he knew the danger, and he did, and could have avoided it by reasonable care, and of this there is no doubt, it was his duty to do so, and, having failed to perform his duty in this respect, he was guilty of contributory negligence, and there can be no recovery in this case.

Judgment affirmed.

MESTREZAT, J., dissents.

BRUNDRED et al. v. McLAUGHLIN et al.
(Supreme Court of Pennsylvania. Oct. 30, 1905.)

EVIDENCE—OPINIONS OF EXPERT—ADMISSIBILITY.

In ejectment, a surveyor who made investigations on the ground to determine the location of a boundary line was asked: "Where, in your opinion, is the line between Nos. 83 and 84?" Held, that the question was proper, the evidence not being an opinion of a witness but testimony as to a fact in view of his observations on the ground.

Appeal from Court of Common Pleas, Venango County.

Action by Benjamin F. Brundred and Elizabeth L. Brundred against James E. McLaughlin and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. H. Osmer, A. R. Osmer, N. F. Osmer, and Trax & Parker, for appellants. C. I. Heydrick, F. A. Sayers, and J. L. Nesbit, for appellees.

PER CURIAM. The only question involved in this case was one of fact, to wit, the location of the boundary line between the plaintiffs' land and the adjoining land of the defendants. All of the evidence was relevant to that issue and it was correctly submitted to the jury. The only assignment of error that we need notice specially is the second, to the admission of the question to the surveyor Reed: "Where, in your opinion, is the line between Nos. 83 and 84?" To the objection the court said that the investigation made by the witness on the ground was for the purpose of ascertaining the boundary line, and, having given the facts as he learned them, he would be permitted to answer the question. The judge therefore admitted this, not as a mere opin-

lion of the witness, but as a summary of his observations on the ground, and therefore as testimony to a fact. This is in accordance with the authorities. *Jackson v. Lambert*, 121 Pa. 182, 15 Atl. 502.

Judgment affirmed.

**SAFE DEPOSIT & TITLE GUARANTY
CO. OF KITTANNING v.
LINTON et al.**

(Supreme Court of Pennsylvania. Oct. 30, 1905.)

**MORTGAGE — ABSOLUTE DEED — DEFEASANCE
NOT RECORDED.**

Where, after the execution of a deed absolute on its face, the grantee executed a paper agreeing to pay a mortgage, with interest, then due, and to pay the taxes on the land and a sum stated, and to reconvey the property to the grantors when the amount so paid was returned with interest, such paper is a defeasance, which, if not recorded within 60 days from its date, as provided by Act June 8, 1881 (P. L. 84), cannot be admitted to convert the deed into a mortgage.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 200.]

Appeal from Court of Common Pleas, Armstrong County.

Bill by the Safe Deposit & Title Guaranty Company of Kittanning against P. R. E. Elwina Linton and A. F. Linton. Decree for plaintiff, and defendants appeal. Affirmed.

Patton, P. J., filed the following opinion in the court below:

"On December 30, 1901, the defendants, by deed of general warranty, conveyed to the plaintiff two-thirds of a tract of land in Perry township, Armstrong county, containing 307 acres. On February 3, 1902, the plaintiff gave to the defendants the paper which is the foundation of the present controversy. It was acknowledged the same day, but was not recorded until June 5, 1903. It is not denied that the defendants are the owners of at least one-third of the real estate in controversy. The plaintiff claims to own the two-thirds by reason of the deed of December 30, 1901, which is a deed for the real estate, regular and absolute on its face. The defendants, while admitting this deed, allege that it is held subject to the paper of February 3, 1902, which they call a deed or declaration of trust. This is the issue before us, and must be determined upon the proper construction of the paper of February 3, 1902.

"This paper is out of the ordinary. It is in a class of its own, yet it has all the earmarks of a defeasance, and falls within every definition of a mortgage. The grantee agrees to pay a mortgage of \$6,500, with interest from July 3, 1899, then due, to advance at least \$20,000 more, and to pay the taxes assessed upon the land conveyed, and agrees to reconvey the property to the grantors when they refund the amount advanced by the grantee, with interest and costs. It is a pledge of the land described in the agree-

ment by the grantor to the grantee, and is to revert to the grantor on the discharge of the obligation for the performance of which it is pledged. Hence it is a mortgage. *Lance's Appeal*, 112 Pa. 456, 4 Atl. 375; *Moran v. Munhall*, 204 Pa. 242, 53 Atl. 1094. The paper of February 3, 1902, contains conditions upon the performance of which the estate created would have been defeated or totally undone, and prior to the act of June 8, 1881, would have reduced the deed of December 30, 1901, to a mortgage. But it was not recorded within 60 days of its execution; hence it runs into the very jaws of the act of June 8, 1881 (P. L. 84), which provides: 'That no defeasance to any deed for real estate regular and absolute on its face, made after the passage of this act, shall have the effect of reducing it to a mortgage, unless the said defeasance * * * is recorded * * * within sixty days from the execution thereof.' The law is well settled that since the act of June 8, 1881, a written defeasance signed by the grantee, but unacknowledged and unrecorded, will not be admitted to convert such deed into a mortgage. *Sankey v. Hawley*, 118 Pa. 30, 13 Atl. 208; *Molly v. Ulrich*, 133 Pa. 41, 19 Atl. 305; *Grove v. Kase*, 195 Pa. 325, 45 Atl. 1054; *Crotzer v. Bittenbender*, 199 Pa. 504, 49 Atl. 286; *Lohrer v. Russell*, 207 Pa. 105, 56 Atl. 333. The question was forever set at rest by the decision of the Supreme Court in *Sankey v. Hawley*, 118 Pa. 30, 13 Atl. 208; that court saying, in words that cannot be misunderstood: 'There is now but one method left by which a deed absolute can be reduced to a mortgage, and that method in this case has not been pursued. * * * If we give effect to this act, an act in no wise ambiguous, it is certain the defeasance offered on part of the defense was properly rejected.' Feeling constrained by these authorities to reject the defeasance of February 3, 1903, the defense falls with it.

"The defendants further contend that their case falls within the rulings of *Goodwin v. McMinn*, 193 Pa. 646, 44 Atl. 1094, 74 Am. St. Rep. 703, and is controlled by it. But that case is clearly distinguishable from the one before us. There the allegation of the grantor was that the deed was procured by fraud, and that fraudulent use was being made of the conveyance. It is stated clearly in the opinion of the court: 'He did not set up an agreement as a defeasance to the deed, and which had the effect of changing its absolute character into a conditional one, for the security of a debt or a contingent future liability.' There is no allegation in the answer or proof offered to show fraud on the part of the grantee. The plaintiff offers a deed absolute on its face. The defendants offer to show a defeasance not recorded as required by the act of 1881, which we are required by the provisions of that act and the authorities under it to reject, and thereby the defense falls.

"And now, April 7, 1905, let a decree be drawn for the partition of the land described in the bill and the appointment of a master to make partition thereof."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

R. A. McCullough and H. A. Hellman, for appellants. George B. Gordon, James H. McCain, and W. J. Christy, for appellee.

PER CURIAM. This judgment is affirmed, on the opinion of the court below.

In re WILKINSON'S ESTATE.

Appeal of SCOTT.

(Supreme Court of Pennsylvania. Nov. 4, 1905.)

WILLS—CONTEST—STANDING OF CONTESTANT—SUFFICIENCY OF EVIDENCE.

On a petition for an issue of devisavit vel non, evidence held insufficient to raise a question for the jury on the issue of petitioner's legitimacy as a daughter of testator, such as to entitle petitioner to contest the will.

Appeal from Orphans' Court, Beaver County.

Petition by Emma T. Scott to set aside the probate of the will of James Wilkinson, deceased. From a decree refusing an issue of devisavit vel non, petitioner appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

S. L. Webb and W. A. McConnel, for appellant. Agnew Hice and J. Rankin Martin, for appellee.

PER CURIAM. It may be conceded that there was enough testimony to go to a jury that the petitioner was a daughter of the testator, but the weight of the evidence was against her legitimacy. The marriage of her mother and her putative father, was not only not proved, but was clearly disproved. The only direct evidence of the marriage was the testimony of a woman from the Old Woman's Home in Covington, Ky., who did not know how old she was nor when she came to this country, but who testified in 1902 to a marriage between the testator, Wilkinson and the appellant's mother, Sarah Taylor, at some time she could not remember, but assented to a suggested date of 1857, 1858 or 1859, at the house of Mr. Steele in Chester county. The testator she had not seen since that date, and she professed to identify him by a photograph taken 30 odd years after she last saw him. The alleged wife she had never seen before or since that one occasion, and she identified her from a photograph (when taken not shown) "only by the way her hair is fixed, and the earrings, and the ugly mouth." The

witness could not remember the name of the squire who performed the marriage ceremony, and the only name about which she was positive was that of the owner of the house, John D. Steele. Some of his family were present at this wedding, she said, "some in the garret, some down in the cellar."

This flimsy story might well be turned out of court without more, but it was met by evidence from the records of the superintendent of charities of Philadelphia that the witness Sarah Nicholson, whose maiden name was Sarah Hamm, was indentured to Mr. Steele in 1833, and her time having expired in 1847 she was not at his home at any time within 10 or 11 years of the date of the alleged marriage of Wilkinson; and by convincing testimony from several members of the Steele family that they never knew either the testator or Sarah Taylor, and no such marriage ever took place in their house. There were declarations of the testator, and other collateral matters bearing on the principal fact, but it is a favorable view to the appellant to say that the inferences to be drawn from them lead both ways. Two facts, however, raise a presumption against the appellant that has great weight. The marriage was assumed to have taken place in 1857, 1858 or 1859, but it was shown that in 1864 the testator married another woman, and lived with her as his wife until her death; and in the same year Sarah Taylor married another man. There was no evidence of a divorce, and the presumption is strong against the commission of bigamy by both parties. On the question of testamentary capacity the testimony of the lawyer who drew the will is convincing. But, as the petition wholly failed to show any standing to contest, there is no need to discuss that branch of the case.

The decree is affirmed, with costs to be paid by appellant.

COMMONWEALTH ex rel. CARSON, Atty. Gen., v. COLLIER et al.

(Supreme Court of Pennsylvania. Nov. 4, 1905.)

1. TAXATION—BOARD OF ASSESSMENT—APPOINTMENT AND ELECTION—CONSTITUTIONAL PROVISIONS.

Act March 24, 1905 (P. L. 47), providing for the appointment by the courts of common pleas in certain counties of a board for the assessment and revision of taxes, is not repugnant to Const. art. 14, § 2, requiring county officers to be elected at the general elections, as the members of the board are not county officers within the meaning of the Constitution.

2. CONSTITUTIONAL LAW—JUDICIAL POWERS—DUTIES—CONSTITUTIONAL PROVISIONS.

Const. art. 5, § 21, exempting judges from the imposition of nonjudicial duties, applies only to judges of the Supreme Court.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 123, 124.]

Petition for mandamus by the commonwealth, on the relation of Hampton L. Carson, Attorney General, to compel Frederick H. Collier and others, as judges of the several courts of common pleas of Allegheny county, to appoint three persons as a board for the assessment and revision of taxes in and for the county of Allegheny, as provided by section 1 of Act March 24, 1905 (P. L. 47). Writ denied.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Hampton L. Carson, Atty. Gen., and R. H. Jackson, for petitioners. E. H. Stowe, for respondents.

BROWN, J. If the three persons to compose a board for the assessment and revision of taxes created by Act March 24, 1905 (P. L. 47), for counties containing a population of not less than 300,000 nor more than 1,000,000 are county officers, the direction of the act that they shall be appointed by the court or courts of common pleas of the proper county is invalid, for section 2 of article 14 of the Constitution declares that county officers shall be elected at the general elections. By the first section of the same article county officers consist of sheriffs, coroners, prothonotaries, registers of wills, recorders of deeds, commissioners, treasurers, surveyors, auditors or controllers, clerks of the courts, district attorneys, and such others as may from time to time be established by law. With authority thus clearly given to the law-making power to add to and increase the constitutional list of county officers, the first question to be considered in this proceeding is, has the Legislature done so in the act under consideration?

The members of the board created by the act are not declared to be county officers; on the contrary, by directing that they shall be appointed and not elected, the Legislature must manifestly be understood as not having intended to create new county officers. In passing the act the guide of its members was the Constitution, and with it as an open book before them its unmistakable words were that if new county officers were to be established they would have to be elected and could not be appointed. The Legislature further knew from section 3 of the same article that the Constitution contemplates the appointment of officers within a county who are not county officers. The members of the board are not designated in the act as county officers, and, strictly speaking, they could not be so designated. In *Taggart v. Commonwealth*, 102 Pa. 354, it is true it is said, "In determining what class of officials should be designated county officers, the convention manifestly had in view those whose duties were coextensive with the boundaries of the county;" but a surer test is the character of

the duties to be performed by the officers. The duties of a state officer to be performed within a county may be coextensive with and limited to it, but for that reason he is no less a state officer if he acts for the state. The duties to be performed by the board created by the act of 1905 are not for the county alone, but for the state as well. Separate and distinct duties are imposed upon its members. That the commonwealth may receive the tax which it has imposed as a state tax, they are to assess and value a certain species of property, and the act provides that "in so far as respects state taxes, the valuations and assessments shall be made by the board annually, on or before December 31st"; that the county may receive the taxes due it and needed by it for strictly county purposes, they shall assess and value the real estate within it, and in so doing they perform no duty for the state. At times a county officer whose primary duties are to the county, is directed by the state to act for it by virtue of his office. A county treasurer, because he is the appropriate county officer for such a purpose, is designated to collect for the state certain taxes levied by it for state purposes, and so the register of wills by virtue of his office collects the collateral inheritance tax on decedents' estates; but not so here. The appointment of the board is primarily for the state as well as for the county, and though the former looks to the latter for the payment to it of a certain tax, the Legislature does not permit the county through its township and ward assessors to assess and value property upon which the state tax has been imposed, but directs that this board shall be appointed for that specific purpose. Being clearly of the opinion that the members of the board are not county officers, we pass to the next objection raised to the act, which is that it imposes on the court duties that are not judicial.

The executive, legislative and judicial branches of the state government are created by the people through their Constitution, and the powers and duties of each are such only as are expressly conferred or imposed, or are inherent by necessary implication. But there are no powers inherent in either of the branches nor duties to be evaded by either of them, if such powers have been expressly withheld from it by the people or duties have been imposed upon it by them; and therefore no duty can be evaded by the executive or judiciary if the people have authorized its imposition by the Legislature, their law-making power, on either of these branches. In the judiciary article the judges of but one court are exempt from the imposition of nonjudicial duties, and from them alone is the power of appointment withheld. "No duty shall be imposed by law upon the Supreme Court or any of the judges thereof, except such as are judicial,

nor shall any of the judges thereof exercise any power of appointment except as herein provided." Const. § 21, art. 5. "Expressio unius est exclusio alterius" is no less true of this clause than of any statute; and it is therefore to be presumed that the people, with the knowledge that for years before they adopted the present Constitution judges of the common pleas had been directed by acts of assembly to appoint mercantile appraisers, boards of revision of taxes, and other officers, and were so appointing them, adopted the clause containing the limitation upon this court alone, and left the judges of the other courts to continue to appoint when directed to do so by the Legislature.

The real question is not as to the character of the duty to be performed by the courts under the act of 1905, but as to the constitutional power of the Legislature to impose it. If that power exists the duty imposed in this clear exercise of it must be performed. Under the conditions existing at the time of the adoption of the Constitution, the people were able to declare who at that time should be regarded as county officers, but, anticipating the requirements arising from new conditions, power was committed to the Legislature of establishing others from time to time, all, however, to be elected. In addition to new county officers to be elected, the necessity for others to be appointed was clearly contemplated in the adoption of the Constitution to meet requirements in the growth and development of the state. What those new officers should be could not have been anticipated, and therefore their selection is not provided for in the Constitution; but when new offices are needed the Legislature may admittedly create them, and, when created, they may be filled by appointment. They are to be "appointed as may be directed by law." Const. § 1, art. 12. The direction of the law is that the board created by the act of 1905 shall be appointed by the court or courts of common pleas of the proper county, and this direction having been made in pursuance of constitutional authority, a constitutional duty arises which cannot be disregarded. This duty having been imposed upon the courts of common pleas of the county of Allegheny, must be performed by the judges composing them. In all matters a court acts through its judge or judges, and when the combined courts of a county are directed to act, they are to act through a majority of their judges forming one body. In the absence of statutory direction as to the manner in which they shall so act, their good judgment will be their guide.

From the answer of the respondents we deem nothing more necessary than this brief expression of our views on the questions raised by them, and, assuming that the duty imposed upon them will be performed, the order asked for by the commonwealth will not now be made.

SEWARD v. JOHNSON et al.

(Supreme Court of Rhode Island. Dec. 4, 1905.)

1. JUDGMENT—SETTING ASIDE—PERSONS ENTITLED TO RELIEF.

A creditor, who attached the interest in land descending to the debtor on his ancestor dying intestate, knew of proceedings in the probate court and in the common pleas division for the probate of the will of the ancestor, disinheriting the debtor, but did not apply to become a party to the proceedings, as authorized by Gen. Laws 1896, c. 248, § 7. A compromise in the proceedings for the probate of the will was made without notice to him. *Held*, that he was not a party to the proceedings, within chapter 251, § 2, providing that, when it shall be made to appear by "any party" that by reason of mistake judgment has been rendered, a new trial may be granted, and was not entitled to relief.

2. SAME—DEFAULT—WHAT CONSTITUTES DEFAULT—STATUTES.

In proceedings for the probate of a will, evidence showing the execution of the will, its contents, and the capacity of the testator was given. The contestants offered no evidence, and the court admitted the will to probate. *Held*, that the decree was not entered by default as against the contestants represented in court, or as against a person who could have become a party, but did not, within Gen. Laws 1896, c. 251, § 2, authorizing the granting of a new trial when the judgment has been rendered by default, by reason of accident, mistake, etc.

3. SAME—ACCIDENT—MISTAKE—WHAT CONSTITUTE.

A creditor, who attached the interest in land descending to the debtor on the ancestor dying intestate, knew of proceedings in the probate court and in the common pleas division for the probate of the ancestor's will, which disinherited the debtor, but took no steps to become a party thereto. The will was admitted to probate. *Held*, that the creditor's failure to contest the probate of the will was not the result of "accident, mistake, or any unforeseen cause," within Gen. Laws 1896, c. 251, § 2, authorizing the court to grant a new trial on the ground that by reason of "accident, mistake, or any unforeseen cause" judgment has been rendered against the party applying for a new trial.

4. SAME—RIGHT TO REPRESENT ABSENT PARTY IN INTEREST.

An heir, disinherited by a will, had not been heard from for several years by any one in interest, and it was not known whether he was alive or dead. A creditor of the heir, petitioning for a new trial after judgment admitting the will to probate, stated that the heir was without the jurisdiction of the state and that his whereabouts were unknown. *Held*, that the creditor could not represent the heir in a petition to procure a new trial.

Appeal from Probate Court.

Application by Mary E. Seward for the probate of the will of Charles E. Johnson, deceased. The judge of probate decided in favor of the contestants, Emma N. Johnson and others, and on the appeal of the proponent the common pleas division admitted the will to probate. Petition by William A. Lester for a new trial under Gen. Laws 1896, c. 251, § 2. Petition denied.

Argued before DOUGLAS, C. J., and DU-BOIS, BLODGETT, JOHNSON, and PARK-HURST, JJ.

Arthur M. Allen, for petitioner. Littlefield & Barrows, for Mary E. Seward.

PARKHURST, J. This is a petition for a trial or a new trial under chapter 251, § 2, Gen. Laws R. I. 1896, viz.: "Whenever it shall be made to appear to the satisfaction of the appellate division of the Supreme Court, by any party or garnishee in a suit which shall have been tried or decided in the common pleas division of the Supreme Court, or in any district court, within one year previous to such application, that by reason of accident, mistake, or any unforeseen cause, or for lack of newly discovered evidence, judgment has been rendered in such suit on discontinuance, nonsuit, default, or report of referees, or that such party or garnishee had not a full, fair, and impartial trial in such suit, or, in case a trial has been had in such case, that a new trial therein should be had, such division may grant such trial or new trial upon such terms and conditions as it shall prescribe."

The petitioner, William A. Lester, by affidavit sets forth that he was, on December 25, 1903, and still is, a creditor of one Walter H. Johnson, son of Charles E. Johnson, deceased, late of Warwick, R. I., and that his claim amounts to \$1,988.65, with accrued interest, and that Charles E. Johnson died December 25, 1903. At his death the petitioner attached the interest of Walter H. Johnson in certain real estate belonging to Charles E. Johnson in his lifetime, and which descended to said Walter H. Johnson, if the deceased died without a will. It appears that said Charles E. Johnson did have a will, which he destroyed sometime prior to his decease. An administrator was appointed on his estate by the probate court of the town of Warwick, and at or about the time of the application for the appointment of an administrator application was made to admit to probate an alleged copy of Charles E. Johnson's will, which left Walter H. Johnson only \$50, and made Mary E. Seward residuary devisee. Mary E. Seward, the proponent, attempted to show that the deceased was of unsound mind at the time he destroyed the will, and that the paper she presented was a true copy. Both of these alleged facts were disputed. The judge of said probate court refused to admit the will to probate. Mary E. Seward appealed, claimed jury trial, and the appeal was entered in the common pleas division for the county of Kent. It further appears that Lester, the petitioner, was fully aware of all these proceedings; that he had an attorney through whom he made the attachment above referred to; that he was in communication, either personally or through his attorney, with at least one party to the record and her attorney, and was watching the progress of the case; but that he did not enter his appearance, or ask to be made a party either in the probate court or in the common pleas division. He now complains that the parties of record in said

probate appeal, without notice to him, entered into a compromise, and that pursuant thereto a formal proceeding was had in the common pleas division for the county of Kent on the 17th day of March, A. D. 1905, when a mere formal presentation of the alleged will of Charles E. Johnson was made by the appellant, and no evidence against its validity was presented by the appellee, and that the jury returned its verdict sustaining the will, and that on the 11th day of May, 1905, the formal decree of the common pleas division was entered probating said will. The petitioner further claims that he was a "party" in interest in said proceedings, by reason of his said attachment, and by reason of his rights as a creditor of one of the heirs of said Charles E. Johnson, and that the proceedings in said common pleas division were in the nature of a "default," "by reason of accident, mistake or unforeseen cause," so far as he was concerned, and asks for a trial under section 2 of chapter 251, above quoted.

The petitioner was, by reason of his attachment in the suit against Walter H. Johnson, so far peculiarly interested in the lands formerly belonging to Charles E. Johnson, deceased, that he was entitled to appear and be heard either in the probate court in the original proceedings there, or in the common pleas division on the appeal, provided it should be made to appear to either court that he was interested, in accordance with the provisions of chapter 248, § 7, Gen. Laws R. I. 1896, viz.: "Whenever it shall be made to appear in any matter or cause pending in any probate court, or upon appeal from any such court in either division of the Supreme Court, that any person made a party thereto, or interested therein, has not been duly notified that the same has been brought before the court, the jurisdiction of the court where the same is, over such cause, shall not be defeated thereby, but the probate court, if such matter or cause is therein, or if the same is on appeal in either division of the Supreme Court, such court or any justice thereof may order such notice to be given to such person interested, of the said matter or cause, as in the discretion of said court or justice will afford such party a reasonable opportunity to appear in said court and be heard in reference to said matter or cause. Said notice to be served on such person or party not less than fourteen days before the return-day thereof, and from and after such service and return all orders and proceedings of such court in such cause shall be as effective in binding the person named in such notice as if the proper notice of the bringing of such matter or cause had been duly issued and served upon the commencement of such matter or cause in the court of probate." Such pecuniary interest has been frequently held sufficient to give a person a standing in court as a party interested in matters of probate or

probate appeal. *Smith v. Bradstreet*, 16 Pick. 264; *In re Langevin*, 45 Minn. 429, 47 N. W. 1183; *Shepard's Estate*, 11 Pa. Co. Ct. R. 133. See, also, *Pierce v. Gould*, 143 Mass. 234, 235, 9 N. E. 568; *Yeaw v. Searle*, 2 R. I. 164; *O'Rourke v. Elsbree*, 11 R. I. 430; *Stebbins v. Lathrop*, 4 Pick. 33. It is to be noted that in all these cases which are cited by the petitioner the persons interested had actually appeared and made themselves parties, and the court in each case decided that they had the right so to do. See, also, as to Lester's right to become a party to the appeal, although he did not appear in the probate court, *McArthur v. Allen* (C. C.) 3 Fed. 313, 319; *Wells v. Wells*, 4 T. B. Mon. 152, 153, 16 Am. Dec. 150; *Patton v. Allison*, 7 Humph. 320, 328; *Onachita Baptist College v. Scott*, 64 Ark. 349, 42 S. W. 536; *Lischy v. Schrader* (Ky.) 47 S. W. 611; *Meyer v. Henderson* (Md.) 41 Atl. 1073; *Bonnemort v. Gill*, 167 Mass. 338, 340, 45 N. E. 768.

But Lester did not see fit to avail himself of the opportunity to become a party to these proceedings. If he had done so, he would then have been properly before the court and entitled to be heard and to produce such evidence as he saw fit in opposition to the probate of said will. If, then, he had not had notice of the proceedings complained of, and a compromise had been made without notice to him, he would have had a proper standing to apply to this court for relief. The statute (section 2, c. 251) contemplates relief to a "party" to a suit. Lester might have made himself a party within its terms had he seen fit to do so. He has not done so, and is not entitled to relief. See *Bonnemort v. Gill*, 167 Mass. 338, 340, 45 N. E. 768, and other cases cited, *supra*. Furthermore, we think there was no "default" in the common pleas division such as the statute above quoted contemplates. The affidavit of the appellant, Mary E. Seward, shows that the copy of the will alleged to be the will of Charles E. Johnson was not merely formally presented, but evidence at some length was introduced to show both its execution and contents, and also that Charles E. Johnson was of unsound mind at the time of his attempted revocation of the will by its destruction. A proceeding of this kind cannot be said to be a "default" as against a party to the record who is represented in court and does not see fit to offer testimony; neither can it be said to be a "default" as against a person who could have become a party to the record, but has not seen fit to do so. Nor was there any such "accident," "mistake," or "unforeseen cause" as the statute contemplates. It was either an instance of mistake of law as to the proper legal steps necessary to be taken to preserve the petitioner's interest, as in *Howard v. Capron*, 3 R. I. 182, or else it was an instance of negligence, and so within the scope of the

opinion in *Haggelund v. OaMale Mfg. Co.*, 26 R. I. 520, 60 Atl. 106.

We fail to find any evidence in the papers before us that the petitioner ever intended to become a party to the proceedings in question; but it seems, on the contrary, that he has purposely kept out of them, taking chances that persons who owed him no legal duty and whose interests were or might become adverse to his, would in some way do something which would be of service to him without expense on his part. In some vague and shadowy way the petitioner appears to attempt to represent Walter H. Johnson in this proceeding, although he does not in exact terms claim to represent him, nor does he petition in Johnson's name. Johnson has not been heard from for several years by any one in interest, and it is not known whether he is alive or dead; and the petitioner himself states under oath that he is without the jurisdiction of this state and his whereabouts are unknown to the petitioner. The petitioner can have no standing to represent Johnson in this matter, as it is evident he can have no authority from Johnson.

The petition for a trial or new trial is denied and dismissed.

MCGOWAN v. COURT OF PROBATE OF CITY OF NEWPORT.

(Supreme Court of Rhode Island. Nov. 29, 1905.)

TRIAL — INSTRUCTIONS — MANNER OF GIVING REQUESTED INSTRUCTIONS.

An instruction correctly stating the law on a certain point is not erroneous, because not in the exact language of a requested instruction correctly stating the law on that point.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 668, 674.]

Judicial proceedings on the probate of the will of Ann McGowan, deceased. Petition for a new trial after a verdict approving the will. New trial denied.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, and PARKHURST, JJ.

William P. Sheffield, Jr., and Max Levy, for appellant. Frank F. Nolan and Gardiner, Pirce & Thornley, for appellees.

PER CURIAM. This is a petition for a new trial of a probate appeal in which the jury have found a verdict approving the will of Ann McGowan, deceased. The petition is based upon exceptions to the refusal of the court to charge as requested by the appellants, and also on the ground that the verdict is against the law and the evidence.

Two requests to charge were made, which were modified by the presiding justice. The first request is as follows: "Where a person writes or prepares a will for another under which the wife of the writer takes a benefit, it is a suspicious circumstance, requiring the

court to be vigilant and zealous in examining the evidence in support of the instrument, and is sufficient to exclude the will from probate unless the suspicion is removed." The modification of this request which was granted is as follows: "That where a person writes or prepares a will for another, under which the wife of the writer takes a benefit, it is a circumstance to be considered by you, requiring the court and the jury to be vigilant and zealous in examining the evidence in support of the instrument, and that, unless it appears clearly that no advantage was taken by the person so writing a will, it would be sufficient to exclude the will from probate." The charge given by the court was a substantial compliance with the request. It is not the privilege of counsel to dictate the words that shall be given in a charge to the jury. If the law applicable to the case is correctly stated, it is all that can be required. *McGarrity v. N. Y., N. H. & H. R. Co.*, 25 R. I. 269, 55 Atl. 718.

The second request to charge, as it was worded, was inapplicable to any evidence in the case, as was admitted by counsel at the argument before us. The evidence in the record was, in our opinion, amply sufficient to support the verdict. Indeed, it was so strong in favor of the will that a contrary verdict would have been unreasonable.

The petition for a new trial is denied, and the cause will be remanded to the superior court sitting in the county of Newport, with direction to enter a decree sustaining the will, with costs for the proponents.

DAVIS v. BALTIMORE & O. R. CO. et al.
(Court of Appeals of Maryland. Dec. 7, 1905.)

1. INJUNCTION — PRIMARY RELIEF — BILL — DISMISSAL.

Where an injunction asked for is the primary relief demanded, and not merely ancillary, and on hearing an application to dissolve a temporary injunction it is determined that plaintiff is not entitled to injunctive relief, it is proper for the court to dismiss the bill on the merits.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 279-281.]

2. NUISANCE—INJUNCTION—BILL.

Where a bill sought to restrain the construction of a switch track along a county road in front of plaintiff's premises, charging that the construction, use, and operation of the siding would greatly depreciate the value of plaintiff's property as a residence by reason of the noise and danger incident to the operation of steam cars, and alleged that the smoke, noise, and dust arising from the use of locomotives would constitute a nuisance to plaintiff individually, as well as to the public, and would inflict irreparable injury on plaintiff, but failed to allege the proximity of the railroad to plaintiff's dwelling house, or in what way the value of the latter could or would be affected by the construction of the switch, or how the comfort and enjoyment thereof would be interfered with, or any facts showing how the use of the railroad, the smoke, and noise would operate injuriously

thereon, the bill was insufficient to justify an injunction.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, §§ 77, 181.]

3. SAME—RAILROAD SWITCHES.

A railroad switch or siding is not a nuisance per se, and can only become such by circumstances connected with its construction, location, or the manner of its use.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, §§ 23, 24, 159.]

4. SAME—PUBLIC NUISANCE—PRIVATE INJURY.

Where complainant sought to enjoin the construction of a railroad switch along a county road, alleging that the maintenance of the switch would interfere with and endanger the use of the road, which was her only exit from her premises, but it was not contended that there was any actual obstruction of the road by the switch, complainant's safety and comfort in using the road only being impaired, her injury, if any, was not different in kind from that suffered by the general public having occasion to use the road, and hence she was not entitled to sue to enjoin the maintenance of the switch.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, §§ 164-165.]

5. SAME—PARTIES.

Where a railroad company agreed to construct a switch at the expense of a gravel company, the latter being the party having the substantial interest involved and most responsible for the construction of the switch, and being the directing agency in such construction, the railroad company, though a proper party to a suit by an adjoining property owner to restrain such construction, was not a necessary party.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, §§ 71, 112, 180.]

6. PLEADING—VERIFICATION OF ANSWER.

Where, in a suit to restrain the construction of a switch by a railroad company for the benefit of a certain sand and gravel company, the latter was the substantial agency having the matter of construction in charge, it was no objection to the answer of the railroad company that the facts therein were verified by one of the officers of the gravel company who had knowledge thereof.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 887-890.]

7. SAME—EVIDENCE.

Where, in a suit by an adjoining property owner to restrain the construction of a railroad switch along a county road near her property as a nuisance, there was no evidence showing any diminution in value of plaintiff's property because of the switch, nor to show how noise and smoke from locomotives using the switch could affect the enjoyment of plaintiff's property, nor the probable quantity of such noise and smoke, or what inconvenience would be occasioned thereby, the evidence was insufficient to justify an injunction.

Appeal from Circuit Court, Prince George's County, in Equity; Geo. C. Merrick, Judge.

Action by Nannie E. Davis against the Baltimore & Ohio Railroad Company and others. From a decree dissolving an injunction and dismissing the bill, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Clayton E. Emig, for appellant. Robert W. Wells and Marion Duckett, for appellees. Jas. A. C. Bond, for the Baltimore & Ohio Railroad Company.

JONES, J. This is an appeal from a decree of the circuit court for Prince George's county dissolving an injunction which had been granted in the cause and dismissing the bill of complaint upon which the suit had been instituted. The bill alleges that the plaintiff is the owner of a tract of land at or near Contee Station, on the main line of the Baltimore & Ohio Railroad Company, upon which she has expended more than the sum of \$20,000 "for improvements upon the dwelling erected on said premises, and was about to erect yet larger improvements thereon, all of which enures to the benefit of said county and the taxes collectible therefrom, * * * that she is the owner of valuable horses which she uses daily on said premises and on the county road bordering on said premises, and that she has no exit to drive from said premises other than by said county road; that the defendants [appellants here] Charles Hillers and Albert Taylor are the reputed owners of a tract of land adjoining the said premises along the center of the said county road, running northerly from the intersection of said railroad." Then, after alleging that the plaintiff "is informed and believes" that the Baltimore & Ohio Railroad Company "is about to construct, for the use and benefit of said Charles Hillers and Albert Taylor, a railroad track or siding intersecting with the Baltimore & Ohio Railroad track extending northerly immediately along the county road and along the premises" of the plaintiff (appellant here) "for the purpose of operating steam cars" thereon, the bill charges "that the construction, use, and operation of said railroad track or siding will greatly depreciate the value of her property as a resident, by reason of the noise and danger incident to the operation of said steam cars and locomotives passing immediately in front of her residence"; that the use aforesaid will imperil the life of "the plaintiff" and other members of her family while lawfully engaged in driving upon said county road; that the smoke, noise, and dust arising from the use of locomotives on said railroad in transporting sand and other materials from and to its terminus will constitute a nuisance to "the plaintiff" individually, as well as to the public using said county road, and inflict an irreparable injury; that the construction, use, and operation of said siding and said steam cars constitute a public, as well as a private, nuisance in frightening horses belonging to users of said county road; that the said siding has been graded by the defendants Hillers and Taylor "under a contract with the Baltimore & Ohio Railroad, which" agrees to lay the ties and tracks upon said roadbed; that "all of said grading is now ready" for the laying of the tracks upon said roadbed; "that the use and operation of said steam cars on said siding will greatly endanger the use of said county road by those who reside in the immediate vicinity and the public at

large; that it will tend to inflict injury by continuously frightening horses and decrease the travel of said county road and greatly depreciate the value" of the plaintiff's "property and premises." Upon these allegations the bill prayed that the defendants therein named be enjoined from constructing the railroad or siding of which complaint was made, and from laying tracks on the roadbed graded as set out in the bill, "adjoining the county road or elsewhere in the near vicinity of said county road or the property" of the plaintiff (appellant), and "from operating or in any manner constructing said railroad or siding along said county road or the premises" of the plaintiff. A preliminary injunction was granted upon the filing of the bill. The defendants filed their answers. The Baltimore & Ohio Railroad Company its separate answer, and Charles Hillers and Albert Taylor their joint answer (in which the Contee Sand & Gravel Company united and asked to be allowed to intervene in the suit), and accompanied their answers with a motion to dissolve the injunction. A hearing of this motion upon the bill, answers, and testimony resulted in the decree dissolving the injunction and dismissing the bill, from which this appeal was taken.

The appellant contends that the injunction should have been continued; and further insists that, whether the injunction was continued or not, the bill should not have been dismissed at that stage of the proceedings. In this case no other relief was sought by the bill than the injunction to restrain the defendants from the acts complained of; and no other relief, under the general prayer for relief, could have been granted consistently with that specifically prayed for. It is now well settled in our practice that "where the injunction asked for is not ancillary, but the primary and principal relief prayed for, there is no reason for retaining the bill, if upon hearing, upon bill and answer, or bill, answer, and depositions, it appears to the court, there is no ground for issuing or granting the injunction upon the merits." *Kelly, Plet & Co. v. Baltimore*, 53 Md. 134. Upon the case presented to the court below we are of opinion that the injunction which had been granted therein ought to have been dissolved, and that it was proper to dismiss the bill. That court in its opinion, filed with the decree, said the injunction had been improvidently granted, and with this we agree. The allegations of the bill were altogether too general and indefinite to authorize the granting of the injunction. The suit of the appellant was designed to restrain what was charged in the bill to be a threatened nuisance. In *Adams v. Michael*, 38 Md. 123, 17 Am. Rep. 516, this court said, through Judge Alvey: "To justify an injunction to restrain an existing or threatened nuisance to a dwelling house, the injury must be shown to be of such a character as to diminish materially the value of the property

as a dwelling, and seriously interfere with the ordinary comfort and enjoyment of it. Unless such a case is presented, a court of chancery does not interfere. It must appear to be a case of real injury, and where a court of law would award substantial damages." The principle applied in the case referred to is clearly applicable here, where the gravamen of the bill is that the acts of the defendants complained of will interfere with the use and enjoyment of the premises occupied and owned by the appellant, and will greatly depreciate the value thereof. The bill in the case just referred to was brought to restrain the erection of a factory designed for a use which it was charged would be a nuisance to the plaintiffs, in that it would destroy the comfort and enjoyment of their property and result in irreparable and continuing injury thereto and to the value thereof. The court further said, after referring to the allegations of the bill as being very strong as to what would be the consequences to result from the erection of the factory: "It is not enough for the parties complaining simply to allege that particular consequences will follow the erection of the factory, that may be their opinion or apprehension, but facts must be stated so that the court can see and determine whether the allegation is well founded." The court then points out the defects in the bill there under review, and the same defects are manifest in the bill in the case at bar. The proximity of the railroad, the alleged nuisance in this case, to the dwelling and improvements referred to in the bill, is not shown; nor does it appear in what way the value of these can be, or will be, affected by its construction or the comfort and enjoyment of them will be interfered with. There is nothing but the broad assertion that the results mentioned will follow its construction. There is no allegation of whether the use of the railroad will be frequent or otherwise, nor what smoke and noise it is likely to occasion in its use, nor in what way such smoke and noise will operate injuriously upon the value of the appellant's property or seriously diminish or interfere with the comfort and enjoyment of its use. The nearest approach to determining the character of the railroad as a nuisance, when it shall be constructed and put into operation, is its alleged proximity to the public road mentioned in the bill. If this circumstance makes it a nuisance at all, it is or will become a public nuisance from which the appellant must suffer some peculiar and special injury, different in kind from that which will be occasioned to the general public to entitle her to maintain a private action. *Houck v. Wachter*, 34 Md. 285, 6 Am. Rep. 332; *Schall v. Nusbaum*, 56 Md. 512; *Garitee v. Baltimore*, 53 Md. 422; *Crook v. Pitcher*, 61 Md. 510. The bill alleges the appellant has no exit to drive from her premises other than over the county road, the use of which will be interfered with and endan-

gered by the construction of the railroad in question. Be this as it may, there is no actual obstruction of this county road. It is not pretended it cannot be used at all, but only that the safety and comfort of using it will be impaired, and in the use of it the appellant will encounter the same inconvenience in kind that will be suffered by others of the general public having occasion to use it. A railroad switch or siding is not a nuisance per se. It can only become such by circumstances connected with its construction or location, or the manner of its use after being constructed. It comes, therefore, within the "general rule that where the thing complained of is not a nuisance per se, but may become so according to circumstances, and the injury apprehended is eventual or contingent, equity will not interfere. The presumption is that a person entering into a legitimate business will conduct it in a proper way so that it will not constitute a nuisance" 14 Encyc. of Plead. & Prac. 1128, 1129. Accordingly, to have entitled the appellant here to the preliminary injunction to restrain what was alleged to be a threatened nuisance, the bill in its allegations should have set out the facts and circumstances, if any existed, which, when supported by proof, would constitute substantial grounds for the charges in the bill of a threatened nuisance. The appellant filed exceptions to the answers of the appellee in the court below, which that court could properly have heard and considered at the time of hearing the motion to dissolve the injunction. *Alex. Ch. Prac.* 87; *Keighler et al. v. Savage Manfg. Co.*, 12 Md. 383, 71 Am. Dec. 600. It does not appear from the record that these exceptions were there noticed.

It was urged as grounds for the exceptions that the answers of the Baltimore & Ohio Railroad Company and Charles Hillers were not accompanied with affidavits, and therefore could not be considered, that the answers were not responsive to the bill, and that they were evasive and insufficient. We do not find that the answers are obnoxious to the objections of not being responsive to the bill and of being vague and insufficient. They in terms deny that the appellant would be interfered with in the use of her property and premises by the proposed switch or siding. Explain how the said switch or siding is to be constructed and operated, and the objects of its construction. They are responsive to the allegations of the bill, and contain a sufficient denial of the equity it attempts to set up. In respect to the want of affidavits to the answers, there is no doubt that as a general rule to authorize the dissolution of an injunction when the same is heard upon a motion to dissolve that all of the defendants must have answered the bill; and, to authorize effect to be given to the answers of the defendants, the same must be under oath. There are, however, well-recognized exceptions to the rule requiring the answers of all who

may have been made parties defendant to be filed before entertaining the motion to dissolve. In *Heck v. Vollmer et al.*, 29 Md. 507, it was held that this rule was "subject to discretion and modification, according to the circumstances of the case, as, where those not answering are mere formal parties, or are infants or nonresidents, and whose answers cannot be material in regard to the facts on which the injunction is founded, there the answers of such parties will not be required as a prerequisite to hearing the motion." Now in this case, though it was not improper to make the Baltimore & Ohio Railroad Company a party to the appellant's bill, such company was not an indispensable party. The object of the suit could have been accomplished by a proceeding against the other parties without making that corporation a party defendant. The party having the substantial interest involved and the party most responsible for the acts complained of in appellant's bill was the Contee Sand & Gravel Company, acting through its agents and employees, Taylor and Hillers. Taylor was its president and the directing agency in the matter of the construction of the switch or siding in question. He was the one most familiar with all the facts. He swore to the answer filed by himself and Hillers, and in so doing virtually made oath to the facts stated in the answer of the Baltimore & Ohio Railroad Company, which in substance and effect was identical with that to which his affidavit was appended. It was requisite, if an affidavit was to be appended to the answer of the railroad company that some one should make the affidavit on its behalf, and no one could have done this with better knowledge of the truth of the facts and averments it set out and contained than Taylor, who swore to the practically identical answer of himself and Hillers. We think under the circumstances of this case the answers of Hillers and the railroad company may well be brought within the exceptions to the rule, invoked against their being allowed effect, which have been recognized in practice, as we have seen.

Coming, now, to the consideration of the testimony upon which the motion to dissolve was heard, this was equally as vague and indefinite as the allegations of the appellant's bill. There is no testimony at all showing any diminution in value, present or prospective, of appellant's property. There is none as to how the noise and smoke will or can affect the appellant in the enjoyment of her property. None to show the probable quantity of such noise and smoke or what inconvenience is to be occasioned by it. As to the danger to result from the operation of the switch or siding in question, there is no evidence, except the expression of opinion, in a general way, by two of the witnesses that there will be danger at certain points on the public road likely to be encountered by persons using the road, a danger or inconvenience,

if it results as indicated, not peculiar to the appellant, but which will be suffered by the public generally. There is testimony going to show some flooding upon one occasion of the lands of the appellant by reason of obstruction to the flow of the water by the partly constructed switch. This consequence of the acts complained of was not alluded to in appellant's bill, and is not shown to be a continuing or recurring condition, nor any thing more than an exceptional and extraordinary occurrence readily susceptible of being compensated for in damages in an action at law, if actionable injury was suffered therefrom.

Upon the whole case we find the injunction was properly dissolved and that there was no reason shown for retaining the bill, and the decree in the case will be affirmed, with costs.

Decree affirmed, with costs to the appellees.

EAST BALTIMORE LUMBER CO. v. WALDEMAN et al.

(Court of Appeals of Maryland. April 12, 1905.)

1. APPEAL — REVERSAL — JOINT DEFENDANTS.

Where defendants were jointly sued as original promisors, and the appeal record failed to show that they raised the question of misjoinder of parties in the trial court, a judgment based on a single verdict in favor of all of the defendants could not be reversed, in so far as it affected some of them, and affirmed as to the others.

2. FRAUDS, STATUTE OF—COLLATERAL PROMISE.

Where materials are delivered to a contractor on his sole credit, a subsequent oral promise of the owner of the building to see that the materialman was paid was within the statute of frauds.

3. SAME—JOINT ORIGINAL PROMISE.

A joint promise by a contractor and the owners of a building to pay for materials furnished, credit being given partly to both, is not within the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 35-39.]

On rehearing. Overruled.

For former opinion, see 59 Atl. 180.

SCHMUCKER, J. The appellees, who were defendants below, have asked for a rehearing of this appeal, and they urge in the brief, filed in support of their motion, in addition to the grounds relied on in the argument of the appeal, first, that we should not have reversed the judgment as to all three of the defendants, when we held that the plaintiff had practically abandoned its case against the defendant Silberman and that the record contained no legally sufficient evidence to hold the Hebrew congregation; and, secondly, that we should have held in our opinion that, if any credit at all had been given to the contractor, McCall, for the lumber for the price of which the suit was brought, the undertaking of the defendants

was collateral to that of the contractor, and void under the statute of frauds because not in writing. The appellees were sued jointly as original promisors, and the record fails to show that they raised the question of misjoinder in the court below. There was but one verdict and judgment, and, having been rendered by a court of law, it would have been improper to affirm it in part and reverse it in part. In *Hanley v. Donoghue*, 59 Md. 239, 43 Am. Rep. 554, this court said: "At common law a judgment was regarded as an entire thing, and, being an entirety, it has been repeatedly held that it could not be affirmed as to one or more defendants and reversed as to the others. It must either be affirmed as a whole or reversed as a whole. *Cutting v. Williams*, 1 Salk. 24; *Parker v. Harris*, 1 Ld. Raym. 825; *Lloyd v. Pearse*, Cro. Jac. 425; *Jaques v. Cesar*, 2 Saund. 101; 2 Bac. Abr. 221 marg." *Hanley v. Donoghue* was reversed in 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535, upon the ground that an allegation in the declaration, that a judgment recovered in Pennsylvania against two defendants, only one of whom had been served with process, was binding upon that defendant in Pennsylvania, was admitted to be true by a demurrer to the declaration, but the proposition to which we have referred was not passed upon or reversed by the Supreme Court.

As to the second proposition of the brief, in holding, in our opinion already filed, that the question whether the defendants' undertaking was an original or a collateral one must be solved by determining to whom the credit was given at the time of the sale and delivery of the lumber, we used the precise language employed under similar circumstances by our predecessors, in *Myer v. Grafflin*, 31 Md. 350, 100 Am. Dec. 66, in stating the law as clearly settled by the earlier cases of *Elder v. Warfield*, 7 Har. & J. 391, *Conolly v. Kettlewell*, 1 Gill, 260, and *Cropper v. Pittman*, 13 Md. 190. The same expression was employed by the appellee Waldeman himself in the present case to state the proper rule by which to test his liability in the defendants' fourth prayer, which asks the court to rule that the jury must find in his favor because there is no legally sufficient evidence that the lumber in question was sold and delivered "upon the credit of the said defendant." No allusion is made in the prayer to the effect of giving some credit to the contractor. In a case like the present one, where parties claiming to be only collaterally bound are sued by themselves as original promisors, and not jointly with the person alleged by them to be originally bound for the debt in suit, the expression "the credit," used in the connection in which we have used it in our opinion, means the sole credit, and, as was held in *Norris v. Graham*, 33 Md. 58, if it appear that credit was also given to the party to whom the goods were delivered, the undertaking of the

defendants must be regarded as collateral, and within the statute. In cases where the person to whom the goods were sold and delivered and the one who orally undertook to be bound for their price are sued together as joint original promisors, the action will not be defeated as to the latter by showing that credit for the goods was given partly to one and partly to the other defendant, as the statute of frauds does not extend to a joint promise by two persons for the benefit of one of them. A. & E. Encycl. (2d Ed.) vol. 29, pp. 923, 924, and cases there cited.

The appellees also insist in their motion that there is no legally sufficient evidence to hold any of the defendants, but we still think that the case should have gone to the jury for the reasons stated in our opinion, and we will overrule the motion.

Motion overruled.

OLDENBURG & KELLEY v. DORSEY.

(Court of Appeals of Maryland. Nov. 16, 1905.)

1. APPEAL—JOINT JUDGMENT—PARTIES—SEVERANCE.

Where a judgment at law was rendered against three persons jointly, two of them could not prosecute an appeal therefrom without the issuance of a summons to the third by the Supreme Court and the granting of a severance.

2. SAME—RECORD—QUESTIONS PRESENTED FOR REVIEW.

Where, in an action for the price of certain lumber alleged to have been sold to three defendants jointly, an objection to certain instructions submitting the liability of two of the defendants according to plaintiffs' theory, in that such instructions ignored a "paper writing" which passed between plaintiff and the other defendant and was the foundation of the contract between them, could not be reviewed, where such "paper writing" was not in the appeal record.

3. SALES—CONTRACT—OBLIGATION TO DELIVER.

Where submission of an estimate by a contractor to a materialman for materials desired for a building, and the latter's acceptance thereof, was insufficient to constitute a contract binding such materialman to deliver the material to the contractor, regardless of his ability to pay for it, or of the liability of the owners of the building therefor.

4. FRAUDS, STATUTE OF—JOINT PROMISORS—ACTIONS—INSTRUCTIONS.

Where a materialman sued the contractor and owners of a building for materials as joint original promisors, alleging a joint contract to pay, an instruction that plaintiff could not recover against the owners, unless the materials were sold and delivered to them "upon their special and exclusive credit," was properly refused.

5. FRAUDS, STATUTE OF—ORIGINAL OR COLLATERAL PROMISE.

Where a materialman, on being applied to by a contractor for materials for a building, went to the owners and asked that they give the order for the materials, whereupon one of them told the materialman to deliver the materials and they would pay for them, that they would pay for everything that went into the buildings, and for the materialman to charge the materials to the contractor and hold him, as well as the owners, their contract was an

original promise and was not within the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 35-39.]

6. TRIAL — INSTRUCTIONS — APPLICATION TO FACTS.

Where, in an action for the price of certain building materials, it was proved that plaintiff contracted to furnish materials to the "contractor" as rapidly as wanted, and that all the defendants, including the contractor, were to be liable for the amount, a requested instruction that, if plaintiff contracted to furnish the materials to the "owners" as rapidly as wanted and failed to do so, then the owners were entitled to offset against plaintiff's claim such sum as the jury found "the defendants" lost by reason of such delay, was properly refused.

Appeal from Circuit Court, Baltimore County; David Fowler and Geo. L. Van Bibber, Judges.

Action by William O. Dorsey against Oldenburg & Kelley and George Billings. From a joint judgment against all the defendants, defendants Oldenburg & Kelley appeal. Dismissed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, SOHMUCKER, and JONES, JJ.

John H. Richardson, for appellants. John S. Ensor, for appellee.

BOYD, J. This action was brought by the appellee against the appellants and George Billings. Judgment was rendered against all the defendants, but Mr. Billings did not appeal. It is well settled in this state that, when a judgment is rendered against several persons jointly, all must unite in an appeal. *Poe's Practice*, § 825, and cases there cited. The rule was applied in *Lovejoy v. Irelan*, 17 Md. 525, 79 Am. Dec. 667, to an appeal from a decree of a court of equity, but that was subsequently changed by statute. The rule, however, remains unchanged as to cases at law, as the statute only embraced appeals from final decrees, and orders in the nature of final decrees, passed by courts of equity. The proper practice for the appellants was to apply to this court for a writ of summons and severance (*Mottu v. Primrose*, 23 Md. 482), but no such application was made. Upon service of that writ Billings could have come into this court and united in the appeal, or, upon his refusal to do so, a judgment of severance could have been passed by this court. *Cumberland C. & I. Co. v. Jeffries*, 27 Md. 535. The appellee did not make a motion to dismiss the appeal, and the attention of the appellants was not called to this difficulty at the hearing. In passing on a motion to dismiss in *Mottu v. Primrose*, supra, our predecessors overruled it and ordered a writ of summons and severance to issue, and, as the case was fully argued, we concluded to consider it on its merits, as, under the circumstances, injustice might have been done the appellants if we dismissed their appeal without giving them an opportunity to move

for a severance, although we do not mean this to be taken as a precedent which must be followed in all similar cases. As we have reached the conclusion that there were no reversible errors in the rulings of the court below, no injury will be done either side by dismissing the appeal, but, if we had determined otherwise, the appellants could not have gotten the benefit of it unless we had postponed a decision of the case on the merits until after the writ of summons and severance had been issued, and the proceedings thereunder disposed of; for, inasmuch as the judgment is against Billings and the appellants jointly, he would have the right to determine whether he would unite in the appeal and thus have the judgment of this court for or against the three defendants jointly, or whether he would refuse to do so, and thereby enable this court to order a severance. It is clear, therefore, that before we could properly enter up a judgment of affirmance or reversal of the judgment below it would be necessary to issue a summons for Billings, unless he voluntarily appeared, to determine whether there should be a severance. Having sufficiently referred to this question to explain the reasons for the action we will take, we will now consider the rulings of the court below.

The appellee was engaged in the lumber business, and George Billings, who was a carpenter and builder, was employed in the erection of some houses for the appellants, Oldenburg & Kelley, who were partners. According to the appellee's testimony he sent to Billings an estimate of the cost of the lumber wanted, and Billings agreed to the price, but the appellee refused to deliver the lumber unless he knew where the money was to come from. Billings told him that Oldenburg & Kelley would attend to that, whereupon the appellee saw Mr. Oldenburg and told him what Billings said. The most important part of the testimony is thus stated in the record: "I said, 'Now, Mr. Oldenburg, will you give me an order for these goods?' And he [Oldenburg] said: 'Mr. Dorsey, you deliver these, and I will pay for them, or we will pay for them. Everything that goes in those buildings we will pay for.' 'You mean to say you will pay me?' 'Yes; I will.' 'I understand you will pay me for the goods when delivered?' Oldenburg replies: 'Yes; you charge them to Billings. We are responsible for them, and I give you an order for it. Therefore you will hold me, as well as Billings, for the amount.'" That was denied by Billings and Oldenburg, but the lumber was furnished and charged to "George Billings, for Oldenburg and Kelley, Highland Ave., near Gough St." A verdict was rendered in favor of the appellee. During the trial exceptions were taken to granting the second and sixth prayers of the plaintiff, and to the rejection of the defendants' third, fifth, sixth, and eighth. The plaintiff's two prayers related

to the liability of Oldenburg & Kelley and properly submitted the question to the jury, according to the theory of the plaintiff. It was contended by the appellants that a "paper writing" which passed between Dorsey and Billings was the foundation of the contract between them, and, as these prayers ignored that contract, they were liable to mislead the jury. A sufficient reply to that suggestion is that this "paper writing" is not in the record, and hence we cannot determine its effect. So far as the record discloses, the only writing between them was an estimate for the lumber, and, if there was anything in that which showed the terms of the proposed sale, who was to be responsible for payments, whether the sale was to be made without security, or anything else that the appellants supposed material, it should have been included in the record. The mere statement that the appellee submitted an estimate to Billings, and he accepted it, is manifestly insufficient to show a binding contract on Dorsey to deliver the lumber to him, regardless of his ability to pay for it, or the liability of the owners of the building for it, if, as the plaintiff claimed, they obligated themselves for it.

The defendants' third prayer asked the court to instruct the jury that the plaintiff could not recover from Oldenburg & Kelley, unless the jury found that the materials were sold and delivered to them "upon their special and exclusive credit." It must not be forgotten that this was an action against the three defendants as joint original promisors. The declaration contains the common counts against "George Billings, individually, and August J. Oldenburg and John B. Kelley, copartners, trading as Oldenburg & Kelley." The theory of the plaintiff was that Billings and this firm were jointly liable, and his testimony tended to establish that fact, as will be seen by that already quoted and other portions of it in the record. We said in the opinion delivered on a motion for reargument, in the case of East Baltimore Lumber Company v. Waldeman et al., 62 Atl. 575, filed April 12, 1905, but not yet officially reported, that "in cases where the person to whom the goods were sold and delivered and the one who orally undertook to be bound for their price are sued together, as joint original promisors, the action will not be defeated as to the latter by showing that credit for the goods was given partly to one and partly to the other defendant, as the statute of frauds does not extend to a joint promise by two persons for the benefit of one of them." We cited 29 Am. & Eng. Ency. of Law (2d Ed.) 923, 924. If it was a joint promise of both for the benefit of the two, as to which there was some evidence from which that could be inferred, the plaintiff's case was still stronger. The distinction is made on those pages of the Encyclopædia between the liability on an oral promise in respect of a transaction for the benefit

of a third person and that on a joint understanding by two persons for the benefit of one of them. See, also, Browne on Stat. of Frauds, § 197. In addition to what we have said above, it was held in *Small v. Schaefer*, 24 Md. 143, that "wherever the main purpose and object of the promisor is not to answer for another, but to subserve some purpose of his own, his promise is not within the statute, although it may be in form a promise to pay the debt of another." That was followed in *Little v. Edwards*, 69 Md. 499, 16 Atl. 134. Manifestly, if the plaintiff's evidence was correct, the main purpose and object of Oldenburg & Kelley was not to answer for Billings, but to obtain the lumber for their own buildings, and hence was not within the statute. The third prayer was properly rejected.

The fifth was likewise properly rejected. In addition to what we have said above, much of which might be repeated as to this prayer, it is objectionable on other grounds. The evidence does not show "that credit was given the defendant Billings at the time of the acceptance of the estimate offered in evidence," and "that the defendants Oldenburg & Kelley guaranteed the payment of the sum mentioned in said agreement." On the contrary, the plaintiff's testimony tended to show that they were original promisors, and not merely guarantors of the debt of Billings, while the defendants' evidence denied any promise or understanding on their part. Then, again, inasmuch as the law is as stated above, this prayer would have been altogether misleading, as it may be that credit was given to Billings, but also to Oldenburg & Kelley.

It is only necessary to say in reference to the sixth that the "agreement in writing" and the "supplement to said agreement," therein referred to, are not in the record, and the presumption is that there was nothing in them to justify the granting of the prayer, as the ruling of the court is presumed to have been correct, unless there is something in the record to show the contrary.

The eighth was also properly rejected. The seventh, which was granted, instructed the jury that Billings was entitled to recoup against the plaintiff's claim such sum as they found the defendant lost by reason of the delay in furnishing the materials. The evidence tended to show that the plaintiff contracted to furnish the materials to Billings as rapidly as wanted, and that all of the defendants were to be liable for the amount. This eighth prayer asked the court to instruct the jury that if they found the plaintiff contracted to furnish them to Oldenburg & Kelley as rapidly as wanted, and failed to do so, etc., then the defendants Oldenburg & Kelley are entitled to offset or recoup against the plaintiff's claim such sum as the jury may find "the defendants" lost by reason of such delay, etc. In addition to the objection that there was no evidence

of an agreement to furnish the material to those parties as rapidly as wanted, this would have been very misleading after granting the seventh prayer. They had already been told that Billings could recoup for such sum as the defendant lost by reason of the delay in furnishing him the materials, and the court was asked to instruct them that Oldenburg & Kelley could recoup for such sum as they found "the defendants" lost. If the jury found for the plaintiff against the three defendants, whatever they allowed by way of recoupment against the plaintiff's claim was to reduce the verdict against the three, and not against Billings, of the firm separately. If there was any error, it was in granting the seventh prayer; but the defendants cannot complain of that.

So, without further discussion of them, we are of the opinion that there was no reversible error in the rulings of the court; but for the reason stated above we will dismiss the appeal, instead of affirming the judgment.

Appeal dismissed, the appellants to pay the costs.

MAYOR, ETC., OF BALTIMORE v. ROSENTHAL.

(Court of Appeals of Maryland. Dec. 6, 1905.)

1. MUNICIPAL CORPORATIONS—TAXATION—ANNEXED TERRITORY.

Acts 1888, p. 113, c. 98, annexing certain territory to the city of Baltimore, by section 19 (page 127) provided that till 1900 the rate of taxation on all landed property so annexed should not exceed the rate at that time of Baltimore county, and that after 1900 the then Baltimore county rate should not be increased for city purposes on such property till avenues, streets, or alleys should have been opened and constructed through the same, nor till there should be on every block of ground so formed at least six dwelling or store houses. Acts 1902, p. 199, c. 130, provided that the above provision, relating to avenues, etc., should mean "until avenues, streets or alleys shall have been opened, graded, kerbed and otherwise improved from kerb to kerb by pavement, macadam, gravel, or other substantial material," and that "block of ground" should mean an area not exceeding 200,000 square feet, bounded on all sides by intersecting avenues, streets, or alleys, improved as above provided. *Held*, that an alley, 25 feet wide, paved with cobblestone its entire width, though not on the same grade throughout, and though the paving was in bad repair, was graded as required by the statutes.

2. SAME.

An alley graded and paved is sufficient to form a boundary of a block as described in the statute, though it is not kerbed.

Appeal from Circuit Court of Baltimore City; Pere L. Wickes, Judge.

Suit for injunction by Jacob S. Rosenthal against the mayor and city council of Baltimore. From a decree granting the injunction, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, SCHMUCKER, JONES, and BURKE, JJ.

Edgar Allan Poe, for appellant. Isaac Lobe Straus, for appellee.

BOYD, J. This is an appeal from a decree which perpetually enjoined the appellant from levying taxes for municipal purposes against the appellee, as the owner of certain property in the city of Baltimore, at a rate in excess of 60 cents per \$100 of its assessed value, for the year 1903. The property in question is in what is commonly known as "The Belt," being within the limits of the territory annexed to the city of Baltimore under and by virtue of Acts 1888, p. 113, c. 98. It is in the block bounded on the north by Whitelock street, on the south by North avenue, on the east by Eutaw Place, and on the west by Madison avenue. There is an alley called "Morris Alley," running from North avenue to Whitelock street, about midway between Eutaw Place and Madison avenue. Section 19 (page 127) of the act of 1888 provided that until the year 1900 the rate of taxation upon all "landed property" and upon all personal property liable to taxation in the territory so annexed to the city should not "exceed the present tax rate of Baltimore county." After making certain provisions about assessments, expenditures of the amount of revenue, etc., that section concluded as follows: "Provided, however, that after the year 1900 the present Baltimore county rate of taxation shall not be increased for city purposes on any landed property within the said territory until avenues, streets or alleys shall have been opened and constructed through the same, nor until there shall be upon every block of ground so to be formed at least six (6) dwelling or store-houses ready for occupation." By Acts 1902, p. 200, c. 130, section 4a was added to article 4 of the Code of Public Local Laws, and by it "landed property" was declared to mean "real estate, whether in fee simple or leasehold, and whether improved or unimproved." It further enacted that the reference to avenues, etc., should be construed to mean "until avenues, streets or alleys shall have been opened, graded, kerbed and otherwise improved from kerb to kerb by pavement, macadam, gravel, or other substantial material; the words 'avenues,' 'streets,' and 'alleys,' being herein used interchangeably," and that "block of ground" should mean "an area of ground not exceeding two hundred thousand superficial square feet, formed and bounded on all sides by intersecting avenues, streets or alleys, opened, graded, kerbed, and otherwise improved from kerb to kerb by pavement, macadam, gravel or other substantial material as above provided." This entire block between the streets and avenues mentioned above contains 338,826 superficial square feet, and therefore considerably more than the 200,000 feet mentioned in the act of 1902, but to the east of Morris alley the area of ground contains only 161,342 square feet, and to the west of that alley there are 145,296 square feet. The important question, therefore, is whether that alley can be

used as a boundary within the meaning of this statute.

It is admitted that the streets and avenues above mentioned are so improved that they comply with all the requirements of the statute, as, indeed, they were for some time before the act of 1902 was passed. Mr. Payne, chief assessor of the appeal tax court, testified that on the 1st day of January, 1901, there were 118 houses on the block bounded by them, and that Morris alley was opened by the city under an ordinance of 1889. It is 25 feet wide, and there can be no doubt from the testimony that it was paved with cobblestones as far back as 1897, and probably earlier. It is paved to the fence line on the east side, and is likewise paved to what Mr. Payne testified he understood to be the west line of the alley, but there is an unpaved space between that west line and the fence line of the lots fronting on Madison avenue. There are two blocks of small houses on the west side, and in front of them there are sidewalks about four feet wide; the space referred to above as unpaved being between the sidewalks in front of the houses. Mr. Coonaw, a surveyor, called by the plaintiff, testified that there was granite kerbing extending from White-lock street about 70 or 75 feet, another granite kerb about 30 feet in front of some of the small houses on the alley, and about 100 feet of wooden kerb in front of the houses further down the alley. In the center of the alley there is a gutter for surface drainage. It must be admitted that the paving in the alley is in bad repair, although Mr. Payne said "It would compare with the average 20 or 25 foot alley in the city paved with cobblestones, subject to the ordinary wear and tear of that class of pavement." Mr. Rosenthal, the plaintiff, said: "It is in a condition generally of filth, stable refuse, garbage boxes, and, in fact, all the evidences, the physical evidences, that generally characterize a badly paved alley in a large city." And Mr. Records, who lives on Eutaw Place and was called by the plaintiff, also said it was paved with cobblestones, "just as they are ordinarily put down in an ordinary street." He also said it was, as to cleanliness, "about in keeping with all other alleys," and he only saw garbage carts, ice wagons, milk wagons, "and things of that kind," but no carriages there.

The fact that the paving in the alley is in bad condition would not justify the court in declaring it not to be embraced within the meaning of this statute. Nor can the contention that it is not graded be sustained. It is true Mr. Coonaw testified that "there are possibly about four changes in the grade there. It seems as though the alley was just laid right on the surface, and possibly, from the looks of things, it looks as though it was not paved all at once." But it is manifest that the grading was sufficient to

comply with the requirements of the statute in that respect, and merely because "they didn't make a straight grade all the way through," to use Mr. Coonaw's expression, would not be ground for exemption from the city tax rate under this law. There are doubtless some streets in the heart of the city that might be subject to the same criticism. We are satisfied that the evidence abundantly shows that the alley was opened, paved, and graded within the meaning of this act, and therefore we only have to determine whether the fact that it is not kerbed throughout is to relieve the appellee, and others similarly situated, from the payment of taxes at the ordinary city rate. If it be true that this alley was paved with cobblestones from its eastern to its western lines, it would be remarkable if the Legislature intended that the mere failure to place kerb stones, either along the outside limits or within those limits, should have the effect contended for in this case. Mr. Payne testified that it was so paved according to his understanding of the lines of the alley, and we do not understand that to be contradicted. It may be true that some portions of the ground between the fences are not paved; but there is nothing to show that any part of the alley, as laid out by the city for a public alley, was not originally paved. The plaintiff himself testified that it "is paved in a sense with cobblestones, but unkerbed, having no kerb in either side; the paving being directly from the fence line to fence line." There is not a word in the statute requiring sidewalks to be laid; but the avenues, streets, and alleys are to be "opened, graded, kerbed and otherwise improved from kerb to kerb by pavement, macadam, gravel or other substantial material," and, if it be essential, for the purposes of this statute, that there be kerbs in all avenues, streets, and alleys, what is there in the statute to prevent them from being placed 10 or 15 feet apart and simply paving between them? That would comply with the letter of the statute.

There are doubtless many alleys in the city of Baltimore, as there are in all cities, which have no sidewalks on them, and the fact that they are not paved with cobblestones from one side to the other does not make them any the less public highways. Whatever be the law on the subject of alleys elsewhere, those that are obtained by dedication or condemnation in the city of Baltimore are public highways (*Van Witsen v. Gutman*, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403; Code Pub. Loc. Laws, art. 4, § 806), and, of course, one conveyed to the city by deed would be, unless there be restrictions in it to the contrary. This alley was paved by the city, and undoubtedly some discretion must be allowed the city as to how it should be paved. To hold that all alleys must be kerbed in the way streets usually are—that is to say, that there must be side-

walks on them, and kerbs separating them from the driveways—would in many instances destroy the usefulness of alleys. The proof in this case shows that alleys in Baltimore City are from 8 to 30 feet in width, and it would be impossible to have parts of some of them reserved for sidewalks and other parts for roadways without materially affecting their usefulness. Some are intended for foot passengers only; others merely for vehicles. When, then, an alley in this annexed territory is opened, graded, and paved from one side to the other, and there is no necessity for kerbing, we cannot admit that it is nevertheless necessary to kerb it in order to use it as a boundary in compliance with the requirements of this statute. Ordinarily it is necessary to kerb a street or avenue when it is to be paved, at least it is usually done, but it is neither necessary nor usual to kerb an alley used for such purposes as this one is. Streets are sometimes paved from building line to building line with vitrified brick, or other material, without any kerbstones, and yet it cannot be possible that the mere absence of kerbstones was intended to result in exempting property in the territory annexed to Baltimore City from the paying of taxes at the regular rates, simply because there were no kerbstones, although the street in all other respects was improved as required by the statute. And a fortiori it must be so of alleys which were opened, graded, and paved, but not kerbed.

In some of the cases in this court affecting the territory annexed to Baltimore City under the act of 1888 we stated the objects and purposes of the exemption in the statute. In *Daly v. Morgan*; 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757, which sustained the validity of that act, Judge Robinson said: "The larger part of the territory annexed under the act of 1888 embraces vacant outlying lots and farming lands, and the plainest principles of justice would seem to require a qualified exemption of such property, for a limited period at least, from the heavy burden of city taxation. It must be some time before such property can be available for building or business purposes, or can enjoy the full benefits and privileges of the city government." In *Sindall v. Baltimore*, 93 Md. 533, 49 Atl. 647, the present Chief Judge says: "It must be borne in mind that at the date of the adoption of the annexation act a large part of the added territory was unimproved, outlying, rural land. It would have been manifestly unjust to have subjected such property to the same valuation and to the same rate of taxation as then obtained in the city with respect to distinctively urban property." We there said that "landed property," as used in the act, meant rural unimproved land, as distinguished from real estate compactly built on as in a city, and that the full city tax rate could be imposed on the annexed property under two conditions: "First. When the 'landed property' has been divided into lots

and compactly built on with a view to fronting on a street not yet constructed, but contemplated by the persons who project it or build with reference to it, though the municipality has not opened such street or accepted a dedication of it. Secondly. When though still 'landed property'—that is, rural property—in the sense that it has not been divided into lots and has not been compactly built on, it is intersected by open and constructed streets, opened and constructed by or in conformity with municipal authority, which streets form blocks and upon which blocks there are at least six houses. In the second instance, though the residue of the block be unimproved or be not laid out in lots, the whole block will be liable to be taxed at the current city rate, as soon as six houses are erected on it." That decision was rendered in June, 1901, and the act of 1902 was then passed, which act was held to be constitutional and valid in case of *Joesting v. Baltimore*, 97 Md. 589, 55 Atl. 456.

We see, then, that the Legislature, by the original act of annexation, provided that the rate of taxation fixed for the year 1887 in Baltimore county should continue until after the year 1900, for the reason, as interpreted by this court, that it would have been unjust to impose taxes at the ordinary city rates upon property situated as that in this belt was. The owners of such property did not have the advantages of urban property, such as water, lights, fire and police protection, etc., and therefore the Legislature wisely and justly postponed the time when the ordinary city rate should be levied. When that time had arrived, some of the annexed territory was still in a condition that the Legislature deemed entitled to relief by way of partial exemption. But, as was said in *Sindall's Case*, "like every other exemption from taxation, it must be strictly construed. The taxing power is never presumed to be surrendered, and therefore every assertion that it has been relinquished must, to be efficacious, be distinctly supported by a clear and unambiguous legislative enactment. To doubt is to deny an exemption." When the Legislature, in determining what properties should be exempt from the city rate, declared that section 19 of the act of 1888 should mean what is stated above, it would be an exceedingly liberal construction to hold that it intended to exempt property, which, so far as can be gathered from the record, is improved in the same way and has all the advantages of other city property, merely because an alley, which could otherwise be taken as one of the boundaries under this act, is not kerbed, although it was opened, graded, and paved throughout. There could be no possible reason for making the exemption dependent upon kerbing alone. There can be no doubt that under the act an alley can be taken as a boundary in determining the question as to whether the number of superficial square feet in the block exceeds 200,000. Some al-

leys may be kerbed, and others not. Morris alley is one where this seems to have been thought unnecessary by the municipal authorities, and, if its uses are correctly stated by the witnesses produced by the appellee, for drainage, ice wagons, milk wagons, garbage carts, etc., there could be no possible necessity for the city to kerb it. As we have seen, it is a public highway and the public has the right to use it for the purposes for which it was intended, but the public could not expect an alley situated as this one to be kept in all respects in the same condition as a street. The intention of the Legislature was to exempt property in this territory from the city rate of taxation until it was improved as city property is ordinarily improved. When the act spoke of "opened, graded, kerbed," etc., and declared that the words "avenues," "streets," and "alleys" were used interchangeably, it did not necessarily mean to exclude all alleys which were not kerbed, especially such as were never intended to be kerbed, and it would be adding a new ground for exemption to hold that only such a one as is kerbed can be used as a boundary in determining the area of ground in a block. This court having in effect said in *Sindall's Case* that under the act of 1888 it was not necessary that the beds of the avenues, streets, or alleys be improved in order to make the houses and lots fronting thereon liable to the city rate of taxation, the act of 1902 was intended to so amend the statute as to require the avenue, street, or alley to be improved as mentioned in the act; but, as what we may call improved alleys in contradistinction to those not graded and paved are frequently, if not usually, not kerbed, the Legislature could not have intended that they must in all cases be kerbed. It is a matter of common knowledge that some alleys in the city of Baltimore are kerbed, while others are not, although regularly opened by the municipal authorities and graded and paved. The description given by the witnesses of this block, between the four streets named, shows that it does not differ from other blocks in the original limits of the city. Morris alley is said to be like other city alleys, and we are of the opinion that it does sufficiently comply with the terms of the act of 1902 to make the properties between it and Eutaw Place, and between it and Madison avenue, from North avenue to Whitelock street, subject to the ordinary city rate of taxation.

There is much force in the contention of the city that the act of 1902 was not intended to apply to property situated and improved, as this was, when the act was passed. The improvements to the streets and Morris alley had then been made, and it is scarcely possible that the Legislature could have intended to exempt property which was in most, if not all, respects already improved just as many of the blocks within the old limits of the city were. But as it is not necessary to

now determine that question, and we prefer to rest our decision on what we have said above, we will not further discuss it. The decree of the lower court will be reversed, and the bill dismissed.

Decree reversed, and bill dismissed; the appellee to pay the costs.

MOWEN et al. v. NITSCH.

(Court of Appeals of Maryland. Dec. 7, 1905.)

1. CORPORATIONS—INSOLVENCY—WHAT CONSTITUTES.

Where a corporation owed over \$32,000, having assets amounting to \$26,000, and it was unable to pay its obligations as they matured and had not sufficient credit to borrow money, it was insolvent.

2. SAME—FRAUDULENT CONVEYANCES—MORTGAGE—CONSIDERATION.

On an issue as to the validity of a mortgage given by a corporation as against creditors, evidence held to show that the mortgage was given, not to secure an indebtedness of the corporation, but to secure the individual indebtedness of an officer thereof.

3. SAME.

The loaning of money to an individual, the same being used by him in the business of a corporation, did not render it the lender's debtor, so as to render a mortgage by the corporation securing the loan valid against creditors.

Appeal from Circuit Court, Baltimore County, in Equity; N. Charles Burke, Judge.

Suit by George L. Mowen and another, as receivers of the Arthur B. Nitsch Brick Company, against Josephine Nitsch. From a decree dismissing the bill, the receivers appeal. Reversed.

Argued before McSHERRY, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

William Colton and John P. Poe, for appellants. Francis I. Mooney and Myer Rosenbush, for appellee.

McSHERRY, C. J. On December 31, 1904, the appellants, who are receivers of the Arthur B. Nitsch Brick Company, filed a bill on the equity side of the circuit court for Baltimore county against Josephine Nitsch wherein they assailed as invalid and fraudulent a certain mortgage executed by the brick company to Mrs. Nitsch on the 10th day of July, 1902, to secure the payment of the sum of \$15,000 alleged to be due by the mortgagor to the mortgagee. The bill charged that the brick company, which was a body corporate, was indebted to sundry persons between the date of its incorporation on February 8, 1900, and the date of the execution of the mortgage; that at the time the mortgage in question was given the company was insolvent; that "the giving of the said mortgage was a fraudulent contrivance on the part of the said Arthur B. Nitsch Brick Company and the said Josephine Nitsch to defraud, hinder, and delay the creditors of the said Arthur B. Nitsch Brick Company in the collection of

their just claims against it then existing"; and that the mortgage conveyed all the property of which the corporation was possessed. The bill further sets forth that on September 23, 1902, certain creditors of the brick company filed a bill on the equity side of the circuit court for Baltimore county alleging, among other things, that the company was unable to pay its obligations at maturity, and was hopelessly insolvent; and that upon the same day a decree was passed appointing the appellants receivers, with power and authority to take charge of all the property and assets of the company which, after filing their bond, they proceeded to do. It is also alleged that on December 31, 1904, the circuit court for Baltimore county, sitting in equity, authorized and directed the receivers to institute such proceedings in equity in that court as they might be advised would be proper and right for the purpose of having the aforementioned mortgage set aside, and declared illegal and void, for the benefit of the creditors of the brick company. The relief asked was a decree setting aside the mortgage, and declaring it fraudulent and void. There was also a prayer for general relief included in the bill. By the seventh paragraph of the bill it was charged that the mortgage for \$15,000 included as a part of the sum just named an indebtedness of \$9,000 due by Arthur B. Nitsch personally to the appellee and secured to her by a mortgage from him upon his individual interest in the estate of his deceased father. The appellee, who was the defendant below, first answered the bill, then withdrew her answer and demurred. Upon the demurrer being overruled she refiled her answer. In replying to the seventh paragraph of the bill, the appellee admitted its averments to be true, and therefore admitted that the \$15,000 mortgage included the \$9,000 indebtedness due by Arthur B. Nitsch personally to the appellee and secured by a mortgage on his interest in his father's estate. At the final hearing, however, in the lower court that admission of the answer was amended. The material allegations of the bill were denied by the answer, and after a replication had been filed quite a large volume of testimony was taken. The circuit court denied the relief sought, and dismissed the bill.

The receivers thereupon obtained leave to enter an appeal to this court, and pursuant to that leave they have brought the record here, so that the decree dismissing their bill of complaint may be reviewed. There are two grounds upon which the validity of the assailed mortgage is questioned, and they are, first, that it was a preference which, inasmuch as it was executed within four months prior to the filing of the creditors' bill on September 23, 1902, was invalid under the provisions of the Code; and, secondly, that it was fraudulent and void under St. 18 Eliz. c. 5.

First, then, as to whether the mortgage

is void as a prohibited preference under the provisions of the Code to which reference will be made in a moment. Prior to Acts 1896, p. 643, c. 849, now forming section 377, art. 23, Code Pub. Gen. Laws 1904, a corporation was not in any respect within the scope of the state insolvent laws, nor is it yet amenable to that system; but since the adoption of the act and on the terms therein prescribed, all corporations, other than railroad companies, upon appropriate proceedings against them in a court of equity, are brought within the operation of a provision of that system (but not under the system itself), in so far forth only as respects the preference of one creditor over another when the corporation is insolvent. That provision of the insolvent law is ingrafted on the jurisdiction of a court of equity precisely as though the same provision had been independently enacted in identically the same words without any allusion whatever to the insolvent laws. It is under the above section and the preceding one (section 376), and under section 22, art. 47, that proceedings must be had against a corporation to avoid and set aside a prohibited preference. The questions arising under those sections of the statutes, whilst interesting and important, are not necessarily involved in the decision of this case, if the second of the grounds upon which the mortgage now being attacked is assailed is a tenable one under the evidence contained in the record. It may be appropriate to remark, before proceeding to discuss the second of the two grounds above alluded to, that the evidence in the record is ample and abundant to establish beyond any doubt or dispute the hopeless insolvency of the brick company at the time the mortgage was executed; and whilst apart from the provisions of the insolvent laws and the terms of section 377, art. 23, Code Pub. Gen. Laws, the mere fact that a corporation debtor is insolvent will not prevent it from securing a pre-existing creditor by giving to the latter a priority over other creditors, if the transaction be made in good faith, upon a valid consideration, and without a fraudulent intent; yet if the security given was without consideration, or was created with a view to hinder and delay creditors it will not be permitted to stand when properly assailed. This has been so often ruled that it has become axiomatic, and needs no reference to adjudged cases to support it. But a few words will be required altogether apart from the concessions of the answer to the creditors' bill, which, whilst protesting that the company was solvent, admitted the existence of facts, which in law constitute insolvency, to show that it was when it executed the mortgage in a condition of hopeless insolvency. It owed apart from the mortgage over \$32,500, and its assets amounted to \$26,200, and it was wholly unable to meet and pay its obligations as they matured, besides being without sufficient credit to bor-

row money with which to continue its business. No one can doubt in the teeth of these facts that the company was insolvent.

Coming, now, to the second ground of attack, without further allusion to the first, we are of opinion that the mortgage should have been pronounced null and void under the statute of Elizabeth in view of the evidence by which its bona fides and the verity of its consideration are impeached. It will not be necessary to recite that evidence at any length, because, first, no useful purpose would be subserved thereby, and because, secondly, a brief reference to a few salient facts will be quite sufficient to expose the falsity of the consideration and reveal the bad faith of the transaction. On July 1, 1902, the board of directors of the company adopted a resolution whereby the company was authorized to give a mortgage to Mrs. Josephine Nitsch for the sum of \$15,000 "in payment for \$9,000 due upon the brick plant turned into the company, and intended to be subject to a mortgage for said amount, and for cash heretofore loaned to the company, and the balance thereof to secure the repayment of cash to be advanced the company at the time of the execution of said mortgage." According to this resolution there were three items which made up the amount of the consideration of the mortgage, viz., a \$9,000 mortgage, cash previously loaned to the company, and cash to be advanced the company when the mortgage should be given. In the testimony we find no trace of a \$9,000 mortgage due to Mrs. Nitsch by the brick company, though it appears that Arthur B. Nitsch owed to his mother that sum of money which was secured by a mortgage, not upon the property of the brick company, but upon the individual interest of Arthur B. Nitsch in the estate of his father. If there was no mortgage for \$9,000 due to the appellees, and which was a lien on the company's property, the statement in the resolution that the amount of such a mortgage was to form part of the \$15,000 to be secured by the mortgage now assailed, was groundless and untrue. A false statement as to what constituted the major portion of the consideration stamps the transaction in its very inception as fraudulent; because if an honest and genuine indebtedness to the extent of the expressed consideration had really existed on the part of the company to Mrs. Nitsch, there would have been neither an occasion nor an inducement to assert or to rely on one which was fictitious or spurious. The admission made by Arthur B. Nitsch to the receivers to the effect that the \$9,000 mortgage which was included in the \$15,000 consideration was the identical mortgage which he had given to his mother upon his individual interest in his father's estate, affirmatively shows that more than half of the indebtedness which the assailed mortgage purports to secure was an indebtedness of Arthur B. Nitsch himself, and not of the company at all. But there is another circumstance which con-

clusively proves that the \$9,000, as well as the residue of the \$15,000, not only represented the personal indebtedness of Arthur B. Nitsch to his mother, but further that Mrs. Nitsch knew the whole \$15,000 were due to her by her son, and not by the company; and that she in the most formal and deliberate manner acted upon that knowledge in a way wholly inconsistent with the pretense that it was the company's and not the son's indebtedness which the impeached mortgage was given to secure.

The record shows that on October 17, 1902, involuntary proceedings in bankruptcy against Arthur B. Nitsch were begun in the District Court of the United States for the District of Maryland and that in December following he was adjudicated a bankrupt. It further appears that amongst the claims filed by his creditors was a large one presented by Mrs. Nitsch, the appellee, and to her claim is annexed her affidavit that the debt had not been paid and that she had not received any manner of security for the same. Fourteen items of that claim aggregating about \$5,000 are precisely the same items which are included in a statement produced in evidence in this case, and purporting to set forth the item making up a part of the consideration of the assailed mortgage. Of course if the 14 items just alluded to represented the individual debts of Arthur B. Nitsch, as Mrs. Nitsch unqualifiedly swore in her affidavit that they did, they could not also be due by the brick company, and the actual inclusion of them in the mortgage, and the attempt to charge them against the assets of the company tainted the mortgage with the bad faith which such an effort necessarily indicated. Here, then, we have first, a purely mythical mortgage indebtedness of \$9,000 asserted to be a part of the \$15,000 consideration, when no such mortgage or lien or debt in fact existed; and, secondly, an alleged indebtedness of about \$5,000 for advances made to the company, when the creditor herself has made oath that the precise items making up that sum are due to her, not by the mortgagor company, but individually by Arthur B. Nitsch; and finally the fact that no advances were made when the mortgage was executed. It surely needs no citations from adjudged cases to sustain the proposition that a mortgage founded on such a pretended consideration is null and void as respects subsisting creditors whose confessedly just claims would go unsatisfied if the mortgage were permitted to prevail.

There is no doubt that Mrs. Nitsch advanced to her son Arthur B. Nitsch considerable sums of money which he unquestionably used in conducting the business of the company, but that did not make the company her debtor. Two references to the testimony will show how the borrowing and lending transactions were conducted, and that the result was, in the final development, not that Mrs. Nitsch was a creditor of the company by reason of the loans, but was a creditor of her son, in whose

bankruptcy proceedings she filed her properly verified claim. In the testimony of Roman C. Nitsch the following question and answer will be found: "Isn't it a fact that your mother, in advancing this money, I will ask you, if you know, isn't it a fact when your mother loaned the money, you say you and your sister drew the checks, she loaned the money to Arthur B. Nitsch upon the theory that he controlled the property at Lansdowne, and owned nine-tenths of the stock, and he was practically the company, wasn't that the theory, is that a fact? Answer. She loaned him the money that way, yes, sir." Upon cross-examination, Arthur B. Nitsch was asked: "Not having enough of your own funds you borrowed from time to time large sums from your mother? Answer. Yes, sir. Question. She loaned it to you, and you used it for the company, isn't that it? Answer. Yes, sir." It is obvious, then, that whatever relation was created between Mrs. Nitsch and Arthur B. Nitsch by these loans, they did not cause the company to become her debtor on account of them; and the mortgage which undertook to bind the property of the corporation for their payment, to the exclusion of the actual creditors of the corporation, must be stricken down and annulled as fraudulent and void so far as these last-named creditors are concerned.

It follows from the views we have expressed that upon the second of the two grounds on which the mortgage has been questioned it must be set aside; and accordingly the decree appealed against will be reversed, with costs; and the cause will be remanded that a new decree conforming to the conclusion just announced may be passed.

Decree reversed, with costs above and below, and cause remanded.

ROBERTS BROS. v. CONSUMERS' CAN CO.

(Court of Appeals of Maryland. Dec. 6, 1905.)

1. ARBITRATION AND AWARD—CONSTRUCTION OF AWARD.

Where the parties to an arbitration have had a full and fair hearing, the award of the arbitrators will be expounded favorably, and every reasonable intendment will be made in its support.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arbitration and Award, §§ 333, 422.]

2. SAME—CONCLUSIVENESS OF AWARD.

Where the parties to an arbitration have had a full and fair hearing, the court will not consider the merits of their dispute and review the findings of law or fact made by the arbitrators, nor substitute its opinion or judgment for theirs, but will require the parties to abide by the award.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arbitration and Award, §§ 440-442.]

3. SAME—PROCEEDINGS BEFORE ARBITRATORS—DEPOSITIONS—UNAUTHORIZED REJECTION.

Where a submission to arbitration did not provide for the issuance of formal commissions to take testimony, but authorized the taking of

depositions before a notary, to be returned to the arbitrators under the hand and seal of the notary, the fact that a deposition was mailed, through mistake of the notary, to one of the parties, instead of directly to the arbitrators, did not authorize the arbitrators to refuse to receive it on its being placed in their hands by the party to whom it was sent, unopened and unaltered, within the time prescribed for the return of the depositions.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, §§ 207, 266, 267.]

4. SAME—MISCONDUCT OF ARBITRATORS—WAIVER OF OBJECTION.

A party to an arbitration does not waive his right to assail the award by not withdrawing his submission on refusal of the arbitrators to receive or consider depositions on his behalf, where, by positive and timely protest against their action, he makes plain his intention not to waive his rights in the premises.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arbitration and Award, §§ 342-348.]

5. SAME—VACATION OF AWARD—MISTAKE.

The unauthorized refusal of arbitrators to consider depositions which constitute the only evidence in behalf of one party on a vital point of the question in dispute constitutes such a mistake on their part as to authorize the setting aside of the award.

Appeal from Circuit Court of Baltimore City; Henry D. Harlan, Judge.

Suit by the Consumers' Can Company against Roberts Bros. From a decree in favor of plaintiff, defendants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, SCHMUCKER, JONES, and BURKE, JJ.

William A. Wheatley, for appellants.
Joseph C. France, for appellee.

SCHMUCKER, J. This is an appeal from a decree of the circuit court of Baltimore City, which set aside an award rendered by arbitrators. The subject of the award was a dispute between the appellants and the appellee growing out of the sale of a quantity of tin cans intended for packers' use. The entire dispute was submitted for decision to three arbitrators, who heard evidence upon the subject, and made an award in writing, which was subsequently, upon a bill filed for that purpose, set aside by the decree now appealed from. The merits of the controversy covered by the arbitration are not before us on this appeal, and we express no opinion thereon pro or con, but it will be necessary for us to notice the nature and subject-matter of that controversy, in order to clearly discuss the issue presented by the record before us.

Both the appellants and the appellee are dealers in tin cans in Baltimore City. In the summer of the year 1903 the appellee purchased a large quantity of cans intended for shipment to its western customers. The cans were sold to the appellee f. o. b. at Baltimore, but in the course of dealing between the parties they were loaded by the appellants into the cars of the Baltimore & Ohio Railroad Company at Baltimore, and con-

signed directly to the parties who had purchased them from the appellee, which supplied the names and residences of the consignees for that purpose. Sample cans were submitted for approval to the appellee, but the cans themselves, which were consigned to the purchasers, were never seen by the appellee. Whenever sales of the cans were made by the appellee, they were loaded into the cars, and the bills of lading therefor were taken out in its name, and it drew drafts against the bills for the price at which it had sold the cans, and the drafts, with the bills of lading attached, were placed in the hands of the appellants as collateral and for collection. As the appellee made a profit on the cans sold by it, the proceeds of the drafts would slightly exceed the amount due on them to the appellants, who would account to the appellee for the excess. In this course of dealing a car, said to be No. 91,106, loaded with cans, was shipped by the appellants to the appellee's purchaser, the Westfield Packing Company, located in the state of Indiana, which paid the draft drawn against the bill of lading for the car, in order to get possession of the cans. After that company had gotten possession of the cans it examined and rejected them as being unmerchantable and defective in quality, and, to recover the damages which it had thereby sustained, it sued out an attachment against the appellee of Indiana, and levied the writ on several other car loads of the appellee's cans which had come within that jurisdiction. The Westfield Company recovered a judgment in rem in the attachment suit for over \$1,200, which the appellee had to pay, in order to release the cars seized under the attachment. Other car loads of the cans purchased from the appellants by the appellee, and sold by it to the western packing companies, affiliated with the Westfield Company under a common management, were rejected by the purchasers and returned to Baltimore to the appellants, who held the bills of lading therefor. When the appellants demanded payment for the cans from the appellee, it claimed the right to deduct from the price thereof the losses which it had sustained by reason of their alleged defective quality and unmerchantable condition. Litigation, both at law and in equity, between the appellants and the appellee resulted from this state of affairs, and the arbitration was resorted to for the adjustment of the differences between them.

The parties, on April 28, 1904, entered into a written agreement briefly reciting their conflicting claims, and submitting for determination to three arbitrators "the whole dispute between them, claim and counterclaim." The submission provided that "said arbitrators shall by reasonable notice from time to time give to said parties the opportunity of producing evidence before them, they shall determine all questions of law and fact, they shall make their final award in writing

not later than the 6th day of June, 1904, unless said time is extended by the written assent of both parties, and such final award shall determine what amount of cash, if any, is due by either party to the other, and what, if anything, either party shall do as a condition of being entitled to payment of the amount awarded. * * * The evidence of any witness not residing in the state of Maryland may be taken before a notary public by either party upon five days' notice to the other of the time and place. The evidence, as taken, shall be returned to the arbitrators under the hand and seal of the notary." It was further provided in the submission that the award of the majority of the arbitrators, in case of a failure of the entire number to agree, should be binding on both parties. The arbitrators held a number of sessions between May 5th and 17th, and heard testimony, oral and documentary, produced before them by the parties to the submission, and on the 19th day of May they rendered their unanimous award in writing, finding that the appellee was indebted to the appellants in the sum of \$5,101.99; that upon the payment thereof they execute and deliver to it a release of all demands of every kind to date. On the 27th of May the appellee filed the bill in the present case, alleging the dealings in tin cans between it and the defendants, the dispute arising therefrom, the arbitration, and the award, all of which we have briefly mentioned. It also alleged the following facts: On May 6th, while the arbitration was in progress, it was agreed between the parties and the arbitrators that the appellee should have until May 17th to take and return the depositions of witnesses from Noblesville, Ind., touching the condition of the cans in car No. 91,106, upon which depended the substantial question at issue before the arbitrators whether the said cans were of such quality and in such condition as to constitute a good delivery under the contracts between the parties. The depositions were taken before a notary at Noblesville on May 13th, after notice to the appellants, and certified under the hand and seal of the notary as having been taken in the arbitration, but, through mistake and contrary to the directions of the appellee's attorney, they were mailed by the notary in a box to the address of the appellee, instead of that of the arbitrators. The box containing the depositions was delivered on Sunday, May 15th, at the office of the appellee, which was on that day in charge of a watchman, who handed the box unopened to the president of the appellee on his arrival at the office at about 8 o'clock on Monday morning. He promptly took it to the office of one of the arbitrators, and left it with him, still unopened. On May 17th, the day fixed for the final session of the arbitrators, the package containing the depositions was produced by the one of the arbitrators having it in his possession, but by a vote of two to one the

arbitrators decided not to open the package or consider the depositions, upon the ground that it was addressed to the appellee instead of the arbitrators. Thereupon the appellee's counsel urged the arbitrators to open the package and satisfy themselves that its contents had not been disturbed, or at least to permit the depositions to be returned to Noblesville and recertified and redirected, but the arbitrators, although they had until June 6th to return their award, refused to adopt either suggestion, and made their award without inspecting or considering the depositions, which constituted the only evidence of the appellee upon the vital point of the question in dispute. Upon the refusal of the arbitrators to examine or consider the depositions, the appellee filed with them a written protest against their conduct in that respect. The bill further charged that the award was invalid for the reason that it did not dispose of the entire controversy submitted, in that it failed to require the appellants, upon the payment of the sum awarded to them, to return to the appellee sundry collaterals which the evidence showed were held by them as security for any balance which might be due them from the appellee on account of the sales of tin cans under consideration by the arbitrators.

The answer denies many of the allegations of the bill, and charges the appellee with a purpose to procrastinate and evade the payment of its obligations, but it admits the extensive transactions in cans between the parties, the shipment of them as directed by the appellee, the occurrence of disputes over the transactions and their submission to arbitration, and the award of the arbitrators. It also admits the agreement for taking depositions at Noblesville, and their rejection by the arbitrators, but avers that the rejection was proper because they were not taken and returned in accordance with the arbitration agreement. It further charges that the failure to have the depositions properly returned was part of a studied plan for further delay, concocted and persisted in by the appellee. The answer insists that the award does fully cover all points submitted to the arbitrators, and that it makes allegations explanatory of the dealing of the appellants and arbitrators with the collaterals referred to in the bill, and insists that the appellee is indebted to the appellants, after the allowance of all credits to which it is justly entitled, in the full sum found by the award.

Much testimony was taken in the present case, the greater portion of which related to the merits of the original controversy between the parties over the transactions with the tin cans. The remaining portion of the testimony had reference to the transmission to Baltimore of the box containing the depositions taken at Noblesville, Ind., and its receipt and rejection by the arbitra-

tors. That testimony convinces us that the box was mailed by the notary, before whom the depositions had been taken, to the appellee, instead of to the arbitrators, purely through the mistake of the notary, without the suggestion or procurement of the appellee. We are also convinced by the testimony that the box, upon its receipt by the appellee, was promptly delivered to the arbitrators by the president of the appellee, without having been opened or tampered with.

The cardinal question, therefore, now before us for decision is whether the rejection by the arbitrators of the depositions under these circumstances constituted such a mistake on their part as to justify the circuit court in setting aside the award by the decree appealed from. It has been settled by a long line of decisions that, as arbitrations are intended to compose disputes in a simple and inexpensive manner, whenever the parties to one have had a full and fair hearing the award of the arbitrators will be expounded favorably, and every reasonable intentment made in its support. *Lewis v. Burgess*, 5 Gill, 129; *Caton v. McTavish*, 10 Gill & J. 192; *Ebert v. Ebert*, 5 Md. 353; *Garitee v. Carter*, 16 Md. 312; *Bullock v. Bergman*, 46 Md. 278; *Witz v. Tregallas*, 82 Md. 369, 33 Atl. 718. In such cases it is conceded that the court will not look into the merits of the matter and review the findings of law or fact made by the arbitrators, nor substitute its opinion or judgment for theirs, but will require the parties to submit to the judgment of the tribunal of their own selection, and abide by the award. The favor which the courts accord to awards of arbitrators is, however, predicated upon the assumption that in the conduct of the arbitration the parties to the controversy had a full and fair hearing, and that the award is the honest decision of the arbitrators, and involves no mistake so gross as to work manifest injustice or furnish evidence of misconduct on their part. 3 Cyc. 743; *Rolason v. Carson*, 8 Md. 221, 222; *Wilson v. Boor*, 40 Md. 483; *Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96. It is not denied in the present case that the arbitrators refused to receive or consider the depositions on behalf of the appellee, taken in Indiana, in reference to the condition of the cans in car No. 91,106. The award must, therefore, have been made without reference to that testimony.

The bill of complaint alleges most positively that the substantial question between the parties to the arbitration was whether the cans in that car were in fact unmerchantable, as that fact, if true, formed the basis of the appellee's claim, and that the rejected depositions constituted its only evidence on that subject. It is apparent from the nature of the controversy submitted to the arbitrators that this evidence was vital to the appellee's side of that controversy. The

avowed reason of the arbitrators for rejecting it was that the box containing it was mailed by the notary to the appellee instead of to the arbitrators. In view of the fact that the appellee's president, upon the receipt of the box containing the depositions, promptly carried it unopened to one of the arbitrators and left it with him, we are of the opinion that the arbitrators should have received the depositions and considered them in arriving at their decision of the case submitted to them. In courts of law, where the right to issue commissions to take testimony rests entirely upon statute, it is held to be in derogation of the common law, and a strict compliance with the requirements of the statute as to the execution and return of the commission is usually required. *Elliott on Evidence*, vol. 2, § 1180; *Poe, Practice*, § 223a; *Williams v. Banks*, 5 Md. 201; *Quynn v. Carroll's Adm'r*, 22 Md. 297. It has, therefore, been held by those courts that where the statute required the return of the commission to be made to the clerk of the court, or to the court from which it issued, a return to one of the litigants would be bad.

Arbitrations are, however, not governed by the strict rules as to the admissibility of evidence in force in courts of law. An attempt to require the application of those rules by lay arbitrators, who cannot be expected to know them, would often result in defeating the very purpose of the arbitration. Moreover, in the present case no formal commission to take testimony was contemplated or provided for by the submission. The simple plan of taking depositions before a notary was resorted to. The depositions were, by the terms of the submission, to be returned to the arbitrators by a certain day, and that was substantially done, as it appears that the package containing the depositions reached their hands unopened within the prescribed time. It has been held in a number of cases that a return of depositions to the clerk of a court having no rule to the contrary, through one of the parties to the case, is sufficient if the depositions are in the condition in which they left the hands of the official before whom they were taken and due proof of that fact is made. *Logan v. Hodges*, 7 Ala. 66; *Veach v. Bailiff*, 5 Har. (Del.) 379; *Homer v. Martin*, 6 Cow. 156; *Doty v. Strong*, 1 Pin. 313, 40 Am. Dec. 773; 13 Cyc. 962. The submission, unlike our statute and rules of court, prescribed no particular channel of transmission to the arbitrators of the depositions when taken, and as it appears from the record that they were in fact taken before a notary public after five days' notice, and returned under the hand and seal of the notary, and reached the arbitrators in an unaltered condition within the prescribed time, there was a sufficient compliance with the terms of the submission to serve the substantial ends of justice, and the arbitrators

should have received and considered them.

The appellee did not waive its right to assail the award by not withdrawing its submission when the arbitrators refused to receive or consider the depositions on its behalf. Waiver is a matter of intention, and the positive and timely protest against their action in that respect made plain its intention not to waive its right in the premises. *Morse on Arb. & Award*, p. 173; *Haigh v. Haigh*, 31 L. J. Ch. 420; *Davis v. Price*, 10 W. R. 865.

As the decree of the court below setting aside the award must be affirmed for the reasons already stated, we deem it unnecessary to consider the further objection that it failed to cover the entire ground of the submission. The decree appealed from will be affirmed.

Decree affirmed, with costs.

UNITED RAILWAYS & ELECTRIC CO. OF BALTIMORE v. WEIR.

(Court of Appeals of Maryland. Dec. 6, 1905.)

1. CARRIERS—DUTY TOWARDS PASSENGERS.

While carriers of passengers are not insurers of absolute safety, yet they are bound to exercise the highest degree of care which is consistent with the nature of their undertaking.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1087.]

2. SAME—DISCHARGE OF PASSENGERS—DURATION OF STOP.

Where a railroad stops its cars to allow a passenger to alight, it is bound to stop a sufficient length of time to enable him to alight in safety, and is liable for an injury to a passenger occasioned by reason of its failure so to do.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1224, 1223.]

3. SAME—ACTION—EVIDENCE—SUFFICIENCY.

In an action against a street railroad for injuries to a passenger, evidence held sufficient to show negligence on the part of the railroad in suddenly starting the car while plaintiff was alighting.

4. TRIAL—DIRECTED VERDICTS.

The court, in passing upon defendant's prayers for a directed verdict, must assume the truth of plaintiff's testimony.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 399-402.]

5. NEGLIGENCE—QUESTION OF FACT OR LAW.

The question of negligence is ordinarily one of fact and not of law, but the court may hold plaintiff guilty of contributory negligence when some prominent and decisive act of negligence has been committed by him, in regard to the character and effect of which no room is left for ordinary minds to differ.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 279-286, 295.]

6. CARRIERS—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

A passenger was not guilty of contributory negligence per se in attempting to alight from a street car while it was moving very slowly and smoothly, but whether her act in so doing was negligent was a question for the jury under all the facts in the case.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1391-1393, 1402.]

Appeal from Court of Common Pleas, George M. Sharp, Judge.

Action by Sarah A. Weir against the United Railways & Electric Company of Baltimore. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, JONES, SCHMUCKER, and BURKE, JJ.

Albert E. Donaldson, for appellant. Howard Bryant, for appellee.

BURKE, J. The appellee sued the appellant company for personal injuries sustained by her when alighting from one of its cars. The narr. avers that on the 7th day of August, 1903, while the plaintiff was a passenger on one of the cars of the defendant company at or near the corner of Baltimore and Paca streets, in the city of Baltimore, and after the car had come to a full stop, the plaintiff desired to alight from said car, and proceeded to do so; but before the plaintiff could get off of the car, and while she was exercising due care and caution, the said car was negligently and prematurely started by the agents and servants of the defendant while the said plaintiff was in the act of alighting from the car, and that by such negligence and premature starting of the car the plaintiff was thrown to the ground, and thereby sustained serious and permanent injuries. The accounts given by the witnesses as to the happening of the accident are conflicting, but it is sufficient to say that, so far as the plaintiff's case is concerned, she offered evidence tending to show the following facts: That on the morning of the accident, about the hour of 11 o'clock, she was a passenger on one of the cars of the defendant company coming east on Baltimore street; that when the car reached the corner of Baltimore and Paca streets it stopped, and that she attempted to alight therefrom; that she arose from her seat, and caught hold of the handle bar, and stepped down on the footboard of the car, and was in the act of getting down from the footboard to the street, and whilst in this position the conductor rang the bell, and the car started; that the sudden starting of the car broke her hold on the handle bar, and threw her into the street; and that in consequence of being thus thrown she sustained serious injuries. The defendant offered evidence tending to prove that the car stopped at the corner of Baltimore and Paca streets, and that the plaintiff made no effort to leave the car until after it had started; that the car was in motion when she got upon the footboard, and that she was thrown when in the act of stepping to the ground from the footboard of the moving car; that the car stopped at the corner of Baltimore and Paca streets, and had just started when the accident occurred, and had hardly time to move off at any speed when

the injury occurred; that it had gone a very short distance after it had started, one witness fixing the distance at 10 feet, and another at 3 or 4 feet, and all of the defendant's witnesses concurring in the statement that at the time the plaintiff stepped from the footboard and was injured the car was running smoothly and very slowly. At the conclusion of the case the appellee offered three prayers which were granted by the court, and the defendant offered five, the fourth was granted, the fifth was granted as modified by the court, and its first, second, and third prayers were refused. To the action of the court granting the plaintiff's prayers and in refusing its first, second, and third prayers, and in amending its fifth prayer the defendant excepted, and the verdict and judgment being against the defendant, it was appealed.

The bill of exceptions brings up for review only the rulings of the court on the prayers. In the argument before this court no question was made by the counsel for the appellant as to the correctness of the ruling of the court on the plaintiff's prayers. We find no error in the granting of these prayers. They announced the correct principles for the guidance of the jury in fixing the defendant's responsibility for the injury complained of, and also the correct rule for estimating the damages in case the jury should find for the plaintiff. The defendant's first and second prayers were properly refused. The first prayer asked the court to direct a verdict for the defendant, because there was no evidence in the case legally sufficient to entitle the plaintiff to recover, and the second prayer asked the court to say that the undisputed evidence in the case showed that the negligence of the plaintiff contributed to the injury of which she complained, and therefore the verdict must be for the defendant. In view of the evidence offered by the plaintiff it is clear that the court could not grant either of these prayers.

It is settled that while the carriers of passengers are not insurers of absolute safety, yet they are bound to exercise reasonable care according to the nature of their contract; and as their employment involves the safety of the lives and limbs of passengers, the law requires the highest degree of care which is consistent with the nature of their undertaking. *Baltimore & Ohio R. R. v. State, Use of Hauer*, 60 Md. 449. A railroad company undertaking the carriage of passengers for hire, which stops its cars for the purpose of allowing a passenger to alight therefrom is under an obligation to stop a sufficient length of time to enable him to alight in safety, and if a passenger is injured by reason of the failure of the company to observe this obligation it is liable for the injury. *Cumberland Valley R. R. Co. v. Maugans*, 61 Md. 53, 48 Am. Rep. 88;

United Railways Company v. Hertel, 97 Md. 382, 55 Atl. 428. Assuming the testimony of the plaintiff as to the happening of the accident to be true, and the court in passing upon these prayers was bound to assume its truth, there appears to have been, under the principles stated, a clear act of culpable negligence on the part of the defendant company.

The action of the court in rejecting the defendant's third prayer constitutes the main ground upon which it relies for the reversal of the judgment. This prayer asked the court to instruct the jury that if they found that the plaintiff "attempted to alight from the car while it was in motion, and before it came to a full stop," their verdict should be for the defendant. Under the authority of repeated decisions of this court it would have been manifest error for the trial court, under the facts as testified to by the defendant's witnesses, to have declared the plaintiff guilty, as matter of law, of negligence and want of ordinary care under the facts stated in the prayer. The question of negligence is ordinarily one of fact, and not of law. This is the general rule, but cases frequently occur in which the court will say that the plaintiff is guilty of contributory negligence when some prominent and decisive act of negligence is found to have been committed by him in regard to the character and effect of which no room is left for ordinary minds to differ. Whether it be negligence per se for one to attempt to alight from a moving car must depend always upon the circumstances of the particular case. In the case of the Cumberland Valley Railroad Company v. Maugans, *supra*, where a passenger on the appellant's cars was injured in alighting therefrom while the car was in motion, this court said that the weight of authority is against the proposition that it is always, as matter of law, negligence and want of ordinary care for a person to attempt to get off from a car while it is in motion; that in every case where the facts and circumstances are such that reasonable men may honestly entertain different views as to the nature and character of the act of the plaintiff, it is error in the court to pronounce the act negligence in law, but that the question should be left to the consideration of the jury. To the same effect are the cases of *B. & O. R. R. v. Kane*, 69 Md. 27, 13 Atl. 387, 9 Am. St. Rep. 387; *New York, Phila. & Norfolk R. R. Co. v. Coulbourn*, 69 Md. 360, 16 Atl. 208, 1 L. R. A. 541, 9 Am. St. Rep. 430; *Western Md. R. R. Co. v. Herold*, 74 Md. 510, 22 Atl. 323, 14 L. R. A. 75.

It will be noticed that the prayer excludes from the consideration of the jury the question of the physical condition and activity of the plaintiff, and also all the facts and circumstances of the case as testified to by the defendant's witnesses as to the speed of the car, except the two facts that she

attempted to alight from the car while it was in motion and before it came to a full stop; and if the jury should find these two segregated facts then the court was asked to say, as matter of law, there was such negligence on the part of the plaintiff as would preclude her right to recover, without regard to the other facts of the case. We are of opinion that the question of contributory negligence on the part of the plaintiff was properly left to the jury to determine under the instructions granted by the court upon all the facts and circumstances of the case, and that under the authority of the cases cited the prayer was properly refused. Finding no error in the ruling of the court, we affirm the judgment.

Judgment affirmed, the appellant to pay the costs.

BROWN et al. v. GRENIER.

(Supreme Court of New Hampshire. Hillsborough. Dec. 5, 1905.)

1. PHYSICIANS AND SURGEONS — LICENSES — VALIDITY.

Pub. St. 1901, c. 134, § 1, creates a state dentistry board consisting of three members. Section 2 provides that two members constitute a quorum for the performance of the duties of the board, and requires the board to hold at least one session a year to examine persons desiring to enter the profession of dentistry. Section 3 provides that any person may apply at a regular session of the board and be examined with reference to his knowledge of dentistry, and further provides for the issuance of licenses to such persons as upon examination are found to be qualified by the board. *Held*, that the powers vested in the board are of a judicial nature and can only be exercised in the presence of two of the members of the board, and an examination held by one member alone and a license issued by him, without the knowledge or approval of any other member, are void.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 144, 145; vol. 39, Cent. Dig. Physicians and Surgeons, §§ 3, 5.]

2. SAME — REVOCATION OF LICENSE — PROCEEDINGS.

Under Pub. St. 1901, c. 204, § 2, giving the Supreme Court general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses, that court has jurisdiction to entertain a bill in equity to cancel a license to practice dentistry unlawfully issued by a single member of the state dental board without the knowledge and approval of the other members.

3. SAME — PARTIES.

A proceeding on behalf of the state to cancel a certificate to practice dentistry unauthorizedly issued by a single member of the state dental board can be brought only by the Attorney General, and cannot be brought by the state dental board; but such board is a necessary party defendant to the proceedings.

Transferred from Superior Court; Peaslee, Judge.

Bill in equity by Frederick H. Brown and another against Wilfred Grenier to cancel a certificate or license issued to defendant entitling him to practice dentistry. A decree was entered for plaintiffs, and de-

fendant excepted. Transferred from the superior court upon an agreed statement of facts. Case discharged.

During the year 1902 Frederick H. Brown, George A. Bowers, and William R. Blackstone, residing and having offices, respectively, at Lebanon, Nashua, and Manchester, were the duly constituted members of the state board of registration in dentistry; Blackstone being clerk of the board. In the latter part of February, 1902, Grenier wrote Blackstone from Brockton, Mass., where he was employed in dentistry, inquiring whether the board would permit him to take examinations in French, and, if so, when. Blackstone replied that the board would allow him to take such an examination at any time, upon one week's notice to allow the board an opportunity to prepare questions. Four or five weeks afterward Grenier notified Blackstone that he would come to Manchester to be examined one week later, and at the time appointed came to Blackstone's office for that purpose. He paid a fee of \$10, and at this time inquired of Blackstone where the other examiners were. Blackstone said that he superintended all examinations; that examination papers were sent to the other members to be reviewed and were afterward returned to him with their findings; and that Grenier would be advised later as to the result, and a certificate would be issued to him if he passed a successful examination. Grenier then used the English language with difficulty and was unable to take the examination in that tongue, but was duly examined by Blackstone through an interpreter. The examination consumed several days. In addition to the written examination as to his knowledge of the theory of dentistry, Grenier gave a demonstration of his ability to do practical and operative work, according to the requirement of the board. About four weeks after the examination he wrote Blackstone from Brockton, inquiring as to the result, and was informed by mail that he had passed a satisfactory examination. No certificate was sent to him. A few days later he came to Manchester to get his certificate, or to learn why one had not been sent to him. Blackstone then told him that the answers in the examination papers being in French, there was an additional expense of \$50 for the review of the same by the examiners. Grenier thereupon paid \$50 to Blackstone and received the certificate in question, signed by all the members of the board. According to the practice and understanding of the board, the written examination papers were submitted to and passed upon by each member, and applicants were required to present themselves at the office of each member. Brown and Bowers, for the convenience of Blackstone, had signed diplomas or certificates in blank, for issuance to such applicants as passed the ex-

aminations. Grenier's examination papers were never submitted to Brown and Bowers for approval, nor did he ever present himself at the office of either of them for examination. The examination was taken by Grenier in good faith. He is a graduate of Laval University of Montreal, at which institution he took the course in dentistry, and he also served three years as an apprentice to a well-known dentist in Montreal. Upon receipt of his diploma or certificate, he at once fitted up dental parlors in Manchester, where he has since engaged in the practice of his profession.

Branch & Branch and David W. Perkins, for plaintiffs. Aime E. Boisvert, for defendant.

BINGHAM, J. In 1891 the Legislature created the commission known as the "State Board of Registration in Dentistry." Laws 1891, p. 341, c. 43; Pub. St. 1901, c. 134. Three dentists constitute the board (chapter 134, § 1), and two members of the board constitute a quorum for the performance of its duties (section 2). It is required to hold at least one session a year for the purpose of giving examinations to persons desiring to enter the profession (section 2). Any person can apply at a regular session and be examined "with reference to his knowledge and skill in dentistry and dental surgery" (section 3). Certificates or licenses are to be issued to such persons as, upon examination, the board find to be qualified (section 3). The practice of dentistry without a license from the board, by any person other than a practicing physician who is a graduate from the medical department of an incorporated college, is made a misdemeanor punishable by a fine not exceeding \$100 (sections 6, 7). It seems clear that the powers vested in the board by the act are of a judicial nature. The subject-matter which it is to pass upon is the qualification of applicants to practice dentistry. While all three of the members may hear and pass upon the question, only two are required to constitute a valid tribunal. An attempted exercise of jurisdiction by a less number is *coram non jure* and void. *State v. Richmond*, 28 N. H. 232, 234. It is agreed that the examination of the defendant was had before a single member of the board, and that the license which he holds was issued to him without the knowledge and approval of any other member. The decision of that member, not being authorized by the statute, is void, and the same is true of the license.

The Supreme Court, as a court of general superintendence to prevent and correct errors and abuses of inferior tribunals, has jurisdiction to entertain a proceeding to correct the error disclosed by the case. Pub. St. 1901, c. 204, § 2. The objection taken by the defendant that the plaintiffs are not authorized to bring such a proceeding for the state is well founded. It can be brought

only by the Attorney General, and the state board of registration in dentistry is a necessary party defendant, because it is the official action of that board as a judicial tribunal which is attacked. In its present form, the proceeding cannot be maintained, and the decree for the plaintiffs is erroneous. Should the Attorney General see fit to adopt the proceeding, the state and the state board of registration can be made parties by amendment, and the proceeding will then be a direct attack by the state upon the judgment. If this is done, it is not probable any further hearing of the facts will be required. Upon the facts found, the state will be entitled to the decree asked for by the present plaintiffs.

Case discharged. All concurred.

HAMEL v. NEWMARKET MFG. CO.

(Supreme Court of New Hampshire. Rockingham. Nov. 7, 1905.)

1. MASTER AND SERVANT—INJURY TO SERVANT—PROOF OF ACTIONABLE NEGLIGENCE.

A servant, suing for injuries, must show that the master failed to perform a legal duty and that the failure was the legal cause of the injuries.

2. SAME—INJURY TO SERVANT—NEGLIGENCE—FAILURE TO WARN—EVIDENCE.

Evidence in an action for injuries to an employé while assisting in repairing a broken shafting, in consequence of the shafting falling out of the boxes in which it was held by reason of the removal of the caps from the boxes by a co-employé for the purpose of enabling plaintiff and the co-employé to separate the pieces of the shafting, examined, and held to warrant a finding that the employer should have anticipated that the co-employé would remove the caps, so that the employer was negligent in failing to warn plaintiff, unskilled in the work, of the dangers arising from the removal of the caps.

3. SAME—ASSUMPTION OF RISK—QUESTION FOR JURY.

Whether plaintiff assumed the risk held, under the evidence, for the jury.

4. SAME—KNOWLEDGE OF SERVANT.

An employé who was not aware of the danger to which he was exposed did not assume the risk incident to the work, unless it clearly appeared that he would have known of the danger and appreciated the risk if he had used ordinary care.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 574-581.]

5. SAME—NEGLIGENCE OF FELLOW SERVANT CONCURRENCE WITH MASTER'S NEGLIGENCE—QUESTION FOR JURY.

Whether the negligence of an employé resulting in injury to a co-employé was the sole cause of the injury, or only a cause concurring with the negligence of the employer, held, under the evidence, a question for the jury.

6. SAME.

Where the evidence in an action for injuries received by an employé warranted a finding that the employer was negligent in failing to warn plaintiff of the danger, and that if that had been done the accident could not have occurred, there was evidence justifying a verdict for plaintiff, though a co-employé's negligence contributed to the injuries.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 525.]

Transferred from Superior Court.

Case for personal injuries by Fred Hamel against the Newmarket Manufacturing Company. There was a verdict for plaintiff. Case transferred on defendant's exception to the denial of its motions for nonsuit and the direction of a verdict in its favor. Exceptions overruled.

The evidence tended to prove the following facts: The plaintiff, a man of ordinary intelligence, was employed as a helper in the defendants' machine shop, but was without experience in repairing shafting. January 28, 1904, a line of shafting in the defendants' boiler house broke about 4 feet from one end. The line was about 40 feet long and was suspended about 6 feet above the boilers by J hangers bolted to the roof. The defendants' master mechanic, who had charge of all machinery and the men employed to repair it, directed Kelley, a machinist, to take the plaintiff as helper and repair the break after the mill had shut down. In order to make the repairs, it was necessary to separate the broken ends of the shafting and join them with a coupling. Kelley and the plaintiff were unable to push the long piece through the boxes, because it was worn with turning and was gummed with oil. They cleaned the shafting, and being still unable to move it, they removed the caps that held it in the boxes. They then separated the broken ends, screwed a coupling to the short piece, pushed the long piece back, and inserted its end in the coupling. By Kelley's direction, the plaintiff proceeded to screw the long piece into the coupling with pipe tongs, while Kelley held a light; and at about the third turn, the shafting rolled out of the boxes and fell upon the plaintiff, causing the injuries complained of. If the caps had been replaced after the end of the long piece was inserted in the coupling, or if they had been merely loosened, the accident could not have happened. They were not replaced because Kelley thought the shafting could be safely turned without them. The shafting fell because it was out of line, or because there was some trouble with the box in the hanger farthest from the point where the men were at work. The plaintiff was free from fault at the time he was injured. Neither he nor Kelley supposed there was danger in their method of doing the work. Some one should have been ordered to watch the shafting while the others worked upon it, or enough men should have been employed to push it through the boxes without removing the caps; and if either of these precautions had been taken, the accident would not have happened.

Eastman, Scammon & Gardner and Arthur L. Churchill, for plaintiff. John Kivel and George T. Hughes, for defendants.

PARSONS, C. J. When a servant brings an action against his employer upon the

ground of negligence to recover for an injury sustained in the course of his employment, he must show, to maintain such an action, that his master failed to perform a duty the law imposed on him for his benefit, and that the failure to perform it was the legal cause of his injury. One particular in which the plaintiff says the defendants failed to perform their duty toward him was their failure to inform him of the danger to which he was subjected in attempting to turn the shaft while it laid in the boxes of the hangers with the caps removed - a danger which he says he did not appreciate, and the risks attending which he consequently did not assume as a matter of law by his contract of service. If there was evidence from which the jury might find the facts thus alleged, the defendants' motions were properly denied, whether the defendants were negligent in other respects or not. Whether or not the defendants, in the exercise of ordinary care, ought to have informed the plaintiff of the danger to which he was subjected, depends in part upon the question whether they ought to have anticipated that Kelley would remove the caps; and that is a question of fact to be established, like other facts, by evidence. The fact that the shafting could have been repaired with the caps in place is evidence from which it could be found that the defendants were not bound to anticipate their removal; but it is not conclusive of that question. It cannot be said from that fact alone, when the location and condition of the shafting are considered, that an ordinary man who was familiar with it would not have anticipated that Kelley would remove the caps. So it cannot be said that it conclusively appears that the defendants ought not to have anticipated that he would remove them. It might be found, therefore, that the defendants ought to have anticipated that Kelley would remove the caps; consequently, it might be found that they should have notified the plaintiff of the danger incident to turning the shafting after their removal. But the defendants contend that, even if it could be found that the ordinary man would have notified the plaintiff of that danger, it cannot be found they were in fault, because it conclusively appears that the plaintiff would have known of the danger if he had used ordinary care to inform himself in respect to it. If he ought to have known of that danger, the law imposed no duty in respect to it upon the defendants for his benefit. Notwithstanding the plaintiff knew he would be injured if the shafting fell when he was at work, it does not follow that he ought to have known it was liable to fall if he turned it in the way he did after the caps were removed. It was lying in the boxes in which it was designed to turn. The plaintiff was unskilled in that kind of work,

he was turning the shafting slowly, and there was nothing about the work or the way of doing it calculated to call the attention of such a man to the fact that the shafting was liable to roll out of the hangers if he continued to turn it. Upon these facts it does not conclusively appear that he was in fault for not knowing of the danger to which he was exposed, or, in other words, that he assumed the risk of his injury; for when, as in this case, it appears that the plaintiff was not in fact aware of the danger to which he was exposed, he will not be held to have assumed the risk incident thereto unless it clearly appears that he would have known of the danger and appreciated the risk if he had used ordinary care to inform himself in relation to it. *Miller v. Railroad*, 73 N. H. 330, 61 Atl. 360; *Stevens v. Company*, 73 N. H. 159, 60 Atl. 848; *Kasjeta v. Company*, 73 N. H. 22, 58 Atl. 874; *Murphy v. Railway*, 73 N. H. 18, 58 Atl. 835; *St. Jean v. Tolles*, 72 N. H. 587, 58 Atl. 506; *English v. Amidon*, 72 N. H. 301, 56 Atl. 548; *Slack v. Carter*, 72 N. H. 267, 56 Atl. 316; *Galvin v. Pierce*, 72 N. H. 79, 54 Atl. 1014; *Boyce v. Johnson*, 72 N. H. 41, 54 Atl. 707; *Olney v. Railroad*, 71 N. H. 427, 52 Atl. 1097; *Lapelle v. Company*, 71 N. H. 346, 51 Atl. 1068; *McLaine v. Company*, 71 N. H. 294, 52 Atl. 545, 58 L. R. A. 462, 98 Am. St. Rep. 522; *Thompson v. Bartlett*, 71 N. H. 174, 51 Atl. 633, 93 Am. St. Rep. 504; *Sanders v. Company*, 70 N. H. 624, 46 Atl. 53; *Edwards v. Tilton Mills*, 70 N. H. 574, 50 Atl. 102; *Bennett v. Warren*, 70 N. H. 564, 49 Atl. 105; *Morrison v. Fibre Co.*, 70 N. H. 406, 47 Atl. 412, 85 Am. St. Rep. 634; *Story v. Railroad*, 70 N. H. 364, 48 Atl. 288; *Carr v. Electric Co.*, 70 N. H. 308, 48 Atl. 286; *Whitcher v. Railroad*, 70 N. H. 242, 46 Atl. 740; *Leazotte v. Railroad*, 70 N. H. 5, 45 Atl. 1084; *Lintott v. Company*, 69 N. H. 628, 44 Atl. 98.

The defendants contend that Kelley was negligent when he removed the caps, and that it conclusively appears that his negligence in that respect was the legal cause of the plaintiff's injury. Whether that was the sole cause, one of the concurring causes, or only the occasion, of the plaintiff's injury, is a question of fact. *Ela v. Cable Co.*, 71 N. H. 1, 51 Atl. 281. Since it could be found that the plaintiff should have been instructed in respect to the danger, and that, if that had been done, the accident would not have happened, there was evidence to sustain the verdict, even if it is conceded that Kelley was negligent and that his negligence contributed to cause the plaintiff's injury. A servant who is injured by the concurrent negligence of his master and a fellow servant may recover from either, provided he was himself without fault. *Matthews v. Clough*, 70 N. H. 600, 49 Atl. 637. As there was evidence of a breach of the master's nondelegable duty to instruct the plaintiff as to the

danger of the work, as a cause of the accident sufficient to authorize the submission of the case to the jury, it is not material to inquire, in the absence of any exceptions raising the question, whether the alleged negligence of the master mechanic in assigning so small a number of men to the work was the negligence of a fellow servant, as argued by the defendants, or a breach of the master's duty to furnish sufficient instrumentalities, as claimed by the plaintiff. If the defendants were found to be right in their contention on the point, the exceptions to the denial of the motions for a nonsuit

and to direct a verdict could not be sustained.

Although there was evidence from which it could be found that the defendants made a settlement with the plaintiff before he brought this suit, the jury have found that no settlement was made, and there was evidence to sustain their finding. As the plaintiff had not settled with the defendants, there was no contract to be rescinded, and there could be nothing in his hands which had been paid to him in pursuance of it, and which it was incumbent upon him to return before a rescission.

Exceptions overruled. All concurred.

HANSON v. MANCHESTER ST. RY.

(Supreme Court of New Hampshire. Hillsborough. Nov. 7, 1905.)

1. APPEAL—REVIEW—PRESUMPTIONS.

Where, in an action for injuries, the jury were not directed to pass on certain evidence, it would be presumed on appeal that such evidence was true, and would have established in the hands of the jury everything it tended to prove.

2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE INJURIES—LAST CLEAR CHANCE—PROXIMATE CAUSE.

If a person is injured, in part by the negligence of another and in part by the insufficiency of the driver, horse, or carriage by which the person injured was being conveyed, which insufficiency was due to his own want of care in selecting them, no recovery could be had, not because the driver's negligence, or the defect in the horse, harness, or carriage, was imputable to the person injured, but because his own fault in selecting them was the proximate cause of the injury.

3. STREET RAILROADS—PERSONS IN STREET—INJURIES—LAST CLEAR CHANCE—PROXIMATE CAUSE.

Where, in spite of plaintiff's negligence in selecting an incompetent driver, defendant street car company by the exercise of care could have prevented injury to plaintiff in the position he occupied in the care of such driver, defendant's failure to do so constituted the sole cause of the injury, for which plaintiff was entitled to recover, notwithstanding his prior negligence in selecting such driver or the driver's negligence at the time of the accident.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 218.]

4. SAME—INSTRUCTIONS.

Plaintiff was injured in a collision with a street car while he was being driven in a carriage by a driver claimed to have been negligent and intoxicated. There was evidence that, notwithstanding the driver's negligence and condition, the accident could have been prevented by defendant's motorman by the exercise of ordinary care, but the court charged that plaintiff's previous negligence in riding with such driver, or his misconduct in getting drunk, were not matters which would excuse defendant, if at the time of the accident plaintiff was doing all that prudence required of a person in his situation, and that in law plaintiff's prior negligence merely furnished an occasion for defendant to negligently injure him, and that its fault would be the legal cause of the accident, and the fact that the driver was drunk and was grossly negligent would be no defense; the question being, could plaintiff, at the time of the accident, have avoided the effect of the driver's fault by the use of ordinary care? *Held*, that such instruction was objectionable, as tending to mislead the jury in determining whether the insufficiency or negligence of the driver or defendant's failure to prevent the accident was the proximate cause thereof.

Transferred from Superior Court; Peaslee, Judge.

Action by Henry Hanson against the Manchester Street Railway. A verdict was rendered in favor of plaintiff, and the case was transferred from the superior court. Verdict set aside.

On Labor Day, 1900, the plaintiff was injured in a collision between a car of the defendant corporation and a team driven by one Reagan, with whom the plaintiff had ridden from place to place for some time

prior to the accident. The plaintiff's evidence tended to show that his injury resulted from the motorman's negligent failure to stop the car. The defendant's evidence tended to show that Reagan was intoxicated, and incapable of properly driving a horse; that the plaintiff got into the wagon while Reagan was in that condition, and continued to ride with him after he had an opportunity to quit his company; that at the time of the accident Reagan was guilty of a negligent act, which contributed to cause the accident, and which might reasonably have been expected of one in his condition; and that Reagan's drunken condition was known to the plaintiff during all the time they rode together. The jury were instructed in part as follows; the defendants excepting to the portions of the charge enclosed in brackets: "In this case the road's representative was the motorman. So far as this case is concerned, if he acted with reasonable care, the defendants are free from fault; and, if he was careless, the defendants were negligent. Considering, then, all the surrounding circumstances—the nature of the vehicle being operated, the means at hand for stopping it, the amount and nature of the travel at this place, all the general surroundings, and all the special circumstances you shall find to exist in this particular case—considering all these things, ought the motorman to have done something he failed to do, and so have avoided the accident? Of course, the general rule would be that the cars should go on their way without interruption; but this does not give the road the right to wantonly or carelessly run upon persons or teams upon the track. In a case like that, or in any emergency, they are required to refrain from an exercise of their ordinary rights to such an extent as due or ordinary care requires to avoid doing injury; that is, they are bound to act with an average degree of prudence, in view of the special facts, when the emergency arises. And the sole question as to the defendants' fault is whether the car should have been stopped after the motorman saw, or ought to have seen, the horse upon the track. * * * [The plaintiff was bound to use such a degree of care as a man of average prudence would have used, situated just as the plaintiff was. It is his conduct at the time the accident happened, and while it was imminent, which is decisive. His previous negligence (if he was negligent in riding with Reagan), or his misconduct in getting drunk (if he was in that condition), are not matters which will excuse the defendants, if at the time of the accident he was doing all that prudence required of a person in his situation. So you will inquire how the average man, riding along that street in that wagon driven by Reagan, would have acted at and just before the time of the collision. Was there anything which a fair degree of prudence called upon him to then

do to escape the danger? If there was not, his previous fault (if there was such fault) is of no consequence. In law such prior negligence merely furnished an occasion for the defendants to negligently injure him, and their fault would be the legal cause of the accident.] It would be a negligent act for a man to drive a nervous horse with an insecure pair of reins; but if, while so doing, and controlling the horse the best he could with the insufficient harness, he was carelessly run upon by a person who could, by due care at the time, avoid the collision, the carelessness of the man who could at the time avoid the trouble is the cause of the accident, and he is legally responsible for its results. It is for you to say whether there is anything in the facts in this case to which this rule applies. [The fact (if it is a fact) that Reagan was drunk and was grossly careless is no defense. The question still would be: Could the plaintiff at the time of the accident have avoided the effect of Reagan's fault by the use of ordinary care?] To sum up, then: The plaintiff must have proved that at the time of the accident the defendants could, and he could not, prevent the collision by the exercise of ordinary care; and if Reagan was violating the speed law, and by such act caused the collision, it must appear that the plaintiff was not a party to that crime."

Burnham, Brown, Jones & Warren, for plaintiff. Streeter & Hollis and Taggart, Tuttle, Burroughs & Wyman, for defendants.

PARSONS, C. J. The defendants' complaint is that the jury were not instructed as to the case made by their evidence. The evidence to which this complaint relates was that the plaintiff was knowingly and without necessity riding with a drunken driver, and that at the time of the accident the driver, Reagan, was guilty of a negligent act, which contributed to cause the injury, and which might reasonably have been expected of one in the condition in which Hanson knew Reagan to be. If the jury were not directed to pass upon this evidence, it must be taken, for the purposes of the case here, that this evidence was true, and would have established in the minds of the jury everything it tended to prove. That a jury might find that a man of ordinary prudence would not have continued to ride with a drunken, incompetent driver after he ascertained the fact, and that therefore such conduct was negligent, is not open to argument. They might, also, on the evidence, have found, not only that Hanson ought to have anticipated what was reasonably to be expected of one in Reagan's condition, but that in fact he did anticipate it. What this act was, or in what way it was connected with the injury, the case does not disclose. Whether it was or not a contributing cause of the injury upon the facts proved may be a question of law,

but that question is not presented by the record, which states as a fact that the act did contribute to cause the injury. It is plain from the case that the distinction between negligence as the cause of the danger and negligence as the cause of the injury was present in the minds of counsel and court throughout the trial. The language of the case must have been used in its strict legal signification. In this sense Reagan's negligent act could not have been an act that "contributed to cause the injury," unless it was a proximate cause thereof; i. e., legally a part of the cause—one without which there might have been no injury.

For his own protection Hanson was bound to exercise ordinary care in the selection of a driver, horse, harness, and carriage. *Plummer v. Ossipee*, 59 N. H. 55, 59; *Tucker v. Henniker*, 41 N. H. 317; *Clark v. Barrington*, 41 N. H. 44. For an injury to himself, in part from the negligence of another and in part from the insufficiency of the driver, horse, or carriage, due to his own want of care, he could not recover; not because the negligence of the driver or the defect in the horse, harness, or carriage is imputed to him, but because, under such circumstances, his own fault would be a proximate cause of the injury. The doctrine of imputed negligence, and of the identification of an innocent passenger with his driver, set up in *Thorogood v. Bryan*, 8 C. B. 115, had the effect of preventing a recovery by a faultless plaintiff, injured by the fault of another, in disregard of the fundamental law of negligence; that he whose wrongful act has injured one without fault must pay the damage so occasioned. The authority of the case is now almost universally denied in England and in this country. *Noyes v. Boscawen*, 64 N. H. 361, 370, 10 Atl. 690, 10 Am. St. Rep. 410; *Mills v. Armstrong*, 13 App. Cas. 1. But the refusal to follow *Thorogood v. Bryan* in depriving an innocent plaintiff of his action has nowhere been construed to give an action to a plaintiff whose fault caused the injury. If the suit had been against the city, or against the defendants, for an injury from a previous negligent obstruction of the street, the defendants' evidence would have constituted a defense. The plaintiff's negligence in riding with an unskillful driver, whose incompetency contributed to cause the injury, would have been its sole legal cause.

The law is not affected by the presence or the absence of the parties, or by the difficulty of applying it to a complicated state of facts. But the cases present different aspects, according to the facts in proof; and a statement of the law, correct as applied to one state of facts, may be erroneous in another. He who cannot at the time prevent an injury to himself by the fault of another present and acting is legally without fault, whether his inability to protect himself is

due to his absence, prior negligence, or other cause. The fault of the one who can at the time, but who does not, prevent an injury, is its sole legal cause, however the dangerous situation was created (*Nashua Iron and Steel Co. v. Railroad*, 62 N. H. 159, 163, 164; *Parkinson v. Railway*, 71 N. H. 28, 51 Atl. 268; *Little v. Railroad*, 72 N. H. 61, 55 Atl. 190; s. c., 72 N. H. 502, 57 Atl. 920; *Yeaton v. Railroad*, 73 N. H. 285, 61 Atl. 522); or, as is sometimes said, although the plaintiff is in some degree negligent, he can nevertheless recover, if the defendant, by reasonable care, could have avoided the consequences of the plaintiff's negligence (*Grand Trunk Ry. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Inland, etc., Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; *The Bernina*, 12 P. D. 58, 61, 89). The principle is the same, whatever the language used: The plaintiff can or cannot recover, accordingly as his negligence is or is not a proximate cause of his injury. In a highway or other case, in the absence of the defendants at the time, the negligence of the plaintiff in selecting an incompetent driver, whose incompetency contributed to the injury, would be, as matter of law, a proximate cause of the injury. If the defendants were present at the time of the accident, the plaintiff could no more recover for an injury to which his negligence in the selection of a driver, through the incompetency of the driver, contributed, than if they were absent. If, in spite of the negligence of the plaintiff in selecting a driver, the defendants by care could have prevented injury to the plaintiff in the position he occupied in the care of an incompetent driver, their failure to do so would be the sole cause of an injury which the plaintiff at the time could not prevent. Whatever the driver may have done would be immaterial, because care on the part of the defendants would have prevented the injury. Their negligence would have been its sole cause, to which neither the prior negligence of the plaintiff nor the recklessness of the driver would have contributed in a legal sense. Such was the theory of the instructions to the effect that the negligence of the plaintiff furnished merely the occasion of the injury, and that the reckless conduct of Reagan was no defense. These instructions, which were excepted to, amount to a ruling that, as matter of law, the act of Reagan, of which the defendants offered proof, was not a proximate cause of the injury. Such ruling may be correct, and generally would be so. It would plainly be incorrect if Reagan's act was in fact a proximate cause of the injury. The instructions given as to the defendants' care were correct.

If it were found that the defendants were in fault because the motorman did not stop the car as soon as he ought, under all the circumstances of the case, and thereby fail-

ed to avoid the injury, the instructions as to the plaintiff's fault were also correct, because in such case a negligent act of Reagan's, which the defendants ought to have foreseen, or in spite of which the motorman ought to have prevented the injury, could not have been its proximate cause. But, while the instructions as a whole were technically correct, the plain tendency of those above recited (to which exception was taken), together with the omission to refer to Reagan's conduct on the question of the defendants' care, was to cause the jury to understand that the plaintiff's negligence in being with a drunken driver, and the latter's careless conduct at the time, were entirely immaterial, and were not to be considered by them at all in the case. They were told that the fact that Reagan was grossly careless was no defense. His acts at the time were competent for consideration on the question of the motorman's care, might be entirely decisive, and could in ordinary language be spoken of as a complete defense.

Upon the whole case the tendency of the instructions to mislead the jury appears so plain that it is probable justice may not have been done, and that there ought to be a new trial.

Verdict set aside.

BINGHAM, J., did not sit. The others concurred.

WHEELER v. TOWN OF GILSUM.

(Supreme Court of New Hampshire. Cheshire. Dec. 5, 1905.)

1. TOWNS—LIABILITY FOR ACT OF HIGHWAY AGENT.

A town is not liable for injury to property through the negligence of its highway agent in blowing up ice in a river, under the direction of a selectman, for the purpose of draining water from a highway; his act being that of a public officer in the performance of his duty.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, § 315; vol. 45, Cent. Dig. Towns, § 79.]

2. SAME—NUISANCE CREATED BY HIGHWAY AGENT—DUTY TO REMOVE.

Where a highway agent of a town, under the direction of a selectman, for the purpose of draining water from a highway, negligently blows up ice in a river, creating a nuisance, threatening destruction of a mill, the town is under no duty to remove the nuisance, so as to make it liable for its failure to do so for destruction of the mill therefrom.

Exceptions from Superior Court; Peaslee, Judge.

Action by Lester R. Wheeler against the town of Gilsom. A nonsuit was ordered, and plaintiff excepted. Exceptions overruled.

Case, for negligence. March 2, 1902, the plaintiff owned and occupied a sawmill on the bank of the Ashuelot river. On that day an ice jam in the river above the mill caused the water of the stream, increased by sur-

face water accumulating from rain and melted snow, to overflow a highway in the town of Gilsom, preventing travel thereon. A highway agent of the town, under the direction and control of one of the selectmen, went upon the river outside the highway and attempted to break up the ice with dynamite, so that the water might drain off from the highway. The work was negligently done, with the result of increasing the water in the highway above the jam and of weakening the ice, so that it subsequently broke up, and the water and ice flooded, crushed, carried away, and practically destroyed, the plaintiff's mill. The town, through its officers and citizens, had notice of, and could have removed, the danger to the plaintiff's property created by the negligent attempt to break up the ice. The expense of what was done was borne by the town. The plaintiff was without fault. After the opening statement by plaintiff's counsel of the grounds upon which recovery was claimed, in substance as above set forth, a nonsuit was ordered, and the plaintiff excepted.

Arthur J. Holden and Robert A. Ray, for plaintiff. Charles H. Hersey and Cain & Benton, for defendant.

PARSONS, C. J. In repairing the highway under the direction of the selectmen (Laws 1897, p. 59, c. 67, § 1), the highway agent was a public officer, for whose negligent acts in the performance of his duty the town is not liable. *O'Brien v. Derry*, 73 N. H. 198, 60 Atl. 843; *Hall v. Concord*, 71 N. H. 367, 52 Atl. 864, 58 L. R. A. 455; *Downes v. Hopkinton*, 67 N. H. 456, 40 Atl. 433; *Wakefield v. Newport*, 62 N. H. 624; *Grimes v. Keene*, 52 N. H. 330. The principle under which a town may be liable for an injury to private property rights by an abuse of its possessory right in the highway, permitting an unreasonable use of the land to the injury of another (*Clair v. Manchester*, 72 N. H. 231, 55 Atl. 935; *Flanders v. Franklin*, 70 N. H. 168, 47 Atl. 88; *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175), has no application. The plaintiff's injury was not occasioned by an unreasonable use of the town's property right, made or permitted by the town. The dangerous condition in the river was due to natural causes, or to their action combined with the negligence of public officers. These causes created a nuisance which threatened alike the property of the town and that of the plaintiff. The nuisance was not within the highway, nor was it connected therewith in any way. It did not consist in anything appurtenant to the highway, which the town used for the benefit of its highway property, though without the limits of the highway. If the town could rightfully go without the limits of the highway to abate the nuisance created by the elements and the ac-

tion of the highway agent, which threatened injury to its highway property, and would be liable to the plaintiff for an injury resulting from a negligent exercise of such right by the town, the power to abate such nuisance was merely a right which the town had for its own benefit, not a duty imposed upon it for the benefit of the plaintiff. As no duty rested with the town to act for the protection of the plaintiff, its failure merely to take action is not actionable negligence. *Buch v. Manufacturing Co.*, 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163; *McGill v. Granite Co.*, 70 N. H. 125, 46 Atl. 684, 85 Am. St. Rep. 618.

Exception overruled. All concurred.

ASH et al. v. McLELLAN.

(Supreme Judicial Court of Maine. Dec. 26, 1905.)

1. PAYMENT—VOLUNTARY PAYMENT—RECOVERY BACK.

When one with a full knowledge of all the facts, or with means of knowledge, voluntarily pays money under a claim of right, he cannot maintain an action to recover it back.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payment, §§ 253–266.]

2. SAME—WHAT CONSTITUTES.

When one demands money under a claim of right, and uses no other means to obtain it than importunity, or a threat, expressed or implied, of resort to litigation to obtain it if it is not voluntarily paid, and the one of whom the money is demanded has time for consideration and deliberation, and to obtain the advice of counsel or friends, and the money is then voluntarily paid to settle the demand, it cannot be recovered back, though the demand is illegal and unjust.

3. SAME.

Held, that in the case at bar the payment by the plaintiffs was a voluntary payment and cannot be recovered back.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payments, § 285.]

(Official.)

Exceptions from Supreme Judicial Court, Hancock County, at Law.

Action by Nathan Ash and others against William H. McLellan. On exceptions by plaintiff. Overruled.

Money had and received to recover back money paid by the plaintiffs to the defendant. Previous to this action, the plaintiffs were sureties on a "poor debtor's" bond, dated August 30, 1902, given by one George R. Robinson, a judgment debtor, who had been arrested on execution, and on the 20th day of June, 1903, they as sureties on said bond, paid to the defendant, who was then the legal owner of the judgment on which the execution was issued, \$190 in settlement of bond and execution. September 29, 1903, the plaintiffs demanded of the defendant the return of the \$190 so paid to him, and upon his refusal to return the money this action was brought to recover it back. The action was heard at the October term, 1903, of the Su-

preme Judicial Court, Hancock county, before the presiding justice, with the right to except. The presiding justice ruled that the defendant was entitled to judgment, and ordered judgment accordingly. Thereupon the plaintiffs excepted.

Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, and SPEAR, JJ.

E. S. Clark, for plaintiffs. Wm. H. McLellan and A. W. King, for defendant.

STROUT, J. Carter recovered a judgment against George R. Robinson. This judgment was duly assigned to the defendant McLellan, who became its legal owner. McLellan sued the judgment, and recovered a new judgment in Carter's name for \$145.82 debt and \$9.93 costs at the April term, Supreme Judicial Court, 1896. Upon an execution upon this judgment, dated August 30, 1902, McLellan caused the debtor Robinson to be arrested, and the debtor gave bond to take the poor debtor's oath as provided by statute. The plaintiffs were sureties on that bond. Upon notice to Carter, Robinson did in fact take the poor debtor's oath on January 24, 1903, and thus performed the condition of his bond, but McLellan had no knowledge of this fact from any source. After expiration of the time limited in Robinson's bond, McLellan, believing the condition had not been performed and that the sureties were liable, called upon them for payment. Robinson at that time was in the employment of the plaintiffs, and they saw him daily, and were indebted to him to some amount, which at the end of the season amounted to something over \$200.

Upon the call for payment by McLellan of the plaintiffs, Mr. Ash, one of the sureties, and one of the plaintiffs, wrote him asking for his best terms, to which McLellan replied that he "would send the execution and bond fully discharged for \$190, the sureties paying the deputy sheriff." This was less than the amount due. Thereupon plaintiffs sent McLellan check for \$190, and received back the bond and execution against Robinson fully discharged.

September 29, 1903, the plaintiffs demanded of McLellan the return of the money paid him, but made no offer to return the bond and execution at any time until after the hearing of this suit to recover the money. They obtained what they paid for, not only their discharge from the bond but the discharge of the judgment against Robinson. If for any cause they had the right to rescind or recover back the money paid, it was indispensable that they should have returned or offered to return the bond and execution before suit brought. But instead of that they retained the discharged execution and sued to recover the money paid therefor. Failing to do this, this action cannot be maintained.

But, waiving this technical defense, and treating the case as one of a voluntary payment upon an honest claim of right by Mc-

Lellan, though in fact unfounded, it would be expected that when the plaintiffs were asked to respond for the default of Robinson, the principal in a bond on which they were sureties, they would have called his attention to it, and asked him to make payment, or at least for authority to apply to that purpose the amount in their hands due to him, but instead of this the case finds that "neither Mr. Ash nor Mr. Marcyes made any inquiry of Mr. Robinson about the matter, and sent the check without consulting him and without his knowledge, fearing he would leave if told of the matter, and they desired to have his wages accumulate to that amount." The payment was in no sense compulsory. Plaintiffs knew all the facts that McLellan knew, and had excellent opportunity to learn that Robinson had taken the oath provided for in the condition of his bond. They intentionally refrained from consulting him, though he was in their employ and they saw him daily, for the purpose "to have his wages accumulate" to the amount. Both parties believed there was a legal liability of plaintiffs. The true principle applicable in such cases is stated by Walton, J., in *Parker v. Lancaster*, 84 Me. 515, 24 Atl. 952, to be that "when one demands money under a claim of right, and uses no other means to obtain it than importunity and persistency, or a threat, expressed or implied, of resort to litigation to obtain it, if it is not voluntarily paid, and the one of whom the money is demanded has time for consideration and deliberation, and to obtain the advice of counsel or friends, and the money is then voluntarily paid to settle the demand, it cannot be recovered back, though the demand is illegal and unjust." Early in May, 1903, McLellan wrote the deputy sheriff in regard to forfeiture of the bond, and to notify the sureties. This letter was read to plaintiffs, who then wrote the defendant for his terms. McLellan replied June 16th, and the check was not sent till June 20th. The plaintiffs therefore had ample time for consideration.

The rule of law quoted from *Parker v. Lancaster* is supported by *Norris v. Blethen*, 19 Me. 351, and *Gooding v. Morgan*, 37 Me. 419. In the latter case, Chief Justice Shepley says: "The law is regarded as settled in this state, if one with a full knowledge of the facts, or with the means of knowledge, voluntarily pays money under a claim of right, that he cannot recover it back." To the same effect is *Norton v. Marden*, 15 Me. 45, 32 Am. Dec. 132. See, also, *Gilpatrick v. Sayward*, 5 Me. 465; *Rawson v. Porter*, 9 Me. 119; *Wilson v. Barker*, 50 Me. 447.

The plaintiffs had at hand the means to learn all the facts by an inquiry of their servant daily seen by them. It was inexcusable, almost culpable negligence not to consult him before making the payment. They intentionally refrained from doing this from an ulterior motive insufficient to justify their nonaction. In such case they should be

charged with knowledge of what they might easily and ought to have learned, and ought not to be permitted to take advantage of their self-imposed ignorance. This doctrine is sustained by *East Haddam Bank v. Scovill*, 12 Conn. 310; *Behring v. Somerville*, 63 N. J. Law, 568, 44 Atl. 641, 49 L. R. A. 578; *Stevens v. Head*, 9 Vt. 174, 31 Am. Dec. 617; *West v. Houstin*, 4 Har. (Del.) 170; *Simmons v. Looney*, 41 W. Va. 738, 24 S. E. 677; *Harner v. Price*, 17 W. Va. 545, as well as by the cases in this state, *supra*. There are opposing decisions but we are satisfied with the rule settled in this state.

By making this payment and obtaining a discharge of the execution, without informing themselves of the fact of the disclosure of Robinson, the plaintiffs placed the defendant in a worse position than he would otherwise have been, since they thereby prevented his enforcing his execution against the judgment debtor in some of the ways that were still open to him. A suit in which the plaintiffs could have been summoned as trustees would apparently have secured all or a large part of the debt, as the plaintiffs owed Robinson at the end of that season over \$200.

A majority of the court is of the opinion that the ruling below that judgment should be for the defendant is correct, and the entry must be:

Exceptions overruled.

One of the justices sitting at the term of the law court when this case was argued did not sit in this case, being disqualified under the statute by reason of having ruled therein *at nisi prius*.

HEWEY v. METROPOLITAN LIFE INS. CO.

(Supreme Judicial Court of Maine. Dec. 6, 1905.)

1. INSURANCE—APPLICATION SIGNED IN BLANK—WHEN APPLICANT IS BOUND BY STATEMENTS.

An application for a policy of life insurance was signed in blank by the applicant, and delivered in this condition to the agent of the defendant company, with the understanding that the agent should fill in the answers to the questions from information contained in a previous application for insurance, which had been made out in the applicant's presence and signed by him. The second application, as filled out by the agent, was forwarded to the company, and the policy in suit was issued thereon and afterwards delivered to the applicant, now deceased, and was accepted by him.

Held that, if the agent of the company filled in the second application in accordance with the terms of the first one, then the applicant would be bound by it; but if the agent filled in the second application with answers that were not contained in the first one, or put them in differently from what they were in the first, then the applicant would not be bound by them, because they would be the answers of the agent, and not the answers of the applicant.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 998–1003.]

2. SAME—CONSTRUCTION OF APPLICATION.

It is a sound rule of law that an application for life insurance, signed in blank by one

desiring insurance, and filled in by the company or its agents, should be construed more favorably to the applicant.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 294, 295, 1001, 1002.]

3. SAME—SUCCESSIVE APPLICATIONS—IDENTITY OF ANSWERS.

Upon an analysis of the two applications the most that can be said with respect to their identity is that, if the applicant had read or been personally interrogated with respect to the questions and answers in the second application, he might have answered the same as he did in the first, and he might have answered in an entirely different way. The answers in the second application cannot, therefore, be said to be such necessary inferences from those contained in the first as to be regarded as a statement of the applicant, and therefore binding upon him.

4. SAME—AVOIDANCE OF POLICY—MISREPRESENTATIONS—BURDEN OF PROOF.

In order to defeat the claim of a person insured, who has paid the consideration required for the insurance received, upon the ground that the insured made misrepresentations as to the risk in his application, it is incumbent upon the company to show that the misrepresentations were his, and not mistakes or misrepresentations of its own.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1650.]

5. SAME—APPLICATION—PREPARATION BY INSURER.

When an insurance company or its agents undertake to fill in an application from a previous application or statement made by the applicant it should be held to the strictest adherence to the terms of such application or statement made; otherwise, it would be in the power of the company or its agents in such a case to fraudulently destroy the legal status of the policy so obtained.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 998–1003.]

(Official.)

Exceptions from Supreme Judicial Court, Androscoggin County, at Law.

Action by Annie J. Hewey against the Metropolitan Life Insurance Company. There was judgment for plaintiff, and defendant brings exceptions. Exceptions overruled.

Argued before EMERY, STROUT, PEABODY, and SPEAR, JJ.

Harry Manser, for plaintiff. White & Carter, for defendant.

SPEAR, J. This is an action on the case upon a policy of life insurance. The deceased made an application for a policy for \$1,000 in the defendant company, which was dated October 18, 1902, followed by a medical examination the same day. This application was filled out by an agent of the company in the presence of the deceased from information furnished by him, and was then signed by him and witnessed by the agent. The company declined to write a policy on the class applied for, but intimated that it would write one of a different class to the amount of \$500. Upon this information Robert Hewey, the deceased, signed a new application on the 8th day of November, 1902, in which the answers to the questions had not been filled in, and de-

livered it in this condition to the agent of the defendant company, with the understanding that the agent should fill in the answers to the questions from the information contained in the first application, which had been made out in Hewey's presence and signed by him. There was no new medical examination at the time the second application was made. The second application, as filled out by the agent, was forwarded to the company, and the policy in suit was issued thereon and afterwards delivered to Robert Hewey, the deceased, and was accepted by him. Upon this branch of the case the court instructed the jury as follows: "So that in this case any answer in this second application, assuming that Mrs. Hewey's statement is true, that they left it as she says, and that the agents were to fill in the blanks from the old application, or from the knowledge which they got in the old application, so far as they filled in those blanks in accordance with the old application, they would then be filling in the blanks for him, and the answers made would be his answers, because that was what he agreed to do. But so far as they filled in the application with answers that he had not made in the old application, put in things that were not referred to in the old application, put them in differently from what they were in the old application, then he would not be bound by them, because they would be the answers of the agent, and not the answers of Mr. Hewey." This is undoubtedly the correct statement of the law governing this case, and, as we understand, is so conceded by the defendants. The two applications upon which the above instruction was based contained, among other questions and answers, the following, which are material in this case:

"(6 A) Name and residence of your usual medical attendant. Dr. H. H. Cleveland. (6 B) When and for what have his services been required? 9 mos. ago. Cold. (7) Have you consulted any other physician? If so, when and for what? No, except as in No. 3." No. 3, referred to, is as follows: "(3) Give full particulars of any illness you may have had since childhood, and name of medical attendant or attendants. Grippe, 4 yrs. ago. Dr. J. A. Leader." The second application contained the following: "(5) The following is the name of the physician who last attended me, the date of the attendance, and name of the complaint for which he attended me: Dr. Cleveland; Feb. 1902; grippe. (6) I have not been under the care of any physician within two years, unless as stated in previous line, except none."

Dr. Cleveland testified that he treated the deceased in the winter of 1902 at Hewey's home for a bad cold or grippe. He also testified that subsequent to this treatment, and prior to the making of the first application, on October 18, 1902, he treated Hewey at his office for liver disease. The defendant contended that the answers to questions

5 and 6 in the second application were fully authorized by the statements made by Hewey in answer to questions 6 and 7 in the first application, and that the facts testified to by Dr. Cleveland, if true, constituted a breach of the warranty contained in the second application as to the truth of the facts therein stated. The plaintiff contended that the answers to questions 5 and 6 in the second application were not authorized by the facts stated in the first application, and hence were not the answers of the deceased, and were not binding upon him or upon this plaintiff.

Upon the comparative identity in meaning of the two applications the court, having analyzed them, charged the jury as follows: "I think, gentlemen, upon comparing these two applications, I shall instruct you thus: If you find it to be true, as Mrs. Hewey says, that that answer, with the others, was agreed to be filled in from the old application, and if, having the old application, they attempted to fill it in from that, but filled it in the way which they did, it was an unauthorized answer—that is to say, there is nothing in the former application with reference to Dr. Cleveland which made this answer true or proper; and therefore it was not his answer. It was the answer which the agent put in. The answer referred to by the court was number 5 in the second application."

It is to this instruction, that the answers in the second application are not warranted from those contained in the first, that the defendants particularly object, and say: "The court should have instructed the jury that the answers in the second application were fully authorized from those made in the first, and that, if they were untrue, the plaintiff could not recover." In this class of cases we think it a sound rule of law that an application for life insurance, signed in blank by one desiring insurance, and filled in by the company or its agents, should be construed more favorably to the applicant. Upon this view of the law the construction of the presiding justice should be sustained. The question in the first application, "name and residence of your usual medical attendant, when and for what have his services been required," and the assertion contained in the second, "the following is the name of the physician who last attended me, the date of the attendance, and name of the complaint for which he attended me," cannot be fairly construed to mean one and the same thing, or to require one and the same answer. If we were to stop right here, the two inquiries might elicit entirely different answers. The "usual medical attendant" might not be "the physician who last attended the applicant." He might be ill, in need of medical attendance, and a variety of causes intervene to make it impracticable or even impossible for him to secure the services of his usual physician, and consequently be under the necessity of employing

some other physician. If this occasion happened to be the last time he needed medical attendance before making an application for insurance, then it is clear that the last medical attendant was not the usual one. But a fair analysis of the two applications requires us to go further. These questions and answers in the first application in the form of a statement are as follows: "My usual medical attendant is Dr. Cleveland. He attended me nine months ago for a cold. I have not consulted any other physician since childhood for any illness, except Dr. Leader four years ago for grippe."

In the second application the applicant is made to say Dr. Cleveland was the physician who last attended him, the date was February 9, 1902, and the complaint for which he attended him was grippe; also, that he had not been under the care of any physician within two years, unless as stated in the previous answer.

Now the defendants contend that, by the observance of the proper rules of logic to their interpretation, the two applications mean precisely the same thing. They say that the first application shows that Dr. Cleveland attended the applicant in 1902, and was the only physician that had attended him for four years, as stated in No. 3. If he was the only physician, he must necessarily have been the last one, as stated in the second application. Also, that the answer numbered 6, that he had not been under the care of any physician for two years, was fully authorized by the statement in the first application that Dr. Cleveland's services had been required only for the cold or grippe in the winter, and, further, that he had not even consulted any physician for four years, except Dr. Cleveland at the time he had this cold or grippe. If we admit that by the defendant's process of reasoning the above conclusions may be drawn, yet, is the applicant to be subjected to the test of reasoning by the process of induction and deduction in order to make the application made by the company agree with the application made by himself?

But the logical conclusions are not necessarily true. A different conclusion may also be drawn. In the first application he says he has not consulted any physician. In the second, filled in by the agent, he is made to say: "I have not been under the care of any other physician," etc. "Consulting" a physician and being "under the care" of a physician, not only in the technical use of the terms, but to the common mind, may mean very different things. A man may consult a physician without ever being under his care at all. To consult is defined: "To apply to for direction or information; ask the advice of—as to consult a lawyer; to discuss something together; to deliberate." Care is defined: "Responsibility, charge or oversight, watchful regard and attention." Hence the first answer might, in the mind

of the applicant, be correct, and the second one not. We think the most that can be said with respect to the identity of the two applications is that, if the applicant had read or been personally interrogated with respect to the questions and answers in the second application, he might have answered the same as he did in the first, and he might have answered in an entirely different way. The answers in the second application cannot therefore be said to be such necessary inferences from those contained in the first as to be regarded as the statement of the applicant, and therefore binding upon him. In order to defeat the claim of the person insured, who has paid the consideration required for the insurance received, upon the ground that the insured made misrepresentations as to the risk in his application, it is incumbent upon the company to show that the misrepresentations were his, and not mistakes or misrepresentations of their own. When an insurance company or its agents undertake to fill in an application from a previous application or statement made by the applicant, it should be held to the strictest adherence to the terms of such application or statement made; otherwise, it would be in the power of the company or its agents in such a case to fraudulently destroy the legal status of the policy so obtained.

Exceptions overruled.

RAYMOND v. PORTLAND R. CO.
(Supreme Judicial Court of Maine. Dec. 6. 1905.)

1. CARRIERS—INJURIES TO PASSENGER—CARE REQUIRED—INSTRUCTIONS.

The plaintiff was a passenger on one of the street railway cars of the defendant. There was evidence tending to show that the car, an open one, had come to a stop near the point of intersection with the tracks of a steam railroad, that it was the practice and custom of the defendant to stop there, but that the only purpose of the stop was to safeguard the crossing of said tracks; it not being a place where a stop was regularly made for passengers to get off or on the defendant's cars, although it was also in evidence that passengers did sometimes get off or on the cars while so stopping. There was likewise evidence tending to show that, while the car was stopping at said point of intersection, the plaintiff undertook to alight therefrom, but that while she was in the act of alighting, and before she had reasonable time to alight, the car was started, whereby she was thrown and injured.

At the trial of this action the presiding justice, at the request of the plaintiff's counsel, gave the following instruction to the jury: "If you believe that this was the crossing of tracks, and that under the practice and custom of the company the cars stop at this crossing, and believe that people get on or off at this place while cars are stopped, then it was the duty of the conductor in charge of the car to ascertain for himself whether passengers wanted to get on or off; and if he could by great care discover who wanted to get off, whether they wanted to get off, that would be equivalent to actual knowledge on the subject."

2. SAME—"GREAT CARE."

This instruction imposed upon the conductor the duty of exercising "great care" to discover if any one wanted to get off the car. It is not modified by any other clause in the charge, but rather emphasized by a statement made immediately before it that "the railroad was bound to use greater than ordinary care."

The law requires that the conductor should have acted only in the exercise of reasonable care. The phrase "great care," as used in the instruction, was without limitation. It was left entirely to the jury to say what meaning should be attached to it. Under it the jury may have said that it was the duty of the conductor to inquire of every passenger upon his car if they wished to alight, and that if he failed to do this, in the exercise of the duty requiring "great care," he was negligent; or, if so strenuous a duty as to inquire of each passenger was not deemed necessary in the exercise of "great care," the jury might have found that some other burdensome duty was imposed by the instruction given.

3. NEGLIGENCE — CARE REQUIRED — DEFINITIONS.

The rule of law now generally recognized by the great weight of authority is that the legal measure of duty, except that made absolute by law, with respect to almost all legal relations, is better expressed by the phrases "due care," "reasonable care," or "ordinary care," terms used interchangeably. "Reasonable care" may be defined as such care as an ordinarily reasonable and prudent person exercises with respect to his own affairs, under like circumstances. In this definition it is the phrase "under like circumstances" that imposes upon the term "reasonable care" both its limitations and its elasticity. The term is a relative one. The same act under one set of circumstances might be considered due care, and under different conditions a want of due care, or negligence. Therefore the duty intended by the use of the phrase "ordinary care" is always referable to the circumstances and conditions, under which the act or omission to act is required to be performed. These limit or define the scope of the situation within which the performance of the same act may be called reasonable or unreasonable. *Held*, that the exceptions to the requested instruction given as aforesaid must be sustained.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1327; vol. 37, Cent. Dig. Negligence, § 6.]

(Official.)

Exceptions from Supreme Judicial Court, Cumberland County.

Action on the case by Ada I. Raymond against Portland Railroad Company for negligence, to recover for personal injuries to the plaintiff while a passenger on one of the cars of the defendant, a street railway corporation. Verdict for plaintiff for \$969. Defendant excepted to a certain instruction given by the presiding justice at the request of the plaintiff's counsel, and also filed a general motion for a new trial. Exceptions sustained. Motion not considered.

Argued before EMERY, STROUT, SAVAGE, and SPEAR, JJ.

Charles E. Gurney, for plaintiff. Libby, Robinson, Turner & Ives, for defendant.

SPEAR, J. This is an action on the case for negligence to recover for personal injuries to the plaintiff while a passenger on one of

the cars of the defendant, a street railway corporation. The case comes up on motion and exceptions. It was alleged in the plaintiff's declaration, and evidence was introduced by the plaintiff tending to show that the defendant's car had been brought to a full stop near the tracks of a steam railroad, and that the car was started again while the plaintiff was in the act of alighting therefrom, and before she had had sufficient and reasonable time to alight, whereby she was thrown and injured.

The defendants offered evidence tending to show that the car, an open one, had come to a stop near the point of intersection with the tracks of the steam railroad; that it was the practice and custom of the defendants to stop there, but the only purpose of the stop was to safeguard the crossing of the said tracks, it not being a station or place where a stop was regularly made for passengers to get off the defendant's cars, although it was in evidence that passengers did sometimes get off or on the defendant's cars there; that throughout the stop the conductor of the car remained upon the car, and was standing all the time on the running board on plaintiff's side of the car, but a few feet behind her, and with his attention upon his passengers of whom he had an unobstructed view; that another employé of the defendant's left the car and went forward to see if the crossing could be made in safety, and, upon finding the way clear, gave the signal for the car to proceed; that the plaintiff never made any movement to leave her seat until the car was again in motion after having made its stop to safeguard the crossing of the tracks, when, without giving any indication by signal or otherwise to the conductor or anybody else that she desired or intended to alight, she suddenly slid down from her seat to the running board, and thence off the car while it was in motion and gathering headway to cross the tracks of the steam railroad. The report of the evidence shows that the contention of the respective parties as above set forth is correctly stated.

Upon these contentions, at the request of the plaintiff's counsel, the presiding justice gave the following instruction to the jury: "If you believe that this was the crossing of tracks, and that under the practice and custom of the company the cars stop at this crossing, and believe people get on or off at this place while cars are stopped, then it was the duty of the conductor in charge of the car to ascertain for himself whether passengers wanted to get on or off; and, if he could by great care discover who wanted to get off, whether they wanted to get off, that would be equivalent to actual knowledge on the subject." To this instruction the defendants seasonably excepted. The defendants also requested certain instructions, but, in view of the conclusion

necessarily arrived at with respect to the above instruction, it becomes unnecessary to consider this request by the defendants. We think the exception must be sustained. The instruction imposed upon the conductor the duty of exercising "great care" to discover if any one wanted to get off the car. This instruction is not modified by any other clause in the charge, but rather emphasized by the statement made immediately before it that "the railroad was bound to use greater than ordinary care."

We think the law required that the conductor should have acted only in the exercise of reasonable care. The phrase "great care," as used in the instruction, was without limitation. It was left entirely to the jury to say what meaning should be attached to it. They may have said that it was the duty of the conductor to inquire of every passenger upon his car if they wished to alight, and that, if he failed to do this in the exercise of the duty requiring "great care," he was negligent. Or, if so strenuous a duty as to inquire of each passenger was not deemed necessary in the exercise of "great care," the jury might have found that some other burdensome duty was imposed by the instruction given.

The rule of law now generally recognized by the great weight of authority is that the legal measure of duty, except that made absolute by law, with respect to nearly all legal relations, is better expressed by the phrases "due care," "reasonable care," or "ordinary care," terms used interchangeably. "Reasonable care" may be defined as such care as an ordinarily reasonable and prudent person exercises with respect to his own affairs, under like circumstances. In this definition it is the phrase "under like circumstances" that imposes upon the term "reasonable care" both its limitations and its elasticity. The term is a relative one; that is, the same act under one set of circumstances might be considered due care, and under different conditions a want of due care or negligence. Therefore the duty intended by the use of the phrase "ordinary care" is always referable to the circumstances and conditions under which the act or omission to act is required to be performed. These limit or define the scope of the situation within which the performance of the same act may be called reasonable or unreasonable. The same rule is now generally held to apply to employment in the most perilous places and in the manipulation and use of the most dangerous agencies. A person may be engaged upon a most treacherous machine, yet the employer is held only to the exercise of reasonable care in explaining the hazard connected with the machine and the operation of it. One may employ the use of dynamite or any other powerful explosive, and yet he is responsible only for due care. But in each of these cases due care, under the flexibility of the definition given, might, in the minds of the

jury or of the court, require the exercise of the highest possible care which human effort could bestow; but yet it would be in the end only such care as an ordinarily prudent and careful man would exercise, under like circumstances, with respect to his own affairs.

Am. & Eng. Enc. Law (2d Ed.) vol. 21, p. 459, under the heading "Degrees of Negligence," summarizes the authorities as follows: "The theory that there are three degrees of negligence, described as 'slight,' 'ordinary,' and 'gross,' was introduced into the common law from some of the commentators of Roman law. While not in frequent use, references are still found in judicial discussions of the subject to the classification of negligence into degrees, the tendency of modern authority and the weight of the best considered cases are now opposed to this view, holding that in every case negligence, however described, is merely a failure to bestow the care and skill which the situation demands, and hence it is more accurate to call it simply negligence. Some decisions even go further and declare that the classification of negligence into degrees is a matter of pure speculation and of no practical consequence; that it is useless and tends to confusion; that in fact it is unsafe to base any legal decision on distinctions in the degrees of negligence."

In *Steamboat New World v. King*, 16 How. 469, 14 L. Ed. 1019, Mr. Justice Curtis, in delivering the opinion of the court, said: "The theory that there are three degrees of negligence, prescribed by the terms 'slight,' 'ordinary,' and 'gross,' has been introduced into the common law from some of the commentators of the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield until there are so many general exceptions that the rules themselves can scarcely be said to have a real operation." Then he proceeds to quote from *Storer v. Gowen*, 18 Me. 177, as follows: "How much care will in a given case relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending upon a great variety of circumstances which the law cannot exactly define."

In *Perkins v. New York Central Railroad Company*, 24 N. Y. 196, the court say: "I think with Lord Deunman, who, in *Hinton v. Dibbin*, 2 Q. B. 661, said: 'It may well be doubted whether between gross negligence and negligence merely any intelligent distinction exists.'"

In *Railroad Company v. Lockwood*, 17 Wall. 382, 21 L. Ed. 627, Mr. Justice Bradley,

delivering the opinion of the court, said: "We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. * * * And this seems to be the tendency of modern authors."

In *Milwaukee Railroad Company v. Arms et al.*, reported in 91 U. S. p. 494, 23 L. Ed. 374, the court say: "This court has expressed its disapprobation of these attempts to fix the degree of negligence by legal definition. * * * Some of the highest English courts have come to the conclusion that there is no intelligent distinction between ordinary and gross negligence. * * * 'Gross negligence' is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence'; but after all it means the absence of the care that was necessary under the circumstances." See, also, *Rouse v. Downs*, 5 Kan. App. 549, 47 Pac. 982; *McPheeters v. Hannibal, etc., R. Co.*, 45 Mo. 22; *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; *Culbertson v. Holliday*, 50 Neb. 229, 69 N. W. 853.

It will be here observed that the courts in discussing the above propositions have used the term "negligence," instead of the word "care," to express the measure of duty. But confusion has arisen from regarding "negligence" as a positive, instead of a negative, word.

For this reason, it is usual to express the duty owed in positive terms by stating what constitutes "due care," rather than in negative terms by stating what constitutes "negligence," which is the unintentional failure to perform a duty implied by law. "Negligence" is the opposite of "due care." Where due care is found, there is no negligence. If there is a want of due care, then there is negligence. We are inclined to agree with the great weight of judicial opinion that the attempt to divide negligence, or its opposite due care, into degrees, will often lead to confusion and uncertainty. It seems to us, therefore, that the measure of duty, owed by persons in the discharge of their mutual relations, would be better expressed by the use of the term "negligence," if one prefers a negative definition, or due, reasonable, or ordinary care, always having reference to the circumstances and conditions with regard to which the terms are used. In view of the above conclusion, it becomes unnecessary to consider the motion.

Exceptions sustained.

HEINTZ et al. v. LE PAGE et al.
(Supreme Judicial Court of Maine. Dec. 8, 1905.)

1. INTOXICATING LIQUORS—DEFINITION.

Section 40, c. 29, Rev. St. 1903, reads as follows: "No person shall at any time, by himself, his clerk, servant or agent, directly or in-

directly, sell any intoxicating liquors, of whatever origin, except as hereinbefore provided. Wine, ale, porter, strong beer, lager beer and all other malt liquors, and cider when kept or deposited with intent to sell the same for tipping purposes, or as a beverage, as well as all distilled spirits, are declared intoxicating within the meaning of this chapter; but this enumeration shall not prevent any other pure or mixed liquors from being considered intoxicating."

Held, that any liquor, containing alcohol, which is based on such other ingredients or by reason of the absence of certain ingredients that it may be drunk by an ordinary person as a beverage and in such quantities as to produce intoxication, is intoxicating liquor. If its composition is such that it is practicable to commonly and ordinarily drink it as a beverage, and drink it in such quantities as to produce intoxication, then it is intoxicating liquor within the meaning of the statute.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 142.]

2. SAME—ACTION FOR PRICE.

An action for the price of intoxicating liquors sold contrary to the laws of this state cannot be maintained in the courts of this state.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 474-479.]

3. SAME—KNOWLEDGE OF VENDOR.

It is immaterial whether the plaintiffs had any knowledge for what purpose the liquors were purchased, if they were in fact intoxicating liquors and intended by the purchasers for illegal sale in this state.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 476.]

(Official).

Assumpsit by John C. Heintz and others against Francis Le Page and others on account annexed to recover \$770 for "Paragon Malt Extract" sold and delivered by the plaintiffs, residents of the state of New York, to the defendants, residents of Maine, October 21, November 5, and December 19, 1903, the entire quantity being 60 barrels, containing 800 dozen, or 9,600, bottles. Tried at January term, 1905, Supreme Judicial Court, Penobscot county. Plea, the general issue, with a brief statement alleging "that the claim or demand in the above-entitled case is wholly for intoxicating liquors sold in violation of chapter 29, § 64, Rev. St. Me. 1903, and in violation of chapter 27, § 56, Rev. St. Me. 1883, then in force at the time said liquors were purchased."

Verdict for plaintiffs for \$770. Defendants then filed a general motion for a new trial. Sustained.

Argued before EMERY, STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Bertram L. Fletcher, for plaintiffs. H. H. Patten, for defendants.

SPEAR, J. This is an action of assumpsit to recover the sum of \$770 on the following account: "1903, Oct. 21. To Mdse., \$210. Nov. 5. To Mdse., \$420. Dec. 19. To Mdse., \$210. \$840." The first charge in this account was for 20 barrels, 200 dozen, Paragon Malt Extract. The second charge was for 40 barrels, 400 dozen, Paragon Malt Extract.

The third charge was for 20 barrels, 200 dozen, Paragon Malt Extract. In other words, from the 21st day of October, 1903, to December 19, 1903, a little less than two months, the plaintiffs in this case sent to the defendants at Millinocket, Me., 60 barrels, containing 800 dozen (9,600) bottles of Malt Extract, and claim that it was sold and delivered for medical use by the inhabitants of this village. The defendants pleaded the general issue to the plaintiffs' declaration, and for a brief statement in defense claimed "that the goods they purchased were intoxicating liquors, sold out of this state with the intention that they should be sold in this state in violation of chapter 29, § 64, Rev. St. 1903, which reads as follows: 'No action shall be maintained upon any claim or demand, promissory note or security contracted or given for intoxicating liquors sold in violation of this chapter or for any such liquor purchased out of the state with the intention to sell the same or any part thereof in violation thereof; but this action shall not extend to negotiable paper in the hands of a holder for a valuable consideration and without notice of the illegality of the contract.'" The undisputed facts, regardless of the testimony of witnesses, show conclusively that the plaintiffs knew that these malt extracts were intoxicating. We have no doubt that they were compounded as a subterfuge to avoid the effect of the prohibitory law of this state. The claim that they intended the sale of 9,600 bottles of this extract for medicinal use only in the village of Millinocket and vicinity is utterly absurd. The quantity alone, under the circumstances, is sufficient to convince us that these extracts were intended to be sold as a beverage, and not as a medicine. The other evidence in the case, if any was needed, thoroughly confirms this view. The plaintiffs' salesman admits that he told the defendants, "so long as they sold malt extract as a medicinal preparation, with the cork intact, that it would be selling it just as safe as anything that they had in their store." Why this advice, if the agent did not know that this preparation was intoxicating? What difference could it make, if it was not intoxicating, whether the cork was intact or not? But this was not all. Six witnesses testified without contradiction that they drank these very goods, and five of them that they became intoxicated on them, and the other that he had seen many people get drunk on them.

It also appeared by the testimony of Prof. Knight, called by both the plaintiffs and defendants, that an analysis of several bottles of this extract showed that it contained from 4.89 per cent. to 5.05 per cent. of alcohol. The defendants were also compelled to pay a United States internal revenue tax. This liquor was sold by the bottle and glass, and the testimony shows that one person could drink two or three bottles at

a time. From the testimony we should infer that it was drank practically the same as lager beer and ale. Over 300 bottles were sold on one Fourth of July. The justice presiding charged the jury as follows, with respect to what constituted intoxicating liquors: "So I repeat, any liquor, containing alcohol, which is based on such other ingredients or by reason of the absence of certain ingredients that it may be drank by an ordinary person as a beverage and in such quantities as to produce intoxication, is intoxicating liquor. If its composition is such that it is practicable to commonly and ordinarily drink it as a beverage, and to drink it in such quantities as to produce intoxication, then it is intoxicating liquor." Under this definition, which is entirely accurate, and the evidence in this case, we hardly see how any question can be raised as to the intoxicating quality of the malt extract for which the plaintiffs seek to recover. The evidence indisputably shows that it could be drank in any quantity up to two or three bottles, and by everybody who wanted to drink it, and that it produced intoxication. It seems to us very clear that the plaintiffs must, when they sold these large invoices of goods, have understood the purpose for which they were bought.

It is, however, immaterial whether the plaintiffs had any knowledge for what purpose these extracts were purchased, if they were in fact intoxicating liquors and intended by the purchasers for illegal sale in this state. *Knowlton v. Doherty*, 87 Me. 518, 33 Atl. 18, 47 Am. St. Rep. 849.

Motion sustained.

Verdict set aside.

New trial granted.

GOODWIN v. INHABITANTS OF CHARLESTON.

(Supreme Judicial Court of Maine. Dec. 11, 1905.)

SCHOOLS AND SCHOOL DISTRICTS—TUITION EXPENSES—PAYMENT BY FATHER—RECOVERY BY CHILD.

Under the provisions of section 63, c. 15, Rev. St., a minor, residing with his father, who never undertook to make any contract in his own behalf respecting his tuition at a school attended by him, and who personally incurred no legal indebtedness, made no expenditure, and sustained no loss, cannot maintain an action against a town to recover the amount voluntarily paid as tuition for him to such school by his father.

(Official).

Exceptions from Supreme Judicial Court, Penobscot County.

Action by Frank W. Goodwin, by his next friend, against the inhabitants of Charleston, to recover money paid by plaintiff's father as tuition for plaintiff, a minor residing with his father, as a pupil in school. Verdict for defendant, and plaintiff excepts. Exceptions overruled.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, and PEABODY, JJ.

Taber D. Bailey, for plaintiff. P. H. Gillin, for defendant.

WHITEHOUSE, J. It is provided by section 63, c. 15, of the Revised Statutes, that "any youth who resides with a parent or guardian in any town which does not support a free high school giving at least one four years' course properly equipped and teaching such subjects as are taught in secondary schools of standard grade in this state may, when he shall be prepared to pursue such four years' course, attend any school in the state which does have such a four years' course and to which he may gain entrance by permission of those having charge thereof, provided said youth shall attend a school or schools of standard grade which are approved by the state superintendent of public schools. In such case the tuition of such youth, not to exceed thirty dollars annually for any one youth, shall be paid by the town in which he resides as aforesaid."

The plaintiff was a minor of the age of 17 years, residing with his father in the defendant town of Charleston, which did not maintain a free high school giving at least one four years' course. During the school year 1902-03, the plaintiff attended the Higgins Classical Institute in Charleston, a school of standard grade, approved by the State Superintendent of Schools. According to the practice prevailing in that institution, he was permitted to enter and pursue his studies through his freshman year without any certificate of qualification from the school committee of the town. On the 26th day of December, 1903, the plaintiff took an examination before the school committee of the town, but failed to receive from that board a certificate of qualification to enter Higgins Classical Institute. Notwithstanding this fact, by permission of those having charge of the Institute, the plaintiff entered upon his second, or sophomore, year in that school and maintained "good rank" in his studies during the fall and winter terms of that year. Although requested, the town officers refused to pay the plaintiff's tuition for these two terms, and the amount was thereupon paid to the Institute by the plaintiff's father. This action was brought in the name of the plaintiff, by his next friend, to recover from the town the amount thus voluntarily paid by his father. The presiding justice ruled that this action in the name of the plaintiff was not maintainable, and ordered judgment for the defendant. The case comes to this court on exceptions to this ruling.

It is the opinion of the court that the ruling of the presiding justice was correct. Whether or not under the provisions of the statute above quoted the Higgins Classical

Institute could have maintained an action to recover the tuition of a pupil who was thus permitted to enter the school without a certificate of qualification from the school committee, if the amount had not been paid by the pupil's father, and whether under the same circumstances the father could have maintained an action against the town in his own name for the tuition thus paid by him, are questions not now before the court. The only question now presented for determination is whether this action brought in the name of the pupil himself, by his next friend, can be maintained to recover from the town the amount of the tuition voluntarily paid to the Institute by his father, and our conclusion is that the situation disclosed by the evidence constitutes no legal basis for the plaintiff's action. He was a minor, and never undertook to make any contract in his own behalf respecting his tuition at the Institute. He personally incurred no legal indebtedness, made no expenditure, sustained no loss, and acquired no right of action. The entry must therefore be:

Exceptions overruled.

GERARD v. IVES et al.

(Supreme Court of Errors of Connecticut. Jan. 4, 1906.)

1. WILLS—CONSTRUCTION—"HEIRS"—PERSONS INCLUDED.

The word "heirs," in a devise for life with remainder to the devisee's heirs, was, in the absence of anything to the contrary, used in its ordinary legal sense, and could not be construed as meaning either the children of the devisee or her heirs living at the death of testator.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1090, 1093.]

2. PERPETUITIES—FUTURE CONTINGENT ESTATES.

A devise for the use of a devisee for life with remainder to the devisee's heirs was void, under the statute against perpetuities in force in 1871, in so far as the attempted disposition of the remainder was concerned.

3. EXECUTORS AND ADMINISTRATORS—DISTRIBUTION—EFFECT.

A will directed that a portion of the estate be held by a trustee to pay the income to a devisee during her life with remainder to her heirs. In making distribution in the probate court, the distributors consulted the devisee and her son, and no appeal was taken from the distribution. There was no agreement that the son took any interest, save such as he took by the will; and the devisee and her son supposed and claimed subsequently that the son had a remainder, and testator stated to the son that he had a remainder. *Held* that, the son as a matter of law having taken no interest under the will, he obtained no interest by the distribution.

4. COURTS—PREVIOUS DECISION IN SAME CASE—EFFECT.

Where a demurrer to a complaint was overruled, the court as a matter of law on the final trial was not required to follow the decision on the demurrer.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 340.]

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Suit by George L. Gerard against Marie E. Ives, as administrator, and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

William B. Stoddard and John K. Beach, for appellant. Harrison Hewitt, for appellees.

TORRANOE, O. J. The contest in this case relates to the ownership of a lot of land in New Haven, fronting on Chapel street. The plaintiff is the son of Eunice Louise Beecher, and he claimed in effect that under the will of his mother's aunt, Sarah L. Maltby, the life use of said land was given to his mother, and the remainder in fee to himself. The defendants claim (1) that the clause of said will purporting to dispose of said land to the plaintiff and his mother is void as to him; (2) that consequently he has no interest of any kind in said land; and (3) that whatever interest his mother had therein now belongs to the defendants, under the decision of this court in the case of *Ives v. Beecher*, 75 Conn. 564, 54 Atl. 207. The plaintiff also claims that, if he has no interest in said land under said will, he has such an interest under the distribution of Mrs. Maltby's estate, and the facts found with reference to the acts and conduct of the distributees thereunder.

The complaint was brought under the provisions of the statute (Gen. St. 1902, § 4053) relating to actions to settle the title to land, and one of the prayers for relief is for a judgment that the plaintiff is the owner in fee of said land, subject to his mother's life use. The court held upon the facts found that the plaintiff had no interest in said land, and rendered judgment to that effect; and whether it erred in so doing is the general question in the case. The following is a somewhat condensed statement of the facts found: Mrs. Maltby died in 1871, and her will was probated in October of that year. At the time of her death she owned the land here in question. Her sole heir at law was her sister, Mrs. Garfield, who died intestate in March, 1872, before Mrs. Maltby's estate was distributed. Mrs. Garfield's heirs at law were Nathaniel and John, her sons, Mrs. Beecher, a daughter, and Josephine L. Hazleton Hill, a child of a deceased daughter. In May, 1872, the estate of Mrs. Maltby was settled and distributed. That part of the will of Mrs. Maltby under which the plaintiff claims title reads as follows: "All the real estate that I inherited from my late father, Nathaniel Lyon, I give, devise, and bequeath as follows, to wit: * * * one-fourth part to Henry White, Esq., of New Haven, in trust and confidence that he will annually pay over the rents, issues, interest, and profits thereof to Eunice Louise Beecher, wife of George H. Beecher, my niece, during her natural life; and then and after her decease

I give, devise, and bequeath the said fourth part to her lawful heirs forever." That part of the distribution of the estate of Mrs. Maltby that is claimed to have some bearing upon the questions involved in this case reads as follows: "We have set to Henry White, in trust for Eunice Louise Beecher, * * * during her life, and after her decease to her heirs," certain property described in the distribution, including the land in question.

In making said distribution, the distributors consulted with Nathaniel Garfield and Mrs. Beecher, and endeavored to set out to the distributees such parcels of the estate as would be satisfactory to them, and no appeal was taken from the distribution. "There was no discussion between the distributors and distributees as to the form of said distribution, or of the ultimate effect of the language of the will and of the distribution upon the course of title to the land in question, and such distributors and distributees all endeavored and intended to carry the provisions of the will of Sarah L. Maltby into effect in accordance with the terms thereof, and substantially in the language of the will. There was no agreement, consent, or understanding by the parties interested in said distribution that the plaintiff should by said distribution take any interest in the estate of said Sarah L. Maltby, or in any of the property of said estate, except such interest as he might take by virtue of the will of said Sarah Lyon Maltby at the expiration of the life estate of his mother, should he survive her." Mrs. Beecher is now over 80 years old, and the plaintiff, her son by a deceased husband, and the only child she ever had, is now about 64 years old. When Mrs. Maltby's will was executed in 1853, the plaintiff was about 13 years old, and his mother was then about 34 years old, and married to her present husband. Mrs. Beecher and the plaintiff have always supposed and claimed that she had only a life estate in the land in question, and that he owned the remainder in fee, and none of the other devisees under the Maltby will, and none of the legal representatives of Mrs. Garfield, ever claimed any interest in said land, or that it belonged to the estate of Mrs. Garfield. In February, 1873, Henry White executed a lease of the land in question to Mrs. Beecher and her husband, and immediately thereafter Mrs. Beecher and the plaintiff took possession of said land, and neither White nor his successors in said trust have since then ever had actual possession or charge of said property. For more than 20 years the plaintiff, as agent of his mother in the management of her life interest, has been in possession of said land, and during that time Mrs. Beecher, at her own expense, erected a valuable brick building upon said land. "The said Sarah L. Maltby for many years prior to her death often met this plaintiff, and they were upon very friendly terms, and she told this plaintiff that she had provided

by her will that this plaintiff's mother, the said E. Louise Beecher, was simply to have a life estate in one-fourth of Mrs. Maltby's estate, and that this plaintiff would receive by her will the remainder."

Upon the facts found the plaintiff made these two claims of law: "(1) That under the provisions of the will of Sarah L. Maltby this plaintiff obtained a vested title at the death of Sarah L. Maltby in the property in question, subject to the life estate of his mother, E. Louise Beecher; (2) that by virtue of the distribution and of the proceedings of the probate court this plaintiff obtained a title in fee simple to this property in question, subject to the life use of the said E. Louise Beecher."

The first of these claims is founded upon these words of the will hereinbefore quoted, namely: "One-fourth part to Henry White, * * * in trust and confidence that he will annually pay over the rents, issues, interest, and profits thereof to Eunice Louise Beecher * * * during her natural life; and then and after her decease, I give, devise, and bequeath the said fourth part to her lawful heirs forever." The plaintiff claims that the words "her lawful heirs," as used in the above quotation, should be held to mean either "children" of Mrs. Beecher, or the lawful heirs of Mrs. Beecher, living at the death of Mrs. Maltby. This claim is not tenable. In its primary and technical meaning in our law, the word "heirs" is used to express the relation of persons to some deceased ancestor; and when it is used in a will, as here, to point out legatees or devisees, its primary legal meaning should be given to it, unless it is clearly shown by legitimate evidence that the testator used it in a different sense. This is the settled rule of construction in this state. *Gold v. Judson*, 21 Conn. 616; *Rand v. Butler*, 48 Conn. 293; *Leake v. Watson*, 60 Conn. 498, 21 Atl. 1075; *Jackson v. Alsop*, 67 Conn. 249, 34 Atl. 1106; *Ruggles v. Randall*, 70 Conn. 44, 38 Atl. 885. We are of opinion that the claim of the plaintiff as to the meaning of the word "heirs" finds no support in the will itself, or in the facts found relating to the circumstances under which it was made, and that said word must here be given its primary and technical meaning. This being so, it necessarily follows under the repeated decisions of this court from the case of *Rand v. Butler*, 48 Conn. 293, down to that of *Buck v. Lincoln*, 78 Conn. 149, 56 Atl. 522, that the attempted disposition by will of the remainder interest in the land in question here was void and of no effect, by virtue of the statute against perpetuities, so-called, in force when Mrs. Maltby died. We are therefore of opinion that the plaintiff took no interest whatever in the land in question under the will of Mrs. Maltby.

The next question is, has he any interest in said land by virtue of the distribution of

the estate of Mrs. Maltby and the facts found with reference to the acts and conduct of the distributees thereunder? No distribution of real estate devised can be made under the devise to one not within the terms of the devise. No distribution of real estate devised can be treated as an original source of title. It simply declares those to be benefited by the devise and the extent of that benefit. There is nothing, therefore, in the suggestion that, as the former statute of perpetuities affected only "estates given by deed or will," it did not affect distributions. If the plaintiff has any interest in the lands in question, it must be under the will of Mrs. Maltby. The plaintiff likens this case to that of *Ward v. Ives*, 75 Conn. 598, 54 Atl. 730, but the facts in the two cases differ widely. In *Ward v. Ives* all the parties interested in the final settlement, in 1886, of the estate of a man who died intestate in 1859, entered into what was termed a "family arrangement" to have their respective rights settled and determined by probate proceedings in the form of a distribution to themselves directly, instead of through the immediate heirs of said intestate, and this arrangement was carried out. The land distributed under said arrangement to Mabel I. Stevens, a granddaughter of the intestate, was made subject to the life use of her father, as tenant by the curtesy, when, in fact, he had no such estate therein, and was a burden thus imposed upon the land to which it was not legally subject. Under the distribution so made and accepted by the court of probate the parties entered into the possession of their respective shares, and ever thereafter continued to hold them under it. Under it Mabel and her father entered into possession of the land set to her. They lived together upon the land, he taking to himself, under a claim of right as tenant by the curtesy, all the rents and profits of said land, and she asserting no claim to the contrary, and apparently fully satisfied with the distribution as made. This continued until she died intestate, and without issue, in 1898. After her death those interested in her estate claimed the rents and profits collected by her father, claiming as tenant by the curtesy from the time of her death; but this court held that they were not entitled to do so, because she, with full knowledge, had by her conduct agreed to abide by the family arrangement, and that those claiming under her as against her administrator could claim no right which she had elected to waive and abandon.

In the case at bar the distribution was not made pursuant to any such family agreement. It was made by order of the court of probate in the orderly settlement of the estate, and not to carry out any arrangement made by the distributees. They were not consulted as to the form or the effect of it; and there was between them "no agreement, consent, or understanding" that the

plaintiff should take, by the distribution, any interest in the land in question, "except such interest as he might take by virtue of the will"; and nothing was set out to the plaintiff by name. In setting out the land here in question, the distribution follows the language of the will, and allots to the trustee of Mrs. Beecher just what the will gives him for her, and to her heirs at her decease just what the will gives them, and, as in legal effect the will gave them nothing, it follows that nothing was set to them or to the plaintiff by the distribution. Under these circumstances, and upon the facts found with reference to the acts and conduct of the distributees subsequent to the distribution, it cannot be said that the distributees here waived or abandoned any right in favor of the plaintiff, or that he has acquired as against them or their creditors any right or interest in or to the land in dispute.

It may be added that the distribution neither names nor, as things now stand, embraces the plaintiff. "*Nemo est hæres viventis.*" Before the trial of the case upon its merits a demurrer to the complaint had been overruled by the court (Thayer, J.), and upon the final trial the plaintiff claimed that the court below was bound to follow the decision upon the demurrer, and the failure of the court to do so is assigned for error. This claim and assignment are without merit; for as matter of law the court was not bound to follow the prior ruling upon the demurrer (*Wiggin v. Federal Stock & Grain Co.*, 77 Conn. 507-516, 59 Atl. 607), and in the view we have taken of the case the demurrer and the ruling upon it become of no importance.

There is no error. The other Judges concurred.

In re NICHOLS.

(Supreme Court of Errors of Connecticut. Dec. 15, 1905.)

1. WILLS—MENTAL CAPACITY—UNDUE INFLUENCE—EVIDENCE.

In a will contest, evidence considered, and held to justify a finding that testator possessed sufficient mental capacity to make the will and was not induced to execute it by undue influence.

2. SAME.

Where testator executed a will in 1890, that he was insane prior to 1869 and again became so in 1902, after the commencement of proceedings for the appointment of a conservator over him, and that he was always of weak intellect and never understood the effect of a family settlement, afford no legal reason why he might not have had a sufficient mental capacity to execute the will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 66.]

3. JUDGMENT—RES JUDICATA—ISSUES.

The appointment of a conservator of a testator in 1903, on the ground that he was mentally incapable of bringing suit for setting aside certain conveyances, after a finding that he had

from an early period of his life been mentally unsound in varying degrees, and that he was insane prior to 1872 and since then had been incapable of understanding or managing business or property affairs of any consequence, was not conclusive as an adjudication on the question of testator's capacity to execute a will in 1890, as such question was not within the issues and was not involved in the adjudicated facts.

4. SAME—FINDINGS OF FACTS.

Facts not made a part of the judgment or the record, but found only for the purpose of enabling an appeal to be taken, are not adjudicated facts, binding in a subsequent action between the same parties.

5. WITNESSES—CROSS-EXAMINATION.

Where, in a will contest, an attesting witness testified that testator was of sound mind at its execution, it was error to exclude questions on cross-examination as to how many years he had been identified in business relations with testator, as to what opportunities he had for forming an opinion as to his mental soundness, and what his experience with testator had been.

6. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The exclusion of proper questions to a witness is not sufficient ground for reversal, where the witness was subsequently examined fully on the subject.

7. WITNESSES—REDIRECT EXAMINATION.

Where a witness testified on cross-examination that a brother or testator had a characteristic similar to testator, it was error to exclude, on redirect examination, a question as to the brother's mental condition when he manifested such peculiarities.

8. EVIDENCE—OPINIONS.

Where a witness testified to conversations between testator and his brother concerning the execution of the will and that the testator in certain matters deferred to his brother's judgment, it was proper to permit him to be asked whether there was any act or statement of such brother indicating coercion or attempt to influence testator.

Appeal from Superior Court, Fairfield County; Alberto T. Roraback, Judge.

Application by Susan W. Nichols for the probate of a will of Samuel W. Nichols, deceased. From a judgment of the superior court, reversing a decree of the probate court approving the will, the contestant appeals. Affirmed.

Stiles Judson, for appellant. Alfred S. Brown and Goodwin Stoddard, for appellee.

HALL, J. The testator, Samuel W. Nichols, died in 1903, 69 years of age, unmarried, leaving a will executed December 11, 1890, containing but two provisions: One giving all his property absolutely to his brother, Alexander, and his sister, Susan W. Nichols, in equal proportions, and upon the death of either before that of the testator, to the survivor; and the other appointing said devisees, respectively, executor and executrix of the will. Said Susan W. Nichols is the proponent of the will, and the appellant from the decree of the court of probate refusing to approve the will. The appellee contesting the will is Georgie B. Wentz, a niece of the testator. The testator and his brothers and sisters, Alexander, George, John, William,

Charles, Effingham, Susan W., and Maria, were the children of Samuel and Susan N. Nichols. Said Susan N. Nichols died in 1872, and by her will gave, upon the death of her husband, which occurred in 1880, to eight of her children, not including Charles, as tenants in common, two pieces of real estate in the city of New York, one known as the "Malden Lane and Liberty Street property," hereafter referred to as the "Malden Lane property," and the other as the "Cedar Street property"; to John, Susan W., and Maria, the homestead at Greenfield Hill in this state; and charged each of her six sons, who were such devisees, with the payment of \$2,500, when they should become entitled to the income of the property devised to them, such sum of \$15,000 to be held by George, Effingham, William, and Alexander in trust for the support of Charles during his life; and, upon his death, without issue, the unexpended residue to be distributed among his surviving brothers and sisters.

One of the brothers having conveyed his interest in the Malden Lane and the Cedar Street properties to another of the brothers, the remaining seven tenants in common, in March, 1877, united in a conveyance of said properties, subject to the life estate of their father, and to said charge of \$15,000, to George, Effingham, Alexander, Susan W., and Maria, as joint tenants, who, in 1882, conveyed the same properties through an intermediate conveyance to Effingham, Alexander and Susan W., as joint tenants, subject to said charge of \$15,000; the consideration named in said deeds being a nominal sum, and other good and valuable consideration. In 1888, said three joint tenants conveyed the Cedar Street property to the Mutual Life Insurance Company of New York for the consideration of \$80,000; and, in 1902, Susan W., who by the death of Alexander and Effingham had become the sole owner of the Malden Lane property, sold it for \$140,000. By conveyance from John and Maria, Susan W. became in 1885 the sole owner of the Greenfield Hill property. Charles died in November, 1892, in a retreat for the insane, and in the following month his six brothers and two sisters signed a document, which was duly recorded, acknowledging payment of their respective distributive shares of said \$15,000, and releasing the trustees from liability respecting it.

The testator studied law and was admitted to the bar of New York state prior to 1858, in which year he became an inmate of an insane retreat, where he remained until 1869, when he was discharged, improved. Thereafter, until near the time of his death, he lived with the family at Greenfield Hill, consisting of Susan W., Alexander, and John, and during a considerable portion of the time, also of William and Effingham and their families. The premises upon which they lived consisted of about two acres of

land with a house upon it, until in 1894, when 25 acres of adjoining land was purchased by Susan W. and a new house built upon it. The testator and his brother John continued, of their own choice, to occupy the old house, taking their meals in the new one at the table with the rest of the family. Respecting his manner of life and deportment during this time the trial court finds these facts: The testator presided at the table, was gentlemanly and refined in his deportment, affectionate in his treatment of his brothers and sisters, and neat in his person and attire, and in the care of his room. He occupied himself with gardening, transacted business intelligently, read the daily papers and current magazines, the books in his father's library, and periodicals relating to farming and gardening, and discussed intelligently and interestingly the daily events, and the subjects of which he had read. During the winter he spent much of his time in New York, at the home of one of his brothers, remaining there several months at a time, always going to and about the city unattended. The household bills were paid by Susan W., or by Effingham or Alexander, and the testator was never charged anything for his support. His resources consisted of a legacy from his father of \$5,000, which he lost in speculative investments.

In 1890 the testator began to talk about receiving his share of his mother's estate, and on the 10th of December of that year went to the office of Effingham, who was a lawyer in New York, and had general charge of the family property and financial matters, and met him and Mr. Brown, the family attorney, by appointment, and discussed with them the amount which he should receive as his share. The Cedar Street property had then been sold for \$80,000, and the Malden Lane property was then valued at \$60,000. There was an indebtedness from the testator to Effingham, which the latter proposed should be canceled, and that the testator should further receive certain railroad bonds which Effingham then had as the consideration of a release of his interest in his mother's estate. On the following day the testator stated the number of said bonds which he claimed, to which Effingham assented, and the testator thereupon executed a release to Effingham, Alexander, and Susan W., of all his interest in his mother's estate, for the stated consideration of \$11,265, made up of the value of said bonds, and said indebtedness of the testator to Effingham, with interest to that date of \$1,265. The testator thereafter received the income from these bonds until he loaned the certificate of deposit of the trust company which held them, which certificate he never again recovered. It did not appear that the testator received any other consideration for said deeds, and releases of

his interest in his mother's estate or any other payment of his share of the rent of the Maiden Lane property amounting to \$4,000 or \$5,000 a year, than said sum of \$11,285 and the care and support which he received from his brothers and sisters.

On said 11th of December, 1890, after signing said release, the testator went into a room apart from Effingham and duly executed the will in question, which was produced and read and explained to him by said Brown, and had been prepared in accordance with the previously expressed intention of the testator, and of the execution of which and of his settlement with Effingham he subsequently informed several members of his family. Thereafter the testator continued the same course of life without any apparent change until March, 1902, when the appellee George B. Wentz applied to the court of probate for the appointment of a conservator over him, alleging in her petition that from mental derangement he had become incapable of managing his affairs. The court of probate denied the application, but, upon an appeal to the superior court a conservator was appointed in January, 1903. The appeal from that judgment to this court, entitled "Wentz's Appeal from Probate," is reported in 76 Conn. 405, 56 Atl. 625. After having testified in those proceedings upon being subpoenaed as a witness by this appellee, the testator failed mentally and physically until in May, 1903, it became impossible to take care of him at home, and he was removed to a sanitarium, where he died in the following September. He left little estate of value. John, Maria, and Susan W. are the only living children of said Samuel and Susan N. Nichols.

The said George B. Wentz is a daughter of William Nichols by his first wife, who was divorced from him in 1870, and the appellee has since lived with her mother, and the relations of herself and her mother with the brothers and sisters of her father have not been friendly. The conservator so appointed upon her application, commenced an action against Susan W. Nichols, which was pending at the time of the testator's death, for an accounting, and for a restitution to the testator of his interest in said New York real estate. Upon these facts the trial court held that the testator, at the time he executed the will in question, possessed sufficient mental capacity to make said will; that he was not induced to make it by the undue influence of Effingham and Susan W. Nichols, as alleged in the appellee's reasons for contesting the will, and reserved the decree of the court of probate refusing to admit said will to probate. Assuming for the moment that no mistake was made in the rulings upon evidence, the facts found fully justify the decision of the trial court, unless a different conclusion was compelled by the judgment in Wentz's Appeal.

The fundamental test of the capacity of the testator to make the will in question is whether his mind and memory were sound enough to enable him to know and understand the business in which he was engaged when he executed the instrument claimed to be his will. *Sturdevant's Appeal*, 71 Conn. 392-401, 42 Atl. 70. The fact that he was insane prior to 1890; that he again became so after his niece brought him before the courts in 1902-03 in the proceedings for the appointment of a conservator over him; that he was always of weak intellect, and never fully understood the purpose and effect of the family arrangement by which the New York property was conveyed to certain of his brothers and sisters as joint tenants in 1877, or of the deeds and releases which he signed, furnishes no legal reason why he might not have been found to have had sufficient capacity to make this will on the 11th of December, 1890. *Kimberly's Appeal*, 68 Conn. 428-438-440, 36 Atl. 847, 37 L. R. A. 261, 57 Am. St. Rep. 101. The will is a very simple one, and carries upon its face no evidence that it is the product of an unsound mind. It disposes of all the testator's property by a single provision. The two devisees are a brother and sister of the testator with whom he had lived, and by whom he had been cared for during most of his life, and are two of the three joint tenants to whom the New York property had been conveyed by the other brothers and sisters. The history of the testator's life, and the circumstances under which the will was made, as narrated in the finding, indicate sufficiently clearly that when the testator executed his will he understood what property he was possessed of; that he was making a disposition of it to take effect after his death; and that he appreciated to whom he was giving it, and to whom he ought to give it. The facts are entirely consistent with the conclusion that there was no undue influence exercised over the testator. It does not appear that Effingham could have received any benefit from the will as it was made, or that Susan W. Nichols attempted in any way to induce the testator to make such a will, or was present when it was made or executed, or had any knowledge of it until afterward. Having found that it was shown by a preponderance of evidence that there was no undue influence, the court was not required to state upon whom it considered the burden of proof to have rested upon that question. The adjudication in Wentz's Appeal was not conclusive upon the question of the testator's capacity to make this will. That question was not within the issues of that case, nor was it involved in the adjudicated facts.

It appears by paragraph 27 of the finding of facts that the files and records of the superior court in Wentz's Appeal, including the finding of facts made in that case for the pur-

pose of an appeal to this court, were admitted in evidence, against the appellant's objection, for the purpose of showing that the mental condition of the testator in January, 1903, was in issue, and what it then was and as evidential of his mental condition when the will was executed. They are attached to, and made a part of the finding in this case. It appears by the judgment file in that case, dated January 8, 1903, that Susan W. Nichols, the appellant in this case, appeared to defend said application, and that the court found the allegations of said application true, and appointed a conservator over the testator as an incapable person. The following is a part of the finding of facts in Wentz's Appeal, made by the trial judge in that case for the purpose of an appeal to this court. "Said Samuel [W.] Nichols has, ever since an early period of his life, been mentally unsound in varying degrees. * * * He was insane and an inmate of an insane asylum for a considerable number of years, 7 to 10, prior to 1872. Since 1872, he has been for the most part orderly and tractable, but during all of said time he has been, and still is, incapable of understanding or managing business or property affairs of any consequence, intricacy, or importance. * * * Neither John nor Samuel are wasteful or spendthrifts; they are capable of doing or managing the petty ordinary details and affairs of their every day lives in the circumstances in which they are now placed; they are not capable of managing any matters involving any business responsibility or judgment, or such affairs as may be involved in attempting to set aside any conveyances herein referred to or conducting suits for an accounting in connection therewith." As these particular facts were a part of the finding in Wentz's Appeal, which had been made a part of the finding in this case, it was unnecessary that they should be repeated as a part of paragraph as requested by the appellee.

The trial court having ruled that it was conclusively decided by the judgment in Wentz's Appeal that the testator by reason of mental derangement was, on the 8th of January, 1903, incapable of managing his affairs, and was then a proper subject for a conservator, was not required to rule specifically upon the appellee's claim that the judgment in Wentz's Appeal was an adjudication that the testator was incapable of making a will on that date. If that judgment were to be regarded as in effect such an adjudication, the judgment in the present case, that the testator was of sufficient mental capacity to make a will in 1890, does not conflict with one that he was incapable of making 13 years later. The trial court properly declined to make any specific ruling upon the claim of the appellee that the adjudication in Wentz's Appeal of the testator's mental unsoundness in 1903, coupled with

the fact that there was no change in his mental condition between said date and the date of the execution of the will, established his incompetency at the latter date. Upon the facts before us the trial court properly refused to find that there had been no such change. One of the appellee's reasons of appeal to this court is that the trial court erred in holding that that part of the finding of facts in Wentz's Appeal above recited "was not as to the extent and nature of the testator's mental derangement, or as to the period of its continuance, binding upon the court in the case at bar." It does not appear that the trial court so ruled, or that such question was raised in the trial court, nor do we consider that there is any legal inconsistency between the facts found in Wentz's Appeal and the judgment rendered in the present action. As appears from the finding in this case, and from the transcript of evidence before us called Exhibit F, the portion of the finding in Wentz's Appeal above referred to was received in evidence only for the purpose of showing that the mental derangement of the testator in January, 1903, was the foundation of the judgment then rendered in that case, and that was the purpose for which it was offered. It was admissible, assuming that the judgment itself was doubtful, on its face, to show the scope of the judgment, by showing that the subject of inquiry and adjudication was the mental incapacity of the testator to manage his affairs, and not his inability to do so for other reasons. The facts in that case not made a part of the judgment or of the record, but found only for the purpose of enabling an appeal to be taken, are not adjudicated facts, binding upon the parties to this action, assuming the parties to be the same in both proceedings. *Corbett v. Matz*, 72 Conn. 610-612, 45 Atl. 494, 48 L. R. A. 217; *Kashman v. Parsons*, 70 Conn. 295-304, 39 Atl. 179; *In re Premier Cycle Mfg. Co.*, 70 Conn. 478-480, 39 Atl. 800. We are unable to see that the trial court failed in any respect to give the proper evidential effect either to the finding of facts or to the judgment in Wentz's Appeal, which was manifestly a proceeding to procure the appointment of a conservator over the testator, upon the ground that he was mentally incapable of bringing or conducting suits for setting aside said conveyances, and for an accounting, and was so regarded by the court that tried it.

Upon the opening of the case in the trial court the appellant called as a witness Alfred S. Brown, one of the witnesses to the will, who having testified to what occurred when the will was executed, was asked this question by appellant's counsel: "At the time of the execution of the will by Mr. Nichols, was he of sound and disposing mind and memory?" The witness replied, "He was." Upon cross-examination, counsel for the ap-

pellee asked the witness how many years he had been identified in business or professional relations with the testator, and what opportunities he had had for forming an opinion as to the soundness of his mind, and to state what his experience with the testator had been. Upon objections by the appellant, these questions were excluded by the court, apparently upon the ground that the cross-examination must be limited to what occurred when the will was executed. In answer to further questions by the appellee, the witness stated that his opinion as to the sanity of the testator was based upon his conduct at the time of the execution of the will; that he had known the testator a great many years, and that his previous acquaintanceship might possibly have influenced his judgment that he was of sound mind at the time he executed the will. One of the grounds upon which these questions were claimed by appellee was to test the good faith of the witness in stating that the testator was of sound mind when he executed the will.

There was error in the exclusion of these questions. Prominence is justly given to the attesting witnesses of a will who are supposed, from the fact that they were present when the will was executed, to have had the means and opportunity of judging of the testator's capacity. *Field's Appeal*, 36 Conn. 278. While the testimony of these witnesses in the opening of the case is usually confined to the appearance, conduct, and surrounding of the testator, at the time of the execution of the will, and the opinions of the witnesses based thereon (*Barber's Appeal*, 63 Conn. 393-401, 27 Atl. 973, 22 L. R. A. 90), it does not follow that the cross-examination of these witnesses must be limited to inquiries as to what occurred when the will was executed. The contestants of the will may, by proper inquiries upon the cross-examination of such a witness, seek to elicit facts indicating that the opinion expressed by him is not a candid one; that it is entitled to little weight because of bias or interest arising from his previous relations with the testator, or the part which he may have taken in preparing or procuring the execution of the will; or that such opinion is not based upon what the witness observed when the will was executed, but either wholly or in part upon his previous acquaintance or experience with the testator. To elicit such facts, it is frequently necessary to inquire, on cross-examination, regarding occurrences before the time of the execution of the will. Such cross-examination of a witness to the will who, in the opening of the case, has given his opinion regarding the sanity of the testator as based upon what he observed when the will was executed, is very commonly and properly deferred, upon the understanding that the witness is to be recalled for that purpose at a later stage of the trial: but for

the court to order such postponement against the objection of the contestants might, if the witness was not afterward produced by the proponents, be a sufficient ground for a new trial. The exclusion of the questions referred to is not a sufficient ground for a new trial in the present case, since the appellee afterward fully examined the witness Brown upon the subjects of said inquiries.

Two of the appellee's witnesses who had testified that the testator was of unsound mind, and that one of his characteristics was "to break off in conversation" when talking, and who, when asked on cross-examination, if other members of the family had not the same characteristic, had replied that John had, were asked by the appellee, upon redirect examination, what, in their opinion, was the mental condition of John, when he manifested these peculiarities. These questions were excluded upon the appellant's objection. They were admissible for the purpose of showing that the fact that John had the same peculiarity, did not indicate, as implied by the cross-examination, that it might be a characteristic of a person of sound mind. The fact that the appellee was afterward given a full opportunity to present, and did present evidence as to the mental condition of John and of other brothers and sisters of the testator renders the exclusion of these questions an insufficient reason for granting a new trial.

The witness Brown having testified to the conversations between the testator and his brother Effingham on the 10th and 11th of December, 1890, concerning the execution of the will, and the adjustment of accounts between them, and as what was said at these interviews, and having testified in answer to questions by the appellee that the testator in certain matters deferred to the judgment of Effingham, the appellant was properly permitted to ask the witness whether there was any act or statement of Effingham indicating coercion or attempt to influence the testator; and the witness was properly permitted to answer that there was no suggestion of coercion. This question and answer were permissible, upon the ground that the facts upon which the conclusion of the witness was based could not be fully detailed to the court as they appeared to the witness. *Kimberly's Appeal*, 68 Conn. 428-432, 36 Atl. 847, 37 L. R. A. 261, 57 Am. St. Rep. 101; *Sydleman v. Beckwith*, 43 Conn. 9.

We find no error in the other rulings complained of upon questions of evidence. They require no discussion. The finding of facts was sufficient to enable the appellee to fully present all the questions of law she desired to have reviewed. There was no error in the refusal of the trial judge to make the requested corrections.

There is no error. The other Judges concurred.

HAVENS v. MASON.

(Supreme Court of Errors of Connecticut. Dec. 15, 1905.)

1. WILLS—UNSOUNDNESS OF MIND—EVIDENCE.

The execution of a will, in reliance on the assurance of counsel that it conforms to the instructions given, containing expressions which can only be understood by those acquainted with the law to which it refers, is not evidence of unsoundness of mind.

2. SAME—MENTAL CAPACITY—INSTRUCTIONS.

An instruction that if testatrix was not possessed of sufficient intelligence and memory to rationally know the effect of what she was doing, the nature of her business, and the nature and condition of her property, and to appreciate who were or should be the natural objects of her bounty, and her relations to them, the manner in which she wished to distribute it, and the scope of the provisions of the will, she did not have sufficient intelligence and memory to make a will, was erroneous, as imposing too severe a test of capacity.

Appeal from Superior Court, Fairfield County; Joel H. Reed, Judge.

Application by Francis A. E. Mason for the probate of the will of Sarah B. Stevens, deceased. From a judgment of the superior court, reversing the probate decree approving the will, the proponent appeals. Reversed.

Henry E. Shannon, Carl Foster, and Arthur J. Hull, for appellant. John C. Chamberlain and J. Gilbert Calhoun, for appellee.

BALDWIN, J. The paper propounded as the will of Sarah B. Stevens contained certain specific and pecuniary bequests to a niece, Elizabeth Wells, a nephew, George Wells, and others; gave to Francis A. E. Mason, another nephew, who was also appointed as the executor, \$4,000 "in consideration and appreciation of his services in caring without remuneration for my property in Hartford, and because of his many kindnesses to me"; and had the following residuary clause: "(7) I direct that all the rest and residue of my estate, real and personal, or both, that shall remain after the foregoing bequests shall have been satisfied, be divided among my heirs according to their respective shares under the laws of this state; the aforesaid Elizabeth Wells, George Wells, and Francis A. E. Mason, each to receive whatever may be her or his lawful share in the said residue under this clause in addition to the bequests already hereinbefore made them." On the trial a lawyer who wrote the will testified that the testatrix told him that she wished her residuary estate to be divided equally among all her heirs; that he read the will aloud to her after it was drawn; and that she said it was as she desired. On cross-examination he stated that her instructions for drafting the residuary clause were that each heir should have what the statute would give him in the absence of a will; that he was not informed whether her heirs apparent were all related to her in the same degree; and that he did not explain to her what the effect of the statute would

be in case some should take by representation. Following, in substance, a request of the heir who appealed from the probate decree, the trial court instructed the jury that, if they should find that the terms of the will were so indefinite and uncertain that an ordinary person would not know what they meant upon having them read to him, the fact that Mrs. Stevens executed it was evidence that she was not of sound mind at the time. The will before the jury contained nothing that was indefinite or uncertain. Whether, if it had, such an instruction could, under any circumstances, have been proper, it is unnecessary to inquire. It could only serve to mislead and confuse in the case on trial. To execute, in reliance on the assurance of counsel that it conforms to the instructions given, a will containing expressions the effect of which can only be understood by those acquainted with the provisions of a law to which it refers does not tend to show unsoundness of mind. The error in these instructions requires a new trial; but none of the other reasons of appeal are sufficient to call for one. There was, however, one error not assigned, which, in view of the probable submission of the cause to another jury, it is proper to notice.

The following instructions were given to the jury: "If you find by a fair preponderance of the evidence that at the time Sarah B. Stevens executed the paper before you she was possessed of sufficient intelligence and memory to freely and rationally know and comprehend the effect of what she was doing, and of the nature of the business she was engaged in, and the nature and condition of her property, and to appreciate who were or should be the natural objects of her bounty and her relations to them, the manner in which she wished to distribute it among or withhold it from them, and the scope and bearing of the provisions of the will she was making, then I charge you that the testatrix had in the eye of the law sufficient intelligence and memory to make a will. But if you find that she was not possessed of sufficient intelligence and memory to freely and rationally know and comprehend these things, then she had not in law sufficient intelligence and memory to make a will. * * * It is for the jury * * * to say whether or not at the time of the execution of this will, Mrs. Stevens knew that she was making a will, knew what property she possessed, and knew the natural objects of her bounty, and if you find that these essentials she knew and understood at the time of the execution of this will, then the will should be sustained. * * * In order to have sufficient capacity to make a will, the testatrix must have had at the time sufficient mind and memory to comprehend the nature and conditions of her property, the persons who were or should be the natural objects of her bounty and her relation to them, the manner in which she wished to distribute

it among or withhold it from them, and the scope and bearing of the provisions of the will she was making. A testatrix may not have sufficient strength of mind and vigor of intellect to make and digest all parts of a contract, and yet be competent to direct the distribution of her property by will. The question is, were her mind and memory sufficiently sound to enable her to know and understand the business in which she was engaged? * * * If the jury shall find by a fair preponderance of the evidence that at the time she made this will Mrs. Stevens had become so enfeebled in mind and memory that she could not remember the natural objects of her bounty, and had actually forgotten who they were, they should find for the appellant, and find that this was not the last will and testament of the deceased."

The first of these sentences states a sound legal proposition. But while one possessing the intelligence and memory which it describes has, as matter of law, sufficient testamentary capacity, it does not follow that one without actual knowledge of all the various matters specified may not have it also. Persons of large means rarely know precisely what property they own, or even the nature and present condition of every considerable item of it. If by the class described as those who were or should be the natural objects of Mrs. Stevens' bounty was meant her heirs at law, as seems probable by the reference to their relations to her, a test of capacity was imposed which was too severe. She had 14 nephews and nieces living, who were her next of kin. She might have sufficient testamentary capacity, without knowing whether all were alive, or whether any others, who might have died previously had left issue that then represented them. The vital and really the only question as to the capacity of Mrs. Stevens was correctly stated to be this: Were her mind and memory sufficiently sound to enable her to know and understand the business in which she was engaged? *Sturdevant's Appeal*. 71 Conn. 392, 401, 42 Atl. 70; *In re Nichols*, 78 Conn. —, 62 Atl. 610.

There is error, and a new trial is ordered.

ATWOOD v. BUCKINGHAM.

(Supreme Court of Errors of Connecticut. Dec. 15, 1905.)

1. EXECUTORS AND ADMINISTRATORS—FAILURE TO FILE INVENTORY—PENALTIES—REPEAL OF STATUTE—EFFECT.

Gen. St. 1902, § 1, provides that the repeal of an act shall not affect any suit or prosecution pending at the time of the repeal for an offense committed or for the recovery of a penalty or forfeiture incurred under the act repealed. *Held*, that the repeal of section 324, providing for the recovery of a penalty from an administrator for his unexcused failure to file an inventory within 12 months before suit brought to recover the penalty, while effectual to prevent the institution of new actions for such

delinquencies, past or future, did not affect an action pending at the time of the repeal to recover a penalty under such section.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 372-374.]

2. SAME—CONSTRUCTION OF STATUTE.

Under Gen. St. 1902, § 324, imposing a penalty on an administrator for his unexcused failure to file an inventory for 12 months prior to the bringing of the action to recover such penalty, no penalty or forfeiture could be incurred by any delinquency before suit was in fact instituted to recover such penalty.

3. SAME—RETROACTIVE OPERATION.

Gen. St. 1902, § 324, providing a penalty for an administrator's failure to file an inventory within a specified time, was repealed by Act June 21, 1905 (Pub. Acts 1905, p. 365, c. 160), and later in the session Act July 6, 1905 (Pub. Acts 1905, p. 413, c. 217), was passed, declaring that in all actions pending and brought under section 324 the recovery shall be for the sum of \$1 only, as the forfeiture for such neglect and the taxable costs of the court, and that defendant might before trial tender such sum and costs, and on plaintiff's refusal to accept the same he should not recover more. *Held*, that Act July 6, 1905, was retroactive and applied to pending causes.

4. CONSTITUTIONAL LAW—RETROACTIVE LEGISLATION.

Act July 6, 1905 (Pub. Acts, 1905, p. 413, c. 217), providing the amount recoverable in actions pending to recover a penalty against administrators for failure to file an inventory, as provided by Gen. St. 1902, § 324, was not unconstitutional because retroactive; there being no provision in the State Constitution forbidding such legislation.

5. SAME—VESTED RIGHTS.

A plaintiff, in a suit against an administratrix to recover a penalty imposed by Gen. St. 1902, § 324, for failure to file an inventory prior to the bringing of the action, had no vested right in such unenforced penalty, so as to render unconstitutional, as impairing such rights, Act July 6, 1905 (Pub. Acts 1905, p. 413, c. 217), providing that the penalty in pending actions under section 324 shall not exceed \$1 in costs.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 233.]

6. SAME—OBLIGATION OF CONTRACTS.

No contract relation existed between the state and the person suing an administratrix to enforce a penalty imposed by Gen. St. 1902, § 324, for her failure to file an inventory, as provided by law, so as to render Act July 6, 1905 (Pub. Acts 1905, p. 413, c. 217), limiting the recovery in such actions then pending to \$1 and costs, unconstitutional as impairing the obligation of contracts.

7. SAME—ENCROACHMENT ON JUDICIARY.

Act July 6, 1905 (Pub. Acts 1905, p. 413, c. 217), limiting the recovery in pending actions against administrators for failure to file an inventory as provided by law to \$1 and costs, was a proper exercise of the Legislature's power to declare what the law shall be, and was not an encroachment on the judiciary.

8. SAME—EQUAL PROTECTION OF LAW.

New actions to recover penalties against administrators for failure to file an inventory as provided by law being rendered impossible by the repeal of Gen. St. 1902, § 324, authorizing the recovery of a penalty for such failure, Act July 6, 1905 (Pub. Acts 1905, p. 413, c. 217), limiting the recovery in pending actions under such section to \$1 and costs, was not unconstitutional, as depriving plaintiffs in pending suits under section 324, as distinguished from those who might prosecute suits under such section, of the equal protection of the laws.

Appeal from Court of Common Pleas, Fairfield County; Howard J. Curtis, Judge.

Action by D. Preston Atwood against Annie McLean Buckingham to recover a forfeiture incurred by defendant as an administratrix, for unexcused failure to file an inventory, as provided by Gen. St. 1902, § 324. From a judgment in favor of plaintiff for the limited amount provided in such actions by Pub. Acts 1905, p. 413, c. 217, plaintiff appeals. Affirmed.

E. P. Arvine and John J. Phelan, for appellant. Lucien F. Burpee and S. McLean Buckingham, for appellee.

PRENTICE, J. The plaintiff, in May, 1904, brought his action to recover \$240, as the forfeiture provided by section 324 of the General Statutes of 1902, claimed to have been incurred by the defendant as an administratrix through her unexcused failure, for the 12 months prior to the bringing of the action, to file an inventory as provided by law. While the action was pending the General Assembly, by an act which was approved and went into effect on June 21, 1905, repealed said section. Pub. Acts 1905, p. 365, c. 160. Later in the session, by another act which was approved and went into effect July 6, 1905, it was enacted that "in all civil actions pending in the courts of the state brought under section 324 of the General Statutes for recovery of the forfeiture therein provided, such recovery shall be for the sum of one dollar only as the forfeiture for such neglect and the taxable costs of court." The act further provided that the defendant might before trial tender to the plaintiff the sum of one dollar and accrued costs, and that upon the plaintiff's refusal to accept the same he should not recover any sum in excess thereof. Pub. Acts 1905, p. 413, c. 217. The defendant thereupon filed an answer in which she set up a tender of the sum of \$1 and the amount of taxable costs then accrued. To this answer the plaintiff demurred and assigned as grounds of demurrer various reasons involving the construction and effect of the two acts of 1905 referred to and the constitutionality of the one under which the tender was made and pleaded. The court overruled the demurrer, and, the plaintiff refusing to plead further, rendered judgment that the plaintiff recover the amount of the tender. Of this action he complains.

Section 1 of the General Statutes of 1902, provides, among other things, that the repeal of an act shall not affect any suit or prosecution or proceeding pending at the time of the repeal for an offense committed or for the recovery of a penalty or forfeiture incurred under the act repealed, and that the passage or repeal of an act should not affect any action then pending. The repeal of said section 324 did not, therefore, as the defendant concedes, affect the plaintiff's action or any other which may have been

pending under said section. The repeal, however, was effectual not only to prevent the institution of new actions for future delinquencies, but also to prevent the bringing of such actions for past ones. The plaintiff has erroneously assumed the contrary to be the situation as respects neglects which antedated the repeal. It is the well-settled rule that, in the absence of a saving clause or statute, the right to bring suit to recover a penalty or forfeiture falls with the act which provides it. *Yeaton v. United States*, 5 Cranch, 281, 3 L. Ed. 101; *Maryland v. Baltimore, etc.*, R. Co., 3 How. 534, 11 L. Ed. 714; *Norris v. Crocker*, 13 How. 481, 14 L. Ed. 210; *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 239. There was no saving clause in the present repealing act. Section 1 of the General Statutes of 1902 contains the general provision that the repeal of an act should not affect any punishment, penalty, or forfeiture incurred before the repeal takes effect. But no penalty or forfeiture could by any possibility be incurred under the repealed act by any delinquent before suit was in fact instituted, for the all-sufficient reason, if for no other, that the section expressly provides that there should be no forfeiture incurred in any case where the delinquent before suit is brought makes to the court of probate an acceptable excuse for his delay. The absence of this excuse at the moment suit is brought is thus made one of the conditions of forfeiture. This the plaintiff recognized when he framed his complaint, which averred the absence of an accepted excuse. By reason of this condition, no incurred forfeiture was possible under the act until the status of the party against whom a forfeiture was sought to be enforced was by the bringing of an action fixed as that of a delinquent subject to the statutory penalty. When, therefore, the repeal took effect, there was an end to all situations which could furnish the basis of new actions. Persons who had escaped suit might be in neglect, but none of them had as yet become subject to the penalty of the statute, and it could not then have been foretold that any one of them would ever have become so had the statute continued in force.

The plaintiff contends that said chapter 217, which is the act which reduces the amount of the forfeiture and under which the tender was made, should be given a prospective application only, and not made to retroact upon actions already brought. In aid of this contention it is said, and well said, that the presumption is that statutes are intended to operate prospectively, and that they should not be construed as having a retrospective effect, unless their terms show clearly and unmistakably a legislative intention that they should so operate. *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550; *Plumb v. Sawyer*, 21 Conn. 353; *Smith v. Lyon*, 44 Conn. 175; *Middletown v. New York. N. H. & H. R. Co.*, 62 Conn. 492, 27 Atl.

119. With respect to the present act, however, it is to be observed that to confine its operation to suits to be brought is to deny it all operation whatsoever. Its subject-matter is expressed to be "all civil actions pending in the courts of the state brought under section 324 of the General Statutes." We have already seen that the only actions which could by any possibility ever be or become pending under that act were those which were pending at its repeal, which antedated the enactment of chapter 217. The Legislature must therefore have meant by pending actions those actions or none at all. Furthermore, if chapter 217 be read in connection with chapter 160, as it should be, it will be clearly seen that by the two acts the General Assembly, at its session in 1905, undertook to deal with the whole situation presented by litigation, actual or possible, which might arise under said section 324. In the first it was sought to prevent all new actions; by the second to deal with those which had been begun. These considerations, when taken in connection with the natural meaning of the language employed in chapter 217, leave no room for doubt as to the legislative intent, and that the legislative command was thereby expressly given that the right of recovery in all actions then pending under section 324, should be controlled and limited as therein provided. In the presence of this express command the saving clauses contained in section 1 of the General Statutes, which have been already noticed, of course, become ineffective. They are but legislative enactments, and must yield to the later expression of the legislative will.

The plaintiff next claims that, in so far as chapter 217 professes to operate upon actions pending at the time of its enactment, it is unconstitutional. Three reasons are assigned for this conclusion, to wit: (1) Because it is thus made to retroact to divest vested rights; (2) because thereby contract obligations are impaired; and (3) because it thus becomes an unlawful attempt of the legislative department to dictate to, interfere with, direct, and coerce the judicial department in respect to its judicial functions in the rendition of a judgment. It is further urged that, if the act is to be interpreted as applying solely to actions pending at the time of its enactment, it is unconstitutional for the further reason that it denies to the plaintiff and all others whose actions were pending the equal protection of the laws. There is no provision in our Constitution forbidding retrospective legislation. Such legislation is not of itself unlawful. *Curtis v. Whitney*, 13 Wall. 68, 20 L. Ed. 513. The present statute could affect no vested rights. The plaintiffs, in actions for the recovery of forfeitures under said section 324 which were pending when said chapter 217 went into effect, had not at that time acquired a vested right to such forfeitures. "No person has a vested right in an unenforced penalty." *Norris v.*

Crocker, 13 How. 429, 14 L. Ed. 210; *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 239; *Mix v. Illinois Central R. Co.*, 116 Ill. 502, 6 N. E. 42; *Railway v. Wells*, 65 Ohio St. 313, 62 N. E. 332, 58 L. R. A. 631; *Bank of St. Mary's v. State*, 12 Ga. 475; *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821.

The claim which is based upon a supposed contract relation between the state and the claimant of a forfeiture, said to be created by the enactment of said section 324 and the institution of an action to recover the forfeiture, is wholly without foundation. "A forfeiture is to be regarded as a punishment inflicted for a violation of some duty enjoined upon the party by law." *Maryland v. Baltimore & O. R. Co.*, 3 How. 534, 552, 11 L. Ed. 714. When a law is enacted providing for such a punishment to inure to the benefit of another, the right of the state to ameliorate or remit that punishment at its pleasure is unrestrained, and no contractual relation between the state and any person is created either by force of the enactment itself or by the combined force of the enactment and the institution of proceedings under it which imposes such a restraint. The analogy sought to be drawn between statutes offering rewards and those imposing a forfeiture for the benefit of whomsoever should sue therefor entirely fails. The former contain the conditions of a contract; the latter do not. The many cases, of which certain have been cited which effectually determine that no vested right is acquired by the institution of an action to recover a forfeiture, are directly in point. It is the province of the legislative department to define rights and prescribe remedies; of the judicial to construe legislative enactments, determine the rights secured thereby, and apply the remedies prescribed. Chapter 217 deals with the remedy for a violation of a statutory duty. In this the General Assembly was not invading the judicial province; neither was it thereby interfering with, dictating to, or coercing the judicial department. "To declare what the law is or has been is a judicial power; to declare what it shall be is legislative." *Dash v. Van Kleeck*, 7 Johns. 477, 498, 5 Am. Dec. 291.

If more was necessary to justify our conclusions that the provisions of chapter 217, although operating upon pending actions, were not unconstitutional for any of the reasons thus far discussed, that justification would be found in a long line of decisions including those of the Supreme Court of the United States and our own, uniformly holding that the power of legislative bodies to repeal acts prescribing penalties and forfeitures in such manner as to prevent recoveries in pending suits is, in the absence of special constitutional limitations, not found in our Constitution, full and ample. *Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210; *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 239; *Butler v. Palmer*, 1 Hill, 324;

Lewis v. Foster, 1 N. H. 61; *Oriental Bank v. Freese*, 18 Me. 109, 38 Am. Dec. 701; *Mix v. Illinois Central R. Co.*, 116 Ill. 502, 6 N. E. 42; *Railway v. Wells*, 65 Ohio St. 313, 62 N. E. 332, 58 L. R. A. 651; *Bay City, etc., R. Co. v. Austin*, 21 Mich. 390; *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821; *Bank of St. Mary's v. State*, 12 Ga. 475; *Commonwealth v. Standard Oil Co.*, 101 Pa. 150; *State v. Village of Passaic*, 36 N. J. Law, 382; *Musgrove v. V. & N. R. Co.*, 50 Miss. 677; *Pope v. Lewis*, 4 Ala. 489.

The plaintiff's final claim, that chapter 217 denies to him and all others who may have had suits pending the equal protection of the laws, is based upon the assumption that it singles out for discriminating action a portion only of those who might prosecute suits under the repealed section 324. This assumption we have already had occasion to see was a mistaken one, since new actions were made impossible by the repeal. That being so, the amelioration of the penalty contained in chapter 217 was one which affected alike all actions which were then, or ever could be, pending, and there was no singling out of persons to be reached by the new legislation, and no arbitrary or unreasonable classification made. The plaintiff's argument necessarily falls with the assumption. *Cotting v. Kansas City Stock Yards*, 183 U. S. 79, 111, 22 Sup. Ct. 30, 46 L. Ed. 92; *Norwich G. & E. Co. v. Norwich*, 76 Conn. 565, 573, 57 Atl. 746.

There is no error. The other Judges concurred.

BOUTON v. BEERS.

(Supreme Court of Errors of Connecticut. Dec. 15, 1905.)

FRAUDULENT CONVEYANCES — VALIDITY AS BETWEEN PARTIES.

A conveyance of his property by a debtor to another is valid as between the parties, notwithstanding the debtor intended thereby to place the property beyond the reach of creditors, and his grantee had knowledge thereof; the transaction being voidable only as against those who might be defrauded thereby.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 523.]

Appeal from Court of Common Pleas, Fairfield County; Howard J. Curtis, Judge.

Action by Foster Bouton against Carrie Beers. Judgment for plaintiff, and defendant appeals. No error.

The complaint alleges, in substance, that on April 30, 1902, the plaintiff conveyed by warranty deed to the defendant the tract of land described, with the following condition for reconveyance expressed in the deed: "And it is further agreed and understood by and between the parties that the grantee herein shall deed back the above-described premises to the grantor herein at any time within the period of five years from the date hereof, if so desired by the grantor herein upon the payment of \$5.00 to the grantee

herein"; that said deed was duly recorded; that on March 22, 1904, the plaintiff tendered to the defendant the sum of \$5 and a proper deed of reconveyance, and demanded of the defendant that she execute and deliver the same in fulfillment of her said agreement; that the defendant then refused to execute said deed and to execute any deed of conveyance to the plaintiff, and claims by way of equitable relief judgment for specific performance or a decree vesting the title of said land in the plaintiff. The defendant's answer substantially admits the allegations of the complaint, and avers by way of second defense that just before the execution of the deed the plaintiff was guilty of intolerable cruelty to his wife, by acts which compelled her to leave his house, and that she left his house for several months, returning to him late in the fall of the same year; that the plaintiff executed the deed mentioned in the complaint and delivered the same to the defendant for the purpose of preventing his wife from placing an attachment for alimony in case she brought divorce proceedings, and to prevent her obtaining said alimony. To this second defense the plaintiff demurred, and the claimed error of the court in sustaining the demurrer is the only reason of appeal assigned.

William H. Cable, for appellant. Howard W. Taylor, for appellee.

HAMERSLEY, J. (after stating the facts). The plaintiff urges with much force that the deed of April 30, 1902, from the plaintiff to the defendant, cannot be regarded as a fraudulent conveyance, either at the time of its execution or at the commencement of this action within the meaning of the law defining such conveyances and declaring them to be void as against creditors; but that question is not necessarily involved in this case. No attempt is here made to set aside the deed as void as against the plaintiff's wife. The plaintiff does not seek to set aside or reform the deed for the purpose of compelling the defendant to execute a secret trust in respect to property given to her, with intent thereby to defraud the plaintiff's creditors. This action seeks to compel the defendant to execute an agreement entered into by her and expressed in a deed of land duly recorded. The defendant admits her agreement, and that by the terms of the deed conveying the land to her she is under obligation to reconvey the land to the plaintiff upon the payment of \$5, and claims that the facts stated in her second defense are sufficient in law to justify her in refusing to carry out her agreement. This claim is not maintainable. A conveyance of his property by a debtor to another, so made as to be valid and binding between the parties, is valid as between them, notwithstanding the debtor intended thereby to place his property beyond the reach of creditors, and his gran-

lee knew of his intention. The transaction is not *turpis causa*, and therefore void, but is only voidable as against those who might be defrauded thereby, and, until avoided, is valid and binding. The parties to such transaction, as between each other, will not be permitted to prove their fraudulent purpose in order to escape the obligations of their contract. The grantor will not be permitted to prove his own fraudulent purpose in order to avoid the valid contract he has made; nor will the grantee be permitted to prove the fraud in which he participated for the purpose of avoiding the obligations of his valid contract. This rule rests largely upon considerations of public policy, and has been stringently enforced. *Nichols v. McCarthy*, 53 Conn. 299, 23 Atl. 93, 55 Am. Rep. 105; *Stores v. Snow*, 1 Root, 181; *Chapin v. Pease*, 10 Conn. 69, 72, 25 Am. Dec. 56; *Bonesteel v. Sullivan*, 104 Pa. 9; *Dyer v. Homer*, 22 Pick. (Mass.) 253, 257; *Harvey v. Varney*, 98 Mass. 118; *Clemens v. Clemens*, 28 Wis. 637, 9 Am. Rep. 520; *Greenthal v. Lincoln, Seyms & Co.*, 67 Conn. 372, 376, 35 Atl. 266.

Upon the facts stated in the complaint, and in the defendant's second defense the plaintiff was plainly entitled to the relief asked, and the defendant could not escape the performance of her admitted obligation by proving that the plaintiff executed, and she accepted, the deed in question for the purposes alleged by her, even if that fact rendered the deed void as against the plaintiff's wife. The demurrer to the second defense was properly sustained by the trial court.

There is no error in the judgment of the court of common pleas. The other Judges concurred.

FITZMAURICE v. CONNECTICUT RY. & LIGHTING CO.

(Supreme Court of Errors of Connecticut. Dec. 15, 1905.)

NEGLIGENCE — CONDITION — USE OF LAND — CARE REQUIRED AS TO CHILDREN.

In an action for negligence, it appeared that plaintiff, an infant about three years of age, while living with her parents, strayed upon defendant's land and climbed upon or fell into a pile of hot soot. Defendant's land had been used as a dumping ground for soot from a heating plant for several years, and was practically an open lot; the fences having been down ever since defendant bought it. There was nothing on the land likely to attract children, the place of the injury was not on or near a thoroughfare, and it had never been used as a playground or place of resort for children. *Held*, that defendant was not liable for failure to guard against such injury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 45, 47.]

Appeal from Superior Court, New Haven County; Silas A. Robinson, Judge.

Action by Vera Fitzmaurice, by her next friend, against the Connecticut Railway & Lighting Company, for injuries resulting

from defendant's alleged negligence. From a judgment for defendant, plaintiff appeals. Affirmed.

John J. Walsh and John Keogh, for appellant. William T. Hincks, for appellee.

HALL, J. The plaintiff, an infant about three years of age, brings this action by her next friend. On the day alleged in the complaint, while living with her parents in a house belonging to her uncle, Patrick Fitzmaurice, she strayed upon the defendant's land, and either climbed upon or fell into a pile of hot soot, which one of the defendant's workmen had that day dumped in the defendant's yard, and was severely burned. Upon the following facts the trial court held that she was not entitled to a judgment for substantial damages: The back yard of the premises of said Patrick Fitzmaurice extended along the west side of land purchased by the defendant, about five years before the time of accident, as a place upon which to dump ashes and soot from the furnace of its power house located upon land adjoining on the west, that of said Patrick Fitzmaurice. This land, in the rear of the defendant's premises, had been used by the defendant as such a dumping ground ever since its purchase in substantially the same manner as on the day of the accident. It was practically an open lot; the fences on the east and west sides of it having been down or in a dilapidated condition ever since the company bought it. It did not appear that there had been any division of the fence between the defendant's and Patrick Fitzmaurice's land for the purpose of repair. During most of the time while this yard had been so used, the accumulated ashes had formed a pile 15 to 20 feet wide, extending 30 or 40 feet from the rear of the power house, and sloping from a height of 3 or 4 feet down to the ground, at what remained of the divisional fence between the land of the defendant and that of said Patrick Fitzmaurice. While cinders and material from the dump sometimes slid down this slope upon the Fitzmaurice property, the ashes did not extend over upon it to any considerable extent at the time of the accident. The ash pile was distant from the street, and upon land not used by any one as a thoroughfare. Poor people of the neighborhood sometimes raked over the edges of the pile for coke, and were not driven away by the defendant. The place was not one likely to attract children, nor was there anything to cause the defendant to anticipate that a child of the plaintiff's age would stray unattended upon the premises and be injured. The plaintiff had never gone upon the defendant's lot before, nor had any one been burned by the ashes or soot upon said land. The soot by which the plaintiff was burned was dumped by the defendant's workman upon

the side of defendant's lot most distant from the Fitzmaurice property during the forenoon of the day of the accident, which occurred at about 1:30 in the afternoon. There was nothing in the appearance of the pile of soot to indicate its heat. The defendant knew that the soot thus thrown out retained its heat for a considerable time, but did not throw water upon it or attempt to cool it in any other way. The trial court held that under these circumstances the defendant was not negligent, and that the injury to the plaintiff was due to her "infantile inexperience and helplessness."

Of the six reasons of the plaintiff's appeal the first, third, and fourth may be dismissed with the statement that the rulings assigned by them as erroneous do not appear to have been made by the trial court. The remaining reasons of appeal are, in substance, that the court erred in holding that there was no implied invitation to the plaintiff to come upon the defendant's premises, that the facts did not make the doctrine of "attractive nuisance" applicable, and that the defendant was not required to protect and safeguard the heated soot and ash pile upon its land. None of these assignments of error can be sustained upon the facts found by the trial court.

In support of his claims the plaintiff's counsel cites the case of *Birge v. Gardner*, 19 Conn. 507, 50 Am. Dec. 281, and many cases of injuries to children whose presence upon the defendant's premises and near the dangerous object should have been reasonably anticipated by the defendant. In *Birge v. Gardner* the defendant was held liable upon the ground that he was negligent in placing a heavy gate upon or near the line of a lane or public passway over which the plaintiff, a child under seven years of age, and other children and persons, were accustomed to pass in going to and from the highway, to and from their homes, and because the gate, although upon the defendant's land, was left in such an insecure condition that it fell upon the plaintiff, when, as the defendant claimed to have proved, he put his hands upon it and shook it as he was passing along the lane from the highway to his home. The opinion states that the court did not decide whether the plaintiff was a trespasser or not, but that, if he was, the defendant might properly have been found guilty of such gross negligence as to render him responsible, as in cases of injuries to trespassers by spring guns and mantraps placed by the owners of land upon their property. Evidently the gross negligence of which he might have been found guilty was the careless leaving of this insecurely fastened and heavy gate, where he had reason to know it was liable to fall upon persons who might be lawfully using the public passway.

The case at bar differs from *Birge v. Gardner*, in that in the present case it appears

that the plaintiff was a mere trespasser upon the defendant's land, that the object of danger was not on or near land used as a thoroughfare, and that the presence of an unattended child of the plaintiff's age near it was not reasonably to have been anticipated. It differs from most of the other cases cited of injuries to children either in the fact that the present defendant's land was never used as a playground or place of resort for children, or in the fact that the dangerous object was not in the present case calculated to attract or interest children. The owners of land are not required in using it for legitimate purposes to guard against every possible danger to children. To children whose presence upon the premises could not reasonably have been anticipated they owe no duty to keep their land free from dangerous conditions. As the facts show that the defendant had no reason to anticipate that a young and unattended child like the plaintiff might come into this dump yard and upon or near this pile of hot ashes or soot, it is not liable for the injury sustained by the plaintiff.

There is no error. The other Judges concurred.

STATE v. SLINEY et al.

(Supreme Court of Errors of Connecticut. Dec. 15, 1905.)

WILLS—CONSTRUCTION—ABSOLUTE OR LIMITED ESTATE IN PERSONAL PROPERTY.

Testatrix, after disposing of the bulk of her estate, bequeathed the residue to K., in trust "for the purpose of paying the premiums on a certain policy of insurance on the life of M., * * * and, if any money remains after paying said premiums, I give, devise, and bequeath the use, improvement, income, and enjoyment of the same to said K., and upon the death of said M. said trust shall cease, and thereafter I give, bequeath, and devise the use, improvement, income, and enjoyment of said rest and residue of my estate to said K. during his natural life, and upon the death of said K., I give, devise, and bequeath said rest and residue to others." *Held*, that after the payment of the premiums referred to the residue of income in excess of such payments belonged to K. absolutely.

Appeal from Court of Common Pleas, New Haven County; Jacob B. Ullman, Judge.

Action by the state of Connecticut against John T. Sliney, administrator of the estate of Bernard F. Kivlan, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

William A. Wright, for the State. Edmund Zacher, for appellees.

TORRANCE, C. J. This case involves the construction of the eleventh section of the will of Mary Gallagher, who died in September, 1892. In that section she created a trust, and appointed as trustee thereof her son-in-law Bernard F. Kivlan. After settling her estate as executor, Kivlan in January, 1894, qualified as such trustee, and gave the

bond in suit, executed by himself, as principal, and three sureties. Kivlan died in April, 1902, and one of the sureties died in February, 1903, and this suit is against Kivlan's estate, the two surviving sureties, and the estate of the deceased surety. The trust estate consisted of money in savings bank, and notes secured by mortgage. Between January, 1894, and the time of his death, in April, 1902, Kivlan, as trustee, received an income from the trust fund, in excess of premiums paid and other proper charges, amounting in all to the sum of \$421.68, for which neither he nor his estate has ever accounted. This suit is brought to recover the amount so received. McGuire survived Kivlan. In the trial court the defendants claimed that the money so received belonged to Kivlan under the terms of the will, and the court sustained that claim, and whether it erred in so doing depends upon the construction of the eleventh clause of the will.

The will contains 12 clauses. The first merely directs the payment of debts and funeral expenses, and the twelfth appoints Kivlan as executor. In the second the testatrix devises certain real estate to certain children of her brother, Patrick Williams. In the third, fourth, and fifth she devises real estate to three of the children of Ellen Williams, and in the sixth she gives certain sums of money to each of the remaining two children of Ellen Williams. In the seventh, eighth, and ninth clauses she makes certain bequests of money to divers persons. In the tenth clause she gives her son-in-law, Kivlan, the life use of certain real estate, and gives the remainder over to the children of Ellen Williams. The eleventh clause reads as follows: "All the rest and residue of my estate I give, devise, and bequeath to said Bernard F. Kivlan, in trust, however, and for the purpose of paying the premiums on a certain policy of insurance on the life of John McGuire of said Branford; and if any money remains after paying said premiums, I give, devise, and bequeath the use, improvement, income, and enjoyment of the same to said Bernard F. Kivlan; and upon the death of said John McGuire said trust shall cease; and thereafter I give, devise, and bequeath the use, improvement, income, and enjoyment of said rest and residue of my estate to said Bernard F. Kivlan during his natural life, and upon the death of said Bernard F. Kivlan I give, devise, and bequeath said rest and residue of my estate to the children of said Ellen Williams, to be theirs and their heirs, forever, in fee simple; and in the case of the death of any of the said children of Ellen Williams before my decease, I give, devise, and bequeath to the children of said children of Ellen Williams the share that the parents would have been entitled to if living." The dispute between the parties arises out of these words of the eleventh clause: "And if any money remains after paying said premiums, I give, devise, and bequeath the use, im-

provement, income and enjoyment of the same to said Bernard F. Kivlan."

The state contends that under these words Kivlan took only the use of the sums received by him as income in excess of premiums and charges; while the defendants claim that he took such sums as his own. We think the claim of the defendants must be sustained. In the clauses of her will preceding the eleventh the testatrix had disposed of the great bulk of her estate apparently, and her main object in the eleventh seems to be to provide for the payment of the premiums upon the McGuire policy as they should become due from time to time. She doubtless knew the amount of the residue of her estate which would be required to meet them. That residue consisted entirely of money and notes secured by mortgage, the equivalent of money, and she devotes the whole of it, principal as well as income, to the payment of the premiums. Upon a careful reading of the eleventh clause of the will we think it clear that the testatrix intended (1) that the premiums should be paid at all events, even if it took the entire residue to make them; (2) that if after the payment of premiums from time to time, there should be income from the residue in excess of such payments, that excess should belong to Kivlan; (3) that at McGuire's death the entire income of the residue should belong to Kivlan for life; and (4) that at Kivlan's death the residue should go to the children of Ellen Williams. By the clause in question the testatrix intended to benefit three, and only three, parties—McGuire, Kivlan, and the children of Ellen Williams. McGuire was to have his premiums paid, Kivlan was to have the income of the trust fund not required to pay premiums, and the children of Mrs. Williams were to have that fund as it should be when the payment of premiums ceased. In short, we think the eleventh clause, when read, as a whole in the light of the facts found and of the other parts of the will, shows a clear intent that Kivlan should have all the income from the residue not needed for the payment of premiums.

There is no error. The other Judges concurred.

WATERTOWN SAV. BANK v. MATTOON et al.

(Supreme Court of Errors of Connecticut. Dec. 15, 1905.)

1. PRINCIPAL AND SURETY—CREATION OF RELATION—FRAUD—CONCEALMENT.

Gen. St. 1902, § 3445 provides that the treasurer of every savings bank shall give a bond, payable to the bank, to the satisfaction and acceptance of the directors. *Held*, that inasmuch as the bond is for the benefit of the public, and the only duty imposed by statute upon the directors with reference to it is the duty of accepting or rejecting it, their fraud in failing to inform the sureties, when the bond

was given, that the treasurer had already embezzled funds, did not release the sureties.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, §§ 87, 89.]

2. SAME.

Where the sureties on the bond of a bank treasurer did not sign at the request of the directors, or in their presence, and the sureties did not apply to the directors for any information concerning the character or conduct of the treasurer, the fact that the directors knew, when they accepted the bond, of prior embezzlements by the treasurer, and that they did not inform the sureties, did not amount to a fraud on the part of the directors, releasing the sureties.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, § 89.]

Appeal from Superior Court, New Haven County; John M. Thayer, Judge.

Action by the Watertown Savings Bank against Burton H. Mattoon and others to recover the amount of a bond to secure performance of the duties of the treasurer of the bank. Defendants appealed to the superior court, where a demurrer was sustained to several defenses, and after a trial to the court, and judgment for plaintiff, the sureties appeal. Affirmed.

Edward F. Cole, for appellants. Lucien F. Burpee, for appellee.

TORRANCE, C. J. In July, 1902, Burton H. Mattoon was the treasurer of the plaintiff bank, and as such officer gave to it the bond in suit, signed by himself as principal and by the three other defendants as sureties. The bond was in the usual form of fidelity bonds, for the sum of \$10,000, payable to the plaintiff bank, dated July 1, 1902, and was approved by the directors of said bank July 7, 1902. The complaint alleged that Mattoon, while treasurer of said bank, in September, 1903, embezzled certain funds of said bank, and had never repaid or accounted for the same. The sureties filed an answer purporting to contain four defenses. In the first they admitted the execution and delivery of the bond, but in effect denied the other allegations of the complaint; while in the second, third, and fourth they set up the admissions and denials contained in the first, and the special matter hereinafter set forth. The special matter set up in the second and third defenses was in substance as follows: At the time said bond was given Mattoon had already taken and appropriated to his own use a large amount of the plaintiff's money without authority, all of which was then well known to the directors of the plaintiff bank. "The directors of the plaintiff bank fraudulently concealed from these defendants the fact of said defalcation and misappropriation by the said Burton H. Mattoon, and allowed these defendants to execute said bond, and to become sureties for said Mattoon, as aforesaid, in ignorance of the fact that he was already a defaulter to said bank." The fourth defense, after alleging that Mattoon was a defaulter at the time the

bond was given, proceeds in substance as follows: "The directors of the plaintiff bank utterly failed in the performance of their duties as required by law, and did not cause the books, accounts, and securities belonging to said bank to be annually examined, as required by law. If they had performed their said duties according to law, and caused proper examination of the books, accounts, and securities belonging to said bank to be made as required by law, such examination would have disclosed the said defalcation. By reason of the said neglect of the duties of the said directors of the plaintiff bank, the said defalcations of the said Burton H. Mattoon were concealed from these defendants, and these defendants were thereby fraudulently induced to execute said bond as surety for said Mattoon in ignorance of the fact that he had been and then was a defaulter to said bank." To the new matter thus set up in the answer of the sureties the plaintiff demurred, on the ground that the following facts did not appear anywhere in said answer, namely: (1) That said defendants became sureties on the bond in question at the plaintiff's suggestion or request, or as a result of its inducement; (2) that said plaintiff had any dealings or opportunity to communicate with said defendants prior to or at the time of the execution of said bond; (3) that said defendants relied on the plaintiff for advice or information, or that they requested the same from it, or acted on any belief created or induced by the plaintiff's conduct; (4) that the plaintiff was under any legal duty to said defendants to disclose to them any former wrongdoing of said Mattoon; (5) that the plaintiff was under any legal duty or obligation to said defendants to "cause the books, accounts, and securities belonging to said bank to be annually examined; (6) that the plaintiff had actual knowledge of the fact that said Mattoon had wrongfully taken and appropriated to his own use any money of the plaintiff without authority at or before the time of the execution and delivery of said bond. The trial court sustained the demurrer, and rendered final judgment against the principal and the defendant sureties, and the sole matter assigned for error is the action of the court in sustaining said demurrer.

The new matter set up in the answer amounts in effect to a single defense, the substance of which may be stated in this way: (1) The directors, when they approved, knew that Mattoon had already embezzled the funds of the bank. (2) They did not disclose that fact to the sureties, and thereby "fraudulently concealed" it from them, and "fraudulently induced" them to execute and deliver the bond. Whether the answer contains any legal charge of fraud against the directors is not, perhaps, free from doubt, for the allegation of fraudulent concealment seems to be an inference or conclusion not supported by the other facts alleged. But, assuming for the

present that the answer sets forth such a non-disclosure on the part of the directors as in law amounts to a fraudulent concealment of a material fact, it does not follow that such a fraud can avail the sureties in this suit. The bond in suit was not one which it was the duty of the bank or of its directors to procure. It was one which the statute, under a penalty, required the treasurer to give. Gen. St. 1902, §§ 3445-3454. The law required it to be made for a sum not less than \$10,000, and payable to the bank; that it and all its renewals should be kept safely by the president of the bank; that it and all renewals of it should be recorded at length on the books of the bank, and in the office of the Secretary of State; and that it and its renewals should be inspected by the bank commissioners, at every inspection of the bank. The statute further provides that no president or director of the bank shall be surety upon such a bond. Such a bond is to be regarded as one in which, in an important sense, the public have an interest. It is made, not for the benefit of the directors or officers of the bank, but for the benefit and protection of the public having dealings with the bank as its depositors or creditors. Such a bond ought not to be liable to be invalidated, or the sureties upon it released, by anything short of some act of the bank itself, acting within the scope of its powers, through some agent duly authorized to do such act. The unauthorized fraud or neglect of some officer or agent ought not to have any such effect.

The answer does not allege that the bank perpetrated any fraud upon the sureties. It alleges only that the directors did so, and it does not allege, nor does it otherwise appear, that they did so, as the agents of the bank. Indeed it is not even alleged that in so doing they acted as a board. The only duty imposed by statute upon the directors with reference to the treasurer's bond was the duty of accepting or rejecting it. As agents of the bank they had no power, and were not required, to do more, and from the admitted facts in this case it does not appear that in performing that duty the directors, as agents of the bank, were under the further duty of disclosing to the sureties the prior defalcation of the treasurer. Assuming, then, as we have heretofore, for the purposes of discussion, that the answer contains a legal charge of fraud against the directors as such, we are of the opinion that a fraud of that kind cannot avail the sureties in a suit such as this, brought by the bank. But we are also of the opinion that the answer contains no proper charge of fraud even as against the directors.

The fraud charged is the concealment of a material fact. "The term 'conceal' implies something more than a mere failure to disclose. We do not in general speak of a person concealing a thing, unless he is in some way called upon to produce it." *Bartholomew v. Warner*, 32 Conn. 98, 103, 85 Am. Dec. 251. / The facts alleged in the answer show, on the part of the directors, the nondisclosure of a material fact, rather than the concealment of it; and as a general rule mere nondisclosure of a fact does not amount to fraud, unless the party not disclosing was called upon by the other party to disclose, or his relation to that party was such as to make it his legal or equitable duty to disclose, all material facts. 14 Amer. & Eng. Ency. of Law, p. 66, and cases there cited.

There is nothing in the answer to show that the sureties signed the bond at the request of the directors, or in the presence of the directors, or that the sureties applied to the directors for any information concerning the character or conduct of Mattoon. In short, there is nothing to show that the directors knew anything about the bond or the sureties thereon until it was presented to them for acceptance. It does not appear that the directors had any opportunity to disclose until after the bond was executed and delivered to the bank. The only facts alleged are (1) that the directors, at the time they accepted the bond, knew of the prior defalcation; (2) that the sureties, when they signed the bond, were ignorant of such defalcation; (3) that the directors did not inform the sureties of such defalcation. We think the facts alleged in the answer fail to show that the relation of the parties to each other was such as to make it either the legal or the equitable duty of the directors to disclose to the sureties the prior defalcation, and that upon the admitted facts in this case the failure to disclose such defalcation was not a fraudulent concealment. The court did not err in sustaining the demurrer to the answer. *Pine County v. Willard*, 39 Minn. 125, 39 N. W. 71, 1 L. R. A. 119, 12 Am. St. Rep. 622; *McShane v. Howard Bank*, 73 Md. 135, 20 Atl. 776, 10 L. R. A. 553; *Life Ins. Co. v. Clinton*, 66 N. Y. 326; *Roper v. Sangamon Lodge Trustees*, 91 Ill. 518, 33 Am. Rep. 60; *Cawley v. People*, 95 Ill. 255; *Magee v. Life Ins. Co.*, 92 U. S. 93, 23 L. Ed. 699; *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 231; *Bowne v. National Bank*, 45 N. J. Law, 860; *Ashuelot Bank v. Albee*, 63 N. H. 152, 56 Am. Rep. 501.

There is no error. The other Judges concurred.

COATES v. LOCUST POINT CO. OF CITY OF BALTIMORE.

(Court of Appeals of Maryland. Dec. 6, 1905.)

1. BROKERS — COMMISSIONS — PROCURING CAUSE OF SALE—EVIDENCE—FINDINGS.

In an action for broker's commissions, evidence held to warrant a finding that the broker was the procuring cause of the sale.

2. SAME—LICENSES.

Where a broker was duly licensed at the time he completed negotiations for the sale of certain real estate by which the purchaser leased the same with an option to purchase, the fact that the broker was not licensed at the time the purchaser elected to exercise such option was no defense to the broker's claim for commissions.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 2½, 43.]

3. SAME—STATUTES.

Code Pub. Loc. Laws, art. 4, § 658, provides that any person, copartnership, or firm applying for the same, and paying the sum of money provided, may obtain a license as a real estate broker in the city of Baltimore, and section 659 makes it a misdemeanor, punishable by a fine, for any person not licensed to carry on such business. Held, that such law was a mere revenue measure, and that a broker's failure to procure a license was no ground for denying his right to commissions earned on a sale of real estate.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 43.]

4. SAME—ACTIONS—LIMITATIONS.

Where a broker sold certain property under a contract by which the purchaser leased the same for a term of years with an option to purchase, which option was exercised on December 31, 1902, the broker's right to commissions did not accrue until that date, and was not barred by the three years' statute of limitations prior to the commencement of an action to recover the same on June 27, 1904.

5. SAME—PAYMENT OF PRICE—AMOUNT OF COMMISSIONS.

Where a broker negotiated a sale of certain property for \$31,000, under a contract by which he was to receive 2½ per cent. of the price paid, and the purchaser at the time suit was brought to recover commissions had paid at least \$15,000 of the price, the broker was at least entitled to recover commissions on such amount.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 56.]

Appeal from Baltimore City Court; Danl. Giraud Wright, Judge.

Action by Leonard R. Coates against the Locust Point Company of the City of Baltimore. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, SCHMUCKER, JONES, and BURKE, JJ.

James J. Lindsay and R. R. Boarman, for appellant. Edgar Allen Poe, for appellee.

BOYD, J. This suit was instituted to recover commissions for the sale of a lot of ground in the city of Baltimore claimed to have been made by the appellant for the appellee. The defendant pleaded the statute of limitations in addition to the general issue. The first bill of exceptions presents the ruling of the Baltimore city court on an

offer of certain evidence, and the second contains a prayer granted by the court, at the conclusion of the plaintiff's evidence, which instructed the jury that the plaintiff had offered no evidence legally sufficient to entitle him to recover upon the pleadings, and the verdict must be for the defendant. The questions to be determined are: (1) Did the appellant make the sale for which the commissions are claimed? (2) Does the fact that he was not a licensed real estate broker for 1903, when the deed was made, preclude his recovery? (3) Is the statute of limitations a bar to his recovery? (4) If it be determined that the appellant will be entitled to commissions, was he so entitled when this suit was brought?

1. There can be no doubt from the testimony that the appellant was employed by Dr. Gallagher, the president of the appellee company, to sell the property, and that he was to receive 2½ per cent. commission, if he made the sale. Mr. Levering, the president of the Piedmont-Mt. Airy Guano Company to which the property was conveyed, testified that Dr. Coates called his attention to the property, brought him and Dr. Gallagher together, and that it was through the negotiations begun with Dr. Coates that the arrangement was finally made. That was in the latter part of 1897. On the 16th of December, 1897, an agreement was made between the two companies by which the Locust Point Company leased to the guano company the lot of ground claimed to have been sold by the appellant for the period of three years from the 1st day of January, 1898, at an annual rental of \$1,500. The guano company was authorized to sell the machinery contained in the main building upon the demised premises, and apply the proceeds thereof to repairing the main buildings, the wharf, and the flooring of the machine shop, and to replace the platform of the foundry; the proceeds of sale in excess of the repairs, etc., to be paid to the Locust Point Company, less the costs and expenses incident to the sale. It was further agreed that, "at any time during the demise hereby created and not thereafter," the Locust Point Company would, upon the payment of \$28,000 and a pro rata proportion of the rent accruing under the demise to the date of the payment of the purchase money, convey the demised premises in fee simple to the guano company by a good and merchantable title, free and clear of all incumbrances. The agreement further provided that the term could, at the option of the guano company, be extended for another term of two years "at the same rent and upon the same terms and conditions as those hereinbefore contained," provided notice was given as therein stated. The president of the guano company testified that it availed itself of the option the day it expired, which was December 31, 1902. The deed was dated the 1st day

of January, 1903, and it recites the consideration to be "the sum of five dollars and divers other good and valuable considerations," and conveys this lot of ground and another. A mortgage was given by the guano company to the appellee of the same date as the deed, which recites that the guano company held an option to buy the property demised for the sum of \$31,000, and, having determined to avail itself of the option, had issued three promissory notes of even date, each for the sum of \$5,000, payable on the 1st days of March, May, and July, 1903, and also its note of \$18,000 payable five years after date, as well as certain interest notes. The mortgagor was authorized to pay off the mortgage debt at any time prior to July 1, 1903, and after that date at any time of the maturity of any interest note. It conveyed the two lots of ground and contained the usual provisions for foreclosure in case of default. Mr. Levering testified that \$28,000 was paid for one and \$5,000 for the other lot of ground. He spoke of the mortgage for \$18,000 being given to, the Sheppard-Pratt Asylum, but it is not explained in the record what he meant by that. The lot for which the sum of \$26,000 was to be paid is the one that the appellant had undertaken to sell for the appellee. Dr. Gallagher was not willing to spend any money in making the repairs, and the appellee declined to take the property unless they were made. It was then agreed that the machinery spoken of should be sold and the proceeds used. Dr. Coates sold the machinery, and, apparently, he also had a railroad switch built to the property. Mr. Levering said that Dr. Coates was the only person he saw during the negotiations until they were virtually consummated, and then Dr. Gallagher came to instruct Mr. Dawson to draw the lease—the arrangements were carried out as agreed upon by Dr. Coates, who "brought the principals together." Dr. Coates testified that at the time of his employment by Dr. Gallagher it was agreed that he was to have 2½ per cent. commissions. In his testimony is the following: "Q. At the time of your negotiations with Dr. Gallagher was there anything said by Dr. Gallagher as to what commissions you were to receive for making the sale and the carrying out this agreement? A. I was to receive 2½ per cent., if the option was exercised. Q. You were to receive 2½ per cent. if the option was accepted? Is that it? A. That is the idea." There is also evidence that the appellant received \$75 commission on the first year's rent, but there is nothing in the record to show that that was received in lieu of the commissions on the sale, in case the option was exercised. There was therefore evidence tending to show that the appellant did make the sale, for it cannot be doubted that, if the appellant's statement is correct, he could not be deprived of the commissions simply because he did not effect a sale at once—he distinctly testified that he

was to receive the commissions if the option was exercised, and the evidence tends to show that the agreement or lease was made as the result of his negotiations with Mr. Levering.

This case presents an altogether different question from one in which a broker would be employed to sell property, but simply obtained an option. Of course that of itself would not entitle him to commissions, but in this case the option was exercised, the sale consummated, and, according to the plaintiff, the agreement was that he was to have the commissions if the option was exercised. In *Kimberly v. Henderson*, 29 Md. 512, the brokers inserted a provision in the contract by which the proposed purchaser had the option of avoiding the contract of sale on payment of a forfeit, and he did avoid it and did not become the purchaser. This court held that, under those circumstances the brokers could not recover the commissions, but the opinion strongly intimated that a different conclusion might have been reached if the party had ultimately become the purchaser. In *Leopold v. Weeks*, 96 Md. 280, 53 Atl. 987, the contract of sale was conditioned upon the acceptance of the invention referred to by the Reichspostamt after one year's trial of 400 instruments which were to be installed in the city of Berlin. Several extensions to the time were given, with the consent of the parties interested, and the sale was finally consummated. We held that, as Leopold first procured the purchaser and arranged the terms of contract that formed the foundation upon which the sale was ultimately made, he must be regarded as the procuring cause of the sale, notwithstanding the subsequent modification of the contract, and was entitled to the commissions provided for in the agreement creating his agency.

2. Does the fact that the appellant was not a licensed real estate broker in 1903 prevent his recovering the commissions? We cannot understand how that could be. In the first place he did have such license from October 4, 1897, until the 1st day of May, 1899. He was therefore a licensed broker on the 16th of December, 1897, when the agreement was executed, and there is nothing to show that he was not during the entire negotiations with the guano company. The fact that he was not licensed when the option was exercised and the sale consummated could not prevent his recovering commissions on the sale, which was the result of the work done by him when he was licensed, even if it be conceded that his failure to have a license at the time of his negotiations could have such effect. According to the appellant's testimony he rendered the services for which he seeks compensation when he was a licensed broker, and, if that be true, there can be no reason why he should not be entitled to receive his compensation when it became due, although he was not then a licensed broker. But, aside from that, w-

think the case of *Banks v. McCosker*, 82 Md. 518, 34 Atl. 539, 51 Am. St. Rep. 478, is conclusive of the question. In that case this court held that the failure of a hawker and peddler to take out the license required by the Code did not affect the contract between the unlicensed peddler and the purchaser of goods from him. That statute furnished more reason for such a contention as that made by the appellee than the one applicable to real estate brokers does. Section 24 (formerly 27) of article 56 provides that "No hawker or peddler shall buy for sale out of the state, or buy to trade, barter or sell, or offer to trade, barter or sell within the state any goods, wares or merchandise until he shall have first taken out a license for that purpose." The penalty prescribed by that statute for its violation is the imposition of a fine, and this court said: "When the law declares the consequence of its violation, the contract can in no sense be regarded as illegal, unless the law itself, either by its manifest intent or in express terms, so declares it. The provisions of the Code referred to neither directly nor indirectly refer to any consequences save the payment of a fine for a violation of the law, and the failure to pay such fine, so that it can only be regarded as a revenue measure, and does not affect the contract between an unlicensed peddler and the purchaser of goods from him." The statute now under consideration is to be found in article 4 of the Local Code applicable to Baltimore City. Section 658, Code Pub. Loc. Laws, provides that "Any person, copartnership or firm applying for the same, and paying the sum of money herein provided, may obtain a license for carrying on the business of real estate broker in the city of Baltimore," etc. Section 659, Code Pub. Loc. Laws, makes it a misdemeanor and imposes a fine for carrying on such business without first obtaining a license, but does not declare invalid a contract made by one who was not licensed, or indicate that such should be the result. It would seem then to be clearly "a revenue measure," such as was spoken of in *Banks v. McCosker*. We are therefore of opinion that the plaintiff was not precluded from recovering by reason of anything in that local law. The general laws on the subject do not apply to Baltimore City, but they do not materially differ from this local law in respect to the question under consideration.

3. Nor do we think that the statute of limitations is a bar to the plaintiff's action. As we have already seen, he was only to get the commissions in case the option was exercised. That was not done until December 31, 1902, and therefore the appellant's cause of action did not accrue until then. He could not have sued before that time, and, as this suit was commenced the 27th of June, 1904, the period fixed by the statute of limitations (three years) had not expired.

4. It is impossible to determine from this record just how much of the \$26,000 had been

received by the appellee when this suit was brought, or whether the circumstances were such as to require the appellant to wait until the purchase money was paid. The agreement between the two companies apparently contemplated the payment of the \$26,000 in cash, and it does not appear whether the appellant consented to have the payment of his commission postponed until the money was due under the mortgage, but at least \$15,000 of the \$31,000 was due, and, as we understand from Mr. Levering's evidence, was paid before the suit was brought. It may be that the appellee also realized on the mortgage before then, as Mr. Levering spoke of the mortgage to the Sheppard-Pratt Asylum for the \$16,000, and possibly the appellee had sold it to that institution. But it is apparent that the appellant is entitled to commissions on the \$15,000, or at least so much of it as was to be applied to the payment of the \$26,000 and hence the court below was in error in granting the prayer which prevented the appellant from recovering anything. We will not undertake to determine from the meager facts that appear in this record whether he can recover commissions on the \$16,000, which under the terms of the mortgage was not due for five years. Nor do we deem it necessary to discuss the first bill of exceptions. That exception is thus stated in the record: "To the sustaining of the defendant's objections to any sale made by the plaintiff by which he claims commissions unless he was a licensed real estate broker in the year eighteen hundred and ninety-three, the plaintiff excepted," etc. We suppose it was intended to be "in the year nineteen hundred and three"; but, assuming that to be so, what we have said above on the subject is sufficient. The judgment will be reversed.

Judgment reversed, and new trial awarded; the appellee to pay the costs.

DENTON BROS. v. GILL & FISHER.

(Court of Appeals of Maryland. Dec. 7, 1905.)

1. SALES—FAILURE OF CONSIDERATION—RE-SALE BY VENDEE—ACTION BY VENDEE.

Where a vendee of a shipment of corn resold it, and there was a shortage, the vendee might recover of his vendor without first having reimbursed his vendee for the shortage.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1131.]

2. CUSTOMS AND USAGES—CUSTOM AS AFFECTING CONTRACT.

In order for a custom to be regarded as part of a contract, it must have been actually or constructively known and be consistent with the contract.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs and Usages, §§ 1-6, 24, 27.]

3. SAME—CONSISTENCY WITH CONTRACT.

Where a contract for the sale of corn provided, "Any deficiency on bill of lading weights to be paid for by the seller," the contract could not be varied by evidence of a custom whereby, in sales and purchases of

corn, the shipping weights taken at port of shipment, as stated in the bill of lading, are final.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs and Usages, § 34.]

Appeal from Superior Court of Baltimore City; Danl. Giraud Wright, Judge.

Action by Denton Bros. against Gill & Fisher. From a judgment in favor of defendants, complainants appeal. Reversed.

Argued before McSHERRY, C. J., and BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

John I. Donaldson, for appellants. D. K. Este Fisher, for appellees.

McSHERRY, C. J. The appellants brought suit in the superior court of Baltimore City against the appellees. The declaration contains three of the usual common counts and a fourth count in special assumption. To the common counts the appellees pleaded, and issues were joined thereon; to the special count they demurred, and the lower court sustained the demurrer. The trial then proceeded before a jury on the issues of fact framed on the general issue pleas, and, under the instructions of the court, resulted in a verdict for the appellees, who were the defendants. From the judgment on that verdict this appeal was taken. The questions here involved are, first, the one raised by the demurrer to the fourth count, and, secondly, those arising on the prayers for instructions to the jury. As the question raised by the demurrer and the one arising on the fourth prayer of the appellees, which was granted, and the second prayer of the appellants, which was rejected, are identical, they will be considered together. By doing so but one other inquiry of any consequence will remain to be disposed of, and that is the one presented by the fifth prayer of the appellees, which was also granted, and the first prayer of the appellants, which was rejected.

To simplify the discussion, and with a view to avoid repetition, the facts appearing in the record will now be concisely stated. The appellants, Denton Bros., are grain merchants in Leavenworth, Kan. On September 28, 1899, they sold to the firm of Bowring & Archibald, of New York, 5,000 quarters of No. 2 corn at 43 cents per 56 pounds "cost, freight and insurance to Liverpool," to be shipped in January or February, 1900. Bowring & Archibald, then cabled to C. T. Bowring & Co., Limited, of Liverpool an offer of 5,000 quarters of corn of the same quality on cost, freight, and insurance terms, and the last-named company placed the offer with Montgomery, Jones & Co. who accepted the terms, and C. T. Bowring & Co. cabled Bowring & Archibald of the sale, but C. T. Bowring did not actually buy the corn. Bowring & Archibald then drew, with the documents attached, on C. T. Bowring & Co. in the usual way for the price of the

whole 5,000 quarters sold by Denton Bros. to Bowring & Archibald and sold the draft to Bankers. On January 20, 1900, the appellees, Gill & Fisher, through Parker & McIntyre, brokers, sold to Denton Bros. 8,000 quarters (5 per cent. more or less as per London contract) of No. 2 corn at 46 cents per 56 pounds "cost, freight and insurance to Liverpool," to be shipped during February by first class steamer from any Atlantic port, "Payment by sellers' draft at sight on buyers with documents attached as customary." In February the steamship Indore received on board in hold 5 at Baltimore & Ohio Elevator C at Locust Point the corn sold by Gill & Fisher to Denton Bros., and, upon the faith of a certificate from the railroad company's elevator foreman that 3,000 quarters of corn of the grade sold had been loaded aboard the Indore for account of Gill & Fisher, the agents of the Johnston Line of steamships issued to Gill & Fisher three bills of lading for the 3,000 quarters of corn; each bill of lading being for 1,000 quarters. For 3 cents per bushel of the 46 cents agreed price Gill & Fisher drew on Denton Bros., who paid the draft on presentation, and for the balance of the contract price, viz., 43 cents, at the request and by the direction of Denton Bros., Gill & Fisher drew on Bowring & Archibald, with the bill of lading indorsed in blank, the insurance policies and inspection certificates attached, and the draft was paid on presentation. These directions to the appellees were given by Denton Bros. in part performance of their contract with Bowring & Archibald, though no proof was offered that the appellees knew of the existence of that contract. Montgomery, Jones & Co. paid C. T. Bowring & Co. for the whole 5,000 quarters. When the Indore reached Liverpool, about March 7th, Montgomery, Jones & Co. claim that the corn delivered to that vessel on account of Gill & Fisher at Baltimore & Ohio Elevator C weighed out 215,992 pounds short. For the amount of that alleged shortage at the then value of corn in Liverpool, viz., 18 shillings sterling per quarter, Montgomery, Jones & Co. made demand for reimbursement on C. T. Bowring & Co. and were paid by that company the full amount, namely, £349 17s. 3d. C. T. Bowring & Co. then made claim for the same amount on Bowring & Archibald and were allowed therefor in accounts between them. In April, 1900, C. T. Bowring & Co. took over the business of Bowring & Archibald as a going concern and assumed all its assets and liabilities. On February 1, 1901, Denton Bros. made to C. T. Bowring & Co. an assignment of any claim they might have against Gill & Fisher. The record also contains a copy of the "London Contract" referred to in the memorandum of the sale of the 3,000 quarters of corn for account of Gill & Fisher to Denton Bros.; and the following clauses appear in that contract. "Two per cent. more or less"; and "Seller

has the option of shipping a further 3 per cent., more or less, on contract quantity, the excess or deficiency over the 2 per cent. to be settled at the c. f. & l. price on date of bill of lading, value to be fixed by arbitration, unless mutually agreed"; and again, "Any deficiency on bill of lading weight to be paid for by seller, and any excess over bill of lading weight to be paid for by buyer at contract price." It is denied by the appellees that there was any shortage in the weight of the corn; but with that contention we have nothing to do, as it is exclusively a matter for the jury to determine.

Compressed into the narrowest compass the situation presented is this: Denton Bros. purchased from Gill & Fisher 3,000 quarters of corn, and sold the same corn to Bowring & Archibald; Bowring & Archibald, through C. T. Bowring & Co., sold the same corn to Montgomery, Jones & Co. The last-named purchasers paid C. T. Bowring & Co. in full. It is alleged that there was a material shortage in the weight when the corn was delivered. Montgomery, Jones & Co. were refunded the amount of that shortage by C. T. Bowring & Co., C. T. Bowring & Co. were refunded the same amount by Bowring & Archibald, and the latter have made a demand on Denton Bros. to refund the same amount. Denton Bros. have not paid back that amount, but have sued Gill & Fisher, their vendors, to recover the sum which they, Denton Bros., are liable to pay on account of the same shortage to their vendee. The question on these facts is, can Denton Bros. maintain this suit until they actually pay back to their vendee the amount claimed by the latter from Denton Bros. on account of that shortage? This question is the one raised by the demurrer to the fourth count of the narr., and by the fourth instruction granted at the instance of the appellees and the second rejected prayer of the appellants. We will dispose of that question before stating or considering the other or remaining inquiry.

If Denton Bros. had not resold the grain to Bowring & Archibald, and if, after they had paid Gill & Fisher the agreed price for the entire 3,000 quarters of corn purchased from the latter, it had been discovered that the vendors had in fact failed to deliver over 200,000 pounds of the corn sold and paid for, it could not be questioned that Denton Bros. would have a sustainable cause of action against Gill & Fisher for a breach of the latter's contract. How can the resale of the corn by Denton Bros. extinguish Gill & Fisher's obligation to comply with their contract, or exonerate them from the consequences of a breach which occasions a failure of consideration? The right of the vendee to recover from the vendor for a failure of consideration is founded on the simple fact that the former has not received from the latter what the vendor sold and agreed to deliver, and what the vendee paid for and

contracted to get. The breach consists in the failure of the vendor to live up to his contract, and no subsequent sale of the grain by the vendee can obliterate or condone that breach. If a sale of the same commodity by the vendee to a subvendee extinguishes the responsibility of the vendor to make good a shortage to his vendee, then a payment to the subvendee by his vendor of the damages caused by the shortage would revive the first vendor's responsibility to his vendee; and thus the obligation of the first vendor to make good a deficiency to his vendee would depend, not upon his own breach of the contract of sale, but upon a collateral and independent transaction between the vendee and a third party who is a total stranger to the original contract of sale.

The adjudged cases do not support that view. Allusion will now be made to some of them. Perhaps the most apposite is *Randall and Another v. Raper, Ellis, Black & Ellis*, 84. The defendant in that case by warranting 30 quarters of seed barley to be then chevalier seed barley, sold the same to the plaintiffs at and for £1 2s. 6d. per quarter which the plaintiffs paid him. The plaintiffs were corn factors and purchased the seed barley for the purpose of reselling it in the way of their trade. The seed barley delivered was not chevalier seed barley. Without any knowledge of the breach of the warranty, and believing the seed to be chevalier seed barley, the plaintiffs sold to several subvendees the same seed barley delivered to them by the defendant, and sold it under a like warranty given by the defendant to the plaintiffs. The subvendees sowed the seed and the seed, not being chevalier seed barley as it had been warranted to be, produced inferior crops, whereby the subvendees were damaged and injured. The plaintiffs then became liable to compensate and make good to the subvendees, respectively, the damages by them so sustained and incurred. The plaintiffs, the original vendees, thereupon sued the vendor to recover the amount for which they were liable, but had not yet paid to the subvendees. Judgment went by default, and the damages were assessed under a writ of inquiry before the deputy sheriff of Essex. A verdict was directed for £261 7s. 6d. reserving leave for the defendant to move to reduce the verdict to £15. Upon a motion to reduce the verdict, heard by the Court of Queen's Bench, it was contended that the verdict should be reduced because the jury were misdirected; and it was argued by Bovill that there ought not to have been any allowance for the damages in respect to the plaintiffs having agreed to make compensation to their subvendees because the amount of the compensation to be paid by the plaintiffs to their vendees had not been ascertained and was not definite. Lord Campbell, C. J., after remarking that, if the plaintiffs had paid the subvendees the amount of the damages claimed by them, there would have

been no doubt as to the right of the plaintiffs to recover from the defendant the sums thus paid to the subvendees, observed: "But then it is contended, secondly, that, even if the damages could be recovered in the event of the actual payment, they cannot be recovered upon a mere liability. I think we cannot lay down a rule that the mere liability cannot be the foundation of damages; if it can, the amount may be estimated by a jury. The demand is made, and is a just one; and though it is not yet satisfied, yet the jury may find to what extent the plaintiffs are damaged by their having become liable to it." And Erie, J., said: "But then it is said that here the plaintiffs have made no actual payment; so that, if they recovered such damages in this action, they might put them into their own pockets without paying the subvendees. But I think that the true rule is that a liability to loss is sufficient to give the party liable a title to recover." And Crompton, J., observed: "Taking the narrowest rule as to the probable and necessary consequences of a breach of contract, these damages fall within it. It is said, however, that the plaintiffs have here only incurred a liability, and have made no payment. But I entirely deny that payment is necessary to entitle a party to recover. Liability alone is sufficient. It has always been customary to state in the allegation of special damages, 'whereby the plaintiff became liable to pay.' I recollect a discussion once arising whether an allegation 'whereby the plaintiff paid' was sufficient without an allegation 'whereby the plaintiff became liable to pay'; but I do not recollect a discussion whether the latter allegation was sufficient without the former. In actions for bodily injuries the liability to pay the surgeon's bill is always allowed as an item of damages. In an action for breach of contract you can recover only once, and the action accrues at the moment when the breach occurs. A liability to payment, which has been incurred by a plaintiff in consequence of the breach of a defendant's contract, may well form a part of the damages, though it may be difficult to estimate them." In *Josling v. Irvine*, 8 Hur. & Nor. 512, *Randall v. Raper* was referred to with approval, but distinguished. *Dingle v. Hare*, 7 C. B. N. S. 145, is also directly in point. In *Muller v. Eno*, 14 N. Y. 597, the syllabus states: "The purchaser may recover for the breach of a warranty, although he has sold the goods and no claim has been made upon him and he is liable to none on account of the alleged defect. Nor in such action is he required to prove the price at which he resold the goods. That price may be evidence of the amount of damages but does not furnish the rule." In the judgment of the court it is said: "The vendor is simply required to make good his own contract, and I do not see how he can discharge that obligation by inquiring into relations between other parties. * * *

The promise is not one of indemnity against

loss on a resale." See, also, *Passinger v. Thorburn*, 34 N. Y. 637, 90 Am. Dec. 753, where *Randall v. Raper* is cited with approval. In *Western Twine Co. v. Wright*, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438, suit was brought by the vendor of binder twine to recover from the vendee the amount of a promissory note given for the price thereof. Some of the twine had been sold by the vendee to numerous farmers for cash, and they made no claim on the vendee for reimbursement. It was held that the vendee could defeat a recovery on the note at the suit of the vendor to the extent of the actual difference between the real value of the twine and what it would have been worth had it corresponded with the warranty, even though "a part of it had been sold for cash, and no claim has been made by any of the purchasers on account of defects." The case of *Wheelock v. Berkeley*, 138 Ill. 153, 27 N. E. 942, was cited with approval. In the last-mentioned case it was ruled that in an action for breach of a warranty it is of no consequence what the purchaser may have received from a resale.

The cases cited by the appellees' counsel do not conflict with those above referred to. They arose either upon indemnity bonds or grew out of the evictions, and depended upon entirely different principles. In *California Dry Dock Co. v. Armstrong* (C. C.) 17 Fed. 221, no question between vendor and vendee was involved at all. We hold, then, for the reasons and upon the authorities already alluded to, that *Denton Bros.*, the legal plaintiffs, were entitled to recover from *Gill & Fisher* the amount for which they (*Denton Bros.*) were liable to the subvendees, notwithstanding the fact that *Denton Bros.* had not paid over the sum for which they were so liable to the subvendees. It follows, therefore, that there was error committed in sustaining the demurrer to the fourth count of the narr., and that the court was wrong in granting the appellees' fourth prayer and in rejecting the appellants' second prayer.

Secondly. The appellees contended that the court, by granting their fifth prayer and by rejecting the appellants' first prayer, ruled that the appellants were not entitled to recover, if the jury should find from the evidence that there existed among grain merchants a general and well-established usage or custom to the effect that, in sales and purchases of corn for shipment to a foreign port, the shipping weights taken at the port of shipment upon loading the vessel, as stated in the bill of lading, should be final; and that, in case of shortage in the outturn at the port of discharge, the purchaser or his assigns should have no claim upon the seller for the value of the shortage. To support that contention and to sustain the rulings upholding it, there must be written into the "London Contract," by force of the usage or custom relied on, some such term as "bill of lading weights final or conclusive." "To be regarded as part of a contract, however,

the usage or custom must have both of the following elements: (1) It must be actually or constructively known, and (2) it must be consistent with the contract. If either of these elements is lacking, the usage or custom cannot be regarded as part of the contract." 2 Page on Contracts, § 604. And this court said, in *Foley & Woodside v. Mason & Son*, 6 Md. 49: "And although evidence of usage is sometimes admissible to add to, or to explain, the terms of an agreement, yet it will never be permitted to vary or contradict the clear and manifest signification of the terms which the contracting parties may think proper to employ to express their meaning." By the express terms of the "London Contract" the usage or custom invoked by the appellees is excluded. If the bill of lading weights are final and conclusive according to the custom, how can that custom be imported into the contract in the face of the explicit provision that "any deficiency on bill of lading weights to be paid for by seller"? The custom set up is absolutely inconsistent with the contract and can only constitute a term of that contract by expunging a diametrically opposite term. When the parties to the contract have distinctly agreed that the bill of lading weights shall not be final—as they have done by stipulating who shall be liable if the weights are erroneous—a custom that they shall be final cannot override the contract, because such a custom is flatly inconsistent with the contract. There was error, therefore, in granting the appellees' fifth prayer and in rejecting the appellants' first prayer. The appellants' third prayer should have been granted. It told the jury that if the whole amount of grain called for by the contract, viz., the 3,000 quarters, was not in fact delivered by the railroad company at its elevator to the steamer Indore, then the surrender by Gill & Fisher of elevator receipts calling for that quantity of corn is, under the pleadings, no defense to this action. The proposition announced is self-evident. If the quantity of grain for which Gill & Fisher were paid was not delivered to their vendee, then their surrender of the warehouse receipts did not relieve them from their liability to their vendee for the shortage in delivery. We do not discover any error in the rejection of the appellants' fourth prayer. It undertook to define the rights of Gill & Fisher against the railroad company, but, as the rights of the former against the latter, and the liabilities of the latter to the former with respect to the alleged shortage in the weight of the corn, are not in any way involved in the pending case, they were not matters with which the jury had any concern. The appellants' fifth prayer was correct and ought to have been granted. It merely told the jury that the appellants had no cause of action against the railroad company on account of the shortage, as there was no contract between that company and them.

The appellees' first prayer related to the burden of proof and was properly granted.

It results from what has been said that the judgment in favor of the appellees must be reversed because of the errors committed in sustaining the demurrer, in granting the appellees' fourth and fifth prayers, and in rejecting the appellants' first, second, third, and fifth prayers, and a new trial will be awarded.

Judgment reversed, with costs above and below, and new trial awarded.

GARITEE v. BOND.

(Court of Appeals of Maryland. Dec. 7, 1905.)

1. EXECUTORS — COMPETENCY OF PERSON NAMED AS EXECUTOR—CONVICTION OF INFAMOUS CRIME.

One convicted of making an overcharge for prosecuting a pension claim, in violation of Act Cong. June 27, 1890, c. 634, § 4, 26 Stat. 183 [U. S. Comp. St. 1901, p. 3231], and subject to imprisonment in the discretion of the court, has not been convicted of a "crime rendering him infamous according to law," within Code Pub. Gen. Laws, art. 93, § 51, making one convicted of a "crime rendering him infamous according to law" disqualified from acting as executor, though it be assumed that in the contemplation of the federal jurisdiction the offense be deemed an infamous one.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 32, 77; vol. 27, Cent. Dig. Indictment and Information, §§ 10-22; vol. 50, Cent. Dig. Witnesses, § 111.]

Appeal from Orphans' Court of Baltimore City; Myer J. Block, Wm. J. O'Brien, and Harry C. Gaither, Judges.

Application by Charles E. Garitee for letters testamentary on the estate of Sophia V. Chambers, deceased. From an order denying the application, on the petition of William A. Bond, the applicant appeals. Reversed.

Argued before McSHERRY, C. J., and BOYD, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Joseph W. Bristor and Thomas O. Ruddell, for appellant. W. Ashbie Hawkins, for appellee.

SCHMUCKER, J. The appellant was named as executor in the last will of Sophia V. Chambers, late of Baltimore City. Upon his application to the orphans' court of that city for letters testamentary upon her estate, the appellee, claiming to be the adopted son of the testatrix, filed a petition asking that the letters be refused, because the appellant had been convicted of, and imprisoned for, an infamous crime, and had been disbarred as an attorney by the supreme bench of Baltimore City for unprofessional conduct, involving moral turpitude. The appellant answered the petition, denying that he had been convicted of any infamous offense, or that he was not a fit and proper person to act as executor, and insisting that the mat-

ters alleged in the petition would not justify the court in refusing to grant him letters testamentary. The record contains no evidence touching the appellant's alleged disbarment by the supreme bench, nor is that allegation adverted to or noticed in the order appealed from; but there does appear in the record a transcript of proceedings from the District Court of the United States for the District of Maryland showing his indictment and conviction for a violation of the act of Congress approved June 27, 1890, c. 634, § 4, 26 Stat. 183 [U. S. Comp. St. 1901, p. 3231]. That act provides as follows: "No agent, attorney or other person engaged in preparing, presenting or prosecuting any claim under the provisions of this act, shall directly or indirectly, contract for, demand, receive or retain for such services in preparing, presenting or prosecuting such claim, a sum greater than ten dollars, which sum shall be payable only upon the order of the commissioner of pensions by the pension agent making payment of the pension allowed; and any person who shall violate any of the provisions of this section or who shall wrongfully withhold from a pensioner or claimant the whole or any part of a pension or claim allowed or due such person or claimant under this act shall be deemed guilty of a misdemeanor and upon conviction thereof, shall for each and every offense be fined not exceeding \$500 or be imprisoned at hard labor not exceeding 2 years or both in the discretion of the court."

The indictment in the District Court charges the appellant with having, in violation of the statute, unlawfully demanded and received from a pensioner for prosecuting his claim for the pension the sum of \$12, which was not paid to him upon the order of the commissioner of pensions by the pension agent making payment of the pension. It does not appear from the proceedings whether the traverser charged the pensioner \$12 in addition to the \$10 fee contemplated by the law, but it does appear that the \$12 were collected from the pensioner in violation of the statute.

The orphans' court, upon a hearing of the matter thus presented to it, passed the order appealed from on July 12, 1905, declaring that the appellant "be, and he is hereby, removed as executor of the will of Sophia V. Chambers, he having been convicted of an infamous crime, and that letters testamentary to him be refused." It is conceded that the orphans' court in passing this order acted in exercise of power supposed to have been conferred upon it by section 51, art. 93, of the Code of Public General Laws, which provides as follows: "If any person named as executor in a will shall be at the time when administration ought to be granted under the age of eighteen years or of unsound mind incapable according to law of making a contract or convicted of any crime render-

ing him infamous according to law, or if any person named as executor shall not be a citizen of the United States, letters testamentary or of administration may be granted in the same manner as if such person had not been named in the will."

Without pausing to consider the propriety of the form of the order appealed from, we pass to the discussion of the most important question presented by the record, which is whether the offense of which the appellant was convicted in the federal court was an infamous one, within the meaning of section 51, art. 93, Code Pub. Gen. Laws. The authorities differ in their definition of an "infamous crime." Some of them rely for that purpose upon the character of the crime with reference to its degree of moral turpitude, while others hold that the true test is the nature of the punishment inflicted for the commission of the offense. The definition has in some instances been made to depend largely upon the connection in which the designation "infamous" was applied to the offense and the purpose intended to be accomplished by its use. Thus, in construing the provision of the federal Constitution which prohibits prosecution for "a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury," the Supreme Court of the United States in the habeas corpus case of *Ex parte Wilson*, 114 U. S. 422, 5 Sup. Ct. 935, 29 L. Ed. 89, held that the provision must be considered, not merely from the standpoint of the character of the crime, but also from the nature of the consequences to the accused if he should be found guilty, and it discharged the prisoner, whose offense was punishable by imprisonment for a term of years at hard labor, because he had been tried and convicted upon a mere information without indictment or presentment by a grand jury. The court in that case gave to the constitutional provision then under consideration, which was manifestly adopted for the benefit of accused persons, that construction which afforded to the greatest number of such persons the benefit of its operation. That decision was followed by a number of others in the same court, holding that imprisonment in the penitentiary was infamous punishment. *Mackin v. U. S.*, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909; *In re Mills*, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107; *In re Claassen*, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409. But even in *Wilson's Case* it was held that at common law, prior to the Declaration of Independence, "it was already established law that the infamy which disqualified a convict to be a witness depended upon the character of his crime, and not upon the nature of his punishment." The authorities generally, though not with entire uniformity, hold that the infamous nature of a crime was determined at common law by the character of the act itself, and not by the penalty inflicted for its

commission. The crimes which the common law regarded as infamous because of their moral turpitude were treason, felony, perjury, forgery, and those other offenses, classified, generally, as *crimen falsi*, which impressed upon their perpetrator such a moral taint that to permit him to testify in legal proceedings would injuriously affect the public administration of justice. *Rex v. Ford*, 2 Salk. 690; *Bouv. Law Dict.* 1027; 1 *Greenl. Ev.* § 873; *Whart. Crim. Law*, § 758; *Blash. Crim. Law*, § 974; *Utley v. Merrick*, 52 Mass. 302; 12 *Cyc.* 135; 16 *Am. & Eng. Encyc.* p. 247, and cases there cited; *In re Butler*, 84 Me. 25, 24 *Atl.* 456, 17 *L. R. A.* 704; *State v. Nolan*, 15 *R. I.* 529, 10 *Atl.* 481. Our predecessors had occasion in the case of *State v. Bixler*, 62 Md. 360, to determine what constituted an infamous crime, within the meaning of section 2, art. 1, of the Constitution of this state, which prohibits from voting at any election a person "convicted of larceny or other infamous crime unless pardoned by the Governor." It is said in the opinion in that case: "An 'infamous crime' is such a crime as involved moral turpitude, or such as rendered the offender incompetent as a witness in court; upon the theory that a person would not commit so heinous a crime unless he was so depraved as to be unworthy of credit. 1 *Abb. Law Dict.* 602, and authorities there cited. The general court of this state in *Evans v. Bonner*, 2 *Har. & McH.* 378, defined 'infamous crime' to be one which rises at least 'to the grade of felony.' This is, however, too narrow, for perjury is a misdemeanor, but by all authority is 'infamous.' The Constitution in providing for exclusion from suffrage of persons whose character was too bad to be permitted to vote could only have intended by the language used such crimes as were infamous at common law, and are described as such in common-law authorities. * * * There are many misdemeanors punishable by confinement in the penitentiary which are clearly not infamous crimes within the meaning of the common law or of the Constitution. If, for example, the prisoner had been convicted of any of the assaults with intent mentioned and punished by the Code, and had been sentenced to the penitentiary, and served his time out there without being pardoned by the Governor, he would not be chargeable with having committed an 'infamous crime.'" Construing, therefore, as we should, the expression "infamous crime," used in section 51, art. 93, of the Code, in the same manner that our predecessors construed it when used in the Constitution, we are compelled to hold that the statutory offense of which the appellant was convicted cannot be regarded by us an infamous one merely because it was punishable, at the discretion of the court, by a term of imprisonment, which that court might, in the exercise of its recognized power, have required him to serve in a penitentiary. Nor do we think

that the statutory offense of which the appellant was convicted (of making an overcharge for services in prosecuting a claim for a pension, and collecting the fee so charged without complying with the provisions of the statute) involved the degree of moral turpitude which would have been requisite to make his transgression an infamous crime at common law.

Even if we assume that, in the contemplation of the federal jurisdiction in which the appellant was tried and convicted, his offense would be regarded from the nature of its punishment as an infamous one, that jurisdiction must be considered *quoad hoc* as foreign to that of the Maryland courts. *Logan v. U. S.*, 144 *U. S.* 303, 12 *Sup. Ct.* 617, 38 *L. Ed.* 429; *Langdon v. Evans*, 3 *Mackey (D. C.)* 1. In *Logan's Case* the Supreme Court held that both "at common law and on general principles of jurisprudence, when not controlled by express statute giving effect within the state which enacts it to a conviction and sentence in another state, such conviction and sentence can have no effect, by way of disqualification of a witness, beyond the limits of the state in which the judgment is rendered." See, to same effect, *Com. v. Green*, 17 *Mass.* 515; *National Trust Co. v. Gleason*, 77 *N. Y.* 400, 33 *Am. Rep.* 632; *Story, Conf. Laws*, § 92.

The orphans' court were therefore in error in treating the appellant as disqualified to fill the office of executor because he had been convicted and sentenced by the District Court of the United States for the offense mentioned in the record, and for that error the order appealed from must be reversed, and the case remanded for further proceedings in accordance with this opinion.

Order reversed, with costs, and cause remanded for further proceedings.

THOMAS v. GOTTLIEB BAUERN-SCHMIDT STRAUS BREWING CO.

(Court of Appeals of Maryland. Dec. 7, 1905.)

1. LANDLORD AND TENANT—LEASE—OPTION TO PURCHASE—CONSTRUCTION.

A lease for a year contained a proviso that the "agreement, with all its provisions and covenants," should continue in force from time to time after the expiration of the year, provided that the parties could terminate the same at the end of the year or any term thereafter, and stipulated that the tenant should have the right to purchase the premises "at the end of said term" for a fixed sum. *Held*, that the tenant's option to purchase could be exercised at the end of the year, or every succeeding year until the lease was terminated.

2. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—MISTAKE.

Equity will not compel one to perform a contract which he did not intend to make, and which he would not have entered into had its true effect been understood.

3. SAME — EVIDENCE OF MISTAKE — SUFFICIENCY.

Evidence on the issue whether a stipulation in a lease for a year with the privilege of renewals, which gave the lessee the option

to purchase during the renewal periods, was inserted through misapprehension on the part of the lessor, examined, and held not to warrant a finding that the stipulation was inserted through misapprehension, such as to justify equity in refusing to grant the lessee the right to exercise the option.

4. SAME—MUTUALITY OF OBLIGATION.

Where a lessee notified the lessor of its intention to purchase the property under the terms of the lease, giving the lessee an option to purchase, the stipulation granting the option became enforceable at the instance of the lessor or lessee.

5. SAME—REQUISITES OF CONTRACT.

Relief by way of specific performance is not a matter of right, and to warrant the granting of it the contract must be fair, certain, founded on an adequate consideration, and free from suspicion as to its bona fides.

Appeal from Circuit Court, Baltimore County; N. Charles Burke, Judge.

Suit by the Gottlieb Bauernschmidt Straus Brewing Company against Hannah Thomas. From a decree for plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, JONES, and SCHMUCKER, JJ.

Edward S. Kines, for appellant. Elmer J. Cook, for appellee.

McSHERRY, C. J. This is an appeal from a decree passed by the circuit court for Baltimore county sitting in equity. The decree required the appellant, who was the defendant below, to execute specifically a certain contract for the sale of a house and lot situated in that county by conveying the same to the appellee. The Gottlieb Bauernschmidt Straus Brewing Company, a body corporate, filed its bill of complaint against Hannah Thomas on April 14, 1904. The bill alleged, in substance, that the defendant, the appellant here, being the owner of the real estate in controversy, subject to an annual ground rent of \$45, demised and leased the same to the Maryland Brewing Company, a body corporate, for the term of one year, beginning on the 1st day of May, 1900, and ending on the 30th day of April, 1901, at a specific rent, payable monthly, and that the lease contained a proviso "that this agreement, with all its provisions and covenants, shall continue in force from term to term after the expiration of the term above mentioned, provided, however, that the parties hereto, or either of them, can terminate the same at the end of the term above mentioned, or of any term thereafter, by giving at least thirty days previous notice thereof in writing." The bill further alleged, and the lease itself confirms the averment, that the next succeeding clause of the agreement stipulated "that the said tenant shall have the right to purchase said property at the end of said term for the sum of two thousand dollars." The bill charges that on August 10, 1901, the plaintiff, the appellee here, acquired all the rights and property of the Maryland Brewing Company, including the lease and option of pur-

chase aforesaid, with the knowledge of the appellant, who recognized the appellee as her tenant and as the assignee of said agreement of lease and option of purchase; that, desiring to avail itself of the option of purchase, the appellee corporation during the continuance of the lease so notified the appellant, "and duly tendered the sum of two thousand dollars (\$2,000) upon the execution to it of a proper deed of said premises, and is now ready to pay the same, but the said Hannah Thomas refuses to receive it," and that she "refuses to make a conveyance of the said property to your orator, as she rightfully ought to do." The prayers for relief are, first, that the agreement may be specifically enforced; and, secondly, for general relief. The bill was demurred to, the demurrer was overruled, and the appellant then answered.

The main defenses set up in the answer are, first, that the option of purchase terminated on April 30, 1901 without the Maryland Brewing Company having made any attempt to close the option. In view of one of the contentions relied on in behalf of the appellant, it will not be amiss to advert at this point to an admission contained in her answer under oath. That admission is as follows: The Maryland Brewing Company, "desiring to use the property for a saloon, said through its accredited agent that it did not care to purchase until they knew the character and amount of business that could be done, and requested an option of one year to test the business, and promised that, if the same was satisfactory, to purchase the same at the end of the year, to wit, on the 30th day of April, 1901, and, upon the promise of this defendant to give said option, it was incorporated in the agreement of rental." The second ground of defense is that the appellee never had an option of purchase, inasmuch as the option had expired before the appellee succeeded to the rights of the Maryland Brewing Company; and, thirdly, that no claim was ever made by the appellee that it intended to exercise any option until after the appellant had sold the property to another person. A general replication was filed, and testimony was then taken.

At the argument in this court three reasons were assigned by the appellant for a reversal of the decree, viz.: First. As contended in the answer, because the lease did not give an option which extended beyond April 30, 1901, and, as the option had not been availed of before that date, it had expired and is no longer binding. Secondly. Because the extrinsic facts proven in the case show that the appellant never intended to give any option at all beyond the first year, and therefore that it would be inequitable to force her to make a conveyance which was not within her contemplation when she signed the lease. Thirdly. Because the contract as embodied in the lease is not mutual, and cannot, therefore, be enforced specifically at the suit of the party not obligated by it to purchase. These

three reasons will be considered in the order just named.

First, then, what is the true interpretation of the provision of the lease relating to this subject? There is a distinct agreement that the tenant shall have the right to purchase the property "at the end of the said term" for the sum of \$2,000. What is the end of said term? Is it the end of the first year, or is it the end of any succeeding year thereafter during the continuance of the lease? The lease itself must and does furnish an answer. "This agreement, with all its provisions and covenants, shall continue in force from term to term after the expiration of the term above mentioned [that is, after the term of one year, ending April 30, 1901] provided, however, that the parties hereto, or either of them, can terminate the same at the end of the term above mentioned, or of any term thereafter, by giving at least thirty days' previous notice thereof in writing." The parties themselves have in the contract itself defined the meaning of the phrase "at the end of said term," for they have declared that the agreement, with all its provisions and covenants, and therefore with the provision and covenant giving the option of purchase, shall continue in force from term to term after the expiration of the first year, though to each of the parties the right was reserved to terminate the lease at the end of the first term, or of any term thereafter. It is obvious, then, that the parties to the agreement defined each year to be a term within and subject to every provision and covenant applicable to the first year; and hence it must follow that, if the option of purchase was a provision or covenant which could have been exercised during the first year, it continued in force during every succeeding year or term, until the lease was brought to an end by the method therein prescribed. The right of the tenant to purchase the property is, as was stated by this court in *Maughlin v. Perry & Warren*, 35 Md. 357, "a continual obligation running with the lease on the part of the lessor, with the option in the tenant to accept the same or not within that time." *Maughlin v. Perry & Warren* is decisive of this branch of the case at bar. It appeared there that one Wells on March 9, 1864, rented certain property to Hynson for three years, renewable for a similar period, with covenant binding the lessor to sell and convey unto the lessee the demised premises for the sum of \$1,500 at any time before the expiration of the lease of tenancy. On March 15, 1867, Wells sold the same property to Maughlin for \$1,600, and the purchase money was paid. Wells died intestate before the expiration of the three years for which the lease had been renewed. All the rights of Hynson, the tenant who had the option of purchase, became vested through mesne assignments in Perry and Warren. Under these circumstances, six days before the expiration of the renewal of

the lease a bill was filed by Perry and Warren, alleging that they were ready to pay the stipulated sum of \$1,600, and praying for a specific performance of the contract. Maughlin resisted, on the ground that the acceptance of the option had not been in time, since it was not made during the original term of three years, and not until six days prior to the expiration of the renewal term, and that the mere offer in the bill to pay the money was not a sufficient compliance with the contract. This court ruled against both contentions, using the language hereinbefore quoted. As Maughlin had notice of the contract which gave Hynson the option, it was held that he did not acquire any greater right than Wells possessed. In the case at bar, Smith, who purchased from the appellant, knew of the option contract before he bought, and he secured no right superior to that of the appellee.

It would seem, then, both in view of the terms of the lease and in virtue of the decision by this court of *Maughlin v. Perry & Warren*, that the option of purchase incorporated in the lease was a continual obligation, running with the lease on the part of the appellant, with the option in the tenant to accept the same or not during each successive term which the lease created; and therefore the option had not expired when a tender was made of the agreed purchase money, and a deed was demanded during the continuance of the lease. So much for the defenses set up in the answer.

Secondly. Do the extrinsic facts show that the appellant did not intend to give any option at all beyond the first year, and that, consequently, the insertion of the renewal and extension clause providing therefor was a mistake which ought not to be binding on the lessor? The paragraph we have quoted from the answer distinctly admits that an option of purchase was given for one year. It is a settled principle that a court of equity will not grant its affirmative remedy to compel the defendant to perform a contract which he did not intend to make, and which he would not have entered into had its true effect been understood. *Somerville v. Coppage*, 101 Md. —, 61 Atl. 318. But the evidence shows that an effort was made by the Maryland Brewing Company within the first year to close the option, and at the earnest solicitation of the appellant the matter was permitted to stand open, and the relation of landlord and tenant was allowed to continue under the lease. Though Mrs. Thomas denies this, the preponderance of testimony is against her, and it is reasonably clear that she asked the agent of the Maryland Brewing Company not to insist upon closing the option during the first year of the tenancy, without intimating that it was her understanding that the privilege to purchase lapsed at the expiration of the first term of one year. While she stated in one portion of her testimony that she said to the

person who took the lease to her for her signature, "There's one mistake; that's the two thousand dollars; I have set no price"—she admits a little later on that, had the lessee taken the property "when the year was up, it would have been all right." She must, therefore, have known that the purchase price had been agreed upon at \$2,000; and, as she read the lease before signing it, and had her son read it with her, she must have understood, not only that an option of purchase at a named price had been provided therein, but also that the same option continued from term to term during the period the lease remained in force. We do not find that the testimony makes out such a case of misapprehension or misunderstanding in respect to the provisions of the agreement as would justify a court of equity in refusing to grant the relief prayed for. The evidence does not bring the case within the principle applied in *Somerville v. Coppage* and that class of decisions.

Thirdly. The defense relied on in the argument and founded on the supposed want of mutuality in the contract cannot prevail. If a contract is lacking in mutuality, it cannot be enforced. Whenever, as a general proposition, a contract is from any cause incapable of being enforced against one party, that party will not be permitted to enforce it against the other. Both parties must have a right to compel a specific performance at the date of the decree, or neither will have it. *Dixon v. Dixon*, 92 Md. 440, 48 Atl. 152. Agreements upon condition and options are within the rule, but when the condition has been performed or the option has been closed, the right of the respective parties to demand specific performance becomes mutual. *Dixon v. Dixon*, supra. Here the option was closed within the life of the lease. When the appellee corporation tendered itself ready to pay the money, and announced to the appellant its intention to purchase the property under the terms of the agreement, the contract ceased to be a mere option, and became a mutually binding obligation, which could have been enforced at the instance of the appellant just as effectively as at the suit of the appellee. Before the bill was filed, and, of course, before the decree was signed, both parties to the contract had an equal right to compel a specific performance. The cases cited by the appellant's counsel are not at variance with this conclusion. Take, for illustration, the case of *Geiger & Patterson v. Green*, 4 Gill, 472, where the contract under which Green claimed granted him a mere "privilege of digging and moving ore" at 25 cents per ton on the farm of Charlotte Owings, but imposed no obligation on Green to do anything but to pay for each ton of ore he might dig. He did not contract to dig any particular quantity or any ore whatever, and he had entered into no obligation of any sort, and of course no decree could be passed requiring him to specifically perform some-

thing which he had not undertaken to do. But an option of purchase at a specific price is a very different thing. It is a continuing offer for a definite time, which, upon acceptance within that time, becomes a definite contract, mutually binding on both parties, and hence capable of being enforced by either against the other. The case of *King v. Warfield*, 67 Md. 246, 9 Atl. 539, 1 Am. St. Rep. 384, is also totally dissimilar. That was a suit on a conditional contract—a contract which was to be binding only in the event that a contingency, over which a third party had exclusive control, should happen. The contingency did not happen, and consequently the incomplete contract never ripened into a perfected agreement, and hence no suit could be maintained upon it. In *Duvall v. Myers*, 2 Md. Ch. 401, an application was made for the specific performance of a contract for the sale of growing timber, but the contract relied on was not signed by the vendor, Duvall, or by any one for him, and when he sought to enforce it he was met with the objection that it was lacking in mutuality; and since, by reason of his not having signed it, it could not be enforced against him at the suit of the vendee, he could not compel the vendee, who had signed it, to execute it. The chancellor observed: "The paper says 'I have sold.' Who has sold? Who is the party who has contracted with the defendant? The paper does not inform us, and it may as well be any one else as Duvall. Where, then, in the agreement which he seeks to have specifically executed against the defendant is the reciprocal obligation on his part?" The case is clearly distinguishable from the one at bar. In *Billingslea v. Ward*, 33 Md. 48, a bill was filed by Ward for the specific enforcement of a parol contract alleged to have been made between one Green in his lifetime and Ward for the sale of land by the former to the latter. The evidence adduced by Ward consisted of declarations made by Green, and the evidence adduced by Green's executor comprised declarations made by Ward, to the effect that the contract was not final or conclusive, but left Ward the option to retain or to surrender the property of which, at the time the alleged contract was made, Ward was tenant. There was no sufficient proof of the contract, and no adequate evidence of part performance to take the case out of the statute of frauds. *Tyson v. Watts*, 7 Gill, 124, was quite similar to *Geiger v. Green*, supra. "After carefully collating these contracts," said this court in 7 Gill, 157, "we think the case at bar cannot be distinguished from the case of *Geiger v. Green*." No further comment is needed to show that *Tyson v. Watts* is inapplicable to the case before us.

It is undoubtedly the settled doctrine of courts of equity that relief by way of specific performance is not a matter of right to be demanded *ex debito justitiæ*, and that to

warrant the granting of such relief the contract must be fair, certain, and mutual, it must be founded on an adequate consideration, and must be free from any suspicion as to its bona fides. All these requisites have been met. The certainty and mutuality of the agreement have been considered; there is nothing in the record to question its fairness. The consideration has been shown to be adequate and full, and there is not a suggestion of bad faith in the entire transaction.

We see no reason to disturb the decree of the circuit court, and it will accordingly be affirmed.

Decree affirmed, with costs above and below.

McDERMOTT v. BENNETT.

JOHNSTON v. BENNETT.

(Supreme Court of Pennsylvania. Nov. 4, 1905.)

JUDGMENT—CONFESSION—FRAUD AND COERCION—OPENING.

Where an affidavit, on a rule to open judgment entered on a judgment note given to an attorney by his client when in serious difficulties, avers fraud and coercion, and the circumstances of the note are such as to justify judicial investigation, the judgment is properly opened.

[Ed. Note.—For cases in point, see vol. 80, Cent. Dig. Judgment, §§ 109, 116, 120.]

Appeal from Court of Common Pleas, Allegheny County.

Actions by Frank P. McDermott and by Aaron E. Johnston against Laura Biggar Bennett. From orders discharging rules to open the judgments in both cases, defendant appeals. Reversed.

The petition for the rule averred as follows: "That Frank P. McDermott secured by fraud and coercion a certain judgment note of \$1,500 in the month of July, 1903. The nature of such fraud and coercion will more fully be shown by revelation of all the circumstances connected with the same, to wit: On or about the month of September, A. D. 1902, in the city of Long Branch, Monmouth county, N. J., your petitioner was charged with the crimes of perjury and conspiracy by one Peter J. McNulty, an executor of the will of Henry M. Bennett; said perjury and conspiracy being charged against your petitioner because she established her wifehood to H. M. Bennett, and because she proved the death of a posthumous child as a result of said marriage. That your petitioner in the month of November, 1902, surrendered herself voluntarily into the custody of said court of Monmouth county. That about the month of December, 1902, she was indicted for said crimes by the grand jury of Monmouth county. That on representation to the general sessions court of Monmouth county, New Jersey, that she being unable to retain counsel, she being penniless, the said court assigned Messrs. Frank

P. McDermott and Aaron Johnston, both of the Monmouth county bar, to defend her. That upon being so assigned the said Johnston and McDermott immediately visited said petitioner and codefendants in the jail of Monmouth county, and told said petitioner that her interests in said trial could not be successfully guarded and that trial would not be very well prepared or conducted, except petitioner would sign an agreement wherein she promised to pay said McDermott and Johnston and one Joseph Noonan the sum of \$10,000 jointly. Said agreement, which cannot be found, was based on the consideration above, and on the promises of said McDermott and Johnston to procure bail for codefendants of petitioner, who were indicted for the same crimes, and on consideration of the expenditure of necessary disbursements at trials, and of expenses of an appeal to a higher court if a conviction would result. That said agreement provided, among other things, that no part of said moneys in said agreement would be asked for until said petitioner's estate, under the will of Henry M. Bennett, was satisfactorily settled, and that at no time was she to pay said McDermott and Johnston any more than one-third of her actual income as received from said estate. That each and every condition of said agreement was and is violated by said McDermott and Johnston. Your petitioner further shows that since and before and at the times she was charged with said crimes that she was ill in body and mind, and that the conduct of said attorneys has been of such unfairness to petitioner that she has suffered very much. That your petitioner further shows that said attorneys at the time they were assigned by said court to defend petitioner they visited her in the Monmouth county jail, and told her that owing to the prejudice entertained towards her that they could not fully defend her except she would sign the said agreement. That they spent nothing in the way of disbursements. That they discouraged publicly many offers of bail for her codefendants. That they neglected to get evidence on the demand of her codefendants that they alone could get. That they positively repudiated voluntary witnesses who offered their services in her behalf. That all the witnesses who appeared at petitioner's trial were treated with indifference by said attorneys. That all expenditures of moneys at the trial and for appeal were paid by said petitioner. That your petitioner's codefendants were convicted (your petitioner being acquitted) of said crimes, December 24, 1902. That on or about the 1st day of July, 1903, the last day on which briefs could be filed on the appeal of the codefendants to the Supreme Court of New Jersey, said attorneys notified your petitioner that except she paid the money due on said agreement or gave judgment notes of \$1,500 each to them, and also a

\$1,500 judgment note to lawyer Noonan, that no appeal would be filed, and that her codefendants would have to serve their sentences of two years and a half, and pay a fine of \$1,000 each, and that she would, as a result, never appear before the world as innocent. That at the time this misrepresentation was made the appeal and briefs were actually on file in the Supreme Court at Trenton, N. J., as petitioner found out later on. That on this fraudulent and cruel representation your petitioner executed said judgment notes in lieu of said agreement. That before she executed said notes said attorneys made a written agreement connected with the same to the effect that no attempts would be made to collect on said notes or force the collection on same, until she were able to pay."

The court discharged the rule.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Charles R. Carruth, for appellant. Thomas Patterson, for appellee.

PER CURIAM. These two cases are substantially alike, and were argued together. The appellant in her affidavit for a rule to open the judgment sets out that the notes were given to counsel by a client, who was in serious difficulties, under circumstances which, even if they should not be shown to amount to fraud and coercion as charged, are certainly such as to justify full investigation.

Order reversed, and rule directed to be allowed.

MORGAN v. WESTMORELAND ELECTRIC CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. ELECTRICITY — NEGLIGENCE — ACTION — STATEMENT.

Where the statement in an action against an electric light company to recover for death of plaintiff's son charged that defendant operated two lines of wire from its main line to the cross-arms of a pole sustaining certain telephone wires, and negligently permitted the wires without proper care to be placed on the cross-arm of said pole, charging the arm with a powerful current of electricity, and the action was tried on the theory that such act was a part of the construction, it was sufficient to give notice to the defendant that the plan of the construction was brought into question.

2. PLEADING—WAIVER OF DEFECTS.

Where a certain question was treated by both parties as in issue, it was too late to question the sufficiency of the averment as to such issue after a trial on the merits.

[Ed. Note.—For cases in point, see vol. 89, Cent. Dig. Pleading, §§ 1948-1951.]

3. ELECTRICITY—NEGLIGENCE.

In an action against an electric light company to recover for the death of plaintiff's son, an employé of a telephone company, held, that the evidence was sufficient to sustain a finding

that his death was caused by contact with an iron brace charged with electricity by the negligence of defendant.

Appeal from Court of Common Pleas, Westmoreland County.

Action by Elizabeth Morgan against the Westmoreland Electric Company to recover for the death of her son. Judgment for plaintiff, and defendant appeals. Affirmed.

The court charged in part as follows: "The manner of conducting the current through between the strands of the telephone company's wires and along the cross-arm on which they are supported has been referred to, and you must determine, by an application of the test that we have given you, whether such construction is faulty. If faulty and defective, and by reason of that fault and defect, the plaintiff's decedent has been injured, if that has been the proximate cause of the plaintiff's injury, then there would be a right to recover. * * * In so far as construction is concerned the defendant company needs no notice. Having itself constructed it, it has all the notice that is necessary."

Defendant presented these points: "(2) Even if the jury should find that these two electric wires or either of them were defectively insulated, the defendant would not, on that account, be liable for the death of plaintiff's decedent, there being no evidence that the defendant had notice of the defective insulation, and no evidence as to the cause of the defect. Answer: We have already spoken at some length on that point in the general charge. The question referred to in this point cannot with propriety be disposed of as a question of law by the court. There is evidence respecting the manner in which the wires were carried through on the cross-arms, which tends to show the mode adopted from the beginning to have been faulty in construction. With respect to such faulty construction, if it exists, no notice is necessary. With respect to the wires being in a defective state of repair, notice is necessary, but it may be constructive as well as direct. There is testimony bearing on the ordinary life of insulation and also on the length of time these wires had been in use. There is testimony tending to show that the wire had sagged from its proper position, and that the insulation was worn off at the point of contact with the carriage bolt. If the insulation was, in fact, removed by erosion, the consideration of the question of the duration of time while that process was going on is not irrelevant. There is evidence that several years before a wire on the upper cross-arm, when it had become displaced, caused a lineman to receive a shock. Although that specific displacement of the other wire was at once remedied, and did not exist at the time of the accident, yet it may be considered specific notice of the danger attending a displacement of the wire, and an ad-

monition with respect to the thoroughness with which inspection should be maintained. The high voltage of the current is also an admonition with respect to what thoroughness of inspection is due. The defendant may be held responsible for defects in the state of repair of its appliances of which it has express notice, and also for accidents arising from defects which this supervision, reasonably exercised, would have disclosed. Whether there was a long or a short period of displacement of the wire and wearing of the insulation which an ordinary diligent examination exacted by the circumstances would have disclosed, is a question for the jury, especially when we consider the nature of the inspection which the defendant company's testimony shows was made. The question of notice seems to us to be one not to be disposed of as a question of law by the court, and the point is therefore refused.

* * * (8) Under all the evidence in this case, and under the pleadings, your verdict must be for the defendant. Answer: This point is refused for the reasons that are already indicated."

Verdict and judgment for plaintiff for \$3,000. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John B. Head, D. S. Atkinson, W. C. Peoples, and J. S. Moorhead, for appellant. Curtis H. Gregg and Sidney J. Potts, for appellee.

FELL, J. Three questions are presented by the specifications of error: (1) Did the issue raised by the pleadings include the subject of the original construction of the appellant's lines of electric light wires? (2) Was there sufficient evidence of constructive notice of defective insulation to sustain a recovery on the ground of failure to maintain the wires in a safe condition? (3) Did the evidence warrant the conclusion that defective insulation of one of the wires was the proximate cause of the accident?

It is averred in the declaration that the appellant owned, maintained, and operated two lines of wires extending from its main line to the cross-arms of a pole which sustained a number of telephone wires; that, not regarding its duty to maintain these wires in a safe condition, it "negligently and carelessly allowed and permitted said two wires without proper insulation to be placed on a cross-arm of said pole, thereby charging said arm and braces attached with a powerful current of electricity." The placing of the wire on the cross-arm was a part of the construction, and the averment gave notice to the appellant that the plan of construction was brought into question. The case was tried upon this theory. Testimony as to the construction as it existed at the time of the accident was admitted, without objection

that it did not support the declaration, and affirmative evidence was introduced by the appellant to show the plan of original construction. If there is doubt as to the sufficiency of the averment, it is too late to raise it after a trial on the merits, in which the question was treated by both parties as a part of the issue.

On the question of constructive notice, the instruction was that with respect to faulty construction notice was unnecessary since the appellant must be held to have notice of what it had designedly done; and with respect to a defective state of repair, it must be held to know that which supervision reasonably exercised would have disclosed. This instruction was correct. It was called for because there was evidence tending to show that the manner in which the electric wires were carried through a network of telephone wires was faulty, and that the wire alleged to have caused the injury had been in use a number of years and had sagged, and that its insulation had worn off.

The main contention of the appellant is that there was not sufficient evidence of any negligent act that was the proximate cause of the accident to warrant the submission of the case to the jury. It appears from the evidence that the appellant permitted for a consideration a telephone company to use one of its poles. On this pole there were 11 cross-arms, which supported 130 telephone wires. The cross-arms were 22 inches apart, and each one was supported by iron braces which extended down the pole to within a few inches of the next lower arm. The appellant's electric light wires were attached to the faces of the seventh and eighth cross-arms, and extended across the lines of telephone wires. They were held in place at the cross-arms by the use of porcelain knobs, and their insulation was by cotton covering ordinarily used for inside wiring. These wires had been in use seven years, and the covering of the wire on the seventh cross-arm was worn off at its point of contact with an iron bolt which passed through a brace. It was customary for persons climbing among the wires for the purpose of inspecting or repairing them to use the braces as an aid in climbing, and as supports. The appellee's son was in the employ of the telephone company and was last seen alive when at about the fifth cross-arm. He was killed by an electric shock, and his body was found on the wires supported by this cross-arm. Evidently he had been above these wires or his body would not have fallen on them, and when above them, he would have been in close proximity to the brace of the seventh cross-arm, which was charged with electricity, and its position was such that he probably would have grasped it in climbing.

There was no direct evidence that the deceased was killed by coming into contact

with the iron brace. But direct evidence was not essential. The cause of death might properly be inferred from the location of his body with relation to the dangers to which he was exposed. The telephone wires were in themselves harmless, and death by electricity could have been caused only by the deceased coming into contact with some object charged with a powerful current. This object was at hand in a position where any one climbing the pole would be likely to touch it. Conditions were shown to exist which indicated very clearly the cause of death, and no other cause being shown the jury were warranted in finding that this was the cause.

The judgment is affirmed.

In re MASSETH'S ESTATE.

Appeal of CAMPBELL.

(Supreme Court of Pennsylvania. Nov. 4, 1905.)

1. WILLS—DEVISAVIT VEL NON—REFUSAL OF ISSUE.

A will contained 17 bequests of money and specific articles to 19 different persons. The items were dictated to the counsel who drew the will by the testatrix from memory, and she signed it without reading the same over. The scrivener testified that he wrote it according to his instructions, and failed to read it at her command. There was evidence of delusions on the part of testatrix, arising from the taking of narcotics to relieve pain, but that these delusions did not affect the testamentary act. *Held*, that the refusal of an issue devisavit vel non was not error.

2. SAME—EXECUTION.

The fact that a will was not read over to testatrix at the time she signed was immaterial, where there was no doubt that it correctly expressed testatrix's intent.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 262.]

Appeal from Orphans' Court, Butler County.

In the matter of the estate of Araminta Masseth. From a decree refusing an issue devisavit vel non, Margaret F. Campbell appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas H. Greer, W. S. Thomas, John M. Greer, and John B. Greer, for appellant. W. H. Lusk and T. C. Campbell, for appellees.

PER CURIAM. The will of testatrix bears strong intrinsic evidence of her possession of a sound memory as to her possessions, and a clear view of what she wanted to do with them. There are 17 clauses giving legacies and bequests of money and specific articles of personal and household use to 19 different persons, and according to the testimony of the counsel who drew the will she dictated all these items to him from memory, and without suggestion from others. It would require very clear evidence of want of testamentary capacity to overcome this prima

facie case, and no such evidence was presented. *Kane's Estate*, 206 Pa. 204, 55 Atl. 917.

There was testimony to delusions on the part of the testatrix, but they were fairly accounted for by her habit of taking narcotics for the relief of pain. The learned judge below found that they were not continuous and did not affect her mind as to matters involved in the making of her will. He therefore rightly held that they should be disregarded. *Shreiner v. Shreiner*, 178 Pa. 57, 35 Atl. 974. The fact that the will was not read over to her at the time she signed it is not material. Such fact only becomes important when there is doubt whether the will correctly expresses the testator's intent. *Hess' Appeal*, 43 Pa. 73, 82 Am. Dec. 551. In the present case there is nothing to raise such doubt. The attorney who wrote the will testified that he wrote it according to her instructions, and that his omission to read it to her was by her own command.

Decree affirmed, at costs of appellant.

MAINES v. HARBISON-WALKER CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. MASTER AND SERVANT—INJURY TO EMPLOYEE—DIRECTING VERDICT.

In an action for personal injuries, plaintiff testified that the machine at which he worked was in a dangerous condition, and was told by the master mechanic that he would change it on Sunday. The change was not made, and plaintiff thereafter subsequently called the attention of such mechanic to the condition of the machinery, and each time was informed that a change would be made on the following Sunday. After a promise of that character plaintiff continued to do the work, and on the following Monday he began work again, though knowing there had been no change in the machinery as promised, and was injured. *Held* error to grant a compulsory nonsuit.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1076, 1084, 1085.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Whether an employé was guilty of contributory negligence in continuing to work after discovering that certain changes had not been made in the machinery which he knew was in a dangerous condition was a question for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1096, 1097.]

Appeal from Court of Common Pleas, Cambria County; O'Connor, Judge.

Action by Daniel Maines against the Harbison-Walker Company. From an order refusing to take off compulsory nonsuit, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas H. Greevy, Charles Geesey, and A. V. Dively, for appellant. R. A. Henderson, for appellee.

POTTER, J. The Harbison-Walker Company is engaged in the manufacture of fire

brick, and owns works at Blandburg, Cambria county, Pa. During the process of manufacture at these works the fire clay, after being ground, was placed in circular pans for the purpose of mixing. The mixed clay was formerly shoveled out of the pans by hand, and placed upon trucks to be conveyed to the molds. But later, an improvement was introduced, called a "pan emptier," to carry the mortar from the pans to the trucks. This emptier consisted of a frame carrying a revolving belt passing around a roller at each end. The belt was operated by cogwheels at the upper end. Three pans were in use by the defendant at this place; each pan having an emptier. The plaintiff was a pan tender, and was in charge of pan No. 3. The cogwheels upon the emptier at this pan were upon the side next to the workman. It appears from the evidence that there was no necessity for the cogwheels to be so placed, but that they could just as well have been changed, so as to be at the back of the belt, or upon the far side of it, from the pan tender. In fact they were so placed upon the "emptiers" at the other two pans used by the defendant company. The change in position of the cogwheels could easily have been made at any time when the machinery was at rest. The only danger from the cogwheels being upon the outside or front of the belt was the liability to the workmen of getting caught between the wheels as they revolved. The plaintiff had worked for years about the premises, and was familiar with the machinery. He testified that he considered the arrangement of the cogwheels on this particular emptier as dangerous, and that he had complained of it to the master mechanic. In reply he was told by the master mechanic that he would like to change the position of the cogwheels, but that the superintendent would not give him time to do so. But he added, "I will change them on Sunday." The change was not made then, and the plaintiff testifies that he thereafter called the attention of the master mechanic to the condition of the cogs repeatedly—as often as three or four times a week during a period of some six weeks—and that the answer was that the change would be made on Sunday, when the machinery was idle. Finally, on Monday, April 29, 1901, the plaintiff again called attention to the fact that the change had not been made, and again the promise was renewed that the cogwheels would be changed the following Sunday. The plaintiff continued to work during that week. On the succeeding Monday morning, May 6th he went to the mill at a very early hour, about 8 o'clock in the morning, as was his duty, and he then found that the promise had again been broken, and no change in the position of the cogwheels upon the emptier had been made. He began work, however, and during the manipulation of the machinery, in the effort to get it started, the sleeve of his right arm caught in the cogs, his arm was drawn

in, and so badly mangled that amputation was necessary. This action was brought to recover for the damages thus caused.

Upon the trial a compulsory nonsuit was entered, upon the ground that the plaintiff, by continuing to work with dangerous machinery after the time when he was promised that the dangerous condition should be remedied, took the chances, and could not recover for the negligence of his employer.

It is conceded by counsel for the appellee that the questions as to whether the defendant was negligent, and whether the danger from the cogwheels was so imminent and obvious that a man of ordinary prudence would refuse to work about them, were questions for the jury. But it is contended that the master mechanic promised to make the change at a definite time—that is, on Sunday—and, when he failed to do so, the servant was not justified in continuing to work, except at his own risk. It must be noted, however, that the evidence does not show that the promise was limited to any particular or definite Sunday. But the Sunday following each complaint seems to have been intended as the next convenient season to make the change. The plaintiff says that the promise was made to him time after time, and that he continued to work upon the strength of the promise, which was apparently renewed from week to week. The question, therefore, is whether the plaintiff was negligent in continuing to work in the face of the fact that not only one promise of the employer had been violated, but a series of them. Or, to put it in another way, had he, at the time of his hurt, any reasonable expectation of the fulfillment of the promise, which had been made and broken, and renewed and broken, a number of times before? It is not disputed that, if no exact or specified time is fixed for the restoration of safe conditions, the suspension of the master's right to avail himself of the defense of the servant's knowledge of the defect continues for a reasonable period. What that reasonable period is would ordinarily be a question of fact for the jury.

Under the peculiar circumstances of this case, we feel impelled to hold that, in spite of the plaintiff's knowledge that the fulfillment of the promise had again been delayed, it was still an open question whether he was not justified in continuing to perform his duties. Had but one promise been given, and that one broken, and had there been no renewals of the assurance previously given, from time to time, the case would be different. Certainly it was within the power of the master to take upon himself the risk of the work, and beyond doubt the effect of the promise was to assume that risk during the period covered by the promise. This protected the plaintiff until the morning upon which he was hurt. For clearly he worked under the promise until the close of the week, on Saturday. The change was to have been

made under the last promise, upon the next day, Sunday. The plaintiff went to work before daylight on the following morning, Monday, and was hurt almost immediately. Until then he had no opportunity to know that the change had not been made. We cannot say, therefore, that the mere fact that he observed immediately after the expiration of the time fixed that the cogwheels had not yet been changed, and that he did not then (in consequence) at once refuse to go on with his work, is to be treated as controlling this case as a matter of law. We think that, under the peculiar circumstances here shown, the conclusion as to whether the plaintiff was negligent in continuing his work at the time, was a question of fact, which should have been left to the determination of the jury.

The assignment of error to the refusal to take off the compulsory nonsuit is sustained. The judgment of the court below is reversed, and a writ of procedendo is awarded.

SHEEHAN et al. v. CITY OF PITTSBURG.

(Supreme Court of Pennsylvania. Nov. 4, 1905.)

1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — CONTRACTS — RESPONSIBILITY FOR DELAY.

A municipal contract provided for the construction of a street, and that all loss or damages from delay and unseen difficulties should be borne by the contractor. It was understood by both parties that the complete right of way had been secured by the city. *Held*, that the delay caused by failure to obtain a complete right of way was not within the terms of the contract.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 883, 894.]

2. SAME — RIGHTS OF CONTRACTOR.

Where, because of default of a city in obtaining a complete right of way, a contractor for the construction of a street is delayed in completing his work, he may abandon the work or claim damages caused by the city's fault.

3. SAME — CONTRACT — AMOUNT DUE THEREUNDER.

Where there is a dispute between a city and a municipal contractor as to the amount due for grading a street, and the city could have settled the same by measuring and certifying the work, but did not do so, the question of the amount was for the jury.

Appeal from Court of Common Pleas, Allegheny County.

Action by John C. Sheehan and others against the city of Pittsburgh. Judgment for plaintiffs, and defendant appeals. Affirmed.

It appeared that on September 16, 1896, the city of Pittsburgh entered into a contract with W. E. Howley & Co. for the construction of a street known as the "Grant Boulevard." This contract was subsequently assigned to Werneberg, Sheehan & Co., plaintiffs. Both parties to the contract assumed that the complete right of way had been acquired by the

city. It turned out that this was not the case, and that by reason of the delay in securing the right of way the contractors were subjected to a large loss. The contract contained the following provisions: "All loss or damage arising out of the nature of the work to be done under this contract, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from any incumbrance on the line of the work, shall be sustained by the parties of the second part [the contractors]. No charge shall be made by the contractor for any hindrance or delay from any cause during the progress of the work, but it may justify his asking an extension of the time allotted for completing the same sufficient to make allowance for the detention, to be determined by the director of the department of public works, provided, the contractor shall give said director immediate notice in writing of the cause of the detention." In addition to the loss caused by delay, plaintiffs claimed to recover for a quantity of filling, as to the amount of which they offered evidence.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William Watson Smith, Asst. City Sol., and T. D. Carnahan, for appellant. Thomas Patterson, William W. Wishart, and John W. Kephart, for appellees.

PER CURIAM. Notwithstanding the breadth of the language of the agreement that all loss or damages from unforeseen obstructions and difficulties and from delay, were to be borne by the contractors, it is clear that the delay from the city's failure to obtain complete right of way was not in the class of difficulties and delays which were in the minds of the parties, for the agreement itself was based on the assumption by both parties that the complete right of way had been secured, so that the work could be begun at any point and proceed without interruption. For the same reason the provision for extension of time only on written assent by the director of public works is not applicable. There was, therefore, no breach of the agreement by the plaintiffs which prevented them from recovering, and the authorities are clear that they were not bound to abandon the work or to be taken as having waived the delay caused by the city. While they might have abandoned it, they had the option to continue and claim the damages caused by the city's fault.

The dispute as to grading was one of amount alone. The director of public works might have settled the amount conclusively by measuring and certifying it, but he did not do so. It was therefore a question for the jury.

Judgment affirmed.

JONES v. WEIR.

(Supreme Court of Pennsylvania. Nov. 4, 1905.)

RECEIVERS—APPOINTMENT—HEARING.

A decree appointing a receiver, without any findings of fact on which the decree was based, will be reversed.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 830; vol. 42, Cent. Dig. Receivers, § 67.]

Appeal from Court of Common Pleas, York County.

Bill by Simeon M. Jones against Thomas Weir. From a decree appointing a receiver without findings of fact or opinion filed, defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

N. Sargent Ross and Thomas H. Greevy, for appellant. Edward B. Scull, George E. Neff, and Henry C. Niles, for appellee.

PER CURIAM. The court below made no findings of fact, and there is therefore nothing of record to sustain its decree. This is a plain disregard of the equity rules; and, if we should consider the merits of the case in its present condition, we should be obliged to examine the evidence in detail, make the findings of fact for ourselves, and thus assume the duties of the court of first instance.

The decree is reversed and the injunction dissolved, with directions to the court to vacate the appointment of the receiver and compel an immediate accounting by him. The case may then proceed in the regular way to final hearing.

HANNA v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. RAILROADS — INJURY AT CROSSING — EVIDENCE.

The presumption that one about to cross a railroad track stopped to look and listen can only be overcome by evidence that he failed so to do.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1121-1123.]

2. SAME—NONSUIT.

In action to recover for the death of plaintiff's husband at a grade crossing, held error to enter a compulsory nonsuit.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Sarah Hanna against the Philadelphia & Reading Railway Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

At the trial the court in awarding a nonsuit said: "The deceased was driving on the river road, which runs in a generally northerly direction and parallel with the tracks of the defendant company. Upon reaching an ice-house at the side of the road, a distance of 739 feet from the railroad crossing, he was

seen to stop and rest his horses. He then drove on until he reached a place known as the "battery wall," 363 feet from the crossing, and on a level with the tracks. At this point he was seen to look south along the railroad tracks. He then drove on, and was next seen with the hind wheels of his wagon resting upon a bridge over a small stream 109 feet from the railroad crossing and 12 feet below the level of the tracks. At this point the road curved, and the grade sloped upward to the crossing. Immediately to the south, on the first and second tracks, there were stationary coal cars extending some distance below the crossing. The plaintiff's horses were struck by a north-bound express train as they got upon the third track. The deceased was thrown from his wagon and killed. There was evidence by the witnesses who saw the accident that they heard no whistle blown or gong sounded. The question to be considered is whether or not his death was due to contributory negligence. He was shown to stop, look, and listen at a point 363 feet from the crossing, which is too remote to comply with the rule of law. He was next seen to stop at a point 109 feet from the crossing and 12 feet below the grade. There is no testimony to show that he had a view of the tracks from this place. On the contrary, Harry Nippes and Thomas E. Murry testified that it was necessary to walk up to the tracks in order to see an approaching train. In the opinion of the court, if the deceased had looked at a proper place before driving upon the track, he would have seen the train approaching. As his view of the tracks was obstructed by the coal cars, it was his duty to alight from the wagon and lead his horses to a point where he could see. If he had done this, he would have seen the train. He must, therefore, either have seen the train and driven directly in front of it, or he must have tried to cross the tracks without looking. In either case he was negligent. The nonsuit is granted."

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Frank M. Cody, for appellant. Gavin W. Hart, for appellee.

ELKIN, J. This is an action of trespass to recover damages for the death of the plaintiff's husband, who was struck and killed by a train of the defendant company at a grade crossing. At the place of the accident the railroad tracks run approximately north and south, a short distance west of, and parallel with, the Schuylkill river. Between the river and railroad is a public road, also running north and south, on which the deceased was driving. An icehouse 739 feet, and a battery wall 363 feet, both south of the crossing, are located between the public road and railroad. From the battery wall there is a downgrade until the road reaches the bridge which crosses a small stream 109 feet south of the

crossing. The road at the bridge is 12 feet below the level of the railroad tracks. There are five tracks at the crossing. The deceased was driving a team north on this road. At the icehouse he stopped his team and looked for trains. He again stopped at the battery wall, got off his wagon, walked around his horses, then stood on the wheel of his wagon, and once more looked for trains. He then proceeded on his way until he reached the bridge, where he stopped and looked another time. He was not seen by any one, so far as the testimony discloses, from the time he stopped at the bridge until he was struck and killed by a train running north on the third track. In the court below a nonsuit was granted; the learned trial judge holding that, "if the deceased had looked at a proper place before driving upon the tracks, he would have seen the train approaching. As his view of the tracks was obstructed by the coal cars, it was his duty to alight from the wagon and lead his horses to a point where he could see. If he had done this, he would have seen the train. He must, therefore, either have seen the train and driven directly in front of it, or he must have tried to cross the tracks without looking. In either case he was negligent."

The question therefore arises whether, under the testimony offered by the plaintiff, it was the duty of the court to hold as a matter of law that the deceased was guilty of such contributory negligence as to preclude a recovery in this action. The evidence does not disclose what the deceased did immediately before starting over the crossing. It does show that he had stopped and looked at the icehouse, again at the battery wall, and still again at the bridge. These facts conclusively show that he had exercised the greatest care possible under the circumstances until he reached the bridge. What he did after leaving the bridge is only a matter of conjecture or inference. Under these circumstances he is entitled by the settled rule of law to the presumption that he did his duty, and this presumption can only be overcome by testimony showing that he failed to observe the precautions required by law. *Penna. Railroad Co. v. Weber*, 76 Pa. 157, 18 Am. Rep. 407; *Weiss v. Penna. Railroad Co.*, 79 Pa. 387; *Longenecker v. Penna. Railroad Co.*, 105 Pa. 328; *Schum v. Penna. Railroad Co.*, 107 Pa. 8, 52 Am. Rep. 468; *Cromley v. Penna. Railroad Co.*, 208 Pa. 445, 57 Atl. 832.

The learned counsel for appellee admits the force and effect of this rule as applied to the present case, but contends that the presumption of the deceased having done his duty is rebutted by the testimony offered by the plaintiff. The answer to this position is that there is no evidence in the case showing what the deceased did immediately before going on the crossing. The learned counsel argues that under the circumstances it was the duty of the deceased to lead his horses to a place where he could see the ap-

proaching train, and, if he had been leading his horses, he could and would have been seen by Mrs. Nippes. This does not necessarily follow. In the first place, it is doubtful whether under the facts proven and circumstances established the court was justified in holding as a matter of law that it was the duty of the deceased "to alight from the wagon and lead his horses to a place where he could see." The testimony did not clearly show that the view of the deceased was so obstructed as to require him to alight, nor does it show just what position of danger the deceased was in as the train approached, and whether he exercised such care as was required of him under the circumstances. But, even if it be conceded that it was his duty to alight and lead his horses, in the absence of evidence showing that he did not do so, the presumption is that he did perform whatever duty the law required of him. The testimony of Mrs. Nippes is not sufficient to overcome this presumption. In answer to questions by counsel and court, she testified: "I didn't see the man." At another time this witness said she did not see the man either before or after the accident. It requires a degree of ingenuity, not convincing to the court, to support the contention that the negative testimony of this witness is to be construed into affirmative testimony showing that the deceased had failed in the performance of a legal duty. The witness does not say whether deceased was leading his horses, or walking beside, or sitting upon, his wagon. She does not know where he was, nor has any other witness testified to the whereabouts of the deceased at the time of the accident. Certainly such negative, uncertain, and unconvincing testimony as this cannot be held to overcome the legal presumption in his favor. On the other hand, the presumption that the deceased did his duty before going on the tracks is strengthened by his course of action on his way to the crossing. He stopped three times to look for approaching trains, and may or may not have stopped a fourth time. These facts, added to the legal presumption that he exercised due care, make a particularly strong case in favor of the plaintiff.

It is earnestly contended that this case is ruled by *Kinter v. Penna. Railroad Co.*, 204 Pa. 497, 54 Atl. 276, 93 Am. St. Rep. 795. We think not. In that case it was held to be the duty of Kinter to stop, look, and listen at a place where he could see the approaching train. The evidence showed that he did not stop at such a point; and, it being conceded that he could not see where he did stop, it was for the court to say that he had not observed the rule requiring him to look. In the present case there is no evidence to show that the deceased did not stop at a place where he could see the approaching train, or that there was a better place of view where he should have stopped, or that he failed in the performance of any duty re-

quired of him by law. On these vital questions the evidence discloses nothing. The legal presumption, in the absence of evidence, is that he did stop at a place where he could see, that it was the proper place to stop, and that he performed his duty. It is clear, therefore, that the rule in that case is not applicable to the one at bar.

The question of defendant's negligence has not been raised here, nor was it considered by the court below. When, however, the case is again tried, it should not be overlooked that the first and primary question to be determined is the negligence of the defendant. The contributory negligence of the deceased is predicated upon and presupposes the negligence of the defendant. If the testimony does not show negligence by the defendant, there can be no recovery, no matter how free from negligence the facts show the deceased to be. The defendant is entitled to the benefit of the presumption that through its agents and employees it did its duty in approaching the crossing. There must be affirmative evidence to rebut this presumption, else there can be no recovery. If the case stands on presumptions alone, no evidence having been offered either as to the defendant's negligence or the contributory negligence of the deceased, the presumptions would be equal, and the action to recover damages could not prevail. The burden of showing negligence by the defendant rests on the plaintiff, and must affirmatively appear from the evidence. It is true there is some evidence, negative in character, of the failure to blow the whistle and ring the bell as the train approached the crossing. Whether this evidence is sufficient to rebut the presumption that these duties were performed is a question not raised by this appeal, and it is therefore unnecessary to review this branch of the case.

Judgment reversed, and a procedendo awarded.

DEMPWOLF v. GREYBILL.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. EJECTMENT — EVIDENCE — BINDING INSTRUCTION.

Defendant executed a deed for certain milling property, and deposited it in escrow, under an agreement that he was to receive money and stock of a corporation which was to take title to the property. On notice that the agreement had been carried out the trust company delivered the deed to the purchaser, and forwarded the money and stocks to the defendant, who had about the same time executed a lease to operate the mill as lessee for a certain time. At about the same time he stated to many persons that he was in possession of the property as a tenant, and after the organization of the company he acknowledged his liability to it for the rent. The company executed a mortgage on the property, of which defendant had notice. Subsequently the mortgage was foreclosed and the property sold. In ejectment by the purchaser against defendant to recover the property, he

claimed that no title had passed, because of the failure of the trust company to see that certain conditions of the escrow agreement had been complied with. *Held*, that a binding instrument for plaintiff in ejectment was proper.

2. DEED—EXECUTION—DELIVERY — PRESUMPTIONS.

A purchaser for value has a right to act on the faith of a deed, that the deed has been signed, sealed, acknowledged, and delivered as it purports to be, and the presumption is that it has been so executed and delivered by proper parties.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 564-567, 574.]

3. SAME—CONSTRUCTION—COVENANT.

Where words in a deed can be construed either as a condition, reservation, or covenant, the latter construction is favored.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 469, 471.]

Appeal from Court of Common Pleas, Cumberland County.

Action by Charles H. Dempwolf against John D. Greybill. Judgment for plaintiff, and defendant appeals. Affirmed.

At the trial the court refused, under objection and exception, to admit various offers of testimony by defendant relating to the matters connected with promotion, organization, and financing of the Eastern Milling & Export Company:

"Mr. Woods: It is proposed to prove by C. W. Yost, of Steelton, Dauphin county, Pa., that in the year 1903 he had a conference with Mr. Dempwolf, plaintiff in this action, in which he informed him that the conditions under which the properties in the combination of the Eastern Milling & Export Company of New Jersey had been taken contrary to the conditions of purchase, in the following particulars: That money had been taken from the bond issue of \$800,000 to pay for said properties, and had thereby reduced the working capital to such an extent that the scheme would be a failure; that the said Dempwolf and H. C. Niles were directors at the time of the Security Title & Trust Company of York, Pa. This for the purpose of bringing notice home to Mr. Dempwolf, the plaintiff in this action, and for the further purpose of proving that Mr. Dempwolf is not an innocent purchaser, bona fide purchaser, for value received. Mr. Niles: Objected to as not proper legal evidence to sustain the issue on part of the defendant, or to affect adversely the rights of the plaintiff in this action, as irrelevant, incompetent, and immaterial. The Court: Objections are sustained, offer refused, defendant excepts, and bill is sealed."

The court charged as follows: "The defendant in this action, alleging as a defense that he was the victim of a fraud by which he was induced to make a conveyance of his mill property, we allowed the widest latitude in the admission of testimony, which might tend, in the opinion of his counsel, to establish the truth of his contention, reserving, however, the effect which we would

give to the same. The offers and declarations made on his behalf at the beginning and early stages of the trial led us to think it to be our duty not to reject the offers there made and admitted. We are now, however, at the conclusion of the case, and of the opinion that no such relevant, competent, and material evidence has been adduced on the part of the defendant, John D. Greybill, as will avail against the claim of Charles H. Dempwolf, the plaintiff, to recover, and you are therefore directed to render a verdict in his favor for the land described in the writ."

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, and ELKIN, JJ.

R. W. Woods and Frank B. Sellers, Jr., for appellant. Henry C. Niles and Wetzel & Hambleton, for appellee.

ELKIN, J. The plaintiff stands on his record title, the documentary evidence of which, introduced at the trial, made out a prima facie case in his favor. After an exhaustive examination of all the questions raised by this appeal we are of opinion that no testimony produced at the trial, or offered and refused, was sufficient in law to overcome the prima facie case made out by the plaintiff. The theory upon which the learned counsel for appellant bases his contention is that the terms and conditions of the option or agreement with Jackson, under which the deed was held in escrow, had not been complied with before it was delivered by the Union Trust Company, the depository, to Murphey, the grantee, and, by reason of the alleged failure to comply with the terms and conditions precedent to the delivery of the deed, no valid title passed.

The first seven assignments allege error in the learned trial judge refusing to admit testimony offered by defendant, relating to and bearing upon matters connected with the promotion, organization, and financing of the Eastern Milling & Export Company. The general purpose of these offers was to show such a violation of the conditions upon which the deed was held in escrow as to be a fraud on the rights of appellant, by reason or which no title passed. Whether in a suit between appellant and Jackson, or between appellant and the Eastern Milling & Export Company, this testimony should be admitted for any purpose, it is not necessary to consider and determine, but as between the parties to this litigation, under the admitted and undisputed facts, it is clearly incompetent for the purpose of affecting the validity of plaintiff's title.

It appears from the uncontroverted evidence in the case that appellant executed a deed for the milling property in dispute, and deposited it with the Union Trust Company of Philadelphia in escrow, under the terms and conditions of the agreement with Jackson; that said deed was to be delivered by

the depository to the grantee therein named when the consideration agreed upon, in money and stocks, had been deposited with said trust company and the other conditions had been complied with; that on April 5, 1901, appellant was notified that the Eastern Milling & Export Company had exercised the option to purchase the property; that the amount of money and stocks agreed upon as a consideration therefor had been received by and deposited with said trust company; that a mortgage had been placed on said property to secure a temporary loan; that he should transfer his insurance to the mortgagee; and that he would be expected to enter into a lease, under the terms of which he should operate the mill for a period of 60 days as lessee. A few days after receiving this notice he executed a lease whereby he covenanted to operate the mill for a period of 60 days as lessee, and surrender the same on five days' notice thereafter. Some delay in closing up the transaction was occasioned on account of the failure to deliver a deed for a railroad siding, which it was alleged should be included in the conveyance. The deed for the siding was delivered May 31st, and subsequently the Union Trust Company forwarded the money and stocks deposited with it to appellant as consideration for the transfer under the terms of the agreement by which the deed was held in escrow. On June 20th he acknowledged in writing the receipt of \$6,250 and 375 shares of the preferred and 375 shares of the common stock of the Eastern Milling & Export Company, which he accepted as consideration in full for his mill property. Before and after the receipt of the cash payment and stocks appellant asserted at different times and to different persons that he was in possession of the property as a tenant under the lease. As late as July 5th, after the organization meeting of the Eastern Milling & Export Company, he acknowledged his liability for rent due the company as its tenant, and asked that it be charged to him as a set-off in the settlement to be made on account of the company taking over certain personal property belonging to him. On the same day he deposited the stock held by him in a pool with other stockholders of the company, but withdrew it a few days later.

On the other hand, it cannot be doubted that the grantee and his assigns treated the delivery of the deed as an absolute transfer of the property on and after April 5, 1901. On that day Murphey, the grantee, acting under the direction of the Eastern Milling & Export Company, executed a mortgage on the milling property, the title to which is in dispute in this suit, to secure a temporary loan of money. The appellant had notice of the execution of this mortgage because he was notified to transfer the insurance to the mortgagee. On July 1st a general mortgage covering all the constituent properties of the new corporation, including the property of the appellant, was executed and recorded.

This mortgage secured a bond issue in a large sum of money. The corporation defaulted in the payment of interest on the bonds, and the mortgage was foreclosed by a decree of the United States Circuit Court, under which the property in dispute, and all other properties covered by the mortgage, were sold and conveyed to the plaintiff, who brought this action in ejectment.

It is thus apparent that the appellant, the new consolidated milling company, and all other parties in interest, treated the delivery of the deed by the trust company to Murphey, April 5, 1901, as an absolute transfer of the property. Against this array of concrete facts it is of no avail to assert abstract principles of law wherein it is held that a deed takes effect only from the time of its delivery; or, where a deed is placed in the hands of a third person as an escrow, the grantee is only entitled to a delivery upon a strict compliance with the conditions precedent to such delivery; or that if the depository delivers the deed without authority from the grantor, or if the grantee obtains possession of it fraudulently, without performing the conditions, the deed is void; or that where the future delivery of a deed depends upon the payment of money, or the performance of some other condition, and the grantee obtains possession of the deed without performing the condition, he acquires but a voidable title. These are recognized and settled principles of law, and will not be questioned by any one familiar with the rules of property; but it would do violence to every rule of construction to hold them applicable to the facts of the case at bar.

The appellant does not deny that he received the full consideration for his property, as provided in the agreement with Jackson, to wit, the cash in hand and stocks, but contends that the stocks are depreciated in value because of the failure to comply with certain other conditions of the agreement, and that it was the duty of the depository to see that all the terms and conditions of said agreement were carried out before the delivery of the deed. The position is not tenable under the facts of the present case. Such a rule would impose a higher standard of legal requirement on the agent than on the principal. It will not be seriously contended that in this respect the Union Trust Company can be required to exercise greater care and diligence in the enforcement of the conditions of the escrow than the appellant, who, with Jackson, constituted the trust company depository for the receipt of the consideration and delivery of the deed. When the appellant, who was as familiar with the facts connected with the organization of the new milling company as the common agent, the depository, accepted the money and stocks in full consideration for his property, and thereafter acquiesced in the mortgage of said property as a security to third parties and bondholders, who had advanced their money for

the uses and purposes of the new corporation, he cannot now be heard to say that the depository had been unfaithful in not enforcing the alleged conditions of escrow precedent to the delivery of the deed. If a title may be avoided under such circumstances, no purchaser is safe. The learned court below was clearly right in the construction placed upon the escrow agreement. The rule is that, where words can be construed either as a condition, reservation, or covenant, the latter construction is favored. *Methodist Church v. Old Columbia Public Ground Co.*, 103 Pa. 808; *In re Sellers M. E. Church*, 139 Pa. 61, 21 Atl. 145, 11 L. R. A. 282. A purchaser for value has a right to act on the faith that a deed has been signed, sealed, acknowledged, and delivered as it purports to be, and the presumption is that it has been so executed and delivered by proper parties. *Blight v. Schenck*, 10 Pa. 285, 51 Am. Dec. 478. A mortgagee is regarded in law as a purchaser for value. *Logan v. Eva*, 144 Pa. 312, 22 Atl. 757.

In the view we take of the case it is not important to consider the question of notice at the foreclosure sale, raised by the eighth assignment of error. The appellant had executed a conveyance of his property, and had received the consideration agreed to be paid him, and the delivery of the deed under the circumstances was binding upon him. Having parted with the title to his property, and the rights of third parties having intervened, it was immaterial what notice he gave at the sale.

The ninth and tenth assignments, for reasons hereinbefore stated, are without merit. The agreement with Jackson may have been an improvident one. The plan for the combination and operation of the smaller milling properties in a large operating company may have been unwise and unprofitable, like many other promising enterprises floated for speculative purposes; but the matters complained of must be raised, if at all, in a proper proceeding between the parties, and cannot be set up as a defense for the purpose of avoiding a deed solemnly executed and duly recorded.

This opinion was not handed down with others in cases heard at the same time, for the reason that it was originally assigned to our late Brother, Mr. Justice DEAN, and after his death it was reassigned too late to hand down with others in June.

Judgment affirmed.

MERRILL et al. v. AMERICAN BAPTIST MISSIONARY UNION et al.

(Supreme Court of New Hampshire. Hillsborough. Dec. 5, 1905.)

1. WILLS—ESTATE CREATED—FEE TAIL—INVALIDITY—ABSOLUTE FEE.

A will bequeathing to testator's children and their heirs, forever, the use of certain real estate, and providing that, if testator's heirs and the heirs of the children should cease to

exist, the property should go to certain devisees, was void as an attempt to create a conditional fee or an estate in fee tail, and the children took an absolute fee.

2. CHARITIES—PERPETUITIES.

The fact that an annuity given by a will to a charitable corporation may continue perpetually does not affect its validity.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Perpetuities, §§ 57-66.]

3. WILLS—CONSTRUCTION—TRUSTS.

Testator's will bequeathed certain real estate to his children and their heirs forever, providing that they should keep the property insured and pay all taxes and claims, and pay annually a certain sum to a specified corporation, and it was provided that, if testator's heirs and the heirs of the children should at any time cease to exist, the property should go to the corporation in question. *Held*, that though the attempt to create a conditional fee or fee tail was void, whereby the children took an absolute fee, they took the property impressed with a trust to pay the annuity specified from the income.

Transferred from Superior Court; Pike, Judge.

Suit by John C. Merrill and others against the American Baptist Missionary Union and others for the interpretation of the will of Calvin Merrill, deceased. Case transferred from the Superior Court. Case discharged.

The plaintiffs are the four children of the testator named in the beginning of the clause requiring interpretation, which in substance reads as follows: "I give, bequeath, and devise to my four children, John C. Merrill, Arthur W. Merrill, Hattie E. Ware, and Walter B. Merrill, the use, income, and occupancy of my coal-yard property [describing it], to them and their heirs, forever, by their keeping the buildings insured and in good repair, paying all taxes and claims against said property, including any deficiency arising in the settlement of my estate, making such improvements from time to time as the business seems to warrant and require, and paying annually the sum of fifty dollars to the American Baptist Missionary Society, fifty dollars annually to the American Baptist Publication Society, * * * fifty dollars annually to the American Baptist Home Missionary Society, * * * and the balance of the net annual income from this property shall be paid to my beloved wife, Elizabeth W. Merrill, during her lifetime annually. Should my heirs and their heirs cease to exist, and the time ever come when there was no lineal descendant to occupy and care for said property as above directed, I would then give, bequeath, and devise the same to the three societies mentioned and their successors, forever, in equal shares." The two children first named are executors of the will. Besides the plaintiffs, six grandchildren survived the testator. His wife also survived him, but died in 1904. The societies named are charitable corporations formed for the promotion of religion. The "coal-yard property" consists of a tract of land situated near the tracks of the Boston

& Maine Railroad, in Milford, upon which there are coal and wood sheds, a grain elevator, and two cottages.

Edward L. Kittredge, for plaintiffs.
George B. French, for defendants.

CHASE, J. The terms of the devise are. "I give, bequeath, and devise to my four children [naming them] the use, income, and occupancy of my coal-yard property [describing it], to them and their heirs, forever, by" their doing the acts specified. The right to exercise and enjoy the use, income, and occupancy of material things constitutes ownership; and a conveyance of these powers over particular things is ordinarily a conveyance of the things themselves. "A devise of the income of lands is, in effect, a devise of the lands." *Reed v. Reed*, 9 Mass. 372. See, also, *Sampson v. Randall*, 72 Me. 109; *Hopkins v. Keazer*, 89 Me. 347, 355, 36 Atl. 615; *Diament v. Lore*, 31 N. J. Law, 220. It is evident that "use, income, and occupancy" were used by the testator in this sense, and that he intended thereby to devise the ownership of his coal-yard property, or, expressing the idea in still briefer terms, to devise the property itself. The devise is to the four children, "to them and their heirs, forever." These are apt words to devise the property in fee. But there are other provisions in the will which seem to qualify the meaning of these words. Passing by, for the moment, the provisions relating to the care of the property and the disposition of its income, this provision is reached: "Should my heirs and their heirs cease to exist, and the time ever come when there was no lineal descendant to occupy and care for said property as above directed, I would then give, bequeath, and devise the same," etc. This provision conveys the idea that the property should continue in the lineal descendants of the testator so long as there were any. Reading the first provision above considered and this provision together, it seems that the testator's intention was to give his four children a conditional fee in the property, or an estate in fee tail, instead of an absolute fee. But such intention conflicts with public policy relating to restrictions upon the alienation of real property.

Prior to the passage of the statute *de donis*, conditional estates of this kind were not considered with favor by the courts, because they tied up property indefinitely. The courts adopted that Blackstone characterizes "subtile finesse of construction, * * * in order to shorten the duration of these conditional estates," and held, among other things, that the birth of issue to the first taker fulfilled the condition and converted the estate into an absolute fee. To prevent the courts from thus controlling the law, the statute of Westminster II, commonly called the "Statute De Donis," was passed. It "revived

in some sort the ancient feudal restraints which were originally laid on alienations, by enacting that from thenceforth the will of the donor be observed," thus paying "a greater regard to the private will and intentions of the donor than to the propriety of such intentions, or any public considerations whatsoever." 2 Bl. Com. 110-112. At first it seems to have been understood that the statute de donis was in force in this state, and that estates tail might be created; but in 1837 it was held that the statute had been impliedly repealed by the state statutes relating to the descent and devise of property, and consequently that such estates no longer exist here. *Jewell v. Warner*, 35 N. H. 176; *Crockett v. Robinson*, 46 N. H. 454. A statute was passed in 1837 enabling a tenant in fee tail to convey the land by deed, and thereby bar all remainders and reversions expectant on the estate tail. Laws 1837, p. 316, c. 340, § 1. This provision was continued in the Revised Statutes (chapter 129, § 1), but was dropped upon the enactment of the General Statutes in 1867, no doubt because of the intervening decisions above cited. The policy of the state, now well established, is that real estate shall not be tied up indefinitely by entailment. Attempts to do so in a case like this result in the transmission of an estate in fee, instead of in tail. *Crockett v. Robinson*, supra. A primary object of the testator in this case appears to have been to insure the payment to the three societies named of the annuities given to them. As will be seen later on, this object is not defeated, nor is its fulfillment imperiled, by following the policy of the state in the interpretation of this devise. It follows, also, from what has been said, that there was no remainder or reversion for the devise over to the societies to operate upon, in case of the failure of the testator's issue.

Further than this, it is plain that the failure of issue referred to was not a failure at the death of the first taker, but a failure at some indefinite time in the future. The language is, "Should my heirs and their heirs cease to exist, and the time ever come when there was no lineal descendant," etc. This language removes all doubt on this point. The devise over to the societies, being limited upon an indefinite failure of issue, conflicts with the public policy above mentioned, and is void for remoteness. *Downing v. Wherrin*, 19 N. H. 9, 49 Am. Dec. 139; *Hall v. Chaffee*, 14 N. H. 215, 221; *Pinkham v. Blair*, 57 N. H. 226; *Edgerly v. Barker*, 66 N. H. 434, 459, 31 Atl. 900, 28 L. R. A. 328. The estate which the four children got by the devise "to them and their heirs, forever," was an estate in fee, notwithstanding the subsequent provision in the will above considered. But the four children, and all others who succeed them in title to the property, are charged by implication with a trust in respect to it, to a certain extent. *New Parish in Exeter v. Odiorne*, 1 N. H. 232, 236; *Hutchins v. Heywood*, 50 N. H. 491, 496;

Tappan's Appeal, 55 N. H. 320, 321. The devise "to them and their heirs, forever," is "by their keeping the buildings insured and in good repair, paying all taxes and claims against said property, including any deficiency arising in the settlement of my estate, making such improvements from time to time as the business seems to warrant and require, and paying" the annuities to the societies named, and the balance of the net annual income from the property to the wife annually during life. By the death of the widow she has ceased to be a beneficiary under the trust. No suggestion has been made that there are any claims outstanding against the property or the testator's estate. Apparently the only beneficiaries of the trust now left are the three societies. They and the plaintiffs are the only parties interested in the property. It clearly appears that the testator's intention was that the annuities should be paid from the income of the property, not from the property itself. This appears from the fact that, after making provision for the payment of the taxes, insurance, and other incidental charges against the property, and the annuities to the three societies, the testator provides that "the balance of the net annual income" shall be paid to his wife annually during life. The provision for the payment of taxes and other incidental charges appears to have been made for the purpose of preserving the body of the property to produce income to meet the payments to the annuitants and the widow. The presence of this idea in his mind is also shown by the devise over of the property, should the time ever come when there is no lineal descendant to occupy and care for the property as directed. The annuities are charged upon the income, and not upon the corpus of the property. *Nudd v. Powers*, 136 Mass. 273; *Delaney v. Van Aulen*, 84 N. Y. 16; *Irwin v. Wollpert*, 128 Ill. 527, 21 N. E. 501; *DeHaven v. Sherman*, 131 Ill. 115, 22 N. E. 711, 6 L. R. A. 745; *Baker v. Baker*, 6 H. L. Cas. 616. The duty is placed upon the plaintiffs and their successors in the legal title to the property to pay the taxes and other incidental charges upon it for the time being, and to pay from its net income the annuities, whether the income be derived from tenants or from use of the property by themselves. So long as they faithfully perform this duty, the primary object of the testator is fulfilled. The personal interests of those in whom the legal title to the property is lodged for the time being (they being entitled to the income of the property, except the sum required to pay the annuities) operate as a guaranty that the taxes and other incidental charges will be seasonably paid and that the property will be properly improved. But should they fail to perform the duty in any particular, and the interests of the societies be affected or prejudiced thereby, the court of equity, in the exercise of its

powers relating to trusts, will afford the beneficiaries an adequate remedy.

It does not appear, other than from the very general description of the property given in the case, what its income-producing capacity is. As described, the property is quite extensive in quantity, and appears to be favorably located for business purposes, and to have acquired a particular business character by prior use. It would seem probable that its net income will be sufficient at all times to pay the annuities and something to the general owners. It is unnecessary to consider at this time what would be the effect upon the annuitants in case the net income should be insufficient at any time to pay them in full—a question that may never arise. An annuity may be perpetual, or for life, or for a period of years. A gift of an annuity to a person, without a limitation or qualification as to duration, would generally be understood as designed to continue during the life of the annuitant. 2 Story, Eq. Jur. § 1065a, and notes; *Bates v. Barry*, 125 Mass. 83, 28 Am. Rep. 207; *Yates v. Madden*, 3 Macn. & G. 532; *Blight v. Hartnoll*, 19 Ch. Div. 294. Here the annuitants are corporations, and all the evidence tends to show that the intention was that each annuity should continue so long as the corporation to which it is given exists and fulfills the purposes designed by the corporation's charter. That it may continue perpetually does not affect its validity. Charitable trusts are not within the rule against perpetuities. *Rolfe & Rumford Asylum v. Lefebvre*, 69 N. H. 238, 45 Atl. 1087.

Case discharged. All concur.

LYMAN v. BROWN.

(Supreme Court of New Hampshire. Carroll. Dec. 5, 1905.)

1. TRESPASS—DISPUTED BOUNDARY—PLEADING—GENERAL ISSUE.

In trespass quare clausum, where the location of a boundary line was in dispute, the title to the disputed territory may be determined under a plea of the general issue.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Tresp., § 104.]

2. PLEADING—AMENDMENT TO CONFORM TO PROOF.

Where, in trespass, the title to land was litigated under a plea of the general issue, defendant was entitled, after verdict, if necessary, to amend his plea to conform to the proof, by filing a special plea of soil and freehold in the disputed territory.

3. APPEAL—VERDICT—MOTION TO SET ASIDE—QUESTIONS OF LAW.

The denial of a motion to set aside a verdict because it was alleged to be against the law and the evidence raises no question of law reviewable on exceptions.

4. TRIAL—MISCONDUCT OF JURY—WAIVER.

Where plaintiff had knowledge of certain misconduct of the jury, but failed to call the matter to the court's attention until after a verdict had been rendered for defendant, plaintiff thereby waived the right to insist on such

conduct as a ground for setting aside such verdict.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 751, 972.]

5. NEW TRIAL—GROUNDS—MISCONDUCT OF JURY.

Where, in trespass quare clausum, the boundary line of the land was in dispute, and plaintiff moved to set aside a verdict for defendant because a juror expressed an opinion in favor of the line claimed by defendant before the evidence was fully heard, and because certain persons made remarks as to the case within the hearing of the jury, while they were taking a view, but it was not shown that the opinion so alleged to have been expressed was made by a juror, nor what the remarks alleged to have been made in the presence of the jury were, the denial of the motion for such reasons was not error.

6. APPEAL—STATEMENTS OF COUNSEL—PREJUDICE.

In trespass, where a boundary line was disputed, the statement of a conceded fact by defendant's counsel, in answer to an inquiry of the court, having no tendency to prove where the line in question was located, was not prejudicial.

Transferred from Superior Court; Stone, Judge.

Trespass quare clausum by Frank E. Lyman against Alphonzo D. Brown. Verdict was rendered in favor of defendant, and the cause was transferred to the Supreme Court on exceptions to the overruling of defendant's motion to set the verdict aside. Exceptions overruled.

The plaintiff moved that the verdict be set aside and that judgment be ordered in his favor, for the following reasons: (1) The verdict is against the law and the evidence; (2) the jurors did not keep together at the view, and were spoken to for that reason by the sheriff who had them in charge; (3) during the view of the line claimed by the parties, some of the jurors drank cider as it was offered to them; (4) before the evidence was fully heard, one of the jurors expressed an opinion in favor of the line claimed by the defendant; (5) during the trial the defendant's counsel, in the hearing of the jury, made a statement, to which exception was taken, relative to the boundaries of a lot of an adjacent owner, after evidence upon that point had been offered and excluded by the court; (6) during the trial certain persons, in the hearing of the jury, made remarks relative to the case which were not objected to by him, and continued until stopped by the sheriff. A hearing was had upon the motion, and certain facts were found which appear in the opinion. The motion was denied, and the plaintiff excepted.

Josiah H. Hobbs, for plaintiff. Arthur L. Foote, for defendant.

BINGHAM, J. The plaintiff owns a lot of land situated in Madison, and the defendant's wife owns a lot in Tamworth, adjoining the plaintiff's lot on the west. The title to both lots was derived from the same grantor. The boundary between the towns is a straight

dine. It is also the division line between the lots. The plaintiff claimed at the trial that the town line was located on the ground about seven rods west of where the defendant claimed it to be. The territory upon which the alleged trespass was committed is located between the lines thus claimed. The defendant justified the acts complained of as the agent of his wife. The jury were instructed that the only contention between the parties was in respect to the location of the original boundary line between the towns; that if it was located where the plaintiff claimed it was, the defendant was a trespasser; but if it was located where the defendant claimed, he was not. No exception was taken to this instruction, and none properly could have been. The defendant pleaded the general issue. Under that plea, as it is now understood in this state, the title to the disputed territory could be determined. *Tabor v. Judd*, 62 N. H. 288, 290. Since the decision in *Tabor v. Judd*, the necessity of a special plea of soil and freehold to try the title to disputed territory seems to have been done away with; but if this is not so, and the defendant should have pleaded specially, he may now be permitted to do so by amending his pleadings in the superior court to conform to the issue actually tried.

The first reason assigned in support of the motion to set aside the verdict raises no question of law. The second and third reasons assigned are not sufficient to justify setting aside the verdict, when considered in connection with the facts found at the hearing upon the motion. It seems that the plaintiff and his counsel were present at the view taken by the jury, and knew what took place there. They made no objection at the time, and failed to call the matter to the attention of the court until after a verdict had been returned for the defendant. If they regarded the conduct of the jurors as irregular and prejudicial to the plaintiff's rights, they should have so informed the presiding justice when they returned to court after finishing the view. Instead of so doing, they chose to go on with the trial and obtain a favorable verdict if they could. By so doing they waived any right the plaintiff might have had to insist on these objections. *Tabor v. Judd*, 62 N. H. 292, 293; *Noyes v. Gould*, 57 N. H. 20, 25.

The fourth reason assigned is not supported by the facts, for it is not found that the person who expressed an opinion in favor of the line claimed by the defendant, after the view was taken, was a juror. And the answer to the sixth reason is of a like character. It is not found what the remarks alleged to have been made in the presence of the juror were; and although the juror thought they related to the case, he did not know who the persons making them were, nor what they said.

The fifth reason is likewise without merit. It was conceded at the trial that the division

line between the lots was the boundary line between the towns. The controversy concerned the location of that line. The reply of the defendant's counsel to the inquiry of the court—"I want to say that it (the land of the witness Bickford) is bounded by the Madison town line on the east"—simply tended to show that the division line between the lots was the town line, a conceded fact. Standing alone, the reply had no tendency to prove where the line was located, and, if incompetent, it was not prejudicial.

We think it unnecessary to say more concerning the exceptions taken to the argument of counsel, than that we are of the opinion they are not well founded.

Exceptions overruled. All concur.

HOOD v. MONTGOMERY et al.

(Supreme Court of New Hampshire. Rockingham. Dec. 5, 1905.)

1. PARTITION—APPOINTMENT OF COMMITTEE—REVOCATION.

Under Pub. St. 1901, c. 243, §§ 10, 20, making it the duty of the judge of probate to appoint "suitable persons" as members of a committee to make partition, where the judge of probate made an appointment, relying upon an alleged agreement of the parties as to the suitability of the appointees, when in fact there had been no such agreement, the court had power, on objection by one of the parties to the action, to correct the error by revoking the appointment.

2. SAME—TIME FOR HEARING OBJECTION.

Where, after the appointment of a committee to make partition, defendants objected to the committee as constituted, and the court in its discretion postponed the consideration of the objection until after the return of the committee's report, such action did not as a matter of law amount to a waiver of defendant's objection seasonably made, nor was the nonaction of the court equivalent to the order overruling the objection, and it was proper for the court to sustain the objection after the committee made its report.

3. SAME—REVIEW.

Where the probate court revoked the appointment of a committee to make partition, for the alleged reason that the committee was appointed upon representation made by counsel for the petitioner that the adverse parties had consented to the appointment, which representation was false, it was error for the superior court to dismiss the appeal, inasmuch as a hearing by such court was necessary to determine the truthfulness of the allegations.

Exceptions from Superior Court; Stone, Judge.

Petition by Fannie M. Hood against Mary W. Montgomery and another in the probate court for the partition of real estate. From an order setting aside the report and revoking the appointment of the committee to make partition, plaintiffs appealed to the superior court. From an order sustaining defendants' motion to dismiss the appeal, plaintiff brings exceptions. Exceptions sustained.

Upon the petition of the plaintiff for the partition of certain real estate, the probate court appointed a committee to make the partition, the members of which the court un-

derstood at the time had been agreed to by the parties. Afterward, but before the time for taking an appeal had elapsed, the defendants objected to the committee as constituted, claiming that they did not agree to the appointment of one of the members. At the suggestion of the court, the consideration of the defendants' objection was postponed until the committee should make a report. When the report was returned, the defendants objected to it, and asked that it be set aside and for the appointment of another committee. The court thereupon entered a decree or order setting aside the report and revoking the appointment of the committee, for the reason that the committee was appointed "upon the representation made to the court by counsel for the petitioner that the counsel for the petitionee had agreed upon and consented to the appointment of the committee as herein named," which representation was not in fact true. Thereupon the plaintiff took an appeal to the superior court, assigning, among other reasons of appeal, the legal positions that the probate court had no authority to set aside the report of the committee and that the remedy of the defendants was by an appeal. The defendants' motion to dismiss the appeal was granted, and the plaintiff excepted.

G. K. & B. T. Bartlett, for plaintiff. Butnam, Brown, Jones & Warren, for defendants.

WALKER, J. It was the duty of the judge of probate to appoint "suitable persons" as members of the committee. Pub. St. 1901, c. 243, §§ 10, 20. If unsuitable persons were appointed, it was the right of the defendants to object and to seek to have the appointment revoked, if they presented their objection in a reasonable time after they were informed of the facts authorizing that conclusion. The fact that parties agree that certain persons may be appointed upon the committee is evidence that in that proceeding they are "suitable." It appears that the judge of probate made the appointment in this case, relying upon the alleged agreement of the parties as to the suitability of the appointees, but that the defendants upon learning of the appointment objected thereto, because there was no agreement as to the appointment of one of the men. Having been misled in this material respect, the court had the power to correct the error by revoking the appointment, when the matter was seasonably and properly called to its attention. *Ayer v. Messer*, 59 N. H. 279, 280; *Reed v. Prescott*, 70 N. H. 88, 46 Atl. 457. The appointment of the committee was a preliminary proceeding, which did not have the effect of a final decree upon the rights of the parties. Pub. St. 1901, c. 200, § 1; *Parker v. Gregg*, 23 N. H. 416, 423. The plaintiff acquired no right to have the partition made by a committee composed of unsuitable men; and, if the revocation had been made when

the defendants first made their objection, it is apparent that the rights of the parties would have been amply protected. The fact, however, that the court did not see fit to pass upon the matter at that time, but, in the exercise of its discretion in effect postponed its consideration until after the return of the committee's report, did not as a matter of law amount to a waiver of the defendants' objection seasonably made. Nor was the nonaction of the court equivalent to an order overruling the objection. The decision of the question thus raised was merely held in abeyance; and, when the objection was finally sustained and the appointment revoked, the legal effect of the order of revocation was the same as though it had been made in the first instance. The proceedings before the committee and its report, therefore, necessarily became invalid.

This result is reached upon the assumption that the facts set forth in the appeal are true. As the case is understood, however, the defendants' motion to dismiss the appeal presents merely the question of the legal sufficiency of the reasons assigned for the appeal, which was taken from the decree finally made setting aside the report, and not from the previous action of the court. A hearing in the superior court is necessary to determine the truthfulness of the allegations. Whether the division recommended by the committee was just and equitable will become immaterial, if it should appear that the committee was not such a committee as the parties were legally entitled to. The other reasons of appeal do not appear to be important.

Exceptions sustained. All concurred.

NORTHWESTERN MUT. LIFE INS. CO. v. COLLAMORE et al.

(Supreme Judicial Court of Maine. Dec. 23, 1905.)

1. GIFTS—INTER VIVOS OR CAUSA MORTIS— WHAT CONSTITUTES.

To constitute a gift *inter vivos* or *causa mortis*, there must be a transfer of possession under circumstances indicating an intention thereby to at once transfer title as well as possession irrevocably. Inclosing the article in a sealed envelope, and handing the package to another with instructions to keep, but not to open it until after the death of the depositor, does not indicate such intention.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gifts, §§ 28-42, 122-132.]

2. TRUST—DECLARATION—SUFFICIENCY.

A declaration of trust, to be effective, must be explicit, absolute, and complete, vesting the equitable title in the beneficiary at once, though the transfer of the legal title may be deferred till the happening of some event sure to happen, as the death of the declarant. If the transfer of the legal title is to be contingent on an event which, though expected, may not happen, the declaration is ineffective. Thus a declaration made in contemplation of suicide, and to direct the disposition of the property after death by suicide, is ineffectual, since the intention to commit suicide may be abandoned.

3. SAME—EVIDENCE.

The evidence in this case does not satisfy the court that the property in the insurance policy in question was effectively transferred, either by delivery or by a declaration of trust. (Official.)

Report from Supreme Judicial Court, Knox County, in Equity.

Bill by the Northwestern Mutual Life Insurance Company against Charles H. Collamore and others. Case reported. Decree in favor of Josie Collamore, defendant.

Bill of interpleader to determine whether the amount of a life insurance policy, issued by the plaintiff company to Ellison C. Collamore, should be paid to his estate, he being deceased, or to his brother, Charles H. Collamore. After the death of the said Ellison C. Collamore, the said Charles H. Collamore claimed that payment of the insurance policy should be made to him, alleging that the policy had been assigned to him by the deceased in his lifetime. Thereupon the said Josie Collamore, widow of said deceased, who was afterwards appointed his administratrix, brought a bill in equity to have the plaintiff enjoined from paying said insurance policy to said Charles H. Collamore pending the determination of the bill and decree thereon. An injunction was granted, as prayed for in said bill. The said Charles H. Collamore also brought an action at law against the plaintiff to recover from it the amount of said insurance policy. The said Josie Collamore, after her appointment as administratrix of the estate of said deceased, likewise brought an action at law against the plaintiff to recover from it the amount of said insurance policy. Thereupon this bill of interpleader was brought. At the hearing on the bill of interpleader in the court of the first instance the facts were submitted in the form of an agreed statement, and the case was reported to the law court, with the stipulation that "upon so much of the agreed statement as is legally admissible" the law court determine the rights of the defendants and make decree in accordance therewith.

Agreed Statement.

On September 22, 1899, Ellison C. Collamore took out with the Northwestern Mutual Life Insurance Company a tontine policy of insurance upon his life for the sum of \$1,500, payable to his estate.

At the time of taking out such insurance, and at the time of his death, he had living a wife and one son.

Clause 6 of the policy provides: "If this policy shall be assigned, a duplicate of the assignment shall within thirty days be given to the company, and due proof of interest shall be produced on making claim."

On March 6th, 1900, he signed an assignment of said policy, recited to be in consideration of love and affection, running to Charles H. Collamore, his brother, but there-

in reserving to himself the right to make choice of options contained in the policy, and to receive the whole benefit thereof himself, without the consent of the assignee; and, in event of the death of the assignee before the policy became payable on account of the death of the insured, the same was to be payable to his estate.

This policy and assignment was in the possession of the insured on January 6, 1904, on which date he delivered a sealed envelope to Charles H. Collamore, which it finally turned out contained the insurance policy and assignment, with some other papers; but the contents of the envelope was unknown to Charles H. Collamore until after the death of the insured.

The insured died by his own hand on March 16, 1904. Just prior to committing suicide the insured sent a letter to Charles H. Collamore, which was received after his death, in an envelope postmarked March 16th, and which letter read as follows:

"Rockport, Feb. 9, 1904.

"Well, Charles, as I shall not see you again I will send you this receipt, you will have it, show, and Joe cannot make enny trouble about it. I told Geneva that I would fix my board bill on that note; I have fixed it by making the interest four per cent, and I thought that would satisfy you for what trouble and my board, and the trouble while I was with you. You will have the money to pay this note when you collect the Insurance, but don't pay it too fast, for they will spend it if you do; and you can take the interest on some of the other money and pay them their interest. You will know what I — about the other money when you open the envelope I gave you. Don't wait too long before you attend to it either. It is no need of me telling you my troubles for it will do you no good or me either, but I think that, I am tired of living, and have been for the past three years, I cannot stand and strain enny longer, so I hope you will do all you can for Harry. I have fixed my things as I thought best for you and Harry and our sister, and I hope you will do what I have asked you to do, for I have left it as I thought best. I shall take a dose of poison which I have had ready for a long time, and hoping I will meet you all in a world where trouble never comes, Good bye.

"From your brother,

"E. C. Collamore,

"Rockport, Maine."

In the sealed envelope, which after receiving the above Charles H. Collamore opened, was contained the two following letters, one of them in a smaller envelope:

"Rockport, Oct. 13, 1903.

"To Charles H. Collamore from E. C. Collamore:

"Charles: If enny thing happens to me I want you to collect my Life Insurance and divide it between yourself and Harry and

your sister. Take Five Hundred Dollars for yourself; Five Hundred Dollars for Harry P. Collamore and the rest for your sister, Syreno A. Andrews. I want you to take care of Harry's until he is 17 years old before you give him enny of it; then I want you to give it to him, or put it where he can get it, to finish his schooling with; don't give it to all at one time so Joe can get it and go through with it. I want you to help him all you can; he is not to blame for what he has done, his mother is to blame for it all. You will have to use your own judgment about Syreno's money; you will have to let her have a little at a time when she needs it the most. You will have to get her plaster for her when I am gone. Be shure and keep enought of her money to bury her when she dies, for they will not have enough in the family. If there is enny of her money left when she dies you divide it between yourself and Harry. I have fixed your note so it will be four per cent interest. This is the last favor I shall have to ask of you and I want you to have me buried with mother, at West Rocksport.

"E. C. Collamore."

"Rockport, Jan. 31, 1904.

"Charles:

"You will notify C. R. Dunton, of Bangor Exchange, of my death, for he is the Insurance Agent for the North Western, and will see that you get the money that will fall due there. You use it as I have asked you to in the other letter I have left you. Be shure and do the best you can for Harry, and God will bless you.

"Good bye, from your brother,
"E. C. Collamore."

Instructions in relation to the envelope, as given orally to Charles H. Collamore, were at different times said by him to have been as follows:

"You keep it, and, if anything happens to me, you open it." And: "Keep that; don't open it unless something happens to me."

This was all of the communication made at the time of the delivery of the envelope, and nothing further was said about the envelope, or in relation to property matters, after the delivery.

Other envelopes had previously been left in a similar way; but the contents of envelopes so left were never known to Charles H. Collamore and might or might not have contained the insurance policy and assignment Charles H. Collamore had received; but he drew the inference that said packages did contain these papers among other things, but no direct statement to that effect was made, and the packages held previously were returned to the insured.

Prior to the death of the insured's mother in 1899, the insured had been in the habit of giving her similar matters to keep for him.

The insured was not indebted to said Charles H. Collamore, but, on the other hand, Charles H. Collamore was indebted to his brother for borrowed money, and is still indebted to his estate; he having given his note therefor.

The assignment had no relation to any business transaction between the brothers.

Josie Collamore, the widow of Ellison C. Collamore, was appointed administrator of his estate. Charles H. Collamore claims the insurance under the assignment in question. Josie Collamore claims to collect the same as administratrix, to be disposed of as provided by statute.

On the bill decree was made that the money should be paid into court and the defendants were ordered to interplead. Decree was complied with, and each of the defendants in the bill of interpleader make answer, setting up their respective claims upon the facts above stated.

Argued before EMERY, WHITEHOUSE, STROUT, POWERS, PEABODY, and SPEAR, JJ.

L. F. Starrett, for plaintiff. L. M. Staples, for defendant Charles H. Collamore. C. E. & A. S. Littlefield, for defendant administratrix.

EMERY, J. The question submitted on this bill of interpleader is whether the amount of a life insurance policy, issued by the plaintiff company to Ellison C. Collamore, is payable to his estate, he now being deceased, or to his brother, Charles H. Collamore. The policy is admittedly payable to his estate, unless the court shall find from the agreed statement of facts that the legal or equitable title to it was effectually transferred by him before his death to his brother, the other claimant.

There certainly does not appear to have been any such delivery of the instrument of assignment, or of the policy itself, to the brother, as was necessary to constitute a transfer of any title, legal or equitable. Although he placed them in the hands of his brother, there was nothing said or done indicating that it was an irrevocable gift, or intended as such. The papers were in a sealed envelope. No statement was made of what the envelope contained, or that the contents were a gift. He simply told his brother to keep it, and not to open it unless something happened to him. The brother did not know the contents of the envelope until he opened it after the death of Ellison. Other envelopes had previously been left by Ellison with the brother in a similar way and had been taken back, but the contents of those envelopes are unknown. Prior to his mother's death in 1899, Ellison had been in the habit of giving her similar packages to keep for him.

All that can be reasonably inferred from the agreed statement is that Ellison intrusted

the envelope to his brother as ballee, to be kept for him (Ellison), and not to be opened unless something happened to him. Had Ellison called for the envelope before his death, the brother would have been obliged to give it up. He clearly had acquired no title to it or its contents by its being thus placed in his hands. Indeed, the brother frankly concedes no completed gift, either *inter vivos* or *causa mortis*, can be inferred from the facts stated.

He urges, however, that a declaration of trust by Ellison, in favor of his brother and others, can and should be inferred. For this he relies upon two letters of Ellison found in the envelope with the policy, and another sent by him through the mail just before his death by suicide.

A declaration of trust, to be effectual, must be explicit, unconditional, and complete. If it be tentative, or conditional, or made subject to reservation, it is not a perfected declaration of trust, and will not be enforced by the courts. True, a future time or event may be fixed for the legal title to vest in the beneficiary, such as the death of the donor; but the declaration must be of a present trust, vesting the equitable title in the beneficiary thereby and irrevocably. One may dispose of property during his life by gift or declaration of trust, but to do so he must divest himself of the ownership of what he gives. If he desires to retain ownership during his life, and yet fix its disposition after or in case of his death, he must do so by will. The foregoing legal principles are established by the decisions of this court in *Bath Savings Inst. v. Hathorn*, 88 Me. 122, 33 Atl. 836, 32 L. R. A. 377, 51 Am. St. Rep. 382, and *Norway Sav. Bank v. Merriam*, 88 Me. 146, 33 Atl. 840, and buttressed by the numerous authorities there cited, as well as by the reasoning of the opinions.

Turning now to the letters, and reading them in the light of the other facts, it is clear they do not constitute an effectual declaration of trust. Whatever statements he made of his wishes, he had not gone so far that he could not recall them. The envelope was still unopened. Even after sending the letter, dated February 9th, but mailed March 16th, he could have repented of his design, and, notwithstanding his letters, could have enforced the return of the sealed envelope and its contents.

The deceased evidently desired to retain ownership to the last, and yet deprive his widow of her interest in his estate. This under our law he could not do. *Brown v. Crafts*, 98 Me. 40, 56 Atl. 213.

It must be decreed that the money due on the policy be paid to the administratrix, Josie Collamore, less the costs and reasonable counsel fees of the plaintiff, which may be deducted by the plaintiff from the fund.

Decree to be made accordingly.

WYMAN v. PISCATAQUIS WOOLEN CO.
(Supreme Judicial Court of Maine. Dec. 9, 1905.)

WATERS AND WATER COURSES — COMPLAINT FOR FLOWAGE—PROCESS—SERVICE.

A complaint for flowage, not inserted in a writ of attachment, may, under the statute, be presented to the court in term time or be filed in the office of the clerk in vacation; but before it can be served there must be an order of service by the court in term time or by some justice thereof in vacation. The delivery of a copy of the complaint, attested by the clerk of court, by a sheriff to the respondent, without such an order, is not a sufficient service.

(Official.)

Report from Supreme Judicial Court, Somerset County.

Action by Flavel Wyman against the Piscataquis Woollen Company to recover for flowage of land. Motion to dismiss for want of legal service. Case reported, and complaint dismissed.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and PEABODY, JJ.

J. S. Williams, for plaintiff. D. D. Stewart and David R. Straw, for defendant.

WISWELL, C. J. This is a complaint for flowage. Upon the second day of the term to which the complaint was made returnable, counsel for respondent appeared specially and filed a motion that the complaint be dismissed for want of legal service. There was no officer's return of service of any kind upon the complaint, but these facts as to the manner in which service was made are admitted. The complaint was filed in the office of the clerk of this court for Somerset county in vacation, a copy thereof was made by the clerk, certified by him as such, and returned by him to the counsel for the complainant with the original complaint. The original and certified copy were then given by complainant's counsel to a deputy sheriff for service, and the deputy sheriff gave the copy to the treasurer of the respondent corporation 30 days before the return term named in the complaint. The complaint was not inserted in a writ of attachment, and there was no order of notice by the court in term time nor by any justice thereof in vacation.

Was this a sufficient service of a complaint for flowage? We think not. The statute in relation to the commencement of a proceeding of this nature and the service of the complaint is as follows: "The complaint may be presented to the court in term time, or be filed in the clerk's office in vacation; and the proper officer shall serve the same, fourteen days before the return day, on the respondent, by leaving a copy thereof at his dwelling house, if he has any in the state; otherwise, he shall leave it at the mill in question, or with its occupant; or the complaint may be inserted in a writ of attachment and served by summons and a copy." Rev. St. c. 94, § 6.

What is the purpose of this requirement of the statute? That the complaint, if not inserted in a writ, should be presented to the court in term time, or filed in the office of the clerk in vacation? Clearly, we think that the court in term time may fix the term and order service of the complaint upon the respondent, or that a justice of the court, in vacation, may make such an order; the justices of the supreme and superior courts having authority, under Rev. St. c. 84, § 1, to order notice concerning any civil proceeding in term time or vacation. When such a complaint is inserted in a writ of attachment, the writ contains an order, authorized by statute and signed by the clerk of the court, directed to the proper officer, commanding the service of the process, and the summons contains an order commanding the respondent to appear and answer at the time named. Without such an order, contained either in the writ and summons or in the special order of court, or of some justice thereof in vacation, there is no command to a defendant or respondent to appear and defend, and this command is not to be given to a defendant by a plaintiff, but by the court at the instance of the plaintiff.

Unless authorized by statute in direct terms, or by clear implication, the complaint or petition in any civil proceeding should have thereon an order of court as to service before it can be served. In a petition for partition, for instance, authority for service without order of court is given by the statute in direct terms. Rev. St. c. 90, § 3. But in that section the petition is filed with the clerk in order that the clerk, as provided by the section, may make a certified copy of the petition, which is to be served, but the section in regard to a complaint for flogage, above quoted, contains no authority for the clerk to make a certified copy of the complaint for service, and the requirement that the complaint may be filed in the clerk's office is not for this purpose. Neither does this statute, in our opinion, by implication authorize service without an order therefor.

This insufficient service might have been called to the attention of the court in any way, however informal, and at any time. An inspection of the complaint itself by the court would have shown no return of any service, and, even after the officer had been allowed to make a return in accordance with the facts, such return would have failed to show a sufficient service. The complaint, therefore, should be dismissed for want of service, with costs for the respondent, since, although the respondent only appeared by counsel for the special purpose of calling the attention of the court to the want of service, it was still a party, and the prevailing party, under Rev. St. c. 84, § 132, as decided in *Thomas v. Thomas*, 98 Me. 184, 56 Atl. 651.

The court is asked to decide whether or not, if the respondent's motion to dismiss should prevail, the complainant may be al-

lowed to amend. We do not see how the question of amendment arises. We have not considered the sufficiency of the complaint, although a question concerning it was raised by counsel for the respondent; but, as the complaint must be dismissed for want of service, it is unnecessary to decide this question, and no question of amendment is left.

Complaint dismissed, for want of service, with costs to the respondent.

GLOVER et al. v. O'BRIEN et al.
(Supreme Judicial Court of Maine. Dec. 11, 1905.)

1. COVENANTS—ACTION FOR BREACH—PLEADING.

It is a well-settled general rule respecting the assignment of breaches of covenants that the plaintiff may allege the breaches generally by simply negating the words of the covenant; but the exception to this rule is equally well recognized that, when such a general assignment does not clearly and necessarily show a breach, special averments are required.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Covenants, §§ 197, 199.]

2. SAME—SPECIAL AVERMENTS.

The covenant against incumbrances and that of general warranty comes within the exception, and breaches of those covenants must be specifically set forth, showing in the case of the former the nature of the incumbrance complained of, and in case of the latter a disturbance of title or possession by a paramount title equivalent to an eviction.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Covenants, § 197.]

3. SAME—PLEADING AND PROOF.

In the case at bar, the covenant that the defendant was lawfully seised in fee of the premises and the covenant that she had good right to sell and convey the same to the plaintiffs fall within the rule, and it was only incumbent upon the plaintiffs to negative the words of the covenants. But the plaintiffs were not content to rely upon such a general assignment of the breaches of these covenants, but supplemented it with a specification of the grounds upon which they relied to establish the breach of these covenants, and, having elected to do so, they are confined to the ground stated in the specification, and the defendant would be warranted in relying upon the facts thus stated in the specification as the only cause relied upon by the plaintiffs.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Covenants, § 210.]

4. SAME — ASSIGNMENT OF BREACHES — CONVEYANCE—DELIVERY — NATURE OF INCUMBRANCES.

The specification in this case sets forth that the defendant before the date of her deed to the plaintiffs, by her deed "duly sealed, executed, and acknowledged, did convey said premises to one Charles Steere, of Boston, Mass., and did convey and part with the title which she, before the deed to said Steere, held and possessed in the premises, and that before making her deed to the plaintiffs with the covenants aforesaid she was not the owner of and had no right to convey said premises." This specification does not allege that the prior deed was either delivered or recorded. *Held:*

(1) That although all the facts stated in the specification may be true, yet, if it does not necessarily follow that either of the covenants has been broken, the assignment of breaches is not sufficient.

(2) Assuming that the averment of a conveyance by necessary implication includes a delivery, still the specification is defective, because it does not allege that the deed to Steere was recorded.

(3) All that is stated in the specification may be true, and yet the plaintiffs may have received a good title, and it does not appear, either by express words or necessary implication, that any covenant had been broken.

(4) If this specification could be construed to apply also to the general covenant of warranty, it would be equally unavailing. If it does not apply to this covenant, there is no specification of the breach of it.

(5) Neither does the declaration specify the nature of the incumbrance alleged to constitute a breach of the covenants against incumbrances. Therefore the breaches of these last-named covenants are not well assigned.

(Official.)

Exceptions from Supreme Judicial Court, Knox County.

Action by William H. Glover and others against Clara E. O'Brien and another on an alleged breach of covenant of warranty in a deed under seal. Demurrer to the writ and declaration overruled, and defendants except. Exceptions sustained.

Argued before EMERY, WHITEHOUSE, POWERS, PEABODY, and SPEAR, JJ.

C. E. & A. S. Littlefield, for plaintiffs. D. N. Mortland, for defendants.

WHITEHOUSE, J. The plaintiffs declared in a plea of debt that the defendant conveyed to them a certain piece of land by deed of warranty, and "did therein covenant with the plaintiffs, their heirs and assigns, that she was lawfully seised in fee of the premises, that they were free from all incumbrances, and that she had good right to sell and convey the same to the plaintiffs to hold as aforesaid, and did also covenant that she and her heirs would warrant and defend the same to the plaintiffs, their heirs and assigns, against the lawful claims and demands of all persons."

"But the plaintiffs aver that in fact at the time of making and executing said deed the said defendant was not seised in fee of the premises, that they were not free from all incumbrances, and that she did not have good right to sell and convey the same as in her said deed set forth, and that she has not made good her covenant to warrant and defend the same to the plaintiffs against the lawful claims and demands of all persons. But the plaintiffs aver that the said Clara E. O'Brien before that time, viz., on the 30th day of April, 1884, by her deed of that date, on that day duly sealed, executed, and acknowledged, did convey said premises to one Charles Steere, of Boston, Mass., and did convey and part with the title which she, before the deed to said Steere, held and possessed in said premises, and that before making her deed to the plaintiffs with the covenants aforesaid she was not the owner of and had no right to convey said premises. And so the said Clara E. O'Brien her cove-

nant aforesaid hath not kept, but hath broken the same, to the damage of the said plaintiffs (as they say) the sum of \$800."

To this declaration the defendant filed a general demurrer, which was joined by the plaintiffs. The presiding judge overruled the demurrer, and the case comes to the law court on exceptions to this ruling.

In support of the demurrer the defendant contends in the first place that, inasmuch as the distinguishing feature of the action of debt is the fact that it lies for the recovery of money or its equivalent, in sums certain or that can readily be made certain by computation, if this action is to be deemed one of debt, the declaration is wholly insufficient for want of any allegation of an agreement on the part of the defendant to pay any such sum, or of any failure on his part to pay money. Again it is insisted that if, as the substance of the averments indicates, it was as an action for covenant broken, it is demurrable, first, because the defendant is summoned to answer in a plea of debt and not of covenant broken, and, second, because the action is fatally defective for want of a proper and necessary assignment of the breaches of the covenants.

Whether the objection that the plaintiffs declared in a plea of debt, instead of covenant broken, is open to the defendant upon a general demurrer, or can be taken advantage of only by special demurrer, it is unnecessary to determine; for it is the opinion of the court that, considered as an action for covenant broken, the declaration does not contain a sufficient allegation of a breach of any of the covenants declared upon.

It is undoubtedly a well-settled general rule respecting the assignment of breaches of covenants that the plaintiff may allege the breaches generally by simply negating the words of the covenant; but the exception to this rule is equally well recognized that, when such a general assignment does not clearly and necessarily show a breach, special averments are required. In *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61, cited with approval in *Wait v. Maxwell*, 4 Pick. 87, and *Blanchard v. Hoxie*, 34 Me. 376, the different covenants are critically distinguished, and the reasons for the rule and the exceptions above stated fully considered and explained. According to the doctrine there laid down, the covenant against incumbrances and that of general warranty come within the exception, and breaches of those covenants must be specifically set forth, showing in the case of the former the nature of the incumbrance complained of, and in case of the latter a disturbance of title or possession by a paramount title, equivalent to an eviction.

On the other hand, the covenant that the defendant was lawfully seised in fee of the premises and the covenant that she had good right to sell and convey the same to the plaintiffs fall within the rule, and it is only incumbent upon the plaintiffs to negative

the words of the covenants. But it has been seen that the plaintiffs were not content to rely upon such a general assignment of the breaches of these covenants, but supplemented it with a specification of the grounds upon which they relied to establish the breach of them. Their declaration proceeds as with a videlicet to state the particular facts constituting the breach. It avers that the defendant, before the date of her deed to the plaintiffs, "by a deed duly sealed, executed, and acknowledged, did convey said premises to one Charles Steere, of Boston, and did convey and part with the title which she held in the premises, and that before making her deed to the plaintiffs she was not the owner and had no right to convey said premises."

The plaintiffs were not compelled by the rules of pleading to specify the cause of the breach of these covenants; but, having elected to do so, they are confined to the ground stated in the specification, and the defendant would be warranted in relying upon the facts thus stated in the specification as the only cause relied upon by the plaintiffs. If, therefore, the facts stated in the specification may all be true, and still it does not necessarily follow that either of these covenants has been broken, the assignment of breaches is not sufficient. 5 Ency. of Plead. & Pr. p. 369, and cases cited. It will be noticed that the specification does not state that the prior deed was either delivered or recorded. It does allege, however, that the defendant "did convey the premises to one Charles Steere," etc. Assuming that the deed could not operate as a conveyance of the title to Steere without a delivery, and that the averment of a conveyance by necessary implication includes a delivery, still the specification is defective, for the reason that it does not allege that the deed to Steere was recorded. It is provided by Rev. St. c. 75, § 11, that "no conveyance of an estate in fee simple, fee tail, or for life or lease for more than seven years, is effectual against any person except the grantor, his heirs and devisees, and persons having actual notice thereof, unless the deed is recorded as herein provided." All that is stated in the plaintiffs' specification may therefore be true, and yet the plaintiffs may have received a good title, and it would not appear either by express words or necessary implication that any covenant had been broken. If this specification could be construed to apply also to the general covenant of warranty, it would be equally unavailing. If it does not apply to this covenant there is no specification of the breach of it. Neither does the declaration specify the nature of the incumbrance alleged to constitute a breach of the covenant against incumbrances. The breaches of these last-named covenants are therefore not well assigned, and the entry must be:

Exceptions sustained.

Demurrer sustained.

MEDOMAK NAT. BANK v. WYMAN.

(Supreme Judicial Court of Maine. Dec. 19, 1905.)

LIMITATION OF ACTIONS—NEW NOTE FOR INTEREST—EFFECT.

When one of the makers of a joint and several negotiable promissory note, after the same has become barred by the statute of limitations, gives his negotiable promissory note to the payee of the barred note in payment of interest on the barred note, it constitutes a new promise on his part to pay the barred note, and revives the barred note as to himself.

[Ed. Note.—For cases in point, see vol. 83, Cent. Dig. Limitation of Actions, § 624.]

(Official.)

Report from Supreme Judicial Court, Lincoln County.

Action by the Medomak National Bank against Fannie L. Wyman. A note given by defendant's intestate. Case reported. Judgment for plaintiff.

Argued before EMERY, WHITEHOUSE, STROUT, POWERS, PEABODY, and SPEAR, JJ.

Heath & Andrews and W. H. Miller, for plaintiff. C. E. & A. S. Littlefield, for defendant.

SPEAR, J. This is an action of assumpsit upon seven promissory notes, only four of which are in controversy, and comes up on report. The four notes in question were all substantially in the same form, as follows: For value received, we jointly and severally promise to pay the Medomak National Bank of Waldoboro or order \$500 on demand, and interest. They were all signed by the Medomak Ice Company and indorsed upon the back before delivery by L. L. Kennedy the defendant's intestate. These notes were all intended for the benefit of the ice company and in no respect for the benefit of the indorser. In the report "it is admitted that all the indorsements upon the last-described four notes except the last indorsement on each were made from funds delivered to the plaintiff by the Medomak Ice Company."

"The plaintiff admits that the said four notes are barred by the statute of limitations against Lincoln L. Kennedy defendant's intestate, unless the bar in the statute was removed by the note for \$152.61 above offered under the sixth count."

This note was as follows: "\$152.61. Waldoboro, Maine, May 8, 1902. For value received, we jointly and severally promise to pay the Medomak National Bank of Waldoboro or order one hundred fifty-two ⁶¹/₁₀₀ dollars on demand, and interest"—and was signed by the Medomak Ice Company and indorsed by L. L. Kennedy, precisely as the four notes in controversy were signed and indorsed. It will also be observed by comparison that it was in the same form as the other four notes. "It is further admitted that said note for \$152.61 is made up of the aggregate of the last indorsements appearing

upon the aforesaid four notes, and that said note for \$152.61 was entered upon the books of the bank as 'Note, Medomak Ice Company' and that entry was balanced by a credit of the same amount to profit and loss." The last indorsements appearing upon these notes show that the note for \$152.61 was given to pay the interest upon them to June 5th, March 16th, March 25th, and March 28th, 1902, respectively.

The only question presented by this case is whether the payment of interest upon the four notes by giving the note of \$152.61 removed these four notes from the operation of the statute of limitations with respect to the indorser L. L. Kennedy; whether the payment was such an acknowledgment by him of the debt created by these four notes as to warrant the inference of a new promise on his part to pay them. This is not a question as to whether these notes were revived as to the ice company, but whether they were revived as to the indorser. While the name of L. L. Kennedy appears upon the note in the usual place of an indorser, his legal relation to it under our decisions was that of an original promisor. It will therefore appear that the defendants' intestate stood in the capacity of original promisor upon each of the four notes, and also upon the note which was given for the payment of interest.

After the four notes became outlawed, Mr. Kennedy was relieved by the operation of the statute from payment. At this juncture he was free from any liability, and it was absolutely within his privilege to decline to make himself further liable for the payment of these notes. But he did not do this. On the other hand, he became a joint and several promisor with the ice company upon the note and gave it to the bank in payment of interest as above stated. As a matter of law he gave his own individual obligation for the payment of the interest, the note given being joint and several. Here it may be remarked that the peculiar wording of this note makes the apparent indorser an original promisor in fact as well as law. The only name upon the face of the note is that of the Medomak Ice Company. It could not be joint and several as to the company, a single signer. It must therefore have reference to the indorser as one of the joint and several promisors. This is also true with respect to the relation of Mr. Kennedy to the four notes upon which the interest was paid. They were, in fact as well as law, his individual notes. There can be no presumption, under the wording of these notes, either in fact or law, of any other relation of L. L. Kennedy to all of them than that of an original promisor, individually liable.

It would therefore affirmatively appear from the form of these notes that Mr. Kennedy by the note given was not only making a payment of interest upon the notes of the

Medomak Ice Company but upon his own notes as well. He gave no notice to the bank that he did not intend to revive his liability upon the barred notes, and no evidence in the case tends to show that his relation to the notes was other than that shown by the notes themselves. It therefore seems clear that the natural inference from the facts disclosed by this transaction is that Mr. Kennedy intended this note at the time it was given as a payment of interest upon these four notes as much as if he had made the payment with his own money or his own check in lieu of the notes. We think that instead of requiring evidence to show that the payment of interest by the note was intended to acknowledge and revive the debt, it would rather require some evidence to overcome the inference that it was not.

In view of the above construction of the relation of the defendant's intestate to the notes in controversy, it becomes unnecessary to consider her contention that the note given for the payment of interest was the note of the Medomak Ice Company only, the payment of which was guaranteed by the indorser as surety provided the company failed to pay.

The principles of law applicable to the removal of the bar of the statute of limitations are well settled. Payments on a note already barred remove their bar. *Sinnett v. Sinnett*, 82 Me. 278, 19 Atl. 458; *Manson, Ex'r v. Lancey*, 84 Me. 380, 24 Atl. 880, *Pond v. French*, 97 Me. 405, 54 Atl. 920.

Payments of interest take the case out of the statute with like effect as payments of principal. *Fryeburg Parsonage Fund v. Osgood*, 21 Me. 176.

A partial payment by note is as effectual to take the original debt out of the operation of the statute as payment in any other manner. *Ilsley v. Jewett*, 2 Metc. (Mass.) 168; *Sigourney v. Wetherell*, 6 Metc. 553; *Wenman v. Ins. Co.*, 13 Wend. 267, 28 Am. Dec. 464; *Bowman v. Downer*, 28 Vt. 532.

In *Sigourney v. Wetherell*, 6 Metc. 553, it was held that a note given by a guarantor, in payment of the interest due upon the guaranteed note, takes the debt out of the operation of the statute of limitations.

The above decisions follow and rest upon the well-settled rule in Maine that the giving and acceptance of a negotiable note is presumably payment. *Varner v. Nobleborough*, 2 Greenl. 121, 11 Am. Dec. 48; *Bunker v. Barron*, 79 Me. 62, 25 Atl. 253, 1 Am. St. Rep. 282. But in the case at bar it is unnecessary to rely upon the presumption of payment as it is admitted that the note was given for the express purpose of paying and did pay the last indorsements on the four original notes. Our conclusion is that the note given in payment of interest upon the four notes, removed the bar of the statute upon these notes as to the defendant's intestate, and that she is liable in this action for their payment.

The plaintiff is entitled to judgment upon the first count in its writ for \$3,300 and interest at 6 per cent. from October 1, 1902; under the second count for \$500 and interest at 6 per cent. from June 5, 1902; under the third count for \$336.95 and interest at 6 per cent. from March 16, 1902; under the fourth count for \$135 and interest at 6 per cent. from March 25, 1902; under the fifth count for \$300 and interest at 6 per cent. from March 28, 1902; under the sixth count for \$152.61 and interest at 6 per cent. from May 8, 1902, and under the seventh count for \$250 and interest at 6 per cent. from April 1, 1904.

HURD v. CHASE.

(Supreme Judicial Court of Maine. Dec. 21, 1905.)

1. MORTGAGES—ABSOLUTE DEED AS MORTGAGE.

The court, now having full equity powers, has the power to treat a conveyance or a reservation in a conveyance absolute in terms, as made solely for security for some obligation, if it finds such to be the fact from extrinsic evidence.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 60-94.]

2. SAME—DEBT SECURED—EXTRINSIC EVIDENCE.

Having this power, the court also has the power in such case to determine from extrinsic evidence what the obligation is that was intended to be secured, including its nature, extent, and terms.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 97-107.]

3. SAME.

When the instrument made as security itself contains a description of the obligation to be secured, the court cannot add to nor take away anything from such description; but, when the instrument contains no description, the court can ascertain the full terms of the obligation from extrinsic evidence.

4. ACTION—FORM—EQUITABLE RELIEF IN ACTION AT LAW.

These equity powers of the court can now be exercised in an action at law for the possession of the estate thus conveyed or reserved. A separate bill in equity is not now necessary for that purpose.

5. APPEAL—REPORT OF CASE—TECHNICALITIES IN PLEADING—WAIVER.

Upon report of an action at law, technicalities in pleading are to be regarded as waived, unless otherwise stipulated, and, at least in the absence of such stipulation, the court can ascertain and decide upon its merits the real controversy in the case.

6. MORTGAGES—ABSOLUTE DEED—RESERVATION AS SECURITY.

In this case the plaintiff reserved in terms an absolute life estate out of a farm conveyed by her to the defendant, but the court finds that one consideration for the conveyance was the bond of the defendant to support the plaintiff on the farm, and that the reservation was made solely as security for the performance of the bond. *Held*, that the defendant is entitled to retain possession of the farm until a breach of his bond, and, no such breach being shown, the plaintiff is not yet entitled to possession.

(Official.)

Report from Supreme Judicial Court, Arrostook County.

Action by Mary F. Hurd against Fred W. Chase. Case reported. Plaintiff nonsuit.

Argued before EMERY, STROUT, SAVAGE, PEABODY, and SPEAR, JJ.

Willis B. Hall, Wm. P. Allen, and Louis O. Stearns, for plaintiff. Ira G. Hersey and A. B. Donworth, for defendant.

EMERY, J. This is a real action. The plaintiff formerly owned the demanded land (a farm) in fee, subject to a mortgage, but conveyed it to the defendant with the following habendum clause: "To have and to hold to the said Fred W. Chase [the defendant], his heirs and assigns, to and for the following uses, viz.: To the use of me, the said Mary F. Hurd [the plaintiff], during my natural life, and after my decease or other determination of said estate to the use of the said Fred W. Chase and his heirs and assigns, forever." The consideration for this conveyance was the agreement by the grantee (the defendant) to assume and pay the mortgage debt on the land and his bond to the plaintiff for her support in the house on the conveyed premises during her life. This bond was executed and delivered at the same time as the deed, was a part of the same transaction, and furthermore recites the deed. Under these instruments the defendant at once took possession of the demanded premises, in order to take care of the plaintiff as stipulated in his bond, and she went upon the premises to receive the stipulated support, and remained there ten days. She then brought this real action to recover her life estate. There is no suggestion in the report of any failure of the defendant to perform his bond.

It may be conceded that the plaintiff has the legal title to a life estate in the land, but to maintain this action (ignoring technicalities in pleading) she must be entitled to possession as well. Rev. St. c. 106, § 5. One may retain his title to real estate, while debarring himself from right of entry and possession. We think the plaintiff has done so in this case. It is evident that she reserved a life estate simply and solely as security for the performance of the defendant's bond to maintain her on the premises. It is as if the defendant had mortgaged to her a life estate for the same purpose. It is clearly implied in the instruments that the defendant was to have possession of the farm and its revenues to enable him to perform his bond, and as long as he performed it. This bars an action for possession until there is a breach of the bond, which is not yet shown. *Lamb v. Foss*, 21 Me. 240; *Norton v. Webb*, 35 Me. 218; *Brown v. Leach*, 35 Me. 39; *Davis v. Poland*, 99 Me. 345-348, 59 Atl. 520.

True, the reservation of the life estate in the deed is not in terms conditioned or otherwise than absolute; but, since this court has

possessed full equity powers, it has had full power to go beneath the terms of a conveyance or reservation of an estate to ascertain whether it is in fact unconditional or only for security for some obligation. *Reed v. Reed*, 75 Me. 264; *McPherson v. Hayward*, 81 Me. 329, 17 Atl. 164. And for this purpose the court may even resort to oral evidence. *Knapp v. Bailey*, 79 Me. 195, 9 Atl. 122, 1 Am. St. Rep. 295.

True, again, there are cases holding that the right of possession by the mortgagor must be expressed or necessarily implied in the deed itself, and cannot be sustained by oral evidence, nor even by written instruments not referred to in the deed. Those cases, however, were cases of deeds of mortgage in form, and were decided before the court had the power to go beyond the terms of the deed to get at the truth of the transaction. If the court has power to ascertain and declare that a deed absolute in terms is in fact a mortgage, it necessarily has power to ascertain in the same way what is the obligation the deed is to secure.

There are also cases holding that the conditions expressed in the deed, the statement in the deed itself of what it is intended to secure cannot be enlarged by parol, nor even by the language of other writings between the parties not referred to in the deeds. See *Mason v. Mason*, 67 Me. 546.

Those cases, however, are not applicable to this case where no conditions are expressed in the deed, and where there is no description whatever of the obligation to be secured. When the parties to a deed undertake to describe therein the obligation to be secured, the court cannot enlarge or limit it; but when no description is given, and yet the deed is unquestionably to secure some obligation, the nature and extent of that obligation are to be ascertained from sources outside of the deed.

Of course, the court should not declare a conveyance or reservation of an estate absolute in terms to be for security only, unless fully satisfied upon clear, convincing evidence that such is the truth. In this case, however, the inference from the evidence is irresistible. It is to be noted, also, that the action is by the original party to the deed.

True, this suit is an action at law; but now, since the enactment of Rev. St. c. 84, §§ 17-21, inclusive, the court can use its equity powers to apply equitable principles in the defense to an action of law. A separate bill in equity is not now necessary for that purpose.

The defendant pleaded nul disseisin only, without any plea of equitable matter; and it is suggested that by that plea he denies her title, and thus enables her to maintain this action to establish her title. By reporting the case the parties must be held to have waived technical questions of pleading, there being no stipulation otherwise. *Pillsbury v. Brown*, 82 Me. 455, 19 Atl. 858, 9 L. R. A.

94. It is evident that the only issue between the parties and the only issue that needs decision is the right of present possession. That issue we are authorized by the report to decide.

Plaintiff nonsuit.

KEATING v. HULL

(Supreme Court of Errors of Connecticut. Dec. 15, 1905.)

1. DRUGGISTS — NEGLIGENCE — ACTIONS — PLEADING—NOTICE OF PROOF.

Plaintiff in the third paragraph of her complaint alleged that defendant, a druggist, delivered to her a package which he stated contained salts, for which she paid the customary price, and in paragraph 4 charged that the package so delivered did not contain salts, but contained sulphate of zinc, by which plaintiff was poisoned. *Held*, that no notice that defendant on a hearing in damages would give evidence to disprove paragraph 3 was necessary to enable defendant to prove that plaintiff negligently picked up the wrong package under a notice that evidence would be given in denial of paragraph 4.

2. APPEAL—BILL OF EXCEPTIONS—REVIEW— NEGLIGENCE.

Where, in an action for injuries, no bill of exceptions was filed, the question of defendant's negligence under the facts could not be reviewed.

Appeal from Superior Court, New Haven County; Joel H. Reed, Judge.

Action by Mary C. Keating against William H. Hull. From a judgment in favor of plaintiff for nominal damages, she appeals. Affirmed.

Jacob P. Goodhart and Robert C. Stoddard, for appellant. William H. Ely, for appellee.

BALDWIN, J. The plaintiff entered a drug store kept by the defendant and asked one of his clerks for a pound of Sprudel salts. It was weighed out, put up in a package, and placed on the counter in front of her so as to be under her control. While she was chatting with the clerk another customer, who stood close by her, ordered of the defendant a pound of sulphate of zinc. This is a poisonous article. It was weighed out, put up in a package, and placed on the counter before the purchaser; the defendant then going off to get a "poison" label to put upon it, and telling him, at the same time, to wait till he returned with this. Before he returned the plaintiff picked up the latter package, negligently mistaking it for that which she had bought, and carried it home; the other customer shortly afterwards taking the remaining package and going off with it, without waiting for the label. Afterwards the plaintiff used some of the sulphate of zinc (which looks very much like Sprudel salts) for medicinal purposes, and was poisoned by it. The trial court found the defendant guilty of negligence in leaving the poison, unlabeled, where the plaintiff might take it by mistake for her own parcel, but that she

was negligent in so taking it, and therefore awarded her only nominal damages.

In the plaintiff's complaint she alleged, in paragraph 3, that the defendant delivered to her a package which he stated to contain a pound of Sprudel salts, and that she paid him therefor the customary price of that quantity of that article. In paragraph 4 she alleged that the package so delivered did not contain such salts. The defendant filed a notice that on the hearing in damages he should offer evidence to disprove the allegations in paragraph 4. No such notice was given with respect to paragraph 3, nor was it necessary. The defendant did not dispute the truth of that paragraph. He simply sought to show that the statements of his clerk as to the contents of the package were true; and, if true, paragraph 4 was necessarily shown to be untrue.

The plaintiff asks for a correction of the finding in several respects. The only one as to which she has any plausible ground for such a claim is that there was no evidence that the plaintiff took any other package than that delivered to her. There was, indeed, no direct testimony to that fact, but it was a fair inference from other facts which were established by proof to the sufficiency of which no exception is taken.

It is open to question whether the facts stated in the finding justified the conclusion that the defendant was negligent; but, as no bill of exceptions was filed, no examination of this point is necessary.

There is no error. The other Judges concurred.

CRONAN v. CORBETT.

(Supreme Court of Errors of Connecticut. Jan. 4, 1906.)

1. MECHANICS' LIENS — CERTIFICATE — DESCRIPTION — SUFFICIENCY.

A claimant of a mechanic's lien bargained to do the plumbing work upon certain structures for a gross sum. They stood on one lot and were connected on the street line by a framework attached to each, and there was a door placed therein for the use of occupants of both structures, and in each there were cellar windows opening upon the passway. *Held* that, notwithstanding the adaptation of the structures to being used separately, the certificate of lien having claimed a lien on a certain "building" and upon the entire lot, the description was sufficient.

2. JUDGMENT — RES JUDICATA — SCOPE OF JUDGMENT.

The fact that the superiority of a mortgage to other incumbrances was determined in a suit to foreclose it, and the order of redemption for working equity established as between other incumbrances with reference to the mortgage foreclosure, did not of itself determine the relative priorities of those who might thereafter hold the liens which were made the subject of the foreclosure; but the priorities were with reference to that particular proceeding.

Hamersley, J., dissenting in part.

Appeal from Superior Court, New Haven County; George W. Wheeler, Judge.

Suit by P. J. Cronan against Thomas W. Corbett. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Talcott H. Russell and James P. Pigott, for appellant. John K. Beach and William B. Stoddard, for appellee.

BALDWIN, J. The defendant on January 7, 1898, filed a certificate claiming a mechanic's lien on "a certain building" in New Haven owned by Maier Arick, "and the lot on which it stands," described as 150 feet square. The land is the same described in the case of Halsted & Harmount Co. v. Arick, 76 Conn. 382, 385, 56 Atl. 628, and the term "building" was used to denote the structures upon it, which are also described in that case. It is now found by the trial court that each of these structures has a cornice projecting several inches over the adjoining passway; that, in each, cellar windows, through which coal and wood are put in, open upon the passway; that another passway runs from Admiral street a few feet in the rear of these structures, which is used in common by the tenants in each; and that the rear of the lot was, when the structures were originally built, fenced off into three back yards, each appertaining to one of them. The defendant's lien arose out of a parol bargain to do the plumbing work upon said structures for a certain gross sum, according to written specifications entitled "Specifications for Plumbing of Three Brick Blocks." No separate tenement was specified in this paper, but it called for 24 sinks and 36 bathtubs, with all piping and connections; and the defendant and Arick both treated their agreement as constituting a single contract. The amount due on the mechanics' liens which were the subject of Halsted & Harmount Co. v. Arick was paid by the plaintiff, who was one of the defendants in that proceeding, on the day limited for redemption in the final judgment. These liens dated by relation from May 4, 1897. The defendant's lien dated from June 18, 1897.

The complaint in the present action is predicated both upon the Halsted & Harmount Company liens and upon a mortgage originally given by Arick to one Kaiser on August 20, 1897. The cross-complaint was predicated both on the original lien of the defendant and on his redemption of a prior mortgage of March 30, 1897, by Arick to Matz and Brown, which was the subject of the litigation in Matz v. Arick, 76 Conn. 388, 56 Atl. 630. In the original finding of facts in Halsted & Harmount Co. v. Arick it was stated that the "three buildings are adapted to be used and disposed of separately." The trial court in the present proceeding refused to insert this statement in its finding, deeming it to have been a conclusion from the evidence in the former suit, which that in the present one showed to have been unwarranted. Exception was taken to this ruling, but it is unnecessary

to inquire whether it was erroneous; since, had the insertion which was requested been made in the finding, it would not have followed that the defendant's lien was invalid. He had performed work and furnished materials under a single contract upon a parcel of land belonging to a single owner. The structures placed upon it were so connected that they could, not unfairly, be described as together constituting one building, notwithstanding their adaptation to being used or disposed of separately. They were also so far disconnected that they might not unfairly be described as three buildings. The defendant's services and materials had gone to the benefit of the entire structure or structures, and not of any particular portion. The sum to which he was entitled for them was an entirety, definitely fixed, and insusceptible of apportionment. The contract on which the Halsted and Harmount liens was based was for the supply of materials, without any stipulations as to their price. This left the owner liable to pay a reasonable price; and, as the amount of material supplied to each of the three structures could be closely estimated, it was not difficult to compute the proper charge upon each of them, considered separately.

It is settled that the statute relating to mechanics' liens is to be construed with reasonable strictness, but it is certainly not to be construed with unreasonable strictness. It would be putting upon it an unreasonable construction to hold that, under the circumstances which have been detailed, the defendant could not claim a single and entire lien upon the whole lot and the improvements placed upon it, provided a proper certificate were filed. *Brabazon v. Allen*, 41 Conn. 361. We have no disposition to relax the wholesome rule that no one can impose a statutory lien on another's land, without complying with all the terms and conditions which the statute may prescribe. The defendant, both in venturing to describe the premises as a unit and in the mode of that description, went to the verge of the law, but in our opinion he did not go beyond it. The certificate of lien which he filed is for a lien upon "a certain building" on the lot in question, and upon the entire lot. In one point of view each of the three principal structures on the lot could be styled a building; but that the defendant used that word to denote the aggregation of the three structures was sufficiently apparent from the accompanying claim of a lien on the whole of the land. No one who looked at the premises could fail to see that the whole lot could not reasonably be claimed as appurtenant to any single one of the structures, and would therefore be warned by the terms of the certificate that it related to all of them considered as one entire edifice, for the convenient use of which the entire lot was required. Nor could it fairly be assumed by any one who might subsequently acquire an interest in the land that

the words of the certificate referred to one only of the three structures, since it was clear that they described no one of them in such a way as to distinguish it from the others.

The mechanic's lien claimed by the defendant is therefore valid, and as it dates from June 18, 1897, he was properly granted a foreclosure upon it as against the Kaiser mortgage, which was not given until the following August, unless there is something in the plaintiff's contention that the order of priority between him and the defendant was conclusively settled as respects both that mortgage and the Matz and Brown mortgage by the judgment rendered in 1903 in the case of *Matz v. Arick et al.* By the terms of that judgment the incumbrancers against whom a foreclosure of the Matz and Brown mortgage was decreed were so arranged that Corbett, the present defendant, was required to redeem the first of any, and given another opportunity, 16 days afterward, in case of the failure to redeem of several intervening claimants, among whom was the plaintiff, as assignee of the Kaiser mortgage; but, should Corbett fail to redeem on either of his law days, then the Halsted & Harmount Company were allowed to redeem 4 days later. The record (by reference in the judgment file to the accompanying finding of facts) shows that the first law day fixed for Corbett was given to him as owner of a judgment lien for a judgment of \$4,000 and costs which he had recovered against Arick in 1900, and his second law day given to him as owner of the mechanic's lien, the foreclosure of which is claimed by the cross-complaint in the present action. It does not, however, follow that the order of redemption established for the purpose of working equity in that cause forever determined the relative priorities of those who might thereafter hold the liens which were made the subject of foreclosure. The superiority of the Matz and Brown mortgage to any of the other incumbrances was thus settled, but their relations between themselves were determined solely with reference to its foreclosure in that particular proceeding.

In 1901, during the pendency of this suit by Matz and Brown, Arick conveyed the equity of redemption to the defendant, Corbett, by a quitclaim deed containing a provision that its acceptance should not merge the latter's claim under his mechanic's lien. This fact was not put in evidence, and the judgment file shows that Corbett was dealt with simply as an incumbrancer, and Arick as still sole owner of the equity of redemption. It is, however, now urged that, as Corbett in fact owned it at the time when he redeemed the Matz and Brown mortgage, he must be considered as having redeemed as the owner of the equity, and so that, in favor of every incumbrancer, that mortgage became extinguished. This claim was not made on the trial, but, on the contrary, both

parties acquiesced in the position that the plaintiff as a second mortgagee might redeem the first, or Matz and Brown, mortgage, and thus united in affirming the continued existence of the latter. Corbett, then, having redeemed the Matz and Brown mortgage in the capacity of a junior incumbrancer, stepped into the shoes of Matz and Brown and acquired the first lien upon the land in controversy. As holder of that lien, he was properly granted the foreclosure claimed in his cross-complaint, of the plaintiff's interests both under the Kaiser mortgage and the Halsted & Harmount liens. He was also properly granted, as owner of his mechanic's lien, a foreclosure of the plaintiff's interest under the Kaiser mortgage, since he had shown to the satisfaction of the trial court that the former incumbrance antedated the latter, and since the evidence by which he showed it was, for reasons already stated, not excluded or overcome by any estoppel of record.

There is no error. The other Judges concurred, except HAMERSLEY, J., who dissented in part.

PUROTO et al. v. CHIEPPA et al.

(Supreme Court of Errors of Connecticut. Dec. 15, 1905.)

1. EASEMENT — LIGHT AND AIR — PRESCRIPTION.

Under Gen. St. 1902, § 4046, providing that no occupant of real estate shall acquire by adverse occupation the right to keep any window or light, so as to prevent the adjoining owner from erecting any building on his land, an easement of light and air, which will render it unlawful for an adjoining owner to erect a building on his land, cannot be acquired by prescription.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, § 34.]

2. SAME—IMPLIED GRANT.

The projection of the eaves of a house, and the extension of the window blinds a few inches over the divisional line, is not sufficient proof of such a visible adverse use of the adjoining land as to warrant the presumption of an implied grant, and thereby prohibit a bona fide purchaser of the adjoining land from building on the divisional line.

3. TRESPASS—NOMINAL DAMAGES.

The extension of a flashboard one inch over a divisional line in the erection of a building is a trespass on the adjoining owner, entitling him to nominal damages, though no specific damage results from such injury.

Appeal from Superior Court, New Haven County; William S. Case, Judge.

Action by Alfonso Puroto and another against Salvino Chieppa and another, in the nature of trespass quare clausum fregit. From a judgment for defendants, plaintiffs appeal. Reversed.

George E. Beers and Carl A. Mears, for appellants. Philip Pond and Paul Russo, for appellees.

HALL, J. The complaint alleges that on December 10, 1903, the defendants wrongfully entered upon the plaintiffs' land on

Grand avenue in the city of New Haven, and cut off a portion of the eaves and cornice of the plaintiffs' house, and erected and maintained a building projecting over the plaintiffs' land, constituting a trespass thereon, and by building the wall of their house interfered with the plaintiffs' right to have unobstructed light and air through the windows of their house over the defendants' land. These averments were denied by the answer. The material facts found are these: The plaintiffs and defendants own adjoining lots on the south side of a business street in New Haven; the plaintiffs' premises being west of those of the defendants. Both tracts belonged to one Nicholson, who on September 23, 1851, conveyed to one Gunn that now owned by the plaintiffs, and on the 31st of October, 1851, to certain McCuens that now owned by the defendants. Through several mesne conveyances the defendants acquired their title in October, 1898, and the plaintiffs their title in October, 1900; all the conveyances being by warranty deed, and none of them containing any reference to any easement of light or air. Before said Nicholson conveyed said land, as above stated, and until December 10, 1903, there was upon the land now owned by the plaintiffs a two-story wooden building, the east side of which was about a foot west of the divisional line between said two tracts, upon the west side of each of the two floors of which were two windows with swinging blinds, one room upon each of said floors receiving all its light from a window or windows upon said east side; and upon the land now owned by the defendants there was a wooden building, the west side of which was 8 or 10 feet east of said divisional line. On or about December 10, 1903, the defendants built a three-story brick addition to their house, occupying the 8 or 10 feet between their old house and the divisional line, and extending about 12 feet above the plaintiffs' house, and having no windows upon its west side. At the front of the building the base of the wall of the addition is upon the divisional line, and elsewhere a little east of the divisional line. The lower floors of both of said buildings are used for stores, and the upper floors as tenements. The erection of said brick addition diminished the light and air, which had always before passed unobstructed over the portion of defendants' land occupied by it, through said east windows of the plaintiffs' house. There still remains an open space, varying from 12 to 18 inches, between the brick addition and the plaintiffs' house, which space is darkened by the projecting eaves of the plaintiffs' house, which at nearly all points touch the wall of the defendants' addition. The erection of said addition also prevents the swinging of the blinds upon said east windows as they had before been swung; 2 or 3 inches more space being required for that purpose. Before the erection of said brick addition the cornice of the plaintiffs'

house had, near the front, overhung the divisional line about 8 inches, and in erecting said addition the molding of said cornice was cut off by the defendants some 2 or 3 inches, for a distance of about 12 feet from the front of the building, but in no way injuring the plaintiffs' building. A flashboard, which can be readily removed, was placed by the defendants upon the upper part of the west wall of the addition, so that at the front end of the wall it extended over the plaintiffs' land an inch beyond the divisional line. The court finds that the only damage suffered by the plaintiffs arises from the shutting off of light and air, as aforesaid, by the erection of the defendants' addition on the divisional line.

The principal question in the case is whether the plaintiffs had an easement of light and air which rendered it unlawful for the defendants to erect the brick addition, as they did, upon the strip of land 8 or 10 feet wide, between the defendants' old house and the divisional line. They acquired no such right by prescription. Section 4046 of the General Statutes of 1902, which has been in force since 1847, provides that "no occupant of real estate shall acquire by adverse occupation the right to keep, sustain or enjoy any window or light so as to prevent the owner of adjoining premises from erecting and maintaining any building thereon." There was no implied grant of such an easement. If the ancient law of implied grants or easements of light and air, which is a kindred doctrine to that of prescriptive rights to such easements, has any existence in this state, its force is recognized only to a very limited extent, and it is rarely, if ever, applied against bona fide purchasers of the land over which such easement is claimed. The law as to implied easements of this character is very fully discussed in the case of *Robinson v. Clapp*, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582, in which the facts bearing upon the claimed easement of light and air were quite similar to those in the case at bar, and which we regard as decisive of the plaintiffs' claim to such an easement in the case before us. Of the existence of such an easement the court says (page 384 of 65 Conn., page 944 of 32 Atl. [29 L. R. A. 582]): "It must be of a character so evidently necessary to the reasonable enjoyment of the granted premises, so continuous in its nature, so plain, visible, and open, so manifest from the situation and relation of the two tracts as to fairly and clearly indicate to a prospective purchaser of the reserved portion the intention of the parties to the previous sale that it should remain, and to make such purchaser chargeable with knowledge that the law, based on justice, that equity, founded on good conscience, would forbid him, in case of his purchase, to so occupy the lot as to interfere with such easement."

The fact that the blinds, which had been on the windows of the east side of the plain-

tiffs' house for more than 15 years prior to the erection of the defendants' addition, would, when opened or closed, swing two or three inches over the divisional line, and that the cornice on the eaves of the plaintiffs' house, the molding of which was removed by the defendants, had extended during that period over said line for two or three inches, was properly regarded by the trial court as not sufficient proof of such an open, visible, adverse use of another's real estate as must be presumed to have been with the knowledge and acquiescence of the owner (*School District v. Lynch*, 33 Conn. 330-334), or of such an easement in the plaintiffs, by either prescription or implied grant, as prohibited the defendants from building their addition on the divisional line as described in the deeds. The placing of the flashboard on the west wall of the addition, so that it extended an inch over the divisional line, was a trespass upon the plaintiffs' land, which entitled them to a favorable judgment upon one of the issues raised by the pleadings, as well as to a judgment for a nominal sum for the damage which the legal injury, arising from the trespass, necessarily imports, even when no specific damage results from such an injury. *Parker v. Griswold*, 17 Conn. 288-302, 42 Am. Dec. 739.

For the reason, among others, that the plaintiffs' property has been found to be of the value claimed by them, the exclusion of some of the plaintiffs' evidence to prove that value was not harmful. The conclusions reached by us render other rulings upon evidence unimportant.

There is error, and the case is remanded, with directions to correct the judgment in accordance with the views above stated, but without direction as to the judgment for costs in the superior court. The other Judges concurred.

CAMPBELL v. CITY OF NEW HAVEN.
(Supreme Court of Errors of Connecticut. Dec. 15, 1905.)

1. EVIDENCE—OPINION EVIDENCE—CONDITION OF STREET.

In an action against a city for injuries from a defective sidewalk, a policeman whose beat included the place of the accident, and who had testified fully as to the conditions, was competent to testify as to whether in his opinion the walk was in a reasonably safe condition for public travel.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2256-2263.]

2. MUNICIPAL CORPORATIONS — ACTION FOR INJURIES—FINDINGS—CONSTRUCTION.

In an action against a city for injuries from a defective sidewalk, a finding that the city failed to prove that the walk was safe was not subject to the interpretation that the court held defendant to the high duty of maintaining the walk in a safe condition.

Appeal from Superior Court, New Haven County; William S. Case, Judge.

Action by Mae J. Campbell against the city

of New Haven. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Leonard M. Daggett, for appellant. Robert C. Stoddard, for appellee.

PRENTICE, J. The plaintiff sued to recover for personal injuries sustained by a fall upon a sidewalk in one of the defendant's streets alleged to have been defective and out of repair by reason of snow and ice thereon. Upon the hearing in damages, after a default, the condition of the walk on February 13, 1904, the day before the accident, became the subject of inquiry and a material one. The defendant presented as one of its witnesses a policeman within whose beat the place of accident was, and whose duty it was to see that property owners kept their walks in proper condition. He testified to the conditions which had existed with respect to the walk in question for several days prior to said February 13th and especially upon that day. After stating these conditions in detail and fully as he observed them, he was asked whether or not the walk when he saw it on February 13th was in a reasonably safe condition for public travel. Upon objection that the question called for the expression of an opinion, it was excluded. This ruling was accompanied by the observation on the part of the court that the question put to the witness was one for it, and the direction that the witness' testimony be confined to a statement of what he saw.

The objection and ruling were made under a misapprehension of the rule in this jurisdiction. Whatever may have been elsewhere held, it has been well settled by long practice and repeated decisions in this state that the defendant was entitled to have its question answered. *Porter v. Pequonnoc Mfg. Co.*, 17 Conn. 249; *Dunham's Appeal*, 27 Conn. 192; *Sytleman v. Beckwith*, 43 Conn. 9; *Taylor v. Town of Monroe*, Id. 36; *Ryan v. Town of Bristol*, 63 Conn. 26, 27 Atl. 309; *Dean v. Town of Sharon*, 72 Conn. 667, 45 Atl. 963. It is quite possible that the answer of this witness, if received, would not have influenced the conclusion of the court. In fact the finding contains an intimation that by reason of the large extent of sidewalk which came under the witness' oversight, and of the fact that his recollection of this particular walk was one for which he was largely dependent upon his memorandum book entries, such might have been the case. But we cannot, nevertheless, for reasons well stated in *Peck v. Pierce*, 63 Conn. 310, 28 Atl. 524, so far enter into the mind of the court and forecast its possible operations as to say that it would not have been influenced by an opinion from the witness which it never heard and weighed. *Rooney v. Woolworth*, 74 Conn. 720, 52 Atl. 411. Neither can we say that the defendant was not by the ruling, and possibly others of the same character not repeated upon the record, deterred

from presenting opinion evidence of such convincing character that the action of the court would have been controlled thereby. We cannot, therefore, regard the ruling as a harmless one.

The defendant further complains that judgment was rendered against it upon a finding that it failed to prove that the walk was safe, and upon the theory that it was liable if the injury arose from its failure to keep it safe. An argument is drawn from the finding that the court held the defendant to the high duty of maintaining the walk in a safe condition, and did not content itself with applying the lower standard of duty applicable to the situation. This claim is made with much earnestness, and with the accompanying comment that the action of the court furnishes only one illustration of a growing tendency on the part of trial courts to hold municipalities to a duty with respect to their miles of sidewalks which is unwarranted in law and unjust in its burden. If the defendant is correct in its interpretation of the finding, it is certainly aggrieved. Municipalities are not insurers of the safety of travelers upon their highways, whatever the season or whatever the cause which renders them dangerous. The herculean task of making such ways safe at all times and under all circumstances is not imposed upon them. This is especially true in our climate in respect to accumulations of ice or snow thereon. Some duty is imposed in such cases, but it is a limited one, in that it takes into account a variety of conditions and circumstances, including the difficulties attending situations as they are created by the rigors of our winters. In our leading case of *Congdon v. Norwich*, 37 Conn. 414, this subject, with especial reference to sidewalks, had a thorough discussion. The rule of duty was there carefully stated, and the limitations upon it forcibly expressed. See, also, *Landolt v. Norwich*, 37 Conn. 615; *Cloughessey v. Waterbury*, 51 Conn. 405, 50 Am. Rep. 38. The language of the finding, which contains no other conclusion of negligence than that which is to be drawn from the statement that the walk had not been made safe for travel, lends some color to the interpretation the defendant gives to it. We are, however, unprepared to accept that interpretation as conveying the court's meaning. Not infrequently even in judicial opinions the word "safe" and its cognates have been inadvertently used where "reasonable safety under all the circumstances" was intended. Such doubtless was the case here, and we have little doubt that the court tested the defendant's conduct in the case of the walk in question by the true rule of duty. It is, however, unnecessary to pursue the inquiry further, since a new trial must be granted for another reason, and an opportunity will thus be afforded the defendant to have any possible error in this regard rectified.

There is error, and a new trial is granted. The other Judges concurred.

FOOTE v. BROWN et al.

(Supreme Court of Errors of Connecticut. Dec. 15, 1905.)

1. QUIETING TITLE—STATUTES—APPLICATION.

Gen. St. 1902, § 4053, provides that an action may be brought by a person claiming title to or an interest in land, against any person or persons who claim to own the same or any part thereof, or have an estate in fee, for years, for life, in reversion, or in remainder, or to have any interest therein, or any lien or incumbrance thereon, adverse to plaintiff, for the purpose of determining such adverse estate, interest, or claim, and to clear up all doubts and disputes, and to quiet title to the land, etc. *Held*, that a suit in equity could not be maintained under such section by the owner of land who had been in possession, to recover possession and damages against defendants alleged to have unlawfully entered and occupied the land.

2. APPEAL—REVIEW—THEORY OF CASE.

Where, in a suit to quiet title under Gen. St. 1902, § 4053, authorizing such a suit under certain circumstances, one of the defendants claimed that judgment for costs could not be rendered against him, and both defendants denied that such section authorized the court to render judgment for possession or for money damages in favor of plaintiff, and an exception was taken to such judgment, it could not be sustained, after trial, on the theory that the parties voluntarily submitted their controversy to the court for the purpose of obtaining such a judgment.

3. PLEADING—DEMURRER.

A demurrer covering a general claim that the facts alleged in the complaint were insufficient to support the action against defendants was too general.

4. QUIETING TITLE—STATUTES—DISCLAIMER—Costs.

Under the express provisions of Gen. St. 1902, § 4053, authorizing a suit to quiet title to land under certain circumstances, costs cannot be adjudged against a defendant who by his answer disclaims all estate or interest in or incumbrance on the property.

Appeal from Superior Court, New Haven County; Silas A. Robinson, Judge.

Suit by Eliza S. Foote against Chester A. Brown and others to quiet title to certain land. From a judgment in favor of plaintiff, defendants appeal. Reversed.

The plaintiff, under the will of her husband who died in 1878, had a freehold estate in a small bit of land bounded by the sea. The defendants entered upon this land, occupied the same, built a boathouse thereon, and thereafter continued in occupation of the land. The plaintiff, claiming this entry and occupation to be wrongful, sought redress by an action which is set forth in the complaint as follows: "(1) That she has an interest in certain land in said town of Guilford [describing the land] which is a part of the estate of the said George A. Foote. (2) Her interest in said land is the right to lease the same, and enjoy the rents and income thereof, pursuant to the will of her late husband, the said George A. Foote. (3) Said defendants, Chester A. Brown and James Garfield Brown, have wrongfully entered on said land, placed a building there-

on, claiming some interest or estate in said land adverse to the plaintiff, and continue in the occupation thereof. (4) Said land is worth \$1,000. The plaintiff claims: (1) That each defendant be required to state the nature and extent of his interest in said land and the source through which the same was derived; (2) judgment settling the title; (3) judgment for the possession of said premises; (4) \$300 damages. A demurrer to the complaint was overruled. The defendants filed separate answers. Each answer denied the first three paragraphs of the complaint, but the answer of the defendant Chester A. Brown contained also a disclaimer of all estate or interest in the land described in the complaint, and that of James G. Brown stated the denial of the third paragraph of the complaint in the form of an allegation that the land described was common land belonging to the town of Guilford, and that said town had authorized him to place a building on said land and occupy the same, and that in pursuance of said authority and not otherwise he had occupied said land; and further alleges that his interest and occupation of said land is not adverse to any title, interest, or claim that the plaintiff may have in said land. The case was tried to the court upon the issues raised by these pleadings. The court made a finding from which it appears that the following facts were found: (1) The land was not common land belonging to the town of Guilford, but was included in a farm belonging to the plaintiff's husband at the time of his death. (2) At the time of the entry by the defendants the plaintiff was in possession of the land in pursuance of a valid title in her. (3) The defendants made wrongful entry upon the land, placed a building thereon, and have ever since continued in occupancy of said land. (4) Neither of the defendants has any title, right, or interest in the land—and thereupon rendered judgment for the plaintiff. The judgment describes the action as claiming judgment settling the title to the land described, possession of said land, \$300 damages. It then states that the court finds the issues for the plaintiff and finds the facts as follows—reciting the facts substantially as above stated, with the additional fact that the plaintiff is entitled to nominal damages in the sum of \$5. "Whereupon it is adjudged that the defendants deliver to the plaintiff possession of said premises, and that the plaintiff recover of the defendants five dollars (\$5) damages and her costs." The material errors assigned in appeal are: In overruling the demurrer; in treating this case as an action of ejectment and not one of quieting title to said premises; in refusing to grant costs to the defendant Chester A. Brown upon his filing a disclaimer; in holding that under section 4053 of the General Statutes of 1902 the plaintiff could maintain an action of ejectment and recover pos-

session of the premises and money damages; in holding that the complaint sets forth an action of ejectment.

Robert C. Stoddard, for appellants. Henry C. White, for appellee.

HAMERSLEY, J. (after stating the facts). The disposition of this appeal depends upon the meaning and legal effect of section 4053 of the General Statutes of 1902. This section contains unchanged the provisions of "An Act concerning Civil Actions," passed in 1893 (Pub. Acts 1893, p. 237, c. 66). The terms and language of the act are suggestive of doubt as to its meaning in some particulars, and, in ascertaining its meaning where thus doubtful, the act should be read in view of the evil it was passed to remedy. What this evil was had been shortly before brought to public attention by certain opinions delivered by this court. In 1890 one Ernest Strong Miles was in possession of certain land devised to him by the will of Selah Strong (who died in 1879) and then conveyed said land to his father, Samuel A. Miles, in trust for purposes specified in the deed. The entire estate of Selah Strong had in 1882 been duly distributed to the devisees, and the estate had then been finally settled. When Samuel Miles attempted to sell the land conveyed to him in trust, he found himself hindered in making a sale, by reason of certain claims of heirs of Selah Strong that the land devised to Ernest Miles was not thereby vested in him absolutely, but that these heirs had a remainder interest contingent upon the happening of events named in the will. Whether or not Ernest Miles when he executed the trust deed had an absolute estate in the land conveyed depended on the meaning expressed by the language of the will independently of extrinsic circumstances. For the purpose of obtaining a judicial construction of this language, so that he might be able to make a sale beneficial to his cestui que trust, Samuel Miles, who was also executor of the will, brought an action as such executor for the construction of the will. We held that upon these facts an executor could not maintain such an action, and the complaint was dismissed. *Miles v. Strong*, 60 Conn. 393, 22 Atl. 959. Immediately afterward Samuel Miles, as trustee under the deed above mentioned, and Ernest Miles brought an action for quieting the title of said Ernest or his grantee, stating in the complaint the facts above mentioned. We held that the real question between the parties, as stated in the complaint, related wholly to the legal title to land, involving only legal questions, and as such the defendants were entitled to litigate them in a trial at law, and that under our practice an action in equity for that purpose could not be maintained, and the complaint was accordingly dismissed. *Miles v. Strong*, 62 Conn. 95, 25

Atl. 459. As a result of these decisions it appeared that an owner in possession of land was prevented from making a beneficial sale thereof by claims of others to a contingent remainder interest in the land, that the validity of these claims depended solely on the legal effect of language used in a will, that the owner could not have this question determined in a court of equity, because it was solely a legal question relating to the title to land, and being in possession he could not compel a trial at law until the claimants should see fit to assert their claim through a legal action or some illegal act, and that in the meantime there was no redress for the injury to his property rights caused by the existence of these claims. We recognized in our opinion the force of the dilemma in which an owner of land under such circumstances was placed, and indicated that it arose from the fact that such actual present damage did not constitute under our common law and existing statutes a present legal injury.

Immediately after the rendition of this decision had called attention to this state of our law in reference to such damage, the act of 1893 was passed. The act provided that it should take effect from its passage, and the day after it went into effect Samuel and Ernest Miles, plaintiffs in the last-mentioned action, commenced an action in pursuance of the new act, stating in their complaint substantially the same facts alleged in their prior complaint, and upon this action we held in effect that the present damage caused the plaintiffs by existing claims adverse to their ownership in fee simple of the land which before the passage of the act was practically *damnum absque injuria* had become, through the operation of the act, a legal injury for which they were entitled to redress through a judgment settling the title in them as against the defendants. It seems to us apparent that this act was passed for the purpose of remedying an evil such as that disclosed by the decisions above mentioned, and that, as we have before said, it was evidently intended to provide a remedy for such a wrong and hardship as that thus disclosed, for which there was, under the previously existing law, no plain and adequate remedy. *Miles v. Strong*, 68 Conn. 273, 288, 36 Atl. 55. This evident intent and purpose of the Legislature in passing the act must be an influential element in determining its meaning and legal effect as expressed in the language used. In *Miles v. Strong*, 68 Conn. 287, 36 Atl. 55, we said that the act was in some respects very loosely and carelessly drawn and might require amendment, but that its purpose was tolerably clear and that effect ought to be given to its provisions. The act has now remained unchanged for 12 years. There has been misconception as to its scope, and abuse as to its application. The exigencies of the present case justify,

and indeed require, such a definite construction of the act in respect to the questions involved as will serve the purpose of its enactment and give reasonable effect to its provisions.

Since the last-mentioned decision in *Miles v. Strong*, several actions brought upon this statute have been before us on appeal. The case of *Lawlor v. Holohan*, 70 Conn. 87, 38 Atl. 908, was similar to that of *Miles v. Strong*. The plaintiff, in possession as owner in fee, brought an action against the defendant claiming to own a contingent remainder, praying for an adjudication of these conflicting claims. In *Curtis, receiver, v. Lewis*, 74 Conn. 387, 50 Atl. 678, the action was in reality brought by the receiver of an insolvent estate to set aside a mortgage deed as fraudulent and void as against creditors. Upon the pleadings and finding of facts by committee, it was reserved for the advice of this court. No question as to pleading was raised. In the opinion we say: "The pleadings in this action are unnecessarily framed for the purpose of taking advantage of the provisions of 'An act concerning civil actions' (Pub. Acts 1893, p. 237, c. 66), and for this reason the real cause of action is not set forth in the complaint and no material issue is raised by the answer. The reply alleges the cause of action, and the rejoinder serves the purpose of an answer." In *Cahill v. Cahill*, 76 Conn. 542, 546, 57 Atl. 284, the complaint stated facts showing that the controversy was one concerning title to land; the plaintiffs being out of possession and claiming title as heirs of one party, and the defendants who were in possession claiming title as devisees of another. The defendants filed a plea in abatement alleging the pendency of another suit, to wit, an action of ejectment between the same parties for the same cause of action. In sustaining this plea in abatement, we said: "If under any circumstances one who has been dispossessed may bring an action under section 4053, for the purpose of having his title determined as against his dissolers, he cannot properly do so while another suit in the nature of an action of ejectment to try the title to the same land is pending in the same jurisdiction between the same parties." In *Layton v. Bailey*, 77 Conn. 22, 30, 58 Atl. 355, the pleadings subsequent to the complaint showed that in substance this was an action of ejectment brought by an alleged owner out of possession against the person in possession. In refusing to reverse the judgment of the trial court on account of the errors assigned, we avoided deciding whether or not a cause of action which is in substance an action of ejectment is properly stated in a complaint framed to meet the requirements of the special equitable remedy provided by section 4053, because the parties had not raised that question in the case, and we intentionally left open the question whether the conflicting

claims to the ownership of land can properly be tried in an action brought under that section by an owner out of possession against his alleged dissolers. In *Dawson v. Orange*, 78 Conn. 98, 61 Atl. 101, the plaintiff claimed to be the owner and in possession of a narrow strip of land, and alleged that the defendant claimed to own an interest in that land adverse to the plaintiff. The defendant in its statement of claim described substantially three claims, viz., that as a town corporation it owned the land described, that the land was a public highway, that the land was a public beach. We held that section 4053 authorized an action only against claimants to the ownership of a property interest in the land, and that a town as such did not own land within its limits used as a highway or as a public beach by reason of its appropriation to such public use, and therefore the validity of the two last-mentioned claims could not be tried in this action and the claims were properly expunged. We also held that, when in this statutory action an owner in possession of land seeks to try the validity of his title as against one out of possession claiming ownership, the issue thus presented is in its nature one arising upon legal, as distinguished from equitable, claims, and that such an issue in this case was properly tried to the jury.

Upon a careful study of the circumstances attending the passage of the act of 1893, of the terms and provisions of the act itself, and of the effect of our former decisions, we have reached the following conclusions as to the construction and meaning of section 4053 in respect to the particulars involved in the appeal now before us. The Legislature found a defect in the existing law, whether substantive law or procedure or both, in that an owner of real property might suffer actual damage to his property rights through adverse claims of interest in the same property advanced by others, and yet had no adequate remedy at law or in equity for the redress of that damage as a legal injury. The act provides a remedy for that evil through the creation of a statutory equitable action in which all persons claiming such adverse interest may be made defendants, securing, however, to the parties a trial by jury of issues of fact which might properly arise in the action as incident to the equitable relief sought, but which are in their nature such as should entitle the parties to a jury trial. The action authorized by the statute implies an ownership of land or some interest therein by the plaintiff; a claim by the defendant of ownership of some interest in the same land adverse to the plaintiff's title, of such a nature that the defendant under the formerly existing law could not, or might refuse to, bring to the test of trial, and the judicial settlement of which the plaintiff cannot compel except through the statutory action; a damage to the plaintiff's property rights necessarily in-

cident to such a state of things. The statement of the cause of action in the complaint and the subsequent pleadings should be in accordance with the principle of plain, direct, and truthful statement which underlies the practice act, and may follow the analogies, so far as they exist, to the manner of statement in an ordinary civil action. The essentials of a complaint are, a statement of the plaintiff's ownership in the land described and of his title thereto, and a statement that the defendant claims to have an interest in the same land adverse to the plaintiff. The complaint may also properly state the claim, if known to the plaintiff, made by the defendant, and, if it appears clearly from such a complaint that the plaintiff has adequate remedy through an ordinary action, it is demurrable. The statutory relief is equitable and consists in a judgment quieting and settling the title to the land through a determination of the questions and disputes properly submitted to trial by the pleadings. A claim that the defendant be required to state the nature of his interests, etc., cannot properly be included in the prayer for relief. Any obligation of the defendant in this respect is determined by the requirements of the statute relating to his answer. Where the defendant has made no claim, he may deny the plaintiff's allegation that he claims adverse interest, but ordinarily in such case he would answer by disclaiming any interest. Where the complaint states truly the plaintiff's ownership and the defendant's claim based on admitted facts showing the nature and extent of his title, the defendant's answer should simply admit the allegations of the complaint, and thereupon the question of law determinative of the conflicting claims of title would be in issue. In other cases the defendant must comply with the statute in stating the nature of the interest which he claims. This statement by itself puts nothing in issue; coupled with a denial of the plaintiff's allegation of ownership it puts the plaintiff to his proof or to a reply. The statement of claim may be coupled in the answer with a denial of the plaintiff's statement, or with such denial and affirmative statements proper to explain the denial or setting forth new matter. The duty of the parties in all cases is to state as simply and plainly as possible the material facts, which being admitted or found by the court, the court may lawfully render judgment settling the title as between plaintiff and defendant.

Applying these conclusions as to the construction and meaning of section 4053 to the present case, it is palpable from the complaint, subsequent pleadings, and all the proceedings in the trial, that the plaintiff's cause of action was one not included within the scope of section 4053. She had been an owner of land in possession. Her grievance against the defendants was an unlawful entry and occupation of her land. Her

redress was possession and damages, and her remedy an action at law. The judgment of the trial court is plainly based on an erroneous view of the law. This case is not strictly analogous to one where the plaintiff in attempting to state one cause of action includes in the complaint certain allegations which, separated from the others, may substantially, although informally and inaccurately, set forth another cause of action; and the defendant, waiving the irregularities and defects of form, denies such allegations, and upon the trial both parties claim a judgment appropriate to the issues thus joined and a just judgment is thereupon rendered. In such a case we might properly refuse to set aside the judgment. Substantial justice has been done, and, in the absence of exceptions during the trial, the parties should not be permitted to challenge the judgment. Here, exception was taken during the trial; the action was admittedly brought under section 4053 and was so treated by the parties and the court; one defendant claimed that judgment for costs could not be rendered against him; and both defendants claimed that section 4053 did not authorize the court to render judgment for possession or for money damages in favor of the plaintiff. Under such circumstances we cannot say that the judgment was rendered in pursuance of the request of the parties and upon a voluntary submission by them of their controversies to the court for the purpose of obtaining such a judgment. The defendants, in specifying their grounds of demurrer, covered a general claim that the facts alleged in the complaint were insufficient in law to support the action against them. The demurrer in this respect was too general, and the plaintiff might properly have declined to argue, and the trial court might properly have declined to decide, whether or not the complaint stated a cause of action within the scope of section 4053. But this course was not followed. The court, in overruling the demurrer, plainly holds that the complaint sufficiently states the statutory action and for this reason overrules the demurrer, and this action of the court was accepted by the parties as determining the plaintiff's action to be one under the statute, and all further proceedings in the trial were controlled by this decision upon the demurrer. Under these circumstances we think the defendant's assignment of error that the court erred in overruling the demurrer to the complaint is well taken. Treating the action as one under the statute, the court erred in rendering judgment for costs against the defendant who disclaimed all interest in the land, and erred in holding that section 4053 authorizes the court in that statutory action to try the common-law action of ejectment and to render judgment appropriate to that action for possession and money damages.

No claim can be made in this case that by reason of the pleadings subsequent to the

complaint and by the conduct of the parties there has been an abandonment of the statutory action, and issues have been framed in an action of ejectment which the parties have voluntarily submitted to the determination of the court, and therefore its judgment upon those issues should not be set aside. From first to last the parties and the court have treated this action as the statutory one. Several states have enacted statutes more or less similar in substance or form to section 4053. The courts of some of these states have treated the particular statute under discussion as a mere enlargement of common-law equity jurisdiction; and such statute has been treated by courts of other states as providing for a statutory action controlled in its scope and procedure by the provisions of the statute. These differences are due mainly, if not wholly, to differences in the statutes under discussion and in the existing law of the states enacting them. Where the statute has been treated as providing a statutory action, the decisions relating to its construction necessarily depend upon the provisions of each statute and the law and practice of the enacting state. We have, therefore, in reaching our conclusions as to the meaning and effect of section 4053, been deprived of that direct aid which might be derived from decisions in other jurisdictions, if the questions involved depended merely upon the application of general principles of equity jurisdiction. In *Jersey City v. Lembeck*, 81 N. J. Eq. 255, the court comments on a condition somewhat analogous to that which led to the passage of our act of 1893, and seems to assume that the evident purpose of the New Jersey act under discussion was not to provide an additional remedy for an existing ground of action, but rather to establish or recognize a ground of action not before existing, and to provide for this new legal injury a special statutory remedy, and holds that this inducing purpose of the act should control its meaning and limit its operation.

There is error. The judgment of the superior court is reversed, and the cause remanded for further proceedings according to law. The other Judges concurred.

MCGARRY v. HEALEY.

(Supreme Court of Errors of Connecticut. Dec. 15, 1905.)

1. EVIDENCE — HANDWRITING — SIMILARITY — DISGUISED WRITINGS.

Where, on an issue of similarity of certain handwriting, experts on cross-examination each testified that both the anonymous letters in controversy showed an apparent attempt at disguise, it was proper to show by such witnesses that attempts at disguise in handwriting did not eradicate from the product those peculiarities which indicate the producer.

2. TRIAL—REQUEST TO CHARGE.

Requests to charge may be properly refused, where the court sufficiently stated to

the jury the issues presented for their determination and such principles of law as were necessary for their proper determination.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-659.]

3. LIBEL—PRIVILEGE.

Where, in an action for libel, defendant denied all knowledge of the alleged libelous letters, and did not claim that they were sent in good faith or under a sense of duty, it was proper for the court to refuse to charge on the subject of privileged communications.

Appeal from Superior Court, New Haven County; Ralph Wheeler, Judge.

Action by Daniel McGarry against Francis Healey. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles S. Hamilton, for appellant. David E. Fitzgerald and Walter J. Walsh, for appellee.

PRENTICE, J. The complaint is in two counts. Each charges the defendant with the willful and malicious publication of a libel concerning the plaintiff. The alleged publication and libel consisted of sending upon two occasions to the plaintiff's then employer an anonymous letter, in which the plaintiff was in the first instance accused of theft from his employer, and in the second of being a thief, conviction of theft, former discharge for theft, and drunkenness. Each count contains the usual allegations of falsity and malice, and an averment of special damage, including discharge from employment upon each occasion.

Upon the trial, which was to the jury, the defendant took exceptions to sundry rulings upon the admission of testimony which are assigned as error. All of these rulings were either inherently correct, or within the domain of the court's discretion, or harmless if not technically correct. Only two call for comment and these present the same question. For the purpose of showing that the defendant was the author of the two letters, the plaintiff offered certain writings admitted or shown to be in the defendant's hand, and thereafter two experts in handwriting who testified that the anonymous letters and the standards of comparison were in the same handwriting. Upon cross-examination each testified that in both the anonymous letters there was an apparent attempt at disguise. Upon redirect one of these witnesses was asked whether or not the same general characteristics would be likely to exist where one had attempted to disguise handwriting as in the undisguised hand: The other was asked as to the probability of the writer disguising the second letter in the same manner as the first. This question was ill framed, but the objection to it was general, and the trial court might well have considered it as addressed to its substantial object, rather than to its form. The purpose and intent of it was plain and could not well have been misunderstood when it was asked and answered. The interrogator

was by both questions seeking to show from the experience an observation of the skilled witnesses that peculiarities mark the handwriting of an individual even in the presence of attempts at disguise, so that comparisons even as between disguised and undisguised writings, or as between different disguised writings, furnish intelligent bases for conclusions as to the identity of the writer. The disputed writings having been declared to be disguised, it was not only pertinent, but important that the plaintiff should show that attempts at disguises did not, as shown by experience, eradicate from the product those peculiarities which to the initiated especially indicate the producer. The questions were properly admitted.

The defendant presented to the court a number of requests to charge the jury covering more than four pages of the printed record. The failure of the court to comply with each of these requests is assigned as error. It was the duty of the court to state to the jury the issues which were presented for its determination upon the evidence and such principles of law as might be necessary for their proper determination upon the facts as they should be found to exist and to make this statement in as simple, orderly, clear, and precise a manner as it reasonably could under the circumstances. *Rosenstein v. Fair Haven & W. R. Co.*, 78 Conn. 29, 60 Atl. 1061; *Hartford v. Champion*, 58 Conn. 268, 20 Atl. 471. An examination of the charge discloses that this duty was performed; nor was any subject involved in the requests omitted. The court was under no duty to notice the requests specifically, and the instructions given are to be commended, in that they were in the language of the court, and framed in an orderly manner and judicial spirit, and avoided what we have recently had frequent occasion to condemn as an unsatisfactory and dangerous practice. *Rosenstein v. Fair Haven & W. R. Co.*, 78 Conn. 29, 60 Atl. 1061; *Carney v. Hennessey*, 77 Conn. 577, 60 Atl. 129; *Shaller v. Bullock*, 78 Conn. 65, 61 Atl. 65.

One of the requests asked the court to give to the jury certain somewhat extended instructions upon the subject of privileged occasions and privileged communications, with especial reference to occasions where the one making the communication is, as was the defendant in this case, a pure volunteer without interest, confidential relation, or duty, save such as might arise from a personal sense of social or moral duty. The court refused to comply with this request, and told the jury that in view of the volunteer capacity of the defendant, the nature and contents of the letters, and their anonymous character, they were not privileged communications. This action of the court is especially complained of. We are under no necessity of considering the bearing which the anonymous character of the communications in question has upon the question of

privilege. It is sufficient that there is nothing disclosed in the facts and circumstances of this case upon which a claim of privilege could be made for them had they been signed by the writer. Defamatory communications made by a volunteer, without interest, confidential relation, or other duty than a moral or social one, are never privileged unless made in good faith, and in an honest belief in their truth, and with an honest intent to perform the duty. *Atwater v. Morning News Co.*, 67 Conn. 504, 34 Atl. 865; *Odgers on Libel & Slander*, 213 et seq. This defendant was not heard to say nor did he claim to have proved that he sent the letters in good faith and under a sense of a duty. On the contrary, he strenuously denied all knowledge of them. The court was therefore quite right in giving the instruction it did, and in not sending to the jury an issue which was not in the case. The charge is complained of in three other minor particulars. It is sufficient to say of these passages that they are unexceptionable.

There is no error. The other Judges concurred.

DILTS et al. v. CLAYHAUNCE et al.
(Court of Chancery of New Jersey. Jan. 16, 1906.)

WILLS — CONSTRUCTION — CONTINGENT DEVISE — TRANSMISSIBLE INTEREST.

A devise of real estate to a widow for life and to a stepson in fee is followed by a direction that, if the stepson should die without issue, the same should be divided among testator's brothers and sisters, with a provision that, if any brother or sister should die leaving children, his or her share should go to the children. *Held*:

1. That upon the happening of the contingency, the estate of the stepson was divested.
2. That by the direction to divide the persons indicated as intended by testator to share his bounty are any brothers or sisters then surviving, the children of any brother or sister who had died leaving children, and the grantee, devisee, or heir at law of any brother or sister who had died leaving no child.
3. The interest of children, substituted for parents under the direction, is transmissible to their heirs at law.

(Syllabus by the Court.)

Bill by Anna M. Dilts and others against Elizabeth Clayhaunce and others. Motion to confirm masters report denied.

Richard S. Kuhl, for complainants. John S. Connett and Willard S. Parker, for defendants.

MAGIE, Ch. The bill in this cause was filed for the partition of lands in the county of Hunterdon which formerly belonged to one Asa Moore. By his will, dated April 21, 1858, and probated in Hunterdon county on the 4th day of May, 1858, the following residuary disposition of his estate (including the lands which are the subject of this suit) was made: "(4) I give and bequeath to my beloved wife, Permella, the residue of my estate, both real and personal, whatsoever

and whosoever, during her natural life, and at her decease to go to my stepson, Daniel B. Ege, his heirs and assigns. (5) It is my will that in case my stepson, Daniel B. Ege, should decease without lawful issue, that my property, both real and personal, be equally divided between my brothers and sisters, and in case of the decease of either or any of them their several portions shall descend to their children." It appears by the proofs returned by the master to whom the matter was referred that the wife of testator survived him, and died in possession of the lands, about 1873, and Ege then went into possession, and continued in possession until his death, which occurred on the 19th of April, 1904. He had been married, but his wife had died before him, and he died without leaving issue. The bill seeking partition of the land has made parties many of the persons who, on any construction of the will, can claim an interest, and the master to whom it was referred to determine and report who of them had an interest has made a report, which the complainants now move to confirm. The defendants, or some of them, object to the confirmation of the master's report, on the ground that he has erred in his construction of the clauses of the will above quoted, and in his determination of the parties who now have an interest in the lands in question, and of the proportion of their respective interests. It would have been better practice, perhaps, to have presented these questions by exceptions to the master's report; but no objection was made to their being considered on a motion to confirm. As they have been fully presented and argued, I have considered them.

The facts disclosed by the proofs returned by the master, which must be taken into account in determining these questions, are the following: When Asa Moore died, he left 10 brothers and sisters surviving him. Of these only one survived Ege. That survivor was a sister, who has since died, leaving a husband and a son, her only heir at law. They are parties to the suit. Three of the surviving brothers and sisters died, leaving no children. Two others had children who died, previous to the death of Ege, leaving children. One other had children who survived Ege, and also grandchildren, children of a child who died before Ege. One of those who died without children had assigned his interest in the lands, during his lifetime, to one of his brothers. The division reported by the master is into five shares. One share he reports as belonging to the son and heir at law of the sister who survived Ege, subject to the curtesy of his father; one share he reports as belonging to the complainant and one of the defendants, in common, as children of a deceased sister; one share he reports to belong to three defendants, in common, as the children of a deceased brother; and one share he reports to belong, in common, to five children

of another deceased brother, excluding the children of a daughter of that brother, who had predeceased Ege. The remaining, or fifth, share he reported to belong to a daughter of another deceased sister. The theory on which the master has proceeded in his report as to ownership is that, upon the true construction of the will, there was no interest vested in Asa Moore's brothers and sisters at his death, and that none was acquired by any of them until the death of Ege; that upon the death of Ege, without leaving issue, the estate vested in the sister who then survived and the children of such of the brothers and sisters as had then died leaving children who survived Ege; such children, if more than one, taking the shares their respective ancestors would have taken if living. He therefore ignores the three brothers and sisters of testator who died leaving no children. He pronounces against any claim of the grandchildren of one who died leaving a child, who died a few months before Ege, leaving two children. He pronounces against the children of a daughter of one of the brothers, which daughter died during the lifetime of Ege, and, as before stated, he excludes from any share, along with the five children of one of the brothers, the children of a previously deceased child of that brother. He also pronounces against the assignment of one share, and holds it wholly invalid.

Upon taking up for consideration the testamentary provision which is to be construed, there are two things which are obvious and not open to question. In the first place, it is clear that the stepson of testator, Daniel B. Ege, acquired by devise a vested estate in fee simple, subject, however, to be divested upon the happening of the contingency prescribed, viz., death without lawful issue. In the second place, it is clear that the testator prescribed that, upon the happening of the contingency named, the estate of Ege in his lands should be divested, and thereafter vest in other persons. It is true there are no words of express devise to those persons, but the testator directs his property, both real and personal, to be divided among certain persons, and that form, of testamentary direction is equivalent to a devise. *Denise's Ex'rs v. Denise*, 37 N. J. Eq. 163; *Howell v. Gifford*, 64 N. J. Eq. 180, 53 Atl. 1074; *Outcalt v. Outcalt*, 42 N. J. Eq. 500, 8 Atl. 532; *Buzby v. Roberts*, 53 N. J. Eq. 568, 32 Atl. 9; *Seddel v. Willis*, 20 N. J. Law, 223. It is also clear that the estate intended to vest in such persons upon the happening of the contingency of Ege's death without issue was not a contingent remainder, but a provision in their favor, of the nature of an executory devise, of the kind described by Mr. Fearne as occurring when an estate is limited by devise after a preceding vested fee simple. *Fearne's Devises*, 17; 8 *Greenleaf's Cruise*, 444; *Den v. Allaire*, 20 N. J. Law, 6; *Den v. Snitcher*, 14 N. J. Law, 53; *Armstrong v. Kent*, 21 N.

J. Law, 509; *Seddel v. Wills*, 20 N. J. Law, 223; *Groves v. Cox*, 40 N. J. Law, 40; *Wilson v. Wilson*, 46 N. J. Eq. 321, 19 Atl. 132; *Brooks v. Kip*, 54 N. J. Eq. 462, 35 Atl. 658; s. c., 55 N. J. Eq. 590, 39 Atl. 1113; *Steward v. Knight*, 62 N. J. Eq. 232, 49 Atl. 535.

These constructions of the testamentary clause in question were conceded to be correct in the argument. The contest made is as to the persons in whom testator intended his estate should vest upon the happening of the contingency whereby Ege's title was to be divested. If the clause in question directed the division of the property, at the death of Ege without issue, among testator's brothers and sisters, and omitted the provision for the children of a deceased brother or sister, I apprehend there could be no doubt of the nature of the interest acquired by each brother or sister at the death of Asa Moore. While their interest was not of the nature of a contingent remainder, but only a devise executory in its character, yet the interest thus acquired is one said to be transmissible by grant, devisable by will, or descendible to heirs at law. *Fearne's Devises*, 529; 3 *Greenleaf's Cruise*, 512; *Chauncey v. Graydon*, 2 Atk. 616; *King v. Withers*, *Cases temp. Talbot*, 117-123; *Tuttle v. Woolworth*, 62 N. J. Eq. 532, 50 Atl. 445; *Thornton v. Roberts*, 30 N. J. Eq. 473; *Brooks v. Kip*, *ubi supra*; *Van Dyke's Adm'r v. Vanderpool's Adm'r*, 14 N. J. Eq. 198. If, on the other hand, the clause expressly, or by implication, evinces testator's intent to limit his bounty to brothers and sisters who might survive Ege, and to the children of such as had then died leaving children, no possible doubt could be raised. The difficulty arises from the fact that by the first part of the clause testator, by unmistakable language, discloses an intent to benefit all his brothers and sisters in case of the happening of the prescribed contingency. There is no express limitation to those of them who should survive Ege. Is such a limitation to be implied because of the direction that if any brother or sister should die leaving children, his or her share should descend to the children? As such a construction results in excluding from the bounty, which testator first declared should extend to all his brothers and sisters, each one who died before Ege leaving no children, it ought not to be adopted, unless the whole clause is incapable of a reasonable interpretation which will preserve the primary and the secondary objects of testator's bounty.

The master adopted the view that the direction for the substitution of children for deceased parents requires an implication that testator intended to limit his bounty to the brothers and sisters who should survive Ege, and the children, then living, of such as had died. Upon the argument this view struck me favorably, but upon mature consideration I am unable to adopt it. In my judgment, a reasonable interpretation of the language can be made without excluding from testa-

tor's bounty any of his brothers or sisters. Giving to every word of the clause in question its full force, it may be thus paraphrased, viz.: "Upon the happening of the contingency I have prescribed, my property of all kinds shall go to my brothers and sisters equally, and, if any have died leaving children, their share shall go to their children; but, if any have died leaving no children, their share shall go to their heirs at law or next of kin, according to the nature of the property." This construction, in my judgment, gives a reasonable meaning to the whole clause, and avoids an implication which is contradictory to the expressed intent to benefit all testator's brothers and sisters. Upon this construction, it is obvious that the report of the master cannot be confirmed. For it is clear that the brother who transferred his interest passed a title thereto, to come into possession upon the happening of the contingency, provided that before that time he had not died leaving a child or children. As he died without leaving a child, his transfer was effective. It is also obvious that those brothers and sisters who died without children transmitted their interest in their shares to their heirs at law or next of kin, to become vested in possession upon the happening of the contingency.

There remains to be considered the meaning of the clause respecting the portions of testator's brothers and sisters which thereby vested in their children upon their death. In its primary sense, the word "children" expresses the relation of parent and child, and is not extended to the more distant relations of grandchildren or descendants. When used in a will, it is, *prima facie*, to have its natural and primary meaning attributed to it; but a more extended meaning may be given to it in two classes of cases—one where the more extensive meaning will prevent the testamentary disposition from being inoperative, and the other where the language of the will indicates that the testator used the word in the more extensive signification. *Steward v. Knight*, 62 N. J. Eq. 232, 49 Atl. 535. Reading the whole clause, I strongly incline to the view that it indicates an intent on the part of testator to use the word "children" with a wider significance than exists in its primary meaning. The language of the testator is that the share of a brother or sister should descend to his children. This seems to disclose an intent to confer upon such children a descendible interest, which will not be lost by their death, but will be transferred, as to real property, to their heirs at law. But if the testator's intent to vest in the children of a deceased brother or sister the share intended for that brother or sister is limited by its own terms to the actual children, yet, upon the construction previously given to this clause the child or children of a deceased brother or sister would become invested with the interest of the parent in the property, which interest was transmissible, devisable,

and descendible, and therefore descended to their heirs at law upon their death. It results, therefore, that the master erred in excluding from the division the children of a deceased child, who were heirs at law of the deceased child.

The matter will be referred to the same master, to make a report of the interest of the parties upon the construction of the will above indicated. If other parties are necessary, application for leave to amend may be made.

The motion to confirm will be denied.

COLLINS v. WEST JERSEY EXPRESS CO.
(Court of Errors and Appeals of New Jersey.
Nov. 20, 1905.)

NEGLIGENCE—PROXIMATE CAUSE.

An express wagon, driven by a servant of the defendant along a public highway, struck the hind wheel of a wagon that was being loaded from the sidewalk, forcing it against the horse, which was standing unhitched in the street, whereat the horse took fright and ran away. To avoid being struck by the runaway horse the plaintiff jumped aside, and broke his leg over a board pile in the street, whereupon he sued the defendant and was nonsuited. *Held*, that the nonsuit was erroneous.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 69-75.]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Daniel E. Collins against the West Jersey Express Company. Judgment for defendant, and plaintiff brings error. Reversed.

Matthew Jefferson, for plaintiff in error.
Joseph H. Gaskill, for defendant in error.

GARRISON, J. A servant of the defendant, while driving an express wagon along Central avenue in Atlantic City, struck the hind wheel of a wagon that was standing by the curb, and forced it against the horse, which was unhitched, whereat the horse took fright and ran away. The horse turned into New York avenue and ran up on the sidewalk, where the plaintiff was standing near some lumber that was piled up in the street. The plaintiff, to avoid being hit by the runaway horse, jumped aside and broke his leg over the board pile, and thereupon sued the defendant for damages and was nonsuited.

We think that this nonsuit was wrong. The striking of the standing wagon by the defendant's wagon was unquestionably the initial force that set in motion the train of circumstances by which the plaintiff was injured, none of which had their rise in any intervening force or other cause.

The board pile over which the plaintiff fell, while it was a condition of his injury, was not its cause. 21 Ency. Law, p. 494.

Likewise the circumstance that the horse was standing unhitched, while it was a con-

dition that rendered its running away more likely, was not the cause of that occurrence.

Moreover, as the man in charge of this team was engaged in loading the wagon from a box that stood beside it on the curb, he may not have been negligent in allowing his horse to be unhitched. *Belles v. Kellner*, 67 N. J. Law, 255, 51 Atl. 700, 54 Atl. 99, 57 L. R. A. 627, 91 Am. St. Rep. 429.

Both the running away of the horse and the plaintiff's fall over the lumber relate back to the collision that caused the runaway, and whether that was a negligent act in the defendant's servant was clearly a jury question.

The cases upon intervening and concurring causes are collected in a series of notes in 21 Ency. Law, p. 492 et seq., and also in the annotations to *Scott v. Shephard*, Smith Lead. Cases, vol. 1, p. 754.

The judgment of the Supreme Court is reversed.

STATE v. TOLLA.

(Court of Errors and Appeals of New Jersey.
Nov. 22, 1905.)

1. INDICTMENT—AMENDMENT.

When, upon the trial of a person indicted for killing "John Sonta," it was disclosed that the name of the person killed was "Joseph Sonta," the trial court had power, under section 34 of the criminal procedure act (Rev. Laws 1898, p. 878), to direct an amendment of the indictment.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 514, 515.]

2. SAME—CONSTITUTIONAL LAW.

The statute permitting amendments of an indictment when the name of any person injured by the commission of an offense is misstated therein, if the court shall consider that the defendant cannot be prejudiced thereby, is not violative of the constitutional provision that no person shall be held to answer for any criminal offense, except on the presentment or indictment of a grand jury.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 755.]

3. HOMICIDE—THREATS BY DECEASED — EVIDENCE.

In a homicide case, testimony of antecedent threats or acts of violence by the deceased against the defendant are not admissible, when it appears that at the time of the homicide there was no threat or act by the deceased, which, even in the light of any previous threats or acts, could justify the homicidal act.

4. WITNESSES—COMPETENCY—INFANT.

The law fixes no precise age within which children are absolutely excluded from giving evidence.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 97, 98.]

Garrison, Dixon, Bogert, Vredenburg, and Vroom, JJ., dissenting.

(Syllabus by the Court.)

Error to Court of Oyer and Terminer.
Bergen County.

Antoinette Tolla was convicted of murder. and brings error. Affirmed.

Peter W. Stagg, for plaintiff in error.
Ernest Koester, for the State.

REED, J. On the 4th of March, 1904, Antoinette Tolla shot with a pistol Joseph Sonta, who almost immediately died. For this homicide she was indicted, tried, and convicted of murder in the first degree. The judgment entered upon this conviction is brought into this court by this writ of error.

The first assignment of error pressed on behalf of the defendant is that the court erred in permitting the indictment to be amended. The defendant was indicted for killing John Sonta. It appeared upon the trial that the name of the deceased was "Guleseppe," the Italian equivalent for the English "Joseph," instead of "John" Sonta. Being moved by the prosecutor, the court directed that the name of the deceased be changed from "John" to "Joseph." It is not denied that the terms of the thirty-fourth section of the criminal procedure act (Rev. Laws 1898, p. 878), if constitutional, conferred power upon the court to direct this amendment. This section provides that, if there shall appear to be a variance between the statement in any indictment and the evidence, in the name or description of any person alleged to be injured by the commission of the offense, it shall be lawful for the court, if it shall consider such variance not material to the merits of the case and that the defendant cannot be prejudiced thereby in his defense on the merits, to order the indictment to be amended. The insistence is that the Legislature had not the ability to equip the court with power to change an indictment which charged a crime upon one person into an indictment which charged a crime upon another person. If the legislation is invalid, it is because of the constitutional provision that no person shall be held to answer for any criminal offense except on the presentment or indictment of a grand jury. The grand jury presented the defendant for killing a person whose identity was certain. It was a person whose name was disclosed upon the trial to be "Joseph" instead of "John" Sonta. The grand jury knew that it was this person who was killed, and the defendant knew it. The amendment did not change the identity of the deceased, but only designated it in conformity with the facts developed. Nor was the man's name an essential part of the indictment in describing the crime. If the name of the deceased had been undiscoverable, the defendant could have been indicted for killing a person unknown. 1 Bishop, Criminal Procedure, § 495. There can be no doubt that, on the discovery of the real name, that name could have been inserted in the indictment by amendment. The point now under consideration was made in the case of *People v. Johnson*, 104 N. Y. 213-216, 10 N. E. 690, and it was held upon grounds entirely satisfactory that, the amendment being allowed

under circumstances which assured to the accused party a full and fair hearing upon the only issue upon which the plea was material, the amendment was within the power of the court. There is a line of cases holding that, when permitted by a statute, a court has the power to change the name of the person upon whom injury has been inflicted or the name of the owner of property which has been the subject of larceny or other criminal act. *State v. Hanks*, 39 La. Ann. 234, 1 South. 458; *People v. Herman*, 45 Hun, 175; *Garvin v. State*, 52 Miss. 207; *Miller v. State*, 68 Miss. 221, 8 South. 273; *State v. Craighead*, 32 Mo. 561; *State v. Casavant*, 64 Vt. 405, 23 Atl. 636; *Rough v. Commonwealth*, 78 Pa. 495. There was no error in directing the amendment.

The remaining assignments of error are directed to the alleged erroneous exclusion of proffered testimony, to the reception of incompetent testimony, and to alleged errors in the charge of the trial justice. A proper appreciation of these assignments requires a brief statement of the homicidal occurrence. Joseph Sonta was a married man living near the family of John and Antoinette Tolla. The latter lived in two rooms over a store. They were all Italians, and were intimate. About 1 o'clock in the afternoon of March 4th, Joseph Sonta went to the rooms of the Tollas, where the Tollas, husband and wife, were. He sat down in a rocking-chair. After a little while the wife left the room and went over to the house of Sonta, where she saw Mrs. Sonta and her daughter Annie. After conversing with them a short time, she returned to her rooms and found Joseph Sonta still sitting in the rocking-chair smoking a pipe. She approached Sonta and shot him, killing him almost instantly. On her trial her defense was that she killed Sonta in defense of her honor and her life. She asserted that the reason she shot him was that he wanted to take her honor away from her, and that he wanted to kill her. For the purpose of showing the probability that she could have reasonably thought her honor or her life was in peril at the time she fired, testimony was tendered to show previous talks and conduct by Joseph Sonta, exhibiting a desire to dishonor her. The assignments from the sixth to the sixteenth inclusive, are directed to the exclusion by the trial justice of questions to the defendant inquiring if Sonta and she had had trouble, and what happened, and whether Sonta had asked her to have sexual intercourse, and whether Sonta, at one time when her husband was absent, had come into her house and attempted to drag her into the bedroom and have intercourse with her, and respecting statements she had made to the wife of Sonta. The last question was designed to show the probability of such antecedent conduct of Sonta, and such antecedent talk and conduct were designed to show that the defendant, having knowledge of the disposition of Sonta

ta, could have reasonably inferred from what occurred at the time of the homicide that her life or honor was in eminent danger.

This line of proffered testimony stands upon the same footing as offers to prove previous threats by the deceased in homicide cases, or, by the prosecutor in cases of assault where the defendant sets up that he acted in self-defense. That previous threats or acts of violence afford no justification for an assault or homicidal act is entirely settled. Wharton's Criminal Evidence, § 757; Wharton's Homicide, §§ 482, 606. If all the testimony inferentially possible, in the light of what was offered and overruled, had been introduced, it would not in itself have afforded the slightest ground of justification for this homicide. Such a justification must have arisen from what occurred at the time the shot was fired. The testimony of the previous acts and threats was only admissible to illustrate some possible feature of the actual occurrence, which might, if thus illustrated, have led the jury to believe that the defendant had reasonable ground to conclude that her life or her honor was so menaced as to excuse the shooting. If it had appeared that Sonta was asleep, and she, knowing him to be asleep, had shot him, it would be absurd to say that any previous act of his, however bad, would have justified the shooting or modified the degree of criminality. Under such a condition of affairs, the proof of such acts would have been legally worthless as a basis for a legal verdict, and so irrelevant. It seems to be the logical conclusion that, unless at the time of the homicide the deceased did something to indicate a present intention to harm the defendant, there is nothing upon which the precedent acts can cast any light. There must be some present word or movement to be interpreted in the light of this knowledge of the disposition of the deceased. This view is supported by a great weight of authority. *State v. Reed*, 137 Mo. 125-137, 38 S. W. 574; *State v. Byrd*, 121 N. C. 684, 28 S. E. 353; *State v. McGonigle*, 14 Wash. 594-599, 45 Pac. 20; *State v. Jackson*, 33 La. Ann. 1087; *State v. Janvier*, 37 La. Ann. 645; *State v. Pritchett*, 22 Ala. 39, 58 Am. Dec. 250; *Harrison v. State*, 24 Ala. 71, 60 Am. Dec. 450; *Hughey v. State*, 47 Ala. 97; *Creswell v. State*, 14 Tex. App. 1; *West v. State*, 18 Tex. App. 644; *Myers v. State*, 33 Tex. 525; *Evans v. State*, 44 Miss. 762; *State v. Scott*, 28 N. C. 409, 42 Am. Dec. 148. In the state of New York, where it is permissible to show the reputation of the assailant who was killed for quarrelsomeness and vindictiveness, it was held, in *Thomas v. People*, 67 N. Y. 222, that such testimony was only admissible when it was shown that the assault had been committed or threatened at the time when the homicide was committed, or immediately preceding it, or was intimately connected with it so as to justify the taking of life in self-defense. Such testimony

was held to be rightly excluded in *Abbott v. People*, 86 N. Y. 460-470, because there was no ground for claiming that the act was committed in self-defense. To the same purport is a long array of cases cited by Mr. Kerr, in his article on homicide. *Ency. L.* (1st Ed.) 684, 685.

Turning to the evidence of what occurred at the time of this homicide, I am unable to discover any act or word by Sonta, which, whatever his previous conduct may have been, can be forced into a suggestion of then present harm to the defendant. The defendant herself gives the following account of the affair: She says that Sonta came to her house about half past 1 o'clock; that her husband was lying on a trunk and he went away at once. She says that Sonta asked what Tolla always went away for, when he (Sonta) came in; and she told him that it was on account of his (Sonta's) coming. Then Sonta said something about killing her husband or "my wife" and that she said to him: "You want to take these things out of your head, or I will let you go out of my house with your face broke." Then he said: "Being you are. I will have to post you some way, or shoot you. Then I do what I wish to, and shoot myself." She says that he had a revolver in one hand and a bunch of money in the other hand. At that moment Sonta's six year old son came in, and Sonta shoved the revolver in one pocket and the money in another pocket. She says that the boy began to cry because of some remarks of his father, and that she went into another room and got a cake for the child, and at the same time got a revolver and put it in her pocket. She went out of the room and met her husband coming in the house. She then went out of the house and over to Sonta's house, where she remained for some time talking with Mrs. Sonta and her daughter Annie. She returned and found Sonta sitting down alongside of a closet with his shoulder towards the bedroom door, smoking. She says that her husband was asleep, and little Rocco was playing with her children. She said that when she got to the table she stopped, and Sonta turned towards her, and "he was all of a color, and he put his hands to his prick, and he says, 'Look what I got to suffer! Look what I got to suffer!' His eyes were all mixed up, looked at one time he was red, and another time he was pale." Then she shot him, because if she did not do what she did he would have shot her and her husband. She said that he said one word after she shot him: "You done me before I done you." Immediately after the shots were fired, Sonta was found sitting in the rocking-chair with his legs crossed, with a briar pipe in his right hand, and with his head upon his breast. The autopsy showed four superficial wounds, two where a bullet had entered the temple, gone through the brain, and out under the left jaw. No pistol seems to have been

found other than the one used by the defendant. Her account of Sonta's exhibiting a pistol, as well as her statement of his remark after he was shot through the brain, is manifestly fanciful. But, taking her story as she told it, it appears that, after Sonta's exhibition of the pistol, she procured her own pistol and went over to Sonta's house, where she remained for some time, and after she returned she shot Sonta as he was sitting crosslegged in the rocking-chair with his pipe in his right hand; her husband being present. The only act or word of Sonta's at that time was his placing his hand upon his person, coupled with the remark, "See what I got to suffer." From this account, nothing that he did at the time could afford a justification for her act; and it is impossible for me to conceive how any previous conduct could change the significance of what he did so as to afford such a justification.

It is insisted by counsel for the plaintiff in error that she should have been permitted to show that she bought the pistol for the purpose of defending herself against Sonta; and that the previous acts and words of Sonta were relevant to show that she had ground for believing her person was in danger. It seems sufficient to say that, it appearing that she did not employ the pistol in her self-defense, her motive in buying it became immaterial. As a support to the plea of self-defense, the offers were rightly excluded. Nor do I perceive that the offers were admissible to show the degree of her criminality. The offers excluded were directed entirely to the proof of self-defense. It could not operate to reduce the grade of crime to manslaughter. Nothing occurred at the time, even in the light of any previous words or conduct of the deceased, which would operate to so modify the degree of criminality. Neither words nor indecent actions, unless accompanied by actual or threatened assault, afford provocation sufficient to reduce an intentional killing to manslaughter. Nor would such proffered evidence be evidential in respect to the defendant's premeditation. The ground of the offer was to show that she bought the pistol to use in self-defense only; but, as already remarked, she did not use it in self-defense. She had just previously to the homicide armed herself with it, admittedly to use upon Sonta. She went to Sonta's house, remained there for some time, and then returned to her own house, and, without justification, shot him. Neither the previous conduct of Sonta, nor the fact that such conduct caused her to purchase the pistol, could in the least modify the significance of her conduct at the time.

It is also assigned for error that the trial justice improperly permitted a boy six years old to testify for the state. The boy appears to have been unusually precocious and to have been qualified by intelligence and by a knowledge of the sanction requisite to

equip him with eligibility as a witness. The question whether he should be permitted to testify was within the discretion of the trial justice, and that discretion was not abused. The law fixes no precise age within which children are absolutely excluded from giving evidence. Taylor on Evidence, 1877; Roscoe, Crim. Ev. p. 106; Wheeler v. U. S., 159 U. S. 523, 16 Sup. Ct. 93, 40 L. Ed. 244.

In respect to the assignments directed to alleged errors in the charge, it is sufficient to say that the law was accurately and carefully charged. There is no assignment respecting it which is of sufficient importance to require an extended consideration.

The judgment should be affirmed.

DIXON, BOGERT, VREDENBURGH, and VROOM, JJ., dissent.

GARRISON, J. (dissenting). I think that the excluded testimony (1) as to antecedent sexual assaults and indignities, and (2) as to the purpose for which the defendant bought the pistol, should have been admitted, not as tending to justify the homicidal act, but because of the obvious bearing of such testimony upon the degree of the defendant's crime. The defendant was properly convicted of the crime of murder; whether she was guilty in the first degree depended upon her state of mind when she shot Sonta. The testimony that was permitted to go to the jury was entirely consistent with the conclusion reached by it, viz., that her state of mind on that occasion was one evincing deliberation and premeditation; but, had the excluded testimony been admitted, the verdict upon this vital point might have been different. What effect a prolonged and persistent course of efforts to debauch a woman will have upon her state of mind is one question; but to say that it is the same result that would follow from a single solicitation appears to me to be entirely unsupportable. Especially is this so if, in the course of such persecution, the woman, having armed herself, shoots her persecutor apparently upon such single solicitation.

As this case was tried, one strong element of premeditation, perhaps the strongest, was the purchase of the pistol; but I cannot agree that because the pistol was not used in self-defense it may not have been purchased with that object, and, if it was, then this strong element of premeditation drops out of the case, or at least is rendered doubtful.

I think also that the defendant should have been allowed to show the persistence of Sonta's antecedent solicitations and accompanying threats and assaults. Whether what occurred just at the time of the shooting was an isolated instance of indignity, or whether it was the climax of a long course of like assaults upon her chastity, to which the woman had been subjected, makes, in my opinion, a world of difference

in reaching a correct estimate of the state of mind likely to be induced in her. In the latter case, the persistence of the debaucher, the constant repetition of the insult, the inability of the wife to put an end to the indignity even in her husband's presence, are of the very essence of the question as to the state of mind engendered in her upon that repetition of the offense that proved to be the last.

A judicial ruling that excludes that which is essential to a correct estimate of the woman's mental state, and admits only the culminating act—the last straw, as it were—is based upon a faulty psychology, and, as the distinction between the degrees of murder is at bottom a psychological question, such ruling must likewise be erroneous in point of law.

Upon these considerations I shall vote to reverse.

MAGUTH v. BOARD OF CHOSEN FREEHOLDERS OF PASSAIC COUNTY.

(Court of Errors and Appeals of New Jersey. Nov. 27, 1905.)

1. BRIDGES—DEFECTS—LIABILITY OF COUNTY—CULVERTS.

The twenty-first section of the road act of March 23, 1859 (Gen. St. p. 2844), and the supplement to the bridge act, passed March 15, 1860 (Gen. St. p. 307), apply only in cases where parties have sustained damage through the neglect of duties owed to the general public. They do not apply to a case where, by reason of the smallness of a culvert under a bridge, the water of the stream beneath is backed up on private property.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Bridges, §§ 60–62, 64.]

2. APPEAL—ISSUES IN TRIAL COURT—LIMITATION OF REVIEW.

When, in opposition to a motion of nonsuit, the plaintiff expressly based his right of action on a particular ground, this court on error will confine its consideration of the merits of the judgment to that ground.

Pitney, J., dissenting.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Anna Maguth against the board of chosen freeholders of the county of Passaic. Judgment for defendant, and plaintiff brings error. Affirmed.

William W. Watson and Robert R. Watson, for plaintiff in error. Harry Meyers, for defendant in error.

DIXON, J. In an action brought in the Supreme Court the plaintiff complained that the board of chosen freeholders of Passaic county, in building a public bridge over Weasel brook in said county, had made the culvert too small for the passage of the water after heavy rains, and consequently the water was backed up over the plaintiff's land. At the trial of the case in the Passaic circuit the plaintiff's counsel, in response to a motion for nonsuit, stated that he sought to recover under the supplement, passed

March 15, 1860, to "An act respecting bridges" (Gen. St. p. 307), which enacts that "in all cases where a township or board of chosen freeholders of a county are chargeable by law with the erection, rebuilding or repair of any bridge or bridges, and the said township or board of chosen freeholders shall wrongfully neglect to erect, rebuild or repair the same, by reason whereof any person or persons shall receive injury or damage in his or their persons or property, he or they may bring an action," etc., "against said township or board of chosen freeholders, and recover judgment to the extent of all such damage," etc. A nonsuit being thereupon ordered, the plaintiff sued out the present writ of error to reverse that determination upon an exception taken thereto.

Under the settled rule of practice in this court, to consider, in favor of the party relying upon an exception, only those points which were presented on his behalf in the trial court, we must leave out of view the question whether the matter complained of would entitle the plaintiff to redress under the common law, and confine ourselves to the sight afforded by the statute. *Van Alstyne v. Franklin Council*, 69 N. J. Law, 672, 58 Atl. 818. In *Freeholders of Sussex v. Strader*, 18 N. J. Law, 108, 35 Am. Dec. 530, decided A. D. 1840, wherein the plaintiff sought to recover damages for an injury suffered because of the defective condition of a public bridge over which he was traveling, it was adjudged that the duty of the chosen freeholders respecting bridges was a public duty, and that, although a private action might be maintained against a public corporation for its violation of a duty owed by it to an individual, such an action could not be maintained for the violation or nonperformance of a public duty. The same doctrine was enforced in *Cooley v. Freeholders of Essex*, 27 N. J. Law, 415, decided in February, 1859. The propriety of these adjudications upon the principles of the common law has always been recognized by the courts of this state. To relieve the hardship of this legal situation, we think, the twenty-first section of the road act of March 23, 1859 (Gen. St. p. 2844), was passed, within a few weeks after the judgment in *Cooley's Case*, and in the following year the more comprehensive statute above set forth. The first of these enactments applied only to damage happening to persons or property while passing over a bridge, because of its insufficiency or want of repair (*Livermore v. Freeholders of Camden*, 29 N. J. Law, 245), while the later act extended to any person or property injured through the wrongful neglect of duty, and included the duty to build bridges as well as the duty to maintain them in proper condition. *Ripley v. Chosen Freeholders of Essex and Hudson*, 40 N. J. Law, 45.

Since the enactment of these laws many cases have come before our courts in which the plaintiffs have invoked the aid of the

statutes. *Livermore v. Freeholders of Camden*, 29 N. J. Law, 245, and 31 N. J. Law, 507; *Ripley v. Chosen Freeholders*, 40 N. J. Law, 45; *Jernee v. Monmouth*, 52 N. J. Law, 21 Atl. 295, 11 L. R. A. 416; *Freeholders v. Hough*, 55 N. J. Law, 628, 28 Atl. 86; *Mahnken v. Monmouth County*, 62 N. J. Law, 404, 41 Atl. 921; *Mattlage v. Freeholders*, 63 N. J. Law, 583, 44 Atl. 756; *Spencer v. Freeholders*, 66 N. J. Law, 301, 49 Atl. 483; *Weeks v. Freeholders*, 68 N. J. Law, 622, 54 Atl. 826; *Creighton v. Freeholders*, 70 N. J. Law, 350, 57 Atl. 870. In the *Livermore* and *Jernee* Cases it was claimed that one or the other of these statutes created a private duty or was applicable to the breach of such a duty, but in each case the claim was denied. The other cases were all based upon an alleged breach of public duty, and in more of the judicial utterances, either of the Supreme Court or of this court, has it been declared that the Legislature had intended to do more than to provide private remedies for parties injured through the neglect of those duties which, but for the statutes, were owed only to the general public. So far as private duties were concerned, the common law afforded adequate relief. The mischief to be remedied was the lack of redress to those who sustained special damage through the neglect of public duty, and the reasonable inference is that it was the disclosure and emphasizing of this mischief, by the decision in the *Strader* and *Cooley* Cases, which forthwith resulted in these remedial statutes. We think they should not be extended beyond the scope thus indicated, and therefore it was rightly determined that they did not apply to the damage alleged by the plaintiff in this case.

The judgment of nonsuit is affirmed.

PITNEY, J., dissents.

CHAMBERLAIN v. CHAMBERLAIN.

(Court of Errors and Appeals of New Jersey.
Nov. 27, 1905.)

MARRIAGE—VALIDITY.

When a man and a woman intend to marry and live together as husband and wife, but their intent is frustrated by the existence of some unknown impediment, when the impediment is removed and it is shown that the same intent continues, their relations are lawful.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Marriage, §§ 61, 100, 109.]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by Mary Chamberlain against Stroud H. Chamberlain. Decree for plaintiff (59 Atl. 813), and defendant appeals. Affirmed.

Elmer King, for appellant. Peter J. McGinniss and John M. Ward, for respondent.

GARRETSON, J. The complainant filed her bill against the defendant under the twentieth section of the divorce act, alleg-

ing that her husband has left her and refuses to support her, and praying for support and maintenance.

The only defense which it is necessary to consider is that the defendant is not the husband of the complainant, and therefore is not liable to support her. The complainant, under her maiden name of Mary Walsh, married William Tissell March 29, 1871. William Tissell left Mary Tissell March 12 or 15, 1877, and went to St. Louis, and thence to Oak Grove, Tex. About July, 1877, a letter was received by Mary Tissell from William Tissell. Mary Tissell, under the name of Mary Walsh, was married to Stroud H. Chamberlain, April 4, 1880, by a clergyman in the city of Brooklyn. On May 8, 1880, the complainant under the name of Mary Tissell filed a petition for divorce upon the ground of desertion against William Tissell, and decree was granted thereon June 30, 1881. Prior to the marriage of the complainant and defendant, in 1880, they both believed that William Tissell was dead, and they continued in that belief until after the present suit was instituted, when there was evidence to show that he was still alive. If William Tissell was alive in April, 1880, when the complainant was married to the defendant, that marriage was invalid. When the impediment of her former marriage was removed by the decree of divorce, then the complainant might legally become the wife of the defendant. The complainant testified that, while she believed Tissell was dead when she married Chamberlain, she procured the divorce from Tissell for the reason that she and Chamberlain talked of getting a little property, and she was afraid that something might occur that might do harm in that way. After the complainant and defendant were married in 1880, they lived together as husband and wife until the separation which occurred shortly before the commencement of this suit. Each supposed that the relationship between them was lawful and that of husband and wife. He addressed her and introduced her as his wife. She addressed him and introduced him as her husband. They gave a mortgage upon property of the defendant June 25, 1885, in which she is described as his wife and which she acknowledged as his wife. From the time of the marriage, in 1880, to the commencement of the suit, it was the intention of both the complainant and the defendant, as they state, that their relations should be lawful, and not meretricious. They were by law, meretricious, however, down to the time of the divorce of Tissell, because of Tissell living; but, the impediment which rendered them meretricious having been removed and the lawful intent still continuing, it would be unjust not to give that intent effect if possible.

In connection with the intent of both parties as admitted by them, we have evidence

to show that they manifested that intent to others after the divorce in such way as to fully establish the legality of their relationship. Emily J. Campbell testifies that the defendant on one occasion, in presence of his wife, said: "Here is Mary's divorce from her first husband. I would not have shown it to you, but you knew her first husband, and I want you to know she is my legal wife." Mary Booth testified to an occasion when both were present, and she had been told by one of the neighbors that Mrs. Chamberlain had been divorced, and says: "She felt so badly. They came down and said they had the divorce papers, and were willing for us to see them, because father made the lease. They were anxious for us to know they were married." And Mr. Chamberlain "said she was his wife, and she felt bad and cried, and he told her not to worry." This evidence was a manifestation of an intent to live together as husband and wife, and with the intention and the actual so living an actual marriage is established. In *Collins v. Voorhees*, 47 N. J. Eq. 315, 20 Atl. 676, 14 L. R. A. 384, 24 Am. St. Rep. 412, Chief Justice Beasley, in an opinion denying a motion for a reargument speaking of the opinion of Lord Westbury in the *Breadalbane Case*, said: "The doctrine of that case is supported by nothing that preceded or that has followed it, and is altogether anomalous and, as it seems to me, it was properly rejected by this court. In that case the court acted upon the principle that if a man and a woman agreed to live together adulterously, with a simulation of marriage, there should be an inference of a subsequent valid marriage from the fact that such simulation had been continued after the death of the husband of the adulteress. Why such an inference is to be thus deduced is not apparent, unless it be for the promotion of adultery. By its prevalence the adulterous purpose is converted into a matrimonial purpose without a particle of reasonable evidence in support of the alleged change of intention." "Lord Westbury strangely compares the case before him with those instances where the parties intended originally to marry, and not to commit adultery; their intent being frustrated by the existence of some unknown obstacle. And yet it is presumed that no one who will look with any care into the subject will have the slightest doubt that these two classes of cases with respect to the methods of their proof respectively rest upon entirely different foundations. For, when the parties have intended marriage, being ignorant of an existing impediment, all that is to be established by cohabitation apparently matrimonial, subsequent to the removal of such impediment, is the carrying into effect by the parties of their original purpose; but, when the original purpose was to live in adultery, the evidence under similar circumstances must be sufficient to show an abandonment of such purpose and the

execution of a new one. These lines of cases can be confounded only by want of careful observation of the principles upon which they rest." We think that this reasoning of the Chief Justice abundantly sustains the complainant's contention in this case.

The decree below is affirmed.

GRAHAM et al. v. SECURITY MUT. LIFE INS. CO.

(Court of Errors and Appeals of New Jersey.
Nov. 28, 1905.)

1. INSURANCE—WAIVER OF CONDITIONS.

An insurance company may waive any condition of a policy inserted therein for its own benefit.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 941, 942.]

2. SAME—FORFEITURES.

Forfeitures are not favored in the law, and courts are always prompt to seize hold of any circumstances to indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted.

3. SAME—WAIVER OF CONDITIONS.

It is always open on behalf of the insured to show a waiver of the conditions, or a course of conduct on the part of the insurer from which might justly and reasonably be inferred that a forfeiture would not be exacted.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Amelia M. Graham and E. Louise Kinne against the Security Mutual Life Insurance Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

This was an action brought on a policy of life insurance providing for the payment to the plaintiff of \$10,000 upon receipt of satisfactory proofs of the death of the insured, Theodore Y. Kinne. At the trial at the Passaic circuit before Mr. Justice Pitney and a jury, he denied the defendant's motion to nonsuit, and on due submission of the case to the jury, a verdict was rendered in favor of the plaintiff for \$9,951.80. The policy was issued on or about November 16, 1903, and bore date August 17, 1903. The first annual premium thereon amounted to \$429.60. It was paid in part by a credit of \$97.90, the amount of the unearned premium on a policy previously held by the insured, and surrendered and canceled when the present policy was issued, and by the execution and delivery of the following note: "Paterson, N. J., 11—10—1903. \$331.76. On February 15, 1904, after date I promise to pay to the order of Security Life Insurance Company three hundred and thirty ⁷⁶/₁₀₀ dollars, payable at H. O., value received, with interest at six per cent. per annum. This note is given in payment of premium. [Signed] Theodore Y. Kinne." On the 5th day of February, 1904, the following letter was sent to the insured from the home office of the company: "Binghampton, N. Y., Feb. 5,

1904. Dear Sir: Your note, dated November 10, 1903, for \$331.76, with interest amounting to \$5.19, will fall due on the 15th day of February, 1904, payable to Mr. C. Merwin Turner, 140 Times Bld., New York City. Kindly give the matter your prompt attention and send check at once. It is never safe to delay until the last day. Very truly yours, L. E. Turner." The insured, on February 15, 1904, wrote and sent the following letter: "February 15, 1904. Charles M. Turner, Sec. M. Life Ins. Co., 41 Park Row, N. Y.—Dear Sir: On opening this letter you will be as much disappointed as I by not finding a check contained. Certainly your disappointment cannot be greater. It is almost impossible to make collections of any amount here, and I must ask either extension, suspension, or the privilege of paying a part now and the balance next month. Yours very truly, Theo. Y. Kinne, P." On the following day the following letter was written by C. Merwin Turner to the insured: "New York, N. Y., Feb. 16, 1904. Theo. Y. Kinne, M. D., Paterson, N. J.—Dear Doctor: Your esteemed communication of the 15th to hand, and contents carefully noted. If you will forward your check for part of the amount, I will arrange for the extension of the balance, and in order to save time kindly sign the inclosed note and we will credit you with the amount of your check. I regret exceedingly that collections in your line are poor, but have heard other physicians make the same remark. Trusting that the condition is only momentary, I am, very truly yours, C. Merwin Turner, Cashier."

On the trial it appeared from the testimony of the secretary of Dr. Kinne, that she opened the letter in the doctor's presence, and there was no note inclosed, and nothing was done in reference thereto. Dr. Kinne died on March 4, 1904. The plaintiff then offered in evidence the following letter: "March 8, 1904. Security Mutual Life Association, 140 Times Building, New York, N. Y.—Gentlemen: March 4, 1904, Dr. T. Y. Kinne, of Paterson, N. J., died. Among his insurance policies we find one written by your company. Kindly send us papers for proof of death and oblige. [Signed] Mrs. T. Y. Kinne, Ex. T. Y. Kinne Est." Demand at the trial being made for the original of this letter, it was not produced; counsel for the insurance company stating that they had never received such a letter as that. On the 11th of March, 1904, the following letter was written: "New York, N. Y., Mch. 11, 1904. Dr. Theo. Y. Kinne, 25 Church St., Paterson, N. J.—My Dear Doctor: Your note of \$331.76 is due on the 15th, with \$5.19 interest, making a total of \$336.95. Kindly give this matter your attention. Yours truly, C. Merwin Turner, Cashier." Subsequently, and on the 14th of March, 1904, Thomas P. Graham, the husband of one of the plaintiffs, went to the office of the company in New York, saw Mr. Turner, and told him he was ready to pay the note.

Turner did not seem to know whether the doctor was dead or not. Graham then told him that the doctor died on the 4th of March. Turner said he was sorry, as the doctor was one of their "star" insurers and their medical examiner at one time. He added: "I am sorry there is going to be any question about it, as I do not know whether we shall pay this claim or not. I shall have to communicate with the home office." On the following day Mr. Graham went back to the office and made a tender of the amount of the note to a young lady who stood behind the cashier's desk, who declined to receive it, because she had been instructed not to accept it. On the same day Mr. Graham offered to pay \$336.95 to the defendant at its home office, through the Western Union Telegraph Company, and defendant refused to accept the money. To each of the letters above mentioned a stipulation was annexed in the same terms as the following: "It is hereby consented and agreed by and between the attorneys of the respective parties hereto, that the letter hereto annexed, dated March 11, 1904, to Doctor Theodore Y. Kinne, signed by C. Merwin Turner, Cashier, is the original written by C. Merwin Turner, Cashier of the defendant, on behalf of the defendant, and that on the trial of the above action it is agreed by said attorneys that said letter shall be received in evidence without proof of the signature or agency of said C. Merwin Turner, Cashier."

Eugene Emley (Horton & Tilton, on the brief), for plaintiff in error. Griggs & Harding, for defendants in error.

VROOM, J. (after stating the facts). The assignments of error are six in number; the first being to the refusal of the court to grant the motion for a nonsuit at the close of the plaintiff's case, and the remaining assignments were based upon the charge of the judge.

The first assignment was principally relied upon by the plaintiff in error in the presentation of the case before this court. It was as follows: "That at the close of the plaintiff's case the court before whom," etc., "refused to grant this motion for a nonsuit, made by the said defendant, upon the ground that the policy of insurance sued upon was not any longer in force, and that the said defendant was no longer legally liable under its terms, said policy having been forfeited in the lifetime of the insured, and upon the further ground that there was no evidence of a legal tender of the premium due thereon." In support of this position reliance is had upon condition 4, annexed to the policy of insurance, and which reads as follows: "Failure to pay any renewal premium, or nonpayment (when due) of principle or interest, on any note given in payment of a premium due under, or as a charge against this contract, or any breach of warranty discovered within two years from this date, will render it null and void, and all pay-

ments theretofore made thereunder will be forfeited to the company." And the contention thereunder was that the failure to pay the note when due rendered the policy, under the terms of the contract, absolutely null and void; that there was no longer any legal liability on the part of the defendant; and that the insurance upon the life of the deceased had then lapsed, and the rights of the latter under the policy were then forfeited and gone. The correctness of this position, as a general rule relating to forfeitures of policies, and which is held in the cases cited in this part of the brief of the plaintiff in error, will not be disputed. *Knickerbocker Life Insurance Co. v. Pendleton*, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866; *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S. 252, 26 L. Ed. 765; *Pitt v. Berkshire Ins. Co.*, 100 Mass. 500.

But the facts of this case preclude the application of this strict rule as to forfeiture to this case. The contention of the defendants in error is that there had been a waiver of the forfeiture clause in this policy, and that the question whether all the acts of the defendant and the insured, occurring at different times, did not go to make up a course of dealing, respecting this contract, from which the waiver of strict payment of the note and forfeiture might be inferred, and that this question was one which should be left to the consideration of the jury. It has long been a settled rule of law that the provisions of a contract that are to work a forfeiture are to be strictly construed. Forfeitures are never favored in the law, and attention was called by counsel for defendants in error to the fact that the aversion of courts to the enforcing of forfeitures is emphasized in contracts for insurance for reasons usually existing peculiar to those contracts. An examination of the cases, and notably those upon the brief of the defendant in error, clearly demonstrates the correctness of the principle above stated. In *Hartford Life & Annuity Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496, it was held that "it is always open for the insured to show a waiver of the condition, or a course of conduct on the part of the insurer, which gave him a just and reasonable ground to infer that a forfeiture would not be exacted, and the fact that defendant, without objection, had previously received from the insured monthly dues after the date on which, by the terms of the contract, they were payable, was properly left to the jury to infer waiver," and "that a waiver may arise by express language or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result." Again, in *Hastings v. Brooklyn Life Ins. Co.*, 138 N. Y. 473, 34 N. E. 289, a premium note, which contained a provision of forfeiture in case of nonpayment, was not paid, and a new note given. The renewal note was not paid when due, but it was held that "the

act of the defendant in extending credit to the insured for premiums falling due upon the pledge of the policy established a course of dealing between the parties which it was necessary to terminate in some way before the policy could be treated as forfeited and void." In the case of *Insurance Company v. Norton*, 96 U. S. 244, 24 L. Ed. 689, the questions of waiver and forfeiture were fully discussed, and in delivering the opinion of the United States Supreme Court Mr. Justice Bradley said: "Forfeitures are not favored in the law. They are often the means of oppression and great injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharged the forfeiture upon such compensation being made. It is true we held in *Stat-ham's Case*, 93 U. S. 24, 23 L. Ed. 789, that in life insurance time of payment is material, and cannot be extended by the courts against the assent of the company. But, where such assent is given, the courts should be liberal in construing the transaction in favor of avoiding a forfeiture." In the case of *Insurance Company v. Eggleston*, 96 U. S. 576, 577, 24 L. Ed. 841, Mr. Justice Bradley, again speaking for the court, says: "Forfeitures are not favored in law, and courts are always prompt to seize hold of any circumstances to indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted." See, also, *Kenyon v. K. T. M. M. A. Ass'n*, 122 N. Y. 247, 25 N. E. 299; *Spoeri v. Mass. Mut. Life Ins. Co. (O. C.)*, 39 Fed. 752; *Meyer v. Knickerbocker Life Insurance Co.*, 73 N. Y. 516, 29 Am. Rep. 200; *Church v. Lafayette Fire Insurance Co.*, 66 N. Y. 222. And in this state, in the case of *State Insurance Company v. Maackens*, 38 N. J. Law, 564, it was held that "any conduct on the part of the company or its agent, with respect to their liability on the policy, which may reasonably be supposed to have induced the claimant to believe that the time for delivering the proofs would not be relied on by the company, is competent evidence of a waiver of strict adherence to time in the presentation of proofs"—citing *Basch v. Humbolt Fire Ins. Co.*, 35 N. J. Law, 429, and *Jones v. Mechanics' Ins. Co.*, 36 N. J. Law, 29, 13 Am. Rep. 405. There is always a reluctance on the part of courts to take from the jury, as a matter of law, any facts or circumstances from which a waiver may be inferred, and this is shown in the charge to the jury in the case of *Hartford Life Insurance Co. v. Unsell*, quoted in Justice Harlan's opinion in 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496: "I do not think that any number of instances, one or more, can be said, as a matter of law, to make or not to make a waiver. It is for you, as reasonable men, to consider what the company did intend—what would its conduct make a reasonable man believe in reference to it?"

What are, then, the facts and circum-

stances surrounding this case, and which are to be considered in determining the intent of the plaintiff in error, to waive the forfeiture of this policy. The testimony showed certain facts and circumstances which were insisted upon by counsel for defendants in error as going to show the improbability of the company's intent to enforce the forfeiture against the insured. These facts were the friendly relations subsisting between Dr. Kinne and the company; that he had at one time been the medical examiner of the company, and was one of their "star" insurers; that the company had his note as security for the premium, which was drawing interest at the rate of 6 per cent. per annum. The contention of counsel was, as stated in their brief, that "these relations between them, and the improbability that the company would intend to enforce a forfeiture which would end these relations, are themselves indicia of an intention to waive the forfeiture, if that contingency should arise." While, perhaps, not conclusive in establishing an intention to waive the forfeiture, still, taken in consideration with the correspondence, it was a matter for the jury to consider them when determining the intention of the company. The denial of the motion to nonsuit was put by the learned trial judge upon the correspondence between Dr. Kinne and the company, and he held that there was a construction of this evidence which would warrant the jury in finding that there had been a waiver of the forfeiture on the part of the company.

The first letter was of the date of February 5, 1903, and was written to Dr. Kinne from Binghampton, and signed "L. E. Turner"; the printed heading showing that he was assistant superintendent of the company. It called Dr. Kinne's attention to the fact that his note would fall due on February 15th, and would be payable to Mr. C. Merwin Turner, 140 Times Building, New York City. The letter desired the doctor to give the matter prompt attention, and to send check at once, and added, "It is never safe to delay until the last day"; and in commenting on this letter the trial judge said: "But the letter does not say in terms that nonpayment before the last day, or nonpayment on the last day, will work a forfeiture, and, of course, this stipulation in clause 4 [of the policy] respecting premium payments—the stipulation that nonpayment when due will render the contract null and void—is intended for the benefit of the company and may be waived by the company." This letter was from the home office of the company, and, it seems to me, can have but one construction, and that is that C. Merwin Turner was the agent of the company to receive payment and to deal with Dr. Kinne, the insured, with respect to such payment. On the very day when the forfeiture would have taken place, in the absence of any

waiver, February 15, 1904, Dr. Kinne wrote a letter to Mr. Charles M. Turner (undoubtedly, as appears from his reply, the C. Merwin Turner referred to in the letter of February 5th) as follows: "Dear Sir: On opening this letter you will be as much disappointed as I, not finding a check contained. Certainly your disappointment cannot be greater. It is almost impossible here to make collections of any amount, and I must ask for another extension, suspension, or the privilege of paying a part now and the balance next month." This letter was promptly answered the next day, February 16th, by C. Merwin Turner. He said: "Your esteemed communication of the 15th to hand, and contents carefully noted. If you will forward your check for part of the amount, I will arrange for extension of the balance, and in order to save time kindly sign the inclosed note, and we will credit you with the amount of your check. I regret exceedingly that collections in your line are poor, but have heard other physicians make the same remark recently. Trusting that the condition is only momentary, I am," etc. If, upon the failure of Dr. Kinne to pay the note on February 15th, no action whatever had been taken by the company or its agent, forfeiture under the clause of the policy would have taken effect, but on the day following, as seen above, the agent of the company sent the letter of February 16th, and in submitting the same to the jury the trial judge properly said: "It is for you to say whether it was not the duty of Mr. Turner to report to the company in the ordinary course of his duty the fact that Dr. Kinne had not made the payment strictly on the 15th of February. It is for you to say whether it is to be presumed he did so report. Now Dr. Kinne lived from then until the 4th of March, when, according to the evidence, he died. So far as the case discloses there was no letter subsequently received by Dr. Kinne from the agent or cashier in New York, or from the company's office in Binghampton, insisting on the forfeiture or waiving it, but merely silence on their part, as on the doctor's part, from the 16th of February until the 4th of March." Although in the letter of Mr. Turner of February 16th, in which he said "kindly sign the inclosed note," inadvertently, perhaps, no note was inclosed, and nothing was done by Dr. Kinne in the way of giving a new note or check from the receipt of this letter until his death, still this fact does not in any way affect the inference against the intent of the company to enforce the forfeiture; and this clearly is shown by the retention of the note by the company, and the holding it as a personal obligation. This is further made manifest by the letter of March 11, 1904, written after the death of Dr. Kinne by C. Merwin Turner and addressed to Mr. Theodore Y. Kinne. This letter notifies the doctor that his note for

\$331.76 is due on the 15th instant, with \$5.19 interest, making a total of \$336.95, and desires him kindly to give this matter his attention. While it would appear that, when this letter was written, Turner was unaware of the death of Dr. Kinne, nevertheless, it unmistakably shows that the company considered the note a live obligation.

The contention of plaintiff in error was that this letter contained what was termed a "patent error," that the words "is due" should have been "was due," and that the moneys represented the moneys due on the 15th of February, and not on the 15th of March; but I agree with the disposition of this question, made by the trial judge in refusing a nonsuit, when he said: "But, whether it refers to a date before or a date to come, it has reference to the note as a live obligation, and an obligation which had reference to the keeping alive of an insurance contract in the future. This letter may be taken as evidence that before Dr. Kinne's death O. Merwin Turner had been authorized by the company to deal with that note as a live note, implying a dealing with the contract as a live contract; and it seems to me that the correspondence, taken all together, and the terms of the letter of March 11th, taken all together, also with the fact that there was an omission to inclose with the letter of February 15th (if it be so) the note that was intended to be sent with it, seems to me to leave open a construction of evidence that would warrant the jury in finding that after the 15th of February, and before the Doctor's death, O. Merwin Turner had been authorized to deal with this note as a live note and enforce a payment, instead of enforcing a forfeiture of the contract, and thereby waiving the forfeiture in behalf of the company."

The plaintiff in error further contends that it is difficult to understand how an absolute waiver of a forfeiture can be inferred from the letters of February 16th and March 11th; that both of the letters were written after the forfeiture had occurred, and the latter one, in fact, after the death of the insured. So far as the letter of February 16th is concerned, written concededly after the due day of the note, it has as much force legally in effecting a waiver of forfeiture as if written before that day. To quote again from Justice Bradley in *Insurance Company v. Norton*, supra: "In either case the effect of the legal indulgence is this: The company say to the insured: 'Pay your note by such a time, and your policy shall not be forfeited.' If the agreement be made after the note matures, such agreement is itself a recognition on the company's part of the continued existence of the policy, and consequently of its election to waive the forfeiture."

The point was further taken by the plaintiff in error, under the first assignment of

error, "that there was no evidence of a legal tender of the premium due on the policy," and consequently the offer to pay the note by Mr. Graham on March 14th, and the tender through the Western Union Telegraph Company at the home office on March 15th, would not avail, for the reason that the moneys tendered did not represent the amount then due, but was the sum due for principal and interest on February 15th, 30 days before the tender was made, and that, as the interest was not included to the date of the tender, the company was under no obligation to accept a part of the debt. It is questionable whether a tender of the unpaid premium was at all necessary after the rights of the parties had become fixed by the death of the insured, especially as the policy itself provides for offsetting the unpaid premiums against the amount due from the company on the policy. But we have not found it important to determine this point. If, as was suggested at the argument, the fourth clause of the policy means to say that nonpayment of premiums or notes given therefor works a forfeiture, it is difficult to perceive why it should not be held that the fifth clause of the policy, entitled "Grace in Payment of Premiums," makes no distinction between the grace given on failure to pay premiums and the nonpayment of a note given therefor. The amount due, in accordance with the letter of March 11th, was tendered to the defendant within the period of grace, 30 days, prescribed by the fifth clause aforesaid. On both occasions when made it was refused. The defendant refused to accept the amount tendered under any circumstances. Where a tender is refused, not on the ground that the amount is too small, but on some other ground, the objection to the deficiency is waived. *Am. & Eng. Ency.* vol. 28, p. 18; *Lambert v. Miller*, 38 N. J. Eq. 117. Had the objection to the tender been put on the ground that the amount was too small, there would be some justification for the claim now made by the plaintiff in error, that it was under no obligation to accept a part of the debt. But this ground was not taken at all. The company waived this objection when it placed its refusal of the tender on the grounds of denial of liability and a refusal to accept the amount tendered.

The other assignments of error were not pressed at the argument, and discussed then only so far as they were involved in the consideration of the assignment based upon the refusal to nonsuit; and no opinion is expressed upon the question whether the defendants below were entitled to a verdict in their favor, as a matter of law, on the construction of the policy and note. In my opinion, the motion to nonsuit was properly overruled, and the case submitted to the jury.

The judgment below should be affirmed.

WOOLSEY et al. v. WOOLSEY et al.

(Court of Errors and Appeals of New Jersey.
Dec. 6, 1905.)

EXECUTORS—ACCOUNTING—PAYMENTS.

A testator, after bequeathing two pecuniary legacies, devised and bequeathed the residue of his estate to his executors, in trust (1) to set apart a fund and pay the income to his daughter during her life; (2) out of the income derived from the remaining portion of his estate to pay annuities to his daughter and daughter-in-law, and apply a sum for the use of his grandson during minority. There was no income to pay the annuities, or the sum allowed for the grandson; but the executors paid moneys as annuities, and as an allowance for the grandson, and sought in their account to charge these payments against the corpus of the estate which was needed to pay the legacies and meet the trust fund for the daughter. *Held*, that they are estopped from denying that they had received income from which to make these payments, and are not entitled to an allowance for the payments as against the corpus of the estate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1149.]

(Syllabus by the Court.)

Appeal from Prerogative Court.

Frank Woolsey and James P. Northrop, executors of Charles A. Woolsey, filed their account, to which Alice M. Woolsey and Virginia M. Woolsey excepted. From an order overruling the exceptions, they appeal. Reversed in part.

See 59 Atl. 463.

Randolph Perkins and R. V. Lindabury, for appellants. Charles L. Carrick (Robert L. Lawrence, on the brief), for respondents.

SWAYZE, J. Charles A. Woolsey died July 4, 1895. By his will he bequeathed \$5,000 to Sarah A. Newell and \$10,000 to Virginia M. Woolsey. He devised and bequeathed the residue of his estate to his executors, in trust (1) to set apart \$20,000 and pay the income therefrom to his daughter, Alice, during her life; (2) out of the income derived from the remaining portion of his estate to pay therefrom to his daughter, Alice, \$1,000 per year, and to his daughter-in-law, Virginia M. Woolsey, \$2,000 per year, and to pay and apply for the use of his grandson, Herbert W. Woolsey, during his minority, a sum not exceeding \$1,000 per annum. Other provisions as to the disposition of the estate are not material to the present case. A large part of the apparent assets of the estate were invested in the C. A. Woolsey Paint & Color Company. The testator, in view of this fact, made the following provisions: "It is my will, and I do hereby direct that, with the exception of the funds necessary to pay legacies and create the trust estates hereby made, all surplus dividends and other moneys belonging to me and left by me at my death in the C. A. Woolsey Paint & Color Company shall be and remain therein as a surplus fund for the benefit of said business until

the division of my estate in the manner herein provided. I direct that the amount to be paid to my daughter, daughter-in-law, and grandson, annually as herein specified, shall so far as practicable be paid out of the income of my estate other than that derived from the C. A. Woolsey Paint & Color Company, and that only so much shall be taken from said company as may be necessary to make up the deficiency, and that all surplus accruing shall be and remain in said business for the purpose of increasing the surplus moneys or working capital thereof. In the event of the income of my estate being insufficient for any current year to pay such annual amounts, I direct that the deficiency be drawn from the accumulation of surplus income left by me or my executors in said company. It is my will, and I direct, that during the minority of my grandson, Herbert W. Woolsey, and in case he shall so long live, the shares of stock owned by me in the C. A. Woolsey Paint & Color Company be not disposed of, but held by my executors and trustees as part of my estate, and that such of my executors as are individual stockholders therein be elected to positions of trust and equal profit therein. And I further direct that my executors and trustees shall not be held to account for any diminution in my estate by reason of continuing my investments in and holding the stock of said corporation as a portion of their trust property and of my estate." No inventory of the estate was ever filed by the executors. The paint company became insolvent in January, 1903, and one of the executors, who had been active in its management, died about the same time. Thereupon on July 30, 1903, the surviving executors filed an account, to which Alice Woolsey and Virginia M. Woolsey excepted. Some of these exceptions were sustained by the orphans' court, and an order was made requiring the executors to give security in the sum of \$30,000 for the faithful performance of their duties under the will. Upon an appeal to the Prerogative Court, the Vice Ordinary advised the reversal of both decree and order. From the decrees of the Prerogative Court these appeals were taken by the exceptants.

The exceptions to the account which were sustained by the orphans' court and disallowed by the Prerogative Court were to the following claims for allowances to the executors: (1) For \$507.37 for money paid by the executors to the paint company on September 25, 1905. (2) For \$14,832.82 paid to Virginia M. Woolsey on account of annuity. (3) For \$7,499.72 paid to Alice Woolsey on account of annuity. (4) For \$4,450 paid to Virginia M. Woolsey, guardian of Herbert W. Woolsey. By an answer to the petition of appeal in the Prerogative Court the exceptants sought to question the adverse action of the orphans' court on certain exceptions, as is permitted by the rules of the

Prerogative Court on appeal from a decree of an orphans' court on the settlement of accounts (rule 2). The petition of appeal in this court complains of the action of the Prerogative Court upon these exceptions, and they must therefore be considered. They are: (1) The allowance to the executors of \$500 paid R. A. Simpson December 23, 1896. (2) The failure to charge the executors with a dividend of December 1, 1895, on the paint company stock. (3) The failure to charge the executors with a similar dividend of December 1, 1896.

To deal first with the four items which the orphans' court refused to allow as a credit to the executors. The item of \$507.37 arose in the following way: Several small debts of the testator, amounting in all to the sum mentioned, were paid by the paint company and charged to Mr. Woolsey's account, and the amount was repaid to the company by the executors as soon as they were in the funds. We think the orphans' court was right in refusing to allow this payment. The paint company was at the time heavily in debt to the estate, and there was no reason why the amount paid by it and charged against Mr. Woolsey's account should be repaid. By taking this course, the executors ultimately lost this amount unnecessarily. The other three items may be disposed of together. In considering the propriety of the action of the orphans' court, it is to be borne in mind that these items concern only the allowance side of the account. The executors have not been charged with assets which they failed to collect, nor with any loss by reason of a continuance of the testator's investments in the paint company, nor with interest which they failed to receive through mismanagement. They were charged by the orphans' court only with the sums which by their own account they admitted having received. The case does not, therefore, involve a construction of the clauses of the will authorizing a continuance of the testator's investments in the paint company, nor does it involve the jurisdiction of the orphans' court to charge executors with assets which they may have failed to receive through negligence. The only question is as to the propriety of the claim for allowance of the items above specified.

To understand the controversy, it is necessary to set forth the state of the account between the testator and the corporation at the time of his death, and subsequent dividends and payments. There was standing to his credit on the company's books at his death \$14,049.61. On August 1, 1895, a dividend was credited amounting to \$6,599.20, and on November 30, 1895, a further dividend of \$2,282.20. Beginning with October, 1895, payments were made by the company from time to time and charged to this account. At the time of the insolvency, the balance of the account was \$5,192.26. The executors proved a claim for this amount

with the receiver, and were paid a dividend of \$2,336.52. As the payments were made from time to time by the company, they were paid to Virginia M. Woolsey, individually and as guardian for her son, and to Alice Woolsey, as payments on account of the annuities provided by the will. If these payments are allowed as claimed by the executors, the assets in their hands will fall short of meeting the amount required for the legacies to Mrs. Newell (who has had no interest in her legacy) and Virginia M. Woolsey, and nothing will be left to make up the trust fund of \$20,000 for the testator's daughter, Alice. By the method of accounting adopted by the Prerogative Court, large sums will have been paid for the annuities which by the will were subject to the legacies, and these payments will have been made at the expense of the legacy to Virginia M. Woolsey and the trust fund provided for Alice Woolsey. It is not to the point that most of the moneys will have been received by the legatees. The testator was careful to distinguish between the legacies and the trust fund on the one hand, and the annuities on the other. The legacies and the trust fund were to be first provided for. The annuities were to be paid out of the income from the remaining portion of his estate. It is manifestly to the disadvantage of Virginia M. Woolsey and Alice Woolsey to have the legacy and the trust fund depleted by the payment of moneys which were paid and received on account of the annuities.

As was said by the Chief Justice in *Appleton v. American Malting Co.*, 65 N. J. Eq. 375, 381, 54 Atl. 454, it is absurd to say that a person suffers no wrong who has been unwittingly induced to exhaust his principal by the mistaken or fraudulent representation of those to whom he had intrusted it that what has been paid to him is income. The annuities were payable only out of income derived from the estate after setting aside enough money to pay the legacies. By paying the annuities, the executors represented to the annuitants that they had income out of which to make these payments after paying the legacies. Having led the annuitants to act on this belief, the executors are estopped from asserting the contrary.

Since the executors are estopped from denying that they had income available for the annuities after payment of the legacies, it can make no difference whether they are surcharged with this amount and allowed for the payments on account of annuities, or whether they are disallowed these payments as a credit against the corpus of the estate which is needed to pay the legacies. The sum of \$14,049.61 due the testator from the company at the time of his death was clearly a part of the corpus. The dividend of \$6,599.20 declared within a month of his death must also have been a part of the corpus. *Lang v. Lang's Executors*, 57 N. J. Eq. 325, 41 Atl. 705. Although the dividend

of November, 1895, may have been treated as earnings of the company after the testator's death and applicable to annuities, that dividend has never been paid; for all the payments have been treated by the corporation by the method of keeping the account, and by the executors by filing a claim with the receiver for the balance only, as having been made upon the open account, and therefore applicable to the earliest items of the account; and the balance still due after crediting the amount paid by the receiver exceeds the amount of the November dividend. Although the dividend paid by the receiver was based in part upon this November dividend, and may therefore be regarded as income to that extent, the executors are not entitled to the allowance as claimed, for they were allowed by the orphans' court \$4,959.74 for moneys paid Alice and Virginia Woolsey as interest on the legacies, as distinguished from the sums paid as annuities. This sum was allowed, although the executors failed to charge themselves with any income on the securities or cash actually in hand, and it far exceeds the total dividend paid by the receiver. They have, therefore, actually had allowance for the amount received from the company, so far as it can be called income. The testator did, indeed, provide that the amount to be paid to his daughter, daughter-in-law, and grandson annually should, as far as practicable, be paid out of the income of his estate other than that derived from the paint company; but this provision related only to the annuities, or, as the testator said, "the amount to be paid annually," and this provision of the will became of no importance in the actual situation, as there never was an income out of which the annuities could be paid. If the executors had followed the directions of the will, the assets actually received by them would have sufficed for the legacies and the Alice Woolsey trust fund. They chose, instead, to assume to pay annuities which they had no income to meet. They are not entitled to reimburse themselves at the expense of the legacies which the testator said should be paid before the annuities. We think, therefore, that the orphans' court was right in not allowing the executors for these payments.

Of the exceptions to the account which were disallowed by the orphans' court, three only were complained of in the answer to the petition of appeal. Two of these were to the failure of the executors to charge themselves with certain dividends of the

paint company. These exceptions are not sustained by the proofs, and the action of the orphans' court was right. The third complained of an allowance for \$500 paid to Simpson, one of the executors. The claim of the executors is that the money had been paid by Simpson to Alice Woolsey, and that he was entitled to be reimbursed therefor. The testimony as to this payment is unsatisfactory, and no voucher from Alice Woolsey is produced. One of the executors testified that Simpson advanced the money in some way or other; that he must have paid the \$500; that the witness never signed an estate check unless he was morally certain that it was all right. The other executor testified that he never signed an estate check without being thoroughly satisfied that the amount was correct; that Virginia was being paid \$250 interest; that Alice was looking to Simpson, and he was taking care of her; that the witness must have known at the time; that it was a good while ago to recall. In the absence of a voucher from Alice Woolsey, we think the evidence insufficient to warrant a credit of \$500 for money paid to the deceased executor. This exception should have been sustained.

The Prerogative Court also reversed the order of the orphans' court requiring the executors to give security. This order was made under section 140 of the orphans' court act (P. L. 1898, p. 767), which authorizes the court to require security whenever proof is made to its satisfaction that the property in the hands of the executor is unsafe, insecure, or in danger of being wasted. We think that the conduct of the executors in using money which should have been paid to the legatees, or invested to secure the trust fund for the testator's daughter, to pay annuities which should have been paid out of income received after paying the legacies and setting apart the trust fund, justified the conclusion that the property was unsafe in the hands of the executors. The amount of assets actually admitted to be still in their hands is a little less than \$6,000. The additional amount with which they are chargeable is over \$27,000. We think a bond of \$30,000 is not excessive.

The decrees of the Prerogative Court should be reversed. The decree of the orphans' court upon an accounting should be reversed, and the account restated in accordance with the views herein expressed. The order of the orphans' court requiring security should be affirmed. The exceptants are entitled to costs in both courts.

SHUSTER v. PHILADELPHIA, B. & W. R. CO.

(Supreme Court of Delaware. Jan. 16, 1906.)

1. MASTER AND SERVANT—FELLOW SERVANTS—OPERATION OF RAILROAD.

A yardmaster in charge of a yard and a brakeman and conductor are fellow servants of a car inspector employed in the yard to examine cars and determine whether they are in proper condition for use.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 494, 500.]

2. SAME.

The superintendent of a division of a railway company is not a fellow servant of a car inspector employed in a yard to examine cars and determine whether they are in proper condition for use, but is a vice principal.

3. SAME—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

A superintendent of a division sent a message to a freight conductor, directing him to move a crippled car and "take it on next" to his cabin car. There was no evidence that the car was crippled, except at one end. *Held*, that the message directed the conductor to put the crippled car behind the cabin car, with its uninjured end attached to the cabin car by means of the usual coupling, making the conductor negligent in putting the car before the cabin car, thereby relieving the company of liability for injuries received by a car inspector in consequence of the conductor's act; the car inspector and conductor being fellow servants.

4. SAME—CRIPPLED CARS IN TRAIN—NOTICE—SUFFICIENCY.

In an action against a railway company for the death of a car inspector in consequence of the negligent placing of a defective car in a train, the evidence showed that it was the custom of the company to give notice of the existence of crippled cars by placing on them shop cards denoting that they were injured, and were to be taken to shops for repair, and that the crippled car in question had on each side of it in the usual place such a shop card. The injured car, at the time of the accident, was not used by the company in its business. It was empty, and was being carried to the shop for repairs. *Held*, that the company was not guilty of actionable negligence in failing to give further notice of the crippled car.

5. SAME—RULES.

Since the proper place in a train for a crippled car depends on the character of its injury, it is impracticable to prescribe by general rule the place in which all such cars should be placed, and a railway company is not guilty of actionable negligence toward a servant for failing to establish a general rule.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 283.]

6. SAME.

Where it was usual for car inspectors to ride on trains run in on tracks for inspection, and to do so, if not absolutely necessary, was a convenience to them in the prosecution of their work, the failure of the company to establish a rule prohibiting car inspectors from riding on trains while they were run in on a track for inspection was not such negligence as to render it liable for injuries received by an inspector.

Error to Superior Court, New Castle County.

Action by Elsie D. Shuster, widow of Mahlon C. Shuster, deceased, against the Philadelphia, Baltimore & Washington Railroad Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

62 A.—44

Argued before NICHOLSON, Ch., and SPRUANCE and BOYCE, JJ.

William S. Hilles and William W. Knowles, for plaintiff in error. Ward & Gray, for defendant in error.

SPRUANCE, J. This action was brought by the plaintiff, the widow of Mahlon C. Shuster, for the recovery of damages for the death of her husband, alleged to have been caused by the negligence of the defendant company. Under instruction of the court the jury rendered a verdict for the defendant. To this instruction and the rulings of the court as to the admission and rejection of certain testimony, the plaintiff excepted. At the time of the accident which caused the death of Shuster, and for several years before that time, he was in the employ of the defendant as a car inspector. As such inspector, it was his duty to examine cars at the Edgemoor yard of the defendant, near the city of Wilmington, for the purpose of ascertaining whether they were in proper condition to be used in the business of the defendant. The yard contained 18 or 20 tracks, and was divided into two sections. As a train came in, it was run upon one of these tracks, inspected, and made up for its passage to the point of its destination. On July 22, 1903, a Pennsylvania Railroad box freight car, with the drawbar pulled out and part of the end sill off, was at Seaford, Del. On the same day Alfred Larimore, the conductor of a freight train from Delmar, bound north, received at Seaford from R. L. Holliday, superintendent of the Delaware Division of the defendant company, a telegram, giving the number of said car and directing him as follows: "Move this car from Seaford to Edgemoor. Take it on next to your cabin car." The conductor testified that he understood this to mean that he should place said car next ahead of the cabin car, and he, with the assistance of two of his train crew, did so place it in his train, and made it fast to the cabin car, which was the last car of the train, by means of a chain which he had found about the truck of the damaged end of the injured car. When, by whom, or for what purpose, the said chain had been put upon the injured car, is not disclosed by the evidence. The damaged car appears to have been attached to the cabin car as securely as was possible by means of said chain, and the journey from Seaford to the Edgemoor yard was made without accident, notwithstanding the fact that there was more slack or play between these cars than there would have been had they been connected by means of the usual coupling. Arriving at the Edgemoor yard, the yardmaster ordered the conductor to back his train on track No. 4, saying that everything was clear. This was in the evening after dark, about 8:05 according to one witness, and after 8:35 according to another. Thereupon the train was backed slowly in on

said track, at the rate of between four and five miles an hour; the brakeman, Murphey, standing on the top of the disabled car as a lookout, and Shuster and another car inspector, who had boarded the train while backing in on said track, sitting on the platform of the cabin car next to the disabled car, when the moving train came in violent collision with a car or cars standing on said track, and the shop car, the sill of which was from four to eight inches higher than the sill or platform of the cabin car, rode over and demolished the cabin car, and so injured Shuster and the other car inspector that they both died shortly thereafter.

It is clear that the proximate cause of the accident was the negligence of the yardmaster in directing the conductor to run his train upon track No. 4, and informing him that it was clear, when there was standing upon it a car or cars with which the train was liable to collide. Whether there was negligence on the part of the brakeman standing on the top of the disabled car is not clear from the evidence. If the conductor misinterpreted the telegram of the superintendent, and placed the injured car before, when he should have placed it behind, the cabin car, and coupled them together by means of the chain, instead of the usual and uninjured coupling on the good end of the injured car, he was guilty of negligence, which, to say the least, materially contributed to the fatal accident. But the yardmaster, the brakeman, and the conductor were all fellow servants of the car inspector Shuster, and, if his death was the result of the negligence of any or all of these persons, the defendant would not for this cause be liable in this action. *Wheatley v. P. W. & B. R. R. Co.*, 1 Marv. 305, 30 Atl. 660; *Oreswell v. W. & N. R. R. Co.*, 2 Pennewill, 210, 43 Atl. 629. On the other hand, Mr. Holliday, the superintendent, was not a fellow servant of Shuster, but a vice principal, and, if the death of Shuster was caused by the negligence of the superintendent, the defendant would be liable. *McKinley on Fellow Servants*, p. 292; 3 *Elliott on Railroads*, § 1321; 4 *Thompson on Negligence*, § 4951. It therefore becomes important to determine whether the superintendent was guilty of negligence in sending to the conductor the telegram given above.

It is within the province of the court to construe written instruments, and it is our duty, with the aid of the testimony in the case, to determine, if we can, the meaning of said telegram. While the order of the superintendent was to take the disabled car on next to the cabin car, it did not state whether it was to be placed before or behind the cabin car. A fair interpretation of the order would be that the disabled car, being next to the cabin car, should be placed where it could be safely carried. There is no evidence that this car was crippled, except at one end, and we can see no reason why it

should not have been put behind, and with its uninjured end next to the cabin car, and attached to it by the usual coupling. The uncontradicted testimony is to the effect that the accident would probably not have occurred had the shop car and the cabin car been coupled together with the usual coupling, and that the usual, safe, and proper place for a car with a broken coupler is behind the cabin car. Conductor Larimore testified that, if he had been using his own judgment, he would have put said car behind the cabin car, but that he understood the said telegram to mean that he should put it next before the cabin car, and for that reason he did so. We think that the said telegram was sufficiently explicit, and was not misleading, and that the conductor erred in his interpretation of it, and that in so doing, and in putting said car before the cabin car, and in attaching them together as was done, he was guilty of negligence; but, as before stated, he was the fellow servant of Shuster, and such negligence is not sufficient to charge the defendant in this action.

It is claimed by the plaintiff that the defendant was guilty of negligence in failing to give to its car inspectors proper notice of the dangerous condition of the injured car. It is in evidence that it was the custom of the defendant to give notice to all concerned of the condition and destination of crippled cars by placing upon them what were known as "shop cards," which denoted that they were injured and were to be taken to the shops for repair; and also that the crippled car in this case had on each side of it, in the usual place, a shop card of this character. It will be observed that in this case the injured car, at the time of the accident, was not being used by the defendant in its business. It was empty, had been laid off at Seaford because it was not fit for use, and was being carried to the shop for repairs. This case differs essentially from that of *Rodney v. St. Louis S. W. Railway Co. (Mo.)* 28 S. W. 887, where the defendant was held liable for injuries to an employee while coupling a damaged car. In that case the car had some time before been laid off as damaged and marked as such, but at the time of the accident it was without any danger mark, and was being used in the ordinary business of the company. Under all the circumstances of this case we think that there was no negligence on the part of the defendant in failing to give other notice of the damaged car than was given.

It was urged by the plaintiff that the defendant was guilty of negligence because it failed to provide proper rules for the conduct of its large and complicated business, in that it had no written or printed rule fixing the place in a train in which a crippled car should be put, or prohibiting car inspectors from riding upon a train while it was being run in upon the track for inspection. As the proper place in a train for a

crippled car would depend upon the character of its injury, it would be impracticable to prescribe by a general rule the place in which all such cars should be placed. It appears to have been usual for the car inspectors to ride upon trains while being run in on the tracks for inspection, and that this, if not absolutely necessary, was a convenience to them in the prosecution of their work. We are of the opinion that there was no negligence on the part of the defendant in failing to provide rules.

Having found that the death of Shuster was not occasioned by any negligence for which the defendant is liable in this action, it is not necessary to consider whether there was contributory negligence on the part of Shuster. Nor is it necessary for us to consider the assignments of error relating to the rulings of the court below as to the admission and rejection of testimony, as this subject was not discussed in the argument before us, and none of said rulings appear to affect in any way the question as to the negligence of the defendant.

We are of the opinion that there was no evidence upon which the jury would have been justified in finding a verdict for the plaintiff, and that the jury were properly instructed to find for the defendant, and that the judgment below should be affirmed; and it is so ordered.

LAYTON et al. v. JACOBS.

(Superior Court of Delaware. Sussex. April 8, 1904.)

1. WILLS—PROBATE—REVIEW—PARTIES.

When proceedings are taken, either on caveat or for review of the probate of a will, all the parties in interest must be in court either by citation or voluntary appearance.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 611.]

2. JUDGES — DISQUALIFICATION — RELATIONSHIP.

Where the register of wills with whom a petition for review was filed was the great-uncle of the wife of one of the petitioners for review, he was disqualified by relationship and interest to hear the petition.

Issue from the register of wills by Robert R. Layton and others against John T. Jacobs, as executor of Philip Richards, deceased. Remanded to the register of wills.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

R. C. White, J. M. Richardson, C. W. Whiley, Jr., C. W. Cullen, and J. L. Cahall, for plaintiff. Charles M. Curtis and Herbert H. Ward, for Susan W. Davis, legatee.

The following motion to dismiss petition for review was made:

"Susan W. Davis, one of the legatees under the will of the said Philip Richards, deceased, and one of the parties interested, by her attorney specially appearing in this proceeding for the purpose, hereby moves the

court to vacate and dismiss the petition for review of the said will and that the court decline to hear the issue heretofore sent to this court by the register of wills, for the following reasons, among others: (1) Because no citations were issued to the said Susan W. Davis and others interested under said will or to the other heirs at law of the said Philip Richards, deceased, who were not parties to said petition for review. (2) Because the register of wills waived a hearing of said petition for review without consent of all the parties interested. (3) Because the register of wills sent to this Superior Court an issue respecting said will without issuing citations to the parties interested, and without consent of all the parties interested, and without a hearing before the parties interested, and without affording any opportunity to the parties interested for a hearing before him. (4) Because the order made by the said register of wills on the 12th day of March, A. D. 1904, was in other respects informal, irregular, and erroneous."

LORE, C. J. The counsel for the heirs state that they now represent and did represent the respective heirs at law, except John T. Jacobs, at the time the caveat was filed. Mr. Jacobs is in court by the waiving of notice as executor, and it appears to us, from statements made here by counsel in open court, that all the parties who are interested are now in this court virtually, and have met this requirement of the statute. We therefore cannot grant your motion to remand the issue to the register. It is only fair to say that we think when proceedings are taken, either on a caveat or for a review, that at that time the parties must all be in court, either by citation or voluntarily (here they come in voluntarily); otherwise, there would be no end to interminable reviews, one after another. And it is therefore well enough for the parties to understand that

Mr. Curtis then made the following motion to remit the petition for review to the orphans' court:

"Susan W. Davis, residuary legatee under the will of Philip Richards, deceased, and one of the parties interested, by her attorney specially appearing in this proceeding for the purpose, hereby moves the court that the said petition for review and of record in this cause be certified and remitted by this court to the orphans' court of the state of Delaware in and for Sussex county, to be there heard by the judges thereof, instead of by the said register of wills, for the reason that there is a legal exception to the hearing of the said petition by the said Daniel J. Layton, as register of wills, who is interested in said cause by reason of his relation by consanguinity and affinity to some of the persons and parties interested, as appears by the affidavit herewith submitted, or that the said petition and record be certified and remitted by this court to the said Daniel J. Layton, register of wills, with an order that he proceed no further respecting said petition for

review, but that he forthwith transmit said petition of record, with a certified copy of the order of this court, to the orphans' court of the state of Delaware in and for Sussex county, in order that the same may be heard."

Accompanying said motion was the following affidavit of Susan W. Davis, the residuary legatee: "That she had no notice or knowledge of the filing of said petition for review or the order made thereon by the register of wills prior to the making of said order and the sending of said issue to the said Superior Court, and that she did not attend before the register of wills at any time while said petition was pending before him. That only a part of the persons interested have joined in said petition for review, there being other persons who are heirs at law of the said Philip Richards, deceased, who did not join in said petition for review. That the said Daniel J. Layton, register of wills in and for Sussex county aforesaid, with whom said petition for review was filed and by whom the said order was made, is interested in said cause, being the great-uncle of Rachel Layton, the wife of Robert Reese Layton, one of the petitioners for review, and by reason of said relationship is interested in said cause and therefore disqualified to hear the said petition for review or make any order respecting the same."

In support thereof the following brief was filed:

A judge who is related in any degree by blood or affinity to a party of record is disqualified to hear the cause. *Bayard v. McLane*, 3 Har. 139; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114. In *Bayard v. McLane*, there was an appeal from the Chancellor to the Court of Errors and Appeals, and in this latter court the judges were R. H. Bayard, C. J., and Judges Harrington, Layton, and Milligan. The Chief Justice was a party, and Judge Milligan was the brother-in-law or uncle of another party. The court was asked to certify to the Governor for appointment of a judge ad litem, and it was so ordered. Judge Harrington said: "The common law seems to have been very jealous on this subject and anxious to exclude the judge in any case where there was any degree of interest or relationship calculated to bias his judgment. It would be difficult and improper at present to lay down any general rule on the subject. The books do not announce any such rule; but those of high authority indirectly apply to it the same reasons that would operate as an objection to an arbitrator or constitute a ground of challenge to a jurymen."

The register of wills, at a hearing on a petition for review of a will, is both judge and jury, and the strict rule of disqualification of jurymen should be applied to him. The rule as to disqualification of jurymen in Delaware is very strict. *State v. Williams*, 9 Houst. 508-525, 18 Atl. 949; *Armstrong v.*

Timmons, 3 Har. 342; *Robinson v. Wilmington*, 8 Houst. 409, 32 Atl. 347. A person related by blood or marriage to the ninth degree to a party is disqualified to sit as a juror. *State v. Williams*, 9 Houst. 508-525, 18 Atl. 949. In *Armstrong v. Timmons*, 3 Har. 342, it was held: A cousin of one of the parties was disqualified; also another juror whose wife was a cousin to one of the parties; also a juror who was a cousin to a party in interest, though not a party on the record. In *Robinson v. Wilmington*, 8 Houst. 409, 32 Atl. 347, it was held that a taxpayer of the city was disqualified to sit as jurymen in a suit against city.

Affinity always arises by the marriage of one of the parties so related. A husband is related by affinity to all the consanguineal of his wife, and vice versa the wife to the husband's consanguineal; for, the husband and wife being considered one flesh, those who are related to the one by blood are related to the other by affinity." 1 Bl. Com. 435 (*Christiana* note 5). It seems that a statute was necessary to remove the disqualification of a taxable of the county as judge in any cause involving liability of the trustees of the poor in such county to support any poor person. Rev. Code 1852, amended in 1893, p. 379, c. 48, § 19.

Messrs. Cullen and White replied, contending that the mere relationship of the register of wills to one of the heirs was not such an "interest" as was contemplated by the Constitution.

LORE, C. J. The court are very clear in their judgment that under the constitutional provision Register Layton is disqualified to sit by reason of relationship and interest, and that the authority vests in the orphans' court to hear the petition for review.

The court thereupon made the following order: And now, to wit, this 8th day of April, A. D. 1904, a motion having been made to the court in behalf of John T. Jacobs, executor of Philip Richards, deceased, and Susan W. Davis, legatee and devisee under the last will and testament of said Philip Richards, deceased, that the record and issue heretofore certified to this court, in the above-stated cause, by Daniel J. Layton, Esq., the register of wills for the said county of Sussex, be remanded to the said register of wills by the order of this court; and it appearing to this court, by the affidavit of Susan W. Davis filed in this cause and by the admission in open court by counsel representing the petitioners in this cause and all of the heirs at law of the said Philip Richards, deceased, that the said Daniel J. Layton, said register of wills, is related by affinity within the fourth degree to Robert R. Layton, one of said petitioners in this cause (the said Robert R. Layton having intermarried with Rachel Layton, the grandniece of the said Daniel J. Layton, the said register of wills), it is considered, adjudged, and decreed by this court that the said Daniel J.

Layton, said register of wills, is under the Constitution and laws of this state, by reason of such interest and relationship, disqualified to take or have cognizance of the said petition for the review of the probate of the said last will and testament of said Philip Richards, deceased, mentioned in said record so certified by the said register of wills as aforesaid, and that said record and issue be forthwith remanded to the said Daniel J. Layton, the said register of wills."

McCARTER v. KETCHAM.

(Court of Errors and Appeals of New Jersey.
Nov. 28, 1905.)

1. CORPORATION—EXISTENCE—EVIDENCE.

Facts proved *held* to show the existence of a corporation de facto.

2. SAME—DISSOLUTION.

Where rights of third persons have arisen by reason of the acts of a corporation de facto, such corporation cannot be dissolved by any agreement or acts of the incorporators, so as to affect such rights.

3. SAME—ACTIONS ON SUBSCRIPTIONS.

The statute of limitations commences to run, as to unpaid subscriptions to the stock of a corporation which has become insolvent, after a call and assessment has been made for the amounts necessary to pay creditors.

(Syllabus by the Court.)

Error to Circuit Court, Essex County.

Action by Thomas N. McCarter, Jr., receiver, against William S. Ketcham, Jr. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank E. Bradner and Chandler W. Riker, for plaintiff in error. James E. Howell, for defendant in error.

GARRETSON, J. On the 23d day of January, 1893, Edward S. Campfield, William S. Ketcham, William S. Ketcham, Jr., Frank D. Holloway, and George W. Ketcham signed the certificate of incorporation of the Clinton Hill Lumber & Manufacturing Company. The certificate set forth the name of the company; the place where the business of the company was to be carried on; the objects for which the company was formed, being to manufacture and sell sashes, doors, blinds, and all planing mill work and carpenters' supplies, and to buy and sell lumber; the total amount of capital stock, being \$75,000, divided into 750 shares, of \$100 each; the amount with which the company would commence business, being \$40,500, being 405 shares, of \$100 each; the names and residences of stockholders and the number of shares held by each, being 100 shares by each of the first four named above and 5 shares by George W. Ketcham; and the time of the existence of the company, 50 years. This certificate was filed in the Essex county clerk's office. The certificate was never filed in the office of the Secretary of State. On the same 23d day of January, the first meeting of the stockholders was held,

at which a temporary chairman and secretary were elected. It was moved and carried that certificate of incorporation and waiver of notice of meeting be filed. By-laws were adopted and the original incorporators were elected directors. Upon the same day the directors met, William S. Ketcham was elected president, Edward S. Campfield vice president, F. D. Holloway secretary, and William S. Ketcham, Jr., treasurer. The oath of office was taken by the secretary. The treasurer was instructed to give bonds in \$5,000 and procure necessary stationery. The fixing of the principal office was laid over for the present, and a bill of sale was made by F. D. Holloway, one of the incorporators, to the company; said bill of sale representing what Holloway owed William S. Ketcham, another incorporator, and the property so transferred to be paid for by the stock of the company to be issued to William S. Ketcham.

By the bill of sale, dated the same 23d of January, Frank D. Holloway, in consideration of \$1 paid by the Clinton Hill Lumber & Manufacturing Company, stated to be a corporation of New Jersey, sold to the company the stock of lumber then in the hands of Frank D. Holloway & Co. or in course of shipment, also lease of premises corner Rose street and Jelliff avenue, buildings and improvements thereon, good will, accounts receivable, fixtures, and everything appertaining to the business of the said Frank D. Holloway & Co. On the 6th of February, 1893, a special meeting of the stockholders, called for 9 o'clock in the forenoon of that day, was adjourned to February 7th at 2 p. m. On the same 6th day of February, a special meeting of the directors was held, at which all were present except George W. Ketcham. The board of directors were authorized to call upon the stockholders for 40 per cent. of the amount subscribed to the stock of the company, to be paid into the treasury on or before Tuesday, February 7th, and certificates be issued therefor. The resignation of F. D. Holloway as secretary and director of the company was read and accepted. W. S. Ketcham, Jr., was elected secretary in place of Holloway, and the board adjourned until February 7th. On the same 6th of February a paper was signed by William S. Ketcham, Jr., treasurer, with the name of William S. Ketcham, president, to it, and with the seal of the company attached, which certifies that William S. Ketcham, Jr., is entitled to 40 shares of stock in the company. No payment was ever made on account of the stock subscription of William S. Ketcham, Jr.

On or about March 12, 1893, Holloway confessed judgment to Storeby, Sprague & Co., and also a judgment to the Cumberland Lumber Company. The consideration for these judgments was lumber sold to him prior to January 23, 1893. On March 16, 1893, these judgment creditors filed a bill in

chancery against the Clinton Hill Lumber & Manufacturing Company, the object of which was to set aside the bill of sale made by Holloway to that corporation. That company filed an answer to the bill setting up an advance of moneys to Holloway by William S. Ketcham, Sr.; that Holloway's business was at a standstill for lack of capital to prosecute the same and pay the debts contracted by Holloway; that Holloway agreed a company should be formed with capital sufficient to carry on the business; that the corporation was formed and organized; that Holloway stated that all the assets of his business had been procured with moneys advanced to him by William S. Ketcham, and offered to convey all said business either to William S. Ketcham direct or to the defendant, and, if made to the defendant, that the defendant would issue to William S. Ketcham its stock for the value of the same as property purchased, and Ketcham agreed to accept the stock of the company for the same; that Holloway made the bill of sale and the company issued to Ketcham its certificate of capital stock in payment of the purchase price or value of the business and property; that the defendant attempted to take possession of the property. The answer denies that the transfer from Holloway to the company was without consideration, or was made by him to delay, defeat, and defraud Holloway's creditors. This answer had attached to it an affidavit of William S. Ketcham, Jr., in which he swears that he is the secretary of the Clinton Hill Lumber & Manufacturing Company, and as to the truth of the matter in the answer.

A final decree was made in this suit November 14, 1893, adjudging that the bill of sale be set aside as against the judgments and executions of the complainants; that Thomas N. McCarter, Jr., be appointed receiver to take possession of the property transferred by Holloway to the company by the bill of sale; that the defendant forthwith transfer to the receiver all the property as received from Holloway and convert the same into cash, to be applied to the payment of the complainant's judgments and report to the court; and, if sufficient was not realized to pay the amounts due the complainants, the receiver was given leave to apply to the court for further relief. An appeal from this decree was taken to the Court of Errors and Appeals and the decree affirmed. April 1, 1895, upon petition filed by the complainants, it was ordered that the defendant pay the complainants the amounts due on their judgments and that execution issue to levy and make said sums. Execution was issued and returned unsatisfied. April 9, 1895, the same complainants filed a bill against the Clinton Hill Lumber & Manufacturing Company, alleging that it was insolvent, and praying for the appointment of a receiver, and May 18, 1895, Thomas N. McCarter, Jr.,

was appointed receiver. The claims as above stated of the complainants against the defendant were presented to the receiver and by him allowed, and upon appeal to the Chancellor from his allowance the determination of the receiver was affirmed.

November 8, 1899, the receiver in the last suit presented a petition to the Chancellor asking the court to levy an assessment against the stockholders, or direct the receiver so to do, requiring them to pay to the receiver such amount of their unpaid subscription as might be necessary to pay the debts of the corporation, and that the receiver have leave to bring actions to recover the money assessed against the stockholders. June 9, 1903, it was ordered and decreed by the Chancellor that the receiver be and is directed and authorized to assess, call, and collect the sum of \$6,344.97, with interest, from George W. Ketcham, George W. Ketcham, administrator of William S. Ketcham, Sr., and William S. Ketcham, out of their respective subscriptions as incorporators and stockholders of the Clinton Hill Lumber & Manufacturing Company, which have not been fully paid up (but not to exceed 60 per cent. thereof), and to enforce payment of such assessment and call by suit, if necessary, against each of the above-named delinquent subscribers and stockholders of the said corporation. July 17, 1903, the receiver gave notice to William S. Ketcham and George W. Ketcham, individually and as administrator of William S. Ketcham, Sr., that by virtue of a decree of the Court of Chancery of June 9, 1903, a copy of which was annexed to the notice, he (the receiver) did thereby levy an assessment upon them as original subscribers to the certificate of organization of the Clinton Hill Lumber & Manufacturing Company to raise and pay the sum of \$6,344.97, with interest, and that the amounts levied and assessed separately were: William S. Ketcham, \$3,095; George W. Ketcham, administrator, \$3,095; and George W. Ketcham, \$254.75. In said notice the receiver called upon the persons named to pay the same within 30 days, and, unless paid, he would bring suit.

In September, 1903, the receiver began suit against William S. Ketcham, in the Essex circuit court, alleging in his declaration the incorporation of the Clinton Hill Lumber & Manufacturing Company and the matters set out in the certificate of incorporation. He avers that the defendant subscribed for 100 shares of the capital stock, and agreed to pay therefor in cash at the par value whenever lawfully required, and that the defendant has not paid the amount of the subscription; that the corporation became involvent and the plaintiff was appointed receiver; that the Court of Chancery had authorized him to collect from the defendant and others, out of their subscriptions, an amount sufficient to pay claims which had been presented to

the receiver; and that the plaintiff made an assessment against the defendant of the sum of \$3,095, and notified him that he had levied the assessment, and by reason thereof the defendant became indebted to the plaintiff. To the declaration the defendant pleaded: (1) The general issue; (2) that the Clinton Hill Lumber & Manufacturing Company was never incorporated; (3) that the persons who had subscribed for stock of said alleged company agreed among themselves to cancel the subscription of the defendant; (4) the statute of limitations. Issue was joined on these pleas. Upon the trial of the cause the judge directed a verdict for the plaintiff, and judgment was thereupon entered.

The plaintiff in error seeks a reversal of that judgment chiefly upon the ground that the Clinton Hill Lumber & Manufacturing Company was never a corporation. It is not disputed that the incorporators signed the certificate of incorporation, which was in the form required by law; that the certificate was filed in the Essex county clerk's office; that the incorporators met, adopted by-laws, and elected a board of directors; that the directors met and elected officers; that the secretary took the oath of office; that the bond of the treasurer was fixed, and a bill of sale was made to the company of property of Holloway, and stock authorized to be issued to William S. Ketcham for the value of that property; that the board of directors was authorized to call upon the stockholders for 40 per cent. of the amount subscribed to the stock of the company; that the resignation of the secretary of the company was received, and a successor elected; that as a corporation it afterwards filed an answer to a bill of complaint filed to set aside the bill of sale which it had received from Holloway, and resisted the making of decree declaring that bill of sale a fraud upon Holloway's creditors. The company was a fully organized, active corporation de facto. It needed only the filing of its certificate in the office of the Secretary of State to be a corporation de jure. When the corporation purchased from Holloway property which Holloway's creditors might reach, the rights of outside persons intervened, and the original stockholders and incorporators could not end the corporation by agreement among themselves to abandon the enterprise or by destroying the certificate of incorporation. *Bibb v. Hall*, 101 Ala. 79, 14 South. 98; *Aultman v. Waddle*, 40 Kan. 195, 19 Pac. 730.

The original subscription for stock in the certificate of organization was liable to be paid immediately and as soon as call for the same was made. At the directors' meeting held February 6, 1903, a call for 40 per cent. of the amount subscribed to the stock was authorized. This amount then became due and payable, and left 60 per cent. subject to be called when required. When this was needed to pay creditors, and a call for

that purpose was made, it then became due and payable, and the statute of limitations began to run from the time of such call. It could not be considered as payable until the creditors' claim had been established and it had been ascertained that the corporation had no assets outside of its stock subscriptions to pay that debt. In the present case the Court of Chancery, in the suit to set aside the bill of sale, established the judgment obtained by the complainants in that suit against Holloway as a debt of the corporation, and by the subsequent proceedings to declare the corporation insolvent ascertained that the only assets out of which that debt could be satisfied were the unpaid stock subscriptions, and then made call upon the subscribers to pay. Unpaid subscriptions to stock are assets, and, the corporation being insolvent, the existence of creditors subjects these liabilities to the rules applicable to funds held in trust, and statutes of limitations do not commence to run in respect to them until after a call and assessment has been made. *Hawkins v. Glenn Trustee*, 131 U. S. 334, 9 Sup. Ct. 739, 33 L. Ed. 184.

We find no error in the proceedings below, and the judgment is affirmed.

STATE v. ROSA.

(Court of Errors and Appeals of New Jersey.
Nov. 22, 1905.)

1. CRIMINAL LAW—FORMER ACQUITTAL—DETERMINATION OF PLEA.

Ordinarily a plea of former acquittal raises an issue for the jury; but where, upon its face, it is insufficient in substance, it may be so adjudged on demurrer.

2. SAME—SUFFICIENCY OF PLEA.

A plea to an indictment for the murder of A. that defendant has been lawfully acquitted of the offense charged, in that he was previously indicted for the murder of B., who was shot at the same time and place and by the same person as A., and was tried and acquitted of the murder of B., the entire facts of the shooting of both A. and B. being presented and passed upon by the jury on the trial for the murder of B., and constituting one and the same offense, was obnoxious to demurrer, in that it failed to either allege or show that both homicides were produced by the same act.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 383, 407-409.]

3. HOMICIDE — EVIDENCE — THREATS — REMOTENESS.

In homicide, threats made by defendant about three weeks before the homicide were not too remote in time to be admissible.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 294.]

4. SAME.

In homicide, where it appeared upon the trial that defendant, an Italian, had shot deceased and another, who were both Italians, statements made by defendant, previous to the homicide, that he had a grudge against a couple of his countrymen and was going to shoot them, were admissible; it being for the jury to determine whether the statements referred to the men actually killed or not.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 295.]

5. SAME—ADMISSIONS — STATEMENTS IN DEFENDANT'S PRESENCE.

In homicide, a conversation between witness and another, overheard by defendant, in which one of the parties narrated a statement which he said had been made to him by defendant as to what the latter would do in case he was convicted of murder, was competent.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 898.]

6. SAME.

In homicide, a conversation containing a statement prejudicial to defendant, which took place immediately outside of the door of the room in which defendant was confined, was not rendered inadmissible because defendant made no reply thereto, and did not appear to the witness who was narrating the conversation to have been paying any attention to it; but whether defendant did hear the conversation, so as to render it competent evidence against him, was a question for the jury.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 898.]

7. CRIMINAL LAW—FORMER ACQUITTAL—EVIDENCE.

In a prosecution for killing A., the record of an acquittal of defendant on an indictment charging the killing of B., who was killed at the same time and by the same person as A., was properly excluded, in the absence of an accompanying offer to show that the same evidence was introduced on the trial for the killing of B. as on the trial for the killing of A.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 675.]

8. SAME—INSTRUCTIONS — CREDIBILITY OF WITNESSES.

A charge in a criminal case that contradictory testimony of witnesses "must" be considered by the jury as affecting their credibility was properly excluded as invading the province of the jury.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1772.]

9. SAME.

A charge in a criminal case that, if the testimony of a witness differed from testimony previously given by him on another occasion, it was the duty of the jury to consider that fact and to determine how his credibility was affected thereby, but that the mere fact that there was a discrepancy in the testimony of the witness on the two occasions did not justify the jury in immediately rejecting his evidence, and that they must consider the variance and determine whether it affected his credibility, was proper.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1891, 1892.]

Error to Court of Oyer and Terminer, Bergen County.

Jerry Rosa was convicted of murder, and brings error. Affirmed.

See 58 Atl. 1010.

Peter W. Stagg, for plaintiff in error.
Ernest Koester, for the State.

GUMMERE, C. J. The writ of error in this case brings up for review the conviction of Jerry Rosa upon an indictment charging him with the murder of one Demetrio Denofrio.

The first reason assigned for the setting aside of the conviction is that the trial court erred in ruling that a plea of *autrefois ac-*

quit filed by the defendant did not set out the facts necessary to constitute that defense, and in sustaining the demurrer to that plea filed by the state. The plea was in the following words: "This defendant hereby pleads to the above indictment that he has been lawfully acquitted of the said offense charged in said indictment, in that he was heretofore, at the April term, 1904, lawfully indicted for the murder of one Benedetto Galante, who, by the evidence in said cause, was shot at the same time and place, by the same person, as Demetrio Denofrio, and that this defendant was tried at said April term, 1904, by a jury, and lawfully acquitted; and for that the entire facts of the shooting of both persons, Benedetto Galante and Demetrio Denofrio, were presented by the evidence before said jury, which was one and the same offense as charged by this indictment and passed upon by said jury. This defendant pleads that acquittal as a bar to the trial of this indictment." Ordinarily a plea of former acquittal raises an issue for the jury; but, where upon its face it is insufficient in substance, it may be so adjudged on demurrer. *Commonwealth v. Bressant*, 128 Mass. 246; *Gormley v. State*, 37 Ohio St. 120; *Ency. Plead. & Prac.* vol. 9, p. 640; *Cyc.* vol. 12, p. 368. The present plea, in our opinion, is manifestly insufficient in a substantial respect. Although it sets out that Galante was shot at the same time and place that Denofrio was, and that they were shot by the same person, it fails to allege or show that it was the same act which produced both homicides, and this is universally held to be the essential feature in a plea of this nature; for it is the character of the act, not the results which flow from it, which determines the question of the guilt or innocence of the person who does it. In *State v. Cooper*, 13 N. J. Law, 371, 25 Am. Dec. 490, a case of note in our reports upon this subject, it is said: "The writers concur in stating that these pleas 'must be upon a prosecution for the same identical act.' " And, although that case was decided over 70 years ago, an examination of the textbooks, and of the later decisions bearing upon this point, will disclose no change or modification of this rule. It is not intended to intimate that a common-law plea of former acquittal is bad unless it expressly alleges that the indictment under which the acquittal was had, and that to which the plea is interposed, rest upon one and the same act. It is enough if from the facts set out in the plea such an inference necessarily follows. But no such conclusion necessarily follows from the facts set out in the pleading now under consideration. Circumstances may readily be imagined, not at all contradictory of the plea, under which the killing of Galante would have been justifiable, and that of Denofrio criminal; each resulting from a separate act. For instance, if Galante and Denofrio, being together, had

met the defendant at night on the street (as was the fact), and Galante had attacked the defendant and attempted to rob him, Denofrio standing by and taking no part in the affair, but, on the contrary, remonstrating against it, and the defendant had, in resisting Galante, shot and killed him, his act would have been entirely justifiable (*State v. Bonofiglio*, 67 N. J. Law, 239, 52 Atl. 712, 54 Atl. 99, 91 Am. St. Rep. 423); but, if he had then immediately turned and shot and killed Denofrio, his act in doing so would have been criminal, unless Denofrio, notwithstanding his apparent opposition to his companion's act, was in reality a participator in it, aiding and abetting it, or, at least, unless the defendant had reasonable ground for so believing. In such a situation the "entire facts of the shooting of both persons" might justify an acquittal on the charge of feloniously killing the one, and a conviction on the charge of feloniously killing the other. As the plea does not show that the death of Galante and of Denofrio resulted from one and the same act of the defendant, we have not considered it necessary to decide the question whether an acquittal upon an indictment charging the felonious homicide of A. is a bar to a conviction upon an indictment charging the felonious homicide of B., when it is shown that the death of each was produced by the same act of the person indicted.

Other reasons, upon which the conviction before us is attacked, are rested upon alleged erroneous rulings of the trial court upon the admission and exclusion of evidence. It is first objected that the state was permitted to prove by two witnesses that the defendant, about three weeks before the homicide, exhibited a revolver to them, stating at the same time that there were a couple of his countrymen that he had a grudge in for, and that, if they bothered him, he was going to shoot them. The ground of objection is that the time of the making of the statement was "too remote" from the date of the homicide, and, further, that the defendant did not state that either of the two men against whom the threat was made was Denofrio. Why the time of making the statement was so remote as to render it incompetent we are not informed by counsel, nor are we able to perceive for ourselves. Nor do we consider that the failure of the defendant to disclose the identity of the two men against whom he had the grudge rendered the testimony incompetent. If, in fact, one of them was Denofrio, it is not denied that the evidence was competent. Whether or not such was the case was a matter of inference, to be drawn from the other facts proved; and the drawing of that inference was for the jury, not for the court.

The second objection to the admission of evidence was that the court permitted one Buonocore to relate a conversation had by him

with one Conti, embodying a statement which Conti declared had been made to him by the defendant, as to what the latter would do in case he was convicted of the murder. The conversation was alleged to have taken place at the second-floor door of the jail in which the defendant was then confined. According to the story told by the witness, he himself was then standing just outside the door, and Conti and the defendant were standing right by him, just inside the door. There were a number of other Italians standing about the door at the time. On his cross-examination the witness stated that the defendant did not say anything in reply to Conti's statement, and that he (the defendant) was not paying any attention to what Conti was saying. The contention is that the court should have suppressed this conversation because it was manifest that the defendant did not hear it. That the evidence was competent, if the defendant heard the conversation, cannot be controverted. In *Donnelly v. State*, 26 N. J. Law, 601, this court thus declared the rule: "When a matter is stated in the presence of a person which injuriously affects his rights, and he understands it, the statement and his reply, or silence, are both admissible." Whether the defendant did hear the conversation, or not, was for the jury. He was in a position where he might have heard it. His failure to make any reply is not conclusive proof that he did not. Nor is the statement of the witness that the defendant was not paying any attention to what Conti said conclusive upon the point. It was merely his opinion, based upon his observation of the defendant at the time, and did not at all determine the fact. It was therefore proper to allow this evidence to go to the jury.

It is also contended that the trial court erred in excluding the record of the acquittal of the defendant on the indictment for the killing of Galante. The ground upon which this contention is rested is thus stated by counsel in his brief: "The defendant had a right to offer the record in evidence to show that he was not the person that killed Galante, and that proof would have corroborated the defendant's denial" that he was guilty of the charge upon which he was then being tried. The fallacy of this contention lies in the assumption that the record would have shown that the defendant had not killed Galante. It would only have shown that the evidence produced on the trial of that cause had failed to satisfy the jury that the defendant had feloniously taken the life of Galante. As we have already pointed out, the acquittal of itself constituted no bar to the conviction of the defendant for the wrongful killing of Denofrio. Whether it would have been evidential of his innocence of the latter offense, if it had been shown to have been rested upon precisely the same evidence as that produced upon his trial for that offense, is a question which the case before us does not present, for no offer was made to

show that such was the fact. The only question which is now presented is whether the record of his acquittal of the one offense, without more, was evidential of his innocence of the other; and this question must be answered in the negative.

It is further argued that the conviction should be set aside for the refusal of the trial court to charge the following request, submitted on behalf of the defendant: "Where a witness, when testifying on a former occasion respecting the same interview to which his evidence on this trial is now directed, testifies differently, in an important incident, which he now narrates, that circumstances must be considered by the jury as affecting his credibility on the question as to whether they will believe the interview which he has testified to, notwithstanding any explanation which he may give for the discrepancy." This request, as submitted, was properly refused. Its vice lies in the proposition that such a variation in the testimony of a witness "must" be considered by the jury as affecting his credibility. The determination of the amount of credit to be given to a witness is peculiarly the province of the jury; and any attempt on the part of the court to invade that province, and to restrict the jury in that regard, would be highly improper. The court properly instructed the jury upon this matter that, if the testimony of a witness given on the trial differed from that given by him on another occasion, it was the duty of the jury to consider that fact, and to determine how his credibility was affected thereby, but that the mere fact that there was a difference in the testimony of the witness on the two occasions did not justify the jury in immediately rejecting his evidence, and that they must consider the variance, and determine whether his credibility was affected by the contradiction.

Other reasons assigned for the reversal of the conviction are directed at alleged errors existing in the charge of the court to the jury. Our examination of the charge leads us to the conclusion that the various instructions which have been made the subject of criticism by counsel contain no legal error. But one of these alleged errors presents a question of sufficient importance to require discussion. Among the witnesses produced upon the part of the state was one Michael Buckino, who was called to prove a confession of guilt made to him by the defendant. The testimony of this witness was that the defendant, while they were both inmates of the county jail, told him that he had shot both Galante and Denofrio; that at the time of the shooting he was in the company of a man known in the case as "Frank"; that he first shot Demetrio Denofrio and then Benedetto Galante; that then he "handed this revolver to Frank, and that Frank put this revolver in Denofrio's hind pocket." From other evidence in the case it had been made

to appear that shortly after the shooting there was found in the coat pocket of Galante a five-chambered revolver, four of the chambers of which were loaded. A loose cartridge was also found in the pocket. The revolver carried a bullet of different size from that which produced Denofrio's death, and had no discharged cartridge in it. The court, in its charge, after speaking of the fact of the finding of this revolver upon the person of Galante, and pointing out the fact that it was impossible that this could have been the weapon with which the killing of Denofrio was done, referred to the bearing which these facts had upon the testimony of Buckino in these words: "The evidence of Buckino is that the defendant told him that he (the defendant) 'handed this revolver to Frank and Frank put this revolver in Denofrio's hind pocket.' This is the witness' statement of what the defendant told him, and the fact that the pistol could not have been the one with which the shooting was done cannot cast any discredit upon the witness' statement." The alleged error in this instruction is that it took from the jury the determination of the question whether the finding upon Galante of this pistol cast discredit upon the story told by the witness of the defendant's confession to him. It is difficult to perceive how the fact that a pistol which had not been discharged, and which could not have been used to produce Demetrio's death, had been found upon Galante, threw any discredit upon the statement of the witness that the defendant had told him that the pistol which he (defendant) had used had afterward been placed by Frank in Denofrio's hind pocket. But, assuming that it had a bearing upon the credibility of the witness, it seems to us that the language of the court, construed in connection with the rest of his charge upon this point (which is too voluminous to set out in full), was nothing more than an emphatic declaration of the court as to its own view of the effect of this fact upon the credibility of the witness, and not an instruction to the jury as to its legal effect thereon.

Finding no errors in any of the matters complained of, we conclude that the judgment under review should be affirmed.

STOVER v. HELLYER et al.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1905.)

MORTGAGES—LIEN—PRIORITIES—JUDGMENTS.

A mortgage made by a grantee of lands to the grantor thereof, and which recites that it is a purchase-money mortgage, and contains a clause that certain judgments against the grantee which are mentioned therein shall have priority in lien over the lien of the mortgage, is by such clause rendered subject to the lien of the judgments.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 312.]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by Henry W. Stover against Josiah Hellyer and others. Judgment for defendants (59 Atl. 470), and complainant appeals. Affirmed.

B. W. Ellicott, for appellant. James Buchanan, for respondents.

FORT, J. The bill in this case is filed for the foreclosure of a mortgage and for an injunction to restrain the three defendants, who are the executors of the late Samuel K. Wilson, from further prosecuting a certain action of ejectment to recover the mortgaged premises pending the foreclosure. The executors of Samuel K. Wilson claim title to the property under a deed made by the sheriff of Mercer county upon a sale of the mortgaged premises under three separate judgments held by them against the defendant Hellyer, the mortgagor, and which judgments were so held at the time the mortgage was made, and which are expressly referred to in the mortgage. The facts as to the making of the mortgage, and the circumstances under which it was made, are sufficiently stated in the opinion of the learned Vice-Chancellor in the court below.

There is, as it seems to us, but a single question for decision, viz., does the complainant's mortgage, which is concededly a purchase-money mortgage by its terms, give priority of lien upon the mortgaged premises to the Wilson judgments over the mortgage itself? The mortgage contains this clause: "It is understood and agreed by and between the parties hereto that the lien of three judgments recovered in the New Jersey Supreme Court against said Josiah Hellyer and now held by Samuel K. Wilson shall have priority over the lien of this mortgage, together with all and singular the profits, privileges and advantages, with the appurtenances to the same belonging or in any wise appertaining." Upon the margin of the mortgage, after the above clause and near the end of the mortgage, this clause is written, viz.: "It is hereby understood by the parties herein interested that this mortgage is given to secure so much of the purchase money." This latter clause was inserted in the mortgage at the time it was executed upon the requirement of the mortgagee. Such at least is the proof. Both these clauses appearing, it is the duty of the court, if it can do so, to so construe the mortgage that both may stand.

In my view the mortgage is upon its face free from ambiguity. Both these clauses can be given full force without producing conflict or uncertainty. The clause above quoted, giving priority to the Wilson judgments over the lien of the mortgage, is too clear for construction. There is no contention that, if it stood alone in the mortgage, it would not give the judgments priority. Does the inserted clause, declaring the mortgage to be a purchase-money mortgage, nullify the priority given the Wilson judgments?

We are unable to so construe it. It seems to us that the two clauses may stand together in the mortgage and both be enforced. Where the parties have expressed the agreement in plain words, there is nothing to construe, and the only thing the court can do is to enforce the agreement. *Bower v. Hadden Blue Stone Co.*, 30 N. J. Eq. 171. A mortgage may well be a purchase-money mortgage and be by agreement postponed in priority to other liens. The statement that it is a purchase-money mortgage is merely the statement of a fact. Whether the ordinary consequence shall follow from that fact may be regulated by agreement. Here it is done by the plain terms of the mortgage itself. There is no difficulty to give force to both clauses so that both may stand. By its terms the mortgage is a purchase-money mortgage, but expressly made subject to the lien of the Wilson judgments.

We have not considered the other questions raised or passed upon in the opinion below. On the ground here stated, we think the decree of the Court of Chancery should be affirmed.

MOORE et al. v. GALUPO.

(Court of Errors and Appeals of New Jersey.
Dec. 5, 1905.)

APPEAL—DISMISSAL.

Where, since decree for defendant in an action to compel performance of a contract to purchase real estate, the complainant has so altered the condition of the real estate as to make it impossible to enforce the contract, this is not cause for dismissing complainant's appeal; the proper practice being to present that fact by bill of review in case the judgment is reversed.

Action by Samuel W. Moore and others against Joseph Galupo. From a decree dismissing the bill, plaintiffs appeal. Heard on motion to dismiss appeal. Denied.

See 55 Atl. 628.

Clarence L. Cole, for the motion. Joseph H. Gaskill, opposed.

PER CURIAM. On a verified petition of respondent, setting out that the bill (which by the decree appealed from, was dismissed) sought to compel respondent to perform an alleged contract to purchase certain real estate, and that since decree, appellant has so altered the condition of the real estate as to make it impossible or inequitable to enforce the contract, it was prayed that this court would allow a rule on appellant to show cause why the appeal should not be dismissed for that reason.

If the appeal goes to hearing and is decided in favor of petitioner, the matter will be entirely disposed of. If the decree below should, however, be reversed, and a decree requiring performance be made, petitioner, if entitled to it, can obtain the relief he now seeks by a bill of review upon the newly discovered matter. *Norris v. Le Neve*,

3 Atk. 26; Story, Eq. Pl. pp. 404, 408; 2 Daniell, Chan. Pl. & Pr. 1637; Mitford, Pl. 79. While a bill of review for such a cause can only be filed by leave of the court, such leave will doubtless be obtained, if respondent's petition here correctly states the facts. There may occur cases in which, to prevent injustice, this court will intervene and determine questions of fact affecting the status of an appeal. But such intervention should be necessary to prevent injustice, and not be resorted to for the mere convenience of the respondent. Where an order denying a preliminary injunction against the execution and delivery of a lease was appealed from, this court, after allowing and discharging a rule to show cause why the appeal should not be dismissed, because the lease had been actually executed and delivered, proceeded to hear and determine the appeal, and reversed the order appealed from, and remitted the cause, with direction that the injunction issue "unless it appears by such proceedings as may properly be taken in the court below that some essential change * * * has taken place in the status of the case by reason of which the equities are changed," etc. *Black v. Del. & Raritan Canal Co.*, 24 N. J. Eq. 455, 483. It appears by the dissenting opinion of Beasley, C. J. (page 488), that the court decided not to admit evidence in proof of extrinsic facts, by which he evidently meant the fact that the lease had in truth been executed and delivered, so that an injunction against its execution would be a mere *brutum fulmen*. The court in that case laid down the practice that must be followed in this case. Although the respondent there placed before the court facts which, if established by proof, would render the appeal of no avail, the proposition to investigate was not adopted, but refused. The appeal was heard and decided, and obviously the refusal to admit the proof, and the proceeding to hear the appeal, went on the ground that the relief which might be appropriate could more properly be granted in the court below.

This is the situation of the case before us, and, for the reasons above mentioned, the motion is denied.

VINCENT v. VINCENT et al.

(Court of Chancery of New Jersey. Jan. 16, 1906.)

1. WILLS—PROBATE—JURISDICTION.

Since the orphans' court has exclusive jurisdiction of the probate of a will, and has the power generally to revise proceedings for probate tainted with mistake, fraud, or illegality, a court of equity will not entertain jurisdiction to set aside a will or the probate thereof.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 543.]

2. COURTS—COURT OF GENERAL JURISDICTION.

The orphans' court is a superior court of general jurisdiction, and has the same au-

thority over its decrees by inquiring into the authority of its attorneys to appear as may be exercised by any court of general jurisdiction.

Suit by Harry J. Vincent against Amella Vincent and others. Heard on demurrer to bill. Sustained.

Jerome D. Gedney, for complainant. Howe & Davis, for demurrants.

EMERY, V. C. The bill demurred to discloses this case: Thomas Vincent died on February 18, 1904, seised and possessed of considerable real and personal estate, leaving a widow and, as heirs at law and next of kin, four sons, three daughters, and two infant children of a deceased son. After his death a paper writing, purporting to be his will, was offered for probate to the surrogate of Essex county. No caveat appears to have been filed, but on account of the appearance of the paper itself (its informality, interlineations, changes, and erasures, and its lack of an attestation clause), the surrogate declined to admit the writing to probate, and on March 2, 1904, issued citations to the widow and all of the next of kin to appear before the orphans' court on March 12, 1904, in the matter of the probate. The statute (orphans' court act [Rev. 1898, § 13; P. L. p. 718]) directs that "in case doubts arise on the face of the will, the surrogate shall not act in the premises, but issue citations to all persons concerned, to appear before the orphans' court of the county, which court shall hear and determine the matters in controversy." Complainant signed a paper authorizing by name a proctor of the court to acknowledge service of the citation on his behalf, and due service was acknowledged by the proctor on March 4, 1904, by indorsement in writing upon the citation. The authority to acknowledge service was filed in the surrogate's office. The paper offered as decedent's will was admitted to probate by the orphans' court on March 15, 1904, three days subsequent to the return day of the citation and letters testamentary were issued to the widow and two of the brothers of complainant, the executors named in the will. They have taken possession of the estate, filed an inventory (alleged in the bill to be below the value of the property), and are proceeding under the will to sell and dispose of the personal estate and the real estate not specially bequeathed.

The bill alleges that this paper authorizing the proctor to acknowledge service of the citation, was signed at the request of one Teed, and under false representations by him that it was a paper of a different character, and for an entirely different purpose, viz., an application to have the widow appointed guardian of one of the daughters, who was non compos mentis, and that if not signed by complainant the court would appoint a stranger as guardian; that complainant, being willing to do this, and being unacquaint-

ed with business or legal matters, signed the paper, supposing it was for this purpose, relying on Teed's representations, and without consultation or advice. Complainant himself never employed or retained the proctor. He alleges that by reason of these false representations, the proctor's acknowledgment of service was unauthorized, that he was never served with the citation, did not appear at the return thereof, and knew nothing of the proceedings for probate, and has been deprived of his day in court in reference to the probate. He prays that the probate may therefore be set aside as to him. The bill further alleges that Teed had been a bookkeeper employed by the deceased, and that at the time of procuring complainant's signature, he was in the employment of the sons of decedent, who had been connected with their father in the business, and were still continuing it, but beyond this does not disclose any connection between Teed and the executors, who are the widow and two sons, Charles and Edward, nor charge that they are in any way parties to Teed's misrepresentation, nor does it charge that the proctor had any knowledge or information of the misrepresentation. Neither does it allege that the paper was not the will of deceased, nor that on the proofs submitted the will should not have been submitted to probate. The whole case stated by the bill, and the relief asked, extends only to controlling the effect of the probate itself.

The probate of a will, so far as the personal estate is concerned, is a proceeding in rem, in the strict sense of that term, and within the exclusive jurisdiction of the orphans' court. *Quidort's Adm'r v. Pergeaux*, 18 N. J. Eq. 472, 477 (Zabriskie, Ch.; 1867). For this reason, and the further reason that courts invested with jurisdiction for probate have generally power to check and revise proceedings for probate tainted with mistake, fraud, or illegality, a court of equity will not entertain jurisdiction to set aside a will or the probate thereof. *Broderick's Will* (1874; *Bradley, J.*) 21 Wall. 503, 509-512, 22 L. Ed. 599. This court can neither review the proceedings of the orphans' court, nor revoke the probate, nor decree intestacy. For fraud in the proceedings for probate which the probate court has no power to reach, it was held in a case before Lord Hardwicke, that this court may afford a remedy under its general jurisdiction for fraud, but this remedy is only by a decree which will compel the parties who have fraudulently procured the probate, to consent that proper proceedings may be taken in the probate court upon another application for probate, and this remedy was given only because the fraud in the probate proceedings was of such a character that the ecclesiastical court could not give relief. *Barnesley v. Powell*, 1 Vesey, Sr. 284 (1749). This decision was based on a supposed lack of power in the ecclesiastical court in Eng-

land to set aside a deed consenting to the probate, and was, as Mr. Justice Bradley says, altogether exceptional. It is not authority for an exercise of the jurisdiction, where the fraud alleged relates to the action of an officer of the court in the court of the proceedings. Where the fraud in the probate proceedings is such that a probate court itself has power to give relief, this court should not undertake to control the decree for probate, by directing consent to another probate. It is settled under our decisions that the orphans' court is a superior court of general jurisdiction in probate and other special cases, not an inferior court of limited or special jurisdiction. *Hess v. Cole*, 23 N. J. Law, 116 (Sup. Ct. 1851); *Plume v. Howard Savings Inst.*, 46 N. J. Law, 211, 228 (Sup. Ct. 1884); *Clark v. Costello*, 59 N. J. Law, 234, 237, 36 Atl. 271. (Err. & App. 1896). Where a decree is entered in this court against a defendant on an unauthorized appearance of a solicitor, the decree will be set aside as against the defendant on motion (*Mutual Life Ins. Co. v. Pinner*, 43 N. J. Eq. 52, 10 Atl. 184 [Van Fleet, V. C.; 1887]), and the same control over its judgments or decrees by inquiring into the authority of its attorneys to appear, may be exercised by every court of general jurisdiction. In the case (*In re Myers' Estate* [N. J. Prerog.] 59 Atl. 259 [Magie, Ordinary; 1904]), the probate of a will was set aside by the orphans' court, on an application by petition made nearly six years after the probate, one of the grounds being fraud in procuring the abandonment of contest of probate by caveators. The ordinary, on appeal, considered and determined the question of alleged fraud in the proceedings, reaching a conclusion in favor of the probate, and also denying the application, because of laches. But the right of the orphans' court and of the ordinary on appeal to pass upon the question of vacating the probate because of fraud in the proceedings, was acted on without question, and this was in line with the view expressed by Green, J., in *Ryno's Ex'r v. Ryno's Adm'r*, 27 N. J. Eq. 522, 525 (Err. & App. 1875), that if the probate of a will is irregular or voidable for any cause, the remedy is by appeal to the ordinary or by proceeding for the revocation of the letters. In *Clement's Appeal*, 25 N. J. Eq. 508 (1874; *Runyon, Ordinary*) an order of the orphans' court revoking letters of guardianship obtained through false representations, was sustained on appeal, and the power of the court to guard against frauds perpetrated on the court itself, was held to be sustained by the authorities.

The decree for probate, as a proceeding in rem, binds all the world, and must either stand or be revoked in toto, and any decree in this suit (brought only to revoke the probate) that the authorization of the proctor was procured by fraud on defendant, would be of no practical effect, except as incidental

to a proceeding to revoke the probate and for a reprobate of the will before the orphans' court or the ordinary. If complainant has any relief in equity against the alleged fraud, it can only be for the reason that the orphans' court has no power to revoke the probate, and it is essential that complainant should show this lack of power, either by an application to that court in this case and its denial of its power, or by decisions in other cases, establishing this lack of power. No application appears to have been made to the orphans' court to revoke the probate and for a reprobate, nor does it appear that any such application is proposed. Nor has any decision been referred to showing the lack of power in the orphans' court. Until this does appear, this court should not exercise a jurisdiction over the decree, which can only be ancillary in its character, and which is, or at least may be, altogether unnecessary.

I should say, further, that if the jurisdiction of the court is to be exercised to relieve against alleged frauds of this character in the probate proceedings, this bill fails to disclose a case which entitles complainant to a personal decree against any of the defendants, based on any inequitable or unconscientious conduct. It fails to allege any facts showing on the part of any of the defendants any connection with or responsibility for the misrepresentations of Teed, or any knowledge thereof by them or their solicitor at the time of the probate, and is therefore defective. *Kinney v. Emery*, 38 N. J. Eq. 101 (1884; Runyon, Ch.). But the question of exercising the jurisdiction has been raised, and without passing on this aspect of the case I will advise a decree sustaining the demurrer and dismissing the bill without prejudice.

In re ELLIS.

(Court of Chancery of New Jersey. Jan. 10, 1906.)

INSANE PERSONS—SUPERSEDING INQUISITION.

An order superseding an inquisition in lunacy will not be granted, where the proceedings sought to be superseded merely adjudged the person insane and directed his commitment to an insane asylum, without affecting his property rights.

In the matter of William B. Ellis, an alleged lunatic. On application to supersede proceedings in lunacy. Dismissed.

Joseph Callahan, for petitioner.

EMERY, V. C. On an application made to the Supreme Court of the state of New York, in and for the county of New York, for the commitment of petitioner as an insane person, an order was made by said court, on May 20, 1903, which adjudged petitioner insane and directed his commitment to a hospital for the insane in that state. Petitioner

never was in fact committed, having escaped. He now resides in New Jersey, and applies to this court for an order in the nature of an order under our practice superseding the inquisition in lunacy. Orders of this character superseding the inquisition in lunacy and directing restoration of the lunatic's property are appropriate only when the proceedings against the lunatic are such as to divest him of the title to his property, or to form the basis of proceedings for that purpose. The proceeding in New York was not of this character. It was a statutory proceeding on the petition of the commissioner of charities for the sole purpose of securing the custody of his person in an asylum, and had no effect whatever on his property rights. The proceedings would not, in my judgment, be admissible in evidence against the lunatic, should the question of title to his property come in question. *Leggate v. Clark* (1873) 111 Mass. 308, 310. In this case an order of commitment to an asylum as an insane person, under statutory proceedings, was held not to be admissible as evidence. In a suit involving title to the alleged lunatic's rights, on the question of his capacity to transact business.

The application will therefore be dismissed.

PERRINE v. PENNSYLVANIA R. CO.

(Court of Errors and Appeals of New Jersey. Nov. 18, 1904.)

1. WATERS AND WATER COURSES—RIGHT OF WAY—CONSTRUCTION.

Where a railroad company constructed a fill over a water course, it was bound to learn all the conditions as to the character of the stream, how it had been affected by previous rainstorms, etc., and to provide a suitable culvert to carry off the water; but no such duty rested on an upper riparian property owner, who might be injured by water turned back on his premises, because of such insufficient culvert, so as to prevent recovery for such injuries, where he failed to see that the culvert was of adequate size.

2. SAME—PROPERTY OWNER—INFORMATION—PRESUMPTIONS.

Where plaintiff's property was injured by water of a stream flowing back on his land because of an insufficient railroad culvert, the fact that plaintiff had erected his grain stacks on a knoll, which he had never known to be covered by water, did not raise a conclusive presumption that defendant railroad company, with the knowledge it should have obtained concerning the stream, should not have reasonably anticipated that this fill, as constructed, would be likely to flood the knoll.

Error to Supreme Court.

Action by Charles H. Perrine against the Pennsylvania Railroad Company. From a judgment for plaintiff (61 Atl. 87), defendant brings error. Affirmed.

Alan H. Strong, for plaintiff in error. Theodore B. Booraem, for defendant in error.

REED, J. The defendant in error, Perrine, sued the Pennsylvania Railroad Company to recover the damages resulting to

him from backwater in Indian Run, a stream which flowed through Perrine's land. The railroad company had dammed this stream, and had placed a culvert to carry through the embankment the water flowing in Indian Run. The plaintiff's case was rested upon the insistence that this culvert was insufficient in size and defective in structure, and that because of this the water of the creek was held back and flooded plaintiff's land. The jury so found.

The single ground assigned for the reversal of the judgment entered upon this verdict is that the trial justice permitted the jury, in estimating the damages, to include the injury caused to five stacks of wheat belonging to the plaintiff below. These stacks had been placed on a knoll about 18 inches higher than the surrounding land of the plaintiff. The request to charge was that the defendant was not liable for injury to these wheat stacks, which stood upon ground which never before was covered by water. The trial justice refused this request, but charged that if the wheat was damaged because of the smallness of the culvert—smaller than the defendant should have anticipated the needs to be—and the backwater came, and the wheat was flooded and injured as a result thereof, then he may recover what you think is proper to be allowed for that. The argument in support of this request to charge is rested upon the admission of the plaintiff, upon cross-examination, that he thought his wheat was perfectly safe on the knoll, and that he had never known that knoll to be covered by water. The argument drawn from this testimony by the counsel for the plaintiff in error is that, if the plaintiff below had no reason to anticipate that these stacks would be flooded by the insufficient culvert, the defendant could have had no reason to anticipate it. In the language of his brief, "each party had precisely the same means of gauging whether such a storm would occur, and, if so, whether the culvert would or would not prove adequate to keep the water from the wheat stacks."

This proposition assumed, first, that the knowledge of both parties was the same; secondly, that what each was bound to know was the same; and, thirdly, that each must be conclusively presumed to have drawn the same conclusions therefrom. Now, firstly, it does not appear what the defendant knew when it built the culvert or thereafter; and as to the plaintiff it only appears that he did not know that the knoll had ever been flooded during the 13 years which had passed since the culvert was constructed. Whether it had been flooded does not appear. Secondly, there was a duty imposed upon the defendant to learn all the conditions which it reasonably could to enable it to build a safe culvert. It was its duty, when damming the run, to ascertain the character of the stream; how it was fed; how it had been

affected by previous rainstorms, or was, from its topographical position, likely to be affected by floods from future rainfalls and thaws. Then it was its duty, through its engineers, to calculate the space required to carry any volume of water which could be reasonably anticipated, and then to construct a culvert with a capacity and of a design calculated to accomplish this purpose. But no duty rested upon the plaintiff to collect this information, or to make calculations, or to see that the culvert, as built, was adequate in size or correct in construction. Then, thirdly, because the plaintiff thought the knoll safe from backwater is no conclusive proof that the defendant should not have reasonably concluded otherwise. The plaintiff's opinion of the safety of the knoll was of no more importance than that of any other witness with his information and judgment. It raised no conclusive presumption that the defendant, with the knowledge it should have had, could not have reasonably anticipated that the structure, as built, would be likely to flood the knoll. The request was properly refused.

The judgment should be affirmed.

HARRIS v. HARRIS.

(Court of Chancery of New Jersey. Jan. 12, 1906.)

HUSBAND AND WIFE—BILL FOR SEPARATE MAINTENANCE — COSTS.

Under P. L. 1902, pp. 508, 509, §§ 20, 21, authorizing suit by a wife for separate maintenance, and making it lawful to order a bond for such costs as may be awarded to the defendant, where there were no circumstances tending to justify such a suit, costs may be decreed against the wife.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 1099.]

Bill by Louisa Harris against Daniel Harris for alimony. On application to have costs decreed against defendant. Denied.

S. G. Narr, for complainant. A. H. Swackhamer, for defendant.

BERGEN, V. C. The complainant's bill having been dismissed after answer, hearing, and argument, upon the ground that she failed to make a case which justified her in leaving her husband's house and entitling her to support and maintenance in a home she had set up apart from that which her husband had provided, she now applies to have the costs which she incurred, as well as a counsel fee, decreed to be paid by her husband as a part of the final decree dismissing her bill of complaint. In support of this application, reputable authorities were cited sustaining the doctrine that, even where the misconduct of the wife warrants a decree of divorce against her, still circumstances may exist which would justify the

awarding of costs against the husband. Assuming, without conceding, the correctness of this proposition, it would not avail this complainant; for, with the merits of the case against her, there was not disclosed a single circumstance which justified her in leaving her home or warranted her suit for alimony. Costs and counsel fees in divorce cases are not allowed as a matter of right, and awarding them is usually within the discretion of the court, and I am unable to discover any just cause for the favorable exercise of that discretion in this complainant's behalf.

In addition to the general rule on this subject, we are governed in this state by "An act providing for divorces and for decrees of nullity of marriage and for alimony and the maintenance of children." P. L. 1902, p. 502. Sections 20 and 21 of that act relate to the awarding of suitable support and maintenance to be provided by the husband for his wife, and it is under section 20 that this cause was instituted. It provides that in case a husband shall, without justifiable cause, abandon or separate himself from his wife, and refuse or neglect to maintain and provide for her, this court may decree a suitable maintenance to be paid by the husband for the wife, and empowers the court to enforce such a decree. This section of the act confers upon this court the only jurisdiction it has over cases of this character. *Margarum v. Margarum*, 57 N. J. Eq. 249, 41 Atl. 357. Section 21 makes it lawful for the chancellor, upon a proper application, to order a bond to be given with sureties conditioned to pay such costs as shall or may be awarded by the court to be paid to the defendant. While it has been doubted whether this section is imperative (*Ballentine v. Ballentine*, 5 N. J. Eq. 519), and so far as I am able to ascertain has seldom if ever been applied, I can see no reason why it may not in many cases be justly invoked, and it certainly discloses a legislative intent to provide the court with power to decree, in a proper case the payment of costs by the wife, to her husband, and to secure the payment thereof by exacting a bond.

My conclusion is that where a wife files a bill for alimony against her husband, without being able to prove the facts upon which the jurisdiction of the court must rest, it is a wise exercise of the discretion with which the court is vested in matters of this kind to decline to punish the husband, who is innocent of all wrong, by laying upon him the burden of his wife's unsuccessful contest. Frivolous suits of this character ought not to be encouraged, as they would be, if a dissatisfied wife, without just cause, can come into this court with an unfounded complaint against her husband, and compel him, not only to employ counsel and pay the costs of his defense, but also be subjected to the expenses she may incur in exhibiting her malicious disposition.

This application must be denied.

Appeal of BEARD.

(Supreme Court of Errors of Connecticut. Jan. 4, 1906.)

1. EXECUTORS AND ADMINISTRATORS — PAYMENT OF CLAIMS—DUTY TO HEIRS.

Where intestate died indebted to a bank on a demand note secured by a mortgage on real estate, the heirs were entitled to have intestate's personal assets applied as far as possible by the administrator in payment of such note and mortgage, to the exoneration of the land, though the note was not filed as a claim against the estate, and no demand was made by the holder for payment out of the personal estate.

2. DESCENT AND DISTRIBUTION — RIGHTS OF WIDOW.

A widow has no higher rights than any other distributee of her deceased husband with reference to her share of her husband's property in excess of dower.

Case Reserved from Superior Court, Fairfield County; George W. Wheeler, Judge.

Judicial accounting by James H. Beard, as administrator, etc. An order was entered by the probate court disallowing payment by the administrator of a note and mortgage given by his intestate, without presentation of the note or demand by the payee, from which the administrator appealed to the superior court. Reserved on a finding of facts for the advice of the Supreme Court of Errors. Disaffirmance of probate decree advised.

Robert L. Munger, for administrator. William S. Downs, for widow. Edward A. Hariman and George W. Klett, for heirs at law.

BALDWIN, J. The intestate owned at the time of his decease land which he had mortgaged to a savings bank to secure his own notes for \$2,100, payable on demand, with interest, for money borrowed from it. By order of the court of probate the period allowed for the presentation of claims against the estate was fixed at six months from February 17, 1902. Within this time an inventory was returned, which showed that the land was subject to this mortgage indebtedness to the bank, and the administrator paid it the interest then due upon the notes. After the six months had expired he paid the bank \$1,800 on the principal of the notes. These payments were made because he supposed it to be his duty, and not because requested; nor were the notes or mortgages, or any demand founded upon them, ever exhibited or presented to him as claims against the estate. The intestate left a widow, to whom he was married before 1877, and no issue. At her instance, the court of probate refused to allow a credit in the administration account of \$1,800, for the money paid to reduce the principal of the mortgage debts. The title to the equity of redemption in the mortgaged lands upon his death became vested in his heirs at law, subject to her right to dower. They acquired at the time an equitable right to have the debts of the intestate, whether secured or unsecured, discharged out of the

fund to which resort in all cases is primarily to be had; that is, the general personal estate, so far as it was adequate for that purpose and could be used without prejudice to the rights of unsecured creditors. *Forrester v. Lord Leigh, Ambler, 171; Brainerd v. Cowdrey, 16 Conn. 1, 7; Jackson v. Bevins, 74 Conn. 96, 49 Atl. 899; Bulkley v. Seymour, 74 Conn. 459, 51 Atl. 125, 92 Am. St. Rep. 229.*

It is one of the agreed facts that the bank "never exhibited or presented to the said appellant, as administrator, any claim or note or mortgage against said estate." With this ultimate conclusion none of the subordinate facts, as to which the parties also agreed, are inconsistent in law. That the land was inventoried as subject to the mortgages, and that interest was paid upon the notes before the lapse of the six months allowed for the presentation of claims, did not import that the bank had demanded payment from the estate. They were at least equally consistent with the supposition that both the administrator and the bank contemplated the continuance of the loan on the sole security of the land mortgaged. *Dime Savings Bank v. McAllenney, 76 Conn. 141, 55 Atl. 1019.* Every creditor of the estate who failed to present his claim within the six months allowed by the court of probate for that purpose became, in August, 1902, "forever debarred of his demand against said estate," unless an extension of time should be secured. Gen. St. 1902, § 326. The meaning of this statute is that, should he subsequently attempt to collect his claim from the estate, his omission to present it, if properly set up, is an effectual bar to the proceeding. But, as in the case of the ordinary statutes of limitation, the debt remains in existence. *Berrigan v. Pearsall, 46 Conn. 274, 276.* There is simply a shield against its enforcement as an actionable demand. In no other respect have the relations between the creditor and the estate been affected. Before August, 1902, the bank held two notes of the intestate which his administrator could be compelled to discharge, if there were general assets sufficient for that purpose. After August, 1902, it held the same notes, but without the power thus to compel their discharge. It still had as full a right as ever to foreclose the mortgages by which they were secured. The heirs, therefore, remained as before in peril of losing their lands, unless the incumbrances were removed. The inventory showed that the value of their inheritance was diminished by the amount of these particular mortgages in favor of this particular creditor.

No question is made as to the propriety of the payment made by the administrator of the semiannual interest which accrued upon them during the six months allowed for the exhibition of claims, although no claim for it had been presented to him. But he had no more right to pay it during that period than

he would have had to pay it afterward. His authority proceeded from two things: The fact, which appeared upon the records of the court of probate, that the lands of the intestate were subject to this mortgage indebtedness; and the rule of law that any such indebtedness must be discharged from the general personal estate, if it be adequate for that purpose and can be used without prejudice to the rights of unsecured creditors. This fact and this rule made it his duty to pay both the interest and the principal due upon the notes in question, whether they should or should not be exhibited as claims against the estate. We have heretofore decided that an executor comes under such an obligation in favor of a devisee, since a devise implies, in the absence of any contrary provision, an intention that the land shall be disincumbered by payments from the general personal assets. *Turner v. Laird, 68 Conn. 198, 200, 85 Atl. 1124.* In cases of intestacy, the law secures the same result. The money borrowed became an addition to the personal estate of the borrower. That fund, therefore, having received the benefit of that for which the land was mortgaged, should be held to the burden of discharging the incumbrance. This was the established doctrine of the courts before a similar right of exoneration was conceded to devisees. *Bacon's Abridgment, "Mortgagee," E, 638.*

It is contended that a widow is entitled to greater favor than an heir. Dower is highly favored in law, but as to any additional share in her husband's property which she may receive by the statute of distributions she stands on no better footing than any other distributee. *Sutherland v. Harrison, 86 Ill. 366.*

The superior court is advised to disaffirm the decree of the court of probate. Costs will be taxed for the appellant in this court. The other judges concurred.

HULL v. HOLMES et al.

(Supreme Court of Errors of Connecticut. Dec. 15, 1903.)

1. WILLS—CONSTRUCTION—LIVING ISSUE.

The phrase "die leaving no living issue," when used in a will, is equivalent to the phrase "die leaving no surviving issue," and carries a plain implication in favor of any issue of the first taker who may survive him.

2. SAME — ESTATES DEVISED — VESTED REMAINDER.

A will gave an undivided one-half of testator's residuary estate absolutely to testator's daughter, and the use and income of the other half, subject to a small annuity, to testator's son for life, and directed that after the son's death the said one-half of the residuum of the estate should go to the son's son, but provided that, in case the latter should die leaving no living issue, the said one-half should go to testator's daughter as an absolute estate. *Held*, that the provision for the issue of the grandson took effect only in case the grandson should die before testator; and on testator's death before

the grandson the latter acquired an absolute title to the undivided one-half of the fund, subject only to his father's life interest.

Case Reserved from Superior Court, New London County; Ralph Wheeler, Judge.

Action by Hadlai A. Hull, trustee under the will of William S. Noyes, deceased, against Jeremiah Holmes, executor of the will of William Standin Noyes, deceased, and others. In the superior court the case was reserved for the advice of the Supreme Court of Errors. Judgment advised.

The testator died in 1890, leaving a will in which he gave one undivided half of his residuary estate, real and personal, absolutely to his daughter, Mary, and "the use, rents, interest, and income" of the other half to his son, George W. Noyes, "for and during his natural life," adding, "and after his death I give, devise, and bequeath the said undivided one-half of the said residuum of my estate to his son, William S. Noyes, but, in case he shall die leaving no living issue, then and in that case I give, devise, and bequeath the said one-half of the said residuum of my estate to my daughter, Miss Mary Elizabeth Noyes, as an absolute estate, but not to pass to her until after my son's death." By a codicil reciting that his will gave his son the use for life of half his residuary estate, "with a remainder over to his son, William S. Noyes, to take effect after his father's death, followed by a contingent remainder," he revoked so much of said provision as gave the son "all the use, rents, interest, and income" for life. He then bequeathed an annuity of \$50 to his son's wife for her life "from the avails of the said use, rents, interest, and income," adding, "and the remainder thereof I give and bequeath to my said son, George W. Noyes, for and during his natural life; the same to be paid to him annually, each and every year." The plaintiff was appointed trustee of the fund, thus left, by the court of probate. Mary died testate in 1895. William S. Noyes, the grandson of the testator, died testate in November, 1904, leaving surviving issue. George W. Noyes died in December, 1904.

Hadlai A. Hull, for plaintiff. Herbert W. Rathbun, for defendant Holmes. Abel P. Tanner, for defendant Davis. Frank L. McGuire, for defendant Noyes.

BALDWIN, J. (after stating the facts). The present ownership of the estate, of which the life use was left to George W. Noyes, depends upon the construction of the provision creating a remainder in favor of his sister. The estate was to be hers absolutely after the death of the testator's grandson, William S. Noyes, "in case he shall die leaving no living issue," provided that it was "not to pass to her until after" the death of George W. Noyes, and subject to an annuity charge during the life of the latter's wife. The phrase "die leaving no living is-

sue," by the rules of interpretation adopted in this state, is equivalent to "die leaving no surviving issue." *St. John v. Dann*, 66 Conn. 401, 407, 34 Atl. 110. It carries a plain implication in favor of any issue of the first taker who may survive him. If employed in a devise of lands, with reference to his death, without regard to the time at which that event may occur, it may create an estate tail. If, on the other hand, employed with reference to his death, in case that event should occur before that of the testator, it may amount to a substitutionary provision.

In the will now before us a vested remainder is first given to William S. Noyes in terms sufficient to convey an absolute title. On the happening of a certain contingency an absolute estate is then limited over to Mary W. Noyes; but it is "not to pass to her" (that is, the enjoyment of it is not) until the death of the father of the first remainderman. It is not probable that the testator meant to create an estate tail in his residuary real estate, which, under our statute would become a fee simple in the issue of his grandson, while contemplating the possible vesting of an absolute title in remainder in his daughter before the death of his son. His general intent is better served by interpreting the provision for the issue of William S. Noyes as one to take effect only in case his grandson should die before him. *Coe v. James*, 54 Conn. 511, 9 Atl. 392; *Phelps v. Phelps*, 55 Conn. 359, 11 Atl. 596; *Lawlor v. Holohan*, 70 Conn. 87, 38 Atl. 903.

The superior court is advised that on the testator's death William S. Noyes acquired an absolute title to the fund in question, subject only to his father's life interest. No costs will be taxed in this court.

NEAL v. RENDALL

(Supreme Judicial Court of Maine. Dec. 23, 1905.)

1. APPEAL—EXCEPTIONS—PREJUDICIAL ERROR.

Exceptions to a ruling cannot be sustained merely because the ruling, viewed as an academic proposition, was erroneous. It must further be made to appear in the bill of exceptions that the ruling was also prejudicial to the accepting party's case.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4047.]

2. SAME.

A bill of exceptions to a refusal to give a requested instruction based on a factual hypothesis must show in itself, or by express reference, that there was evidence in support of the hypothesis; otherwise, the court cannot know that the excepting party was prejudiced by the refusal, even though the legal proposition contained in the request was correctly stated.

3. SAME.

Whether a statement in a bill of exceptions that "the evidence upon the motion for a new trial, if printed, may be referred to, to illustrate and explain the exceptions," sufficiently makes the report of the evidence a part of the bill of exceptions—*quæra*.

4. TRIAL — INSTRUCTIONS—EVIDENCE TO SUSTAIN.

In this case, as to the requests based on factual hypotheses, it does not appear from the bill of exceptions that there was any evidence in support of the hypotheses, and hence these exceptions must be overruled.

5. HIGHWAYS — COLLISION — PLEADING AND PROOF.

Where the declaration alleges that the defendant's team ran into the plaintiff's team, and the proof is that both teams were in motion up to the instant of collision, the fact that the defendant's team was much slower in motion than the team of the plaintiff does not constitute a fatal variance between the allegation and the proof.

6. NEGLIGENCE—EVIDENCE—SUFFICIENCY.

To sustain a common-law action based on the negligence of the defendant, it is not necessary to prove that the defendant's negligence was the sole cause of the plaintiff's injury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 74, 75.]

(Official.)

Exceptions from Supreme Judicial Court, Androscoggin County.

Action by Charlotte A. Neal against Daniel H. Rendall. Verdict for plaintiff, and defendant excepta. Exceptions overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant, whose vehicle collided with that in which the plaintiff was riding on a public street in Auburn.

The testimony showed that the plaintiff, 68 years of age, was riding in a light carriage with her husband, and that the horse was his. The husband, who was 72 years of age, was driving. At the time of the collision which resulted in the injuries complained of, the plaintiff and her husband were traveling south, on Turner street, in Auburn, at about six miles an hour, and on the right of the middle of the traveled part of the street, as they traveled. The street at the point of collision was from 46 to 50 feet in width. The defendant, in a heavily loaded team, was traveling north, on the same street, at a walk, but he was on the left of the traveled part of the street, as he traveled. Both teams were thus west of the middle of the traveled part of the street, and the team of the defendant was nearer the middle.

The testimony tended to show that there was apparently sufficient room on the west of the middle of the traveled part of the street, so that the teams could have passed without interference, had they both continued as they were traveling just before the collision described in plaintiff's writ, but that the horse attached to the wagon in which the plaintiff was riding became suddenly frightened, and shied towards the center of the traveled part of the road, and towards defendant's team. The front left wheel of the plaintiff's carriage came into collision with the hind wheel of defendant's vehicle, whereby the plaintiff was thrown from her carriage,

and suffered the injuries for which she claimed damages in this action.

The testimony also tended to show that the two teams would have passed each other safely and without collision, had it not been for the horse's fright and shying; also, that they would have passed each other safely, if the defendant had been driving on the right of the middle of the traveled part of the street.

The plaintiff recovered a verdict for \$400. Before the case was submitted to the jury the defendant requested the presiding justice to give four certain instructions to the jury, the substance of each of which sufficiently appears in the opinion, and which said request was refused. Thereupon the defendant excepted.

Argued before EMERY, WHITEHOUSE, STROUT, POWERS, PEABODY, and SPEAR, JJ.

W. H. Judkins and B. L. Pettigrew, for plaintiff. Oakes, Pulsifer & Ludden, for defendant.

EMERY, J. The first request for instruction is based upon the factual hypothesis that there was not sufficient time for the defendant to turn and reach the right of the middle of the road after he first saw the plaintiff approaching. It does not appear, however, from the bill of exceptions that there was any evidence in support of the hypothesis. Hence the request does not appear to have been applicable to the case, and its refusal does not appear to have prejudiced the defendant.

The second request is based on the factual hypothesis that the defendant's team did not run into that of the plaintiff. From the bill of exceptions, it appears to be undisputed that both teams were in motion up to the moment of collision, though the defendant's team was proceeding at a walk. There is no suggestion of any evidence that the defendant's team was stationary. Each team, therefore, ran into the other, though there was a difference in the speed of the two teams. This sufficiently sustains the case stated in the declaration that the defendant's team ran into the plaintiff's team. It was practically so held in *Neal v. Rendall*, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 668.

The third request was based upon the legal hypothesis that the defendant's negligence must have been the sole cause of the collision. This hypothesis is not well founded in law. It is enough if the defendant's negligence was a direct contributing cause, without which the collision would not have occurred. No evidence of the plaintiff's contributory negligence. While the request might have been applicable were the action a statutory one against a town, it is not applicable to this common-law action against an individual.

The fourth request is based on several factual hypotheses as to the character of the

plaintiff's horse, the condition of her husband, the driver, his manner of driving, his want of control over the horse, etc. Here, again, the bill of exceptions is bare of any statement that there was evidence in support of these hypotheses. It is not made to appear that the request was applicable to the case, and hence that the defendant was prejudiced by the refusal to so instruct.

At the close of the bill of exceptions it is stated that the evidence upon a motion for a new trial, if printed, might be referred to to illustrate and explain the exceptions. It is at least questionable whether such a statement makes the whole evidence a part of the bill of exceptions to supply what was omitted in the bill itself, but we have no occasion to decide this question, inasmuch as the evidence was not printed or brought before the court in any way.

It follows that none of the exceptions can be sustained.

Exceptions overruled.

HIGGINS v. FRANKLIN COUNTY AGRICULTURAL SOC.

(Supreme Judicial Court of Maine. Dec. 19, 1905.)

1. AGRICULTURAL SOCIETY — FAIR — NEGLIGENCE—SAFETY OF PATRONS.

An agricultural society holding a fair, for admission to which a fee is charged, is bound to use reasonable care to keep all parts of its grounds to which patrons are admitted free from dangers to them.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Agriculture, § 8.]

2. SAME—RACE TRACK.

When such society invites patrons, even by implication only, to cross its racing track to reach the space inclosed by the track, it is bound to use reasonable care to keep the track clear of danger of collision during such crossing.

3. SAME—CARE REQUIRED OF PATRONS.

A patron of such fair, while crossing the racing track by invitation of the society, express or implied, is not bound to be as watchful for teams approaching along the track as he would be in crossing a public road. He may assume that the society is using reasonable care to keep the track clear of such teams. Hence the mere fact that he is not watching for such teams does not constitute contributory negligence on his part.

4. SAME—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In this case the evidence, though conflicting, warranted findings by the jury that the plaintiff was invited by the defendant society to cross the track when he did, that he was not guilty of contributory negligence in not seeing the team approaching along the track, and that the defendant was negligent in not preventing the use of the track by the colliding team at that time.

(Official.)

On Motion from Supreme Judicial Court, Franklin County.

Action by Edwin M. Higgins against the Franklin County Agricultural Society. Verdict for plaintiff. On motion for new trial. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff, and also to recover for damages to his wagon, caused by the alleged negligence of the defendant. The defendant, on the 17th day of September, 1903, was holding a fair on its grounds at Farmington, and had under its care and control a half-mile race track or a race course for speeding and racing horses. At a time when a race was not in progress the plaintiff undertook to drive across the track with his horse and wagon, and, while so doing, his wagon was struck and himself injured by a rapidly driven vehicle, with which the driver was giving his horse "a warming up mile" preparatory to a race later in the afternoon.

Argued before EMERY, STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Frank W. Butler, for plaintiff. Joseph C. Holman, for defendant.

EMERY, J. The defendant society was holding a fair on its grounds arranged for that purpose. On these grounds was the usual half mile track for the exercising, speeding, and racing of horses. Outside of this track was space used for various purposes. An admission fee was charged and paid at the outer entrance, and visitors having thus entered the grounds were permitted to cross the track, when not in use for horses, to the space within the track. The passageway to and across the track was barred by a rope while the track was in use, which rope was lowered to the ground by a servant of the company, employed for that purpose. When the track was clear, permitting visitors to cross the track to the interior space. The plaintiff had paid the admission fee, and had driven upon the grounds up to the track at the crossing, barred by the rope. He then started to cross the track, and, when part way across, his carriage was struck and himself injured by a rapidly driven vehicle, with which the driver was speeding his horse along the track. There was evidence that the attendant guarding the passageway across the track lowered the barring rope to the ground in such a manner as to be an invitation to the plaintiff to attempt the crossing when he did, or an assurance to him that the track was then clear for crossing. The defendant strongly denies this, and insists that the rope was lowered only for an instant to enable a team to leave the track, and that the plaintiff practically forced his way past the attendant and barrier. We are not satisfied, however, that the jury was clearly wrong in finding for the plaintiff on this point, and so far the verdict must stand.

The plaintiff might have avoided the collision, had he been on the constant watch for approaching horses from the time he entered upon the track, which, however, he was not. The defendant insists that hence the plaintiff did not exercise due watchfulness, and that

his negligence in that respect was a contributing cause of the collision. The only question of law arising under this contention is whether the plaintiff was negligent, as matter of law, under the circumstances, in not being constantly on the watch for horses and vehicles rapidly passing along the track he was crossing. We think he was not. The case is very different from that of crossing a public highway. There the person crossing has no assurance, but from his own careful observation, that the way is clear. He is therefore bound to anticipate that teams, slow and fast, may be rightfully approaching at any time, and to be on his own guard against them. In this case the track was a purely private way, owned and operated by the defendant society as a part of the attractions to induce people to pay for admission to its grounds. It was the society's duty to exercise due and reasonable care to keep the track clear and free from danger to its patrons at all such times as they were invited or permitted to cross it, and while they were thus crossing. Assuming, as the jury has found, that the plaintiff was assured by the action of the defendant's servant that he could then cross the track, he was thereby assured that reasonable care had been, and was being, taken to keep the track clear for his crossing. With that assurance it cannot be held, as matter of law, that he was negligent in not looking about for the approach of rapidly driven horses and vehicles along the track. Whether under all the circumstances of this case such an omission to look about was negligence was a question for the jury. We see no reason why the finding on this question should be set aside.

Another point made in defense is that the defendant society is not responsible for the act of the offending driver, since he was not in any way its servant, and since it does not appear that he had permission to drive on the track at that time. The society's duty was not limited to refraining from giving permission to drive rapidly on its tracks at such times. It had an active duty to use due and reasonable care to prevent such driving, even by unauthorized persons. The jury has found that it did not perform this duty in this case, and we see no reason to disturb the verdict on this point. It follows that the motion must be overruled. *Thornton v. Maine State Agricultural Society*, 97 Me. 108, 53 Atl. 979, 94 Am. St. Rep. 488. Motion overruled.

STRUTH et al. v. DECKER et al.

(Court of Appeals of Maryland. Jan. 9, 1906.)

JUDGMENTS—RES JUDICATA—ORDERS OF ORPHANS' COURT.

Where issues are framed upon a caveat to a will, and sent to the court of common pleas for trial by a jury, and a verdict is rendered in favor of the caveatees, and certified to the orphans' court, the orphans' court must accept

the conclusions of the jury as final, and its order ratifying the verdict and dismissing the caveat is conclusive on all issues submitted to the jury, and precludes the caveators from framing new issues embracing in a different form questions covered by the issues originally framed.

Appeal from Orphans' Court of Baltimore City; Myer J. Block, Wm. J. O'Brien, and Harry C. Gaither, Judges.

Caveat by Emma Struth, administratrix of Otto A. Struth, and others, to the will of Charles Struth, deceased; Adolph F. Decker and others, executors. From an order dismissing a petition for the submission of certain issues to the jury, caveators appeal. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, SCHMUCKER, JONES, and BURKE, JJ.

Thomas Ireland Elliott and Charles F. Stein, for appellants. A. F. Decker and Charles C. Rhodes, for appellees.

BRISCOE, J. This is an appeal from an order of the orphans' court of Baltimore City passed on the 23d day of May, 1905, in the matter of a caveat to the will of Charles G. Struth, of Baltimore, deceased. It appears that on the 4th day of April, 1902, upon a caveat to this will, six issues were framed and sent to the court of common pleas of Baltimore to be tried by a jury. At the trial a verdict was rendered for the caveatees on all the issues, and upon an appeal to this court the rulings of the court below were affirmed. *Struth v. Decker*, 100 Md. 377, 59 Atl. 727. Subsequently the finding of the jury was by an order of the orphans' court, dated on the 7th of February, 1905, ratified and confirmed, and the caveat dismissed. Afterwards on the 16th of February, 1905, Emma A. Struth and others, the caveators on the former appeal and the appellants here, filed a petition in the orphans' court of Baltimore City against Adolph F. Decker and others, the caveatees and the appellees here, asking that two additional issues be framed and sent to a court of law for trial. The alleged new issues are in substance as follows: First, that the paper writing, dated the 25th day of February, 1902, and purporting to be the last will and testament of Charles Struth, deceased, was and is not his last will and testament, because its execution was procured by fraud exercised and practiced upon him; and, second, that the provisions of the will do not carry out all the material and important intentions of the testator as given by him to its draftsman, but these were omitted and not contained in the will. In their answer the appellees deny the allegations of the petition, and aver that the case was res adjudicata and the matters raised by the new issues were passed upon and determined by the issues of the original appeal. The case was heard on petition and answer, and from an order of the orphans' court denying the caveators' application for

new issues and dismissing the petition, an appeal has been taken.

The case as thus stated, it will be seen, presents the question whether the two issues asked for by the appellants in their petition of the 16th of February, 1905, were not embraced in and determined by the issues on the former appeal; and to do this it becomes necessary to consider what was tried and decided in the former case. The verdict rendered in the original case decided and determined that the will was executed according to the requirements of the statute; that it was executed by the testator when he was of sound and disposing mind and capable of executing a valid contract; that the contents of the will were read to or by him, and known to him, at or before the time of its execution; that no part of the will was unknown to or misunderstood by the testator at the time of its alleged execution; and, lastly, the execution of the will was not procured by undue influence exercised and practiced upon him. We have carefully examined the several issues contained in the record on the former appeal, and also those presented here, and fail to find any substantial difference in the propositions submitted and proposed by the appellants in the two cases.

The new issue asked by the appellants, that the will was not the last will and testament of the testator because the execution was procured by fraud exercised and practiced upon him, is practically the same as the one passed upon by the sixth issue, relating to undue influence, in the former case. In *Struth v. Decker*, supra (the former appeal), it is said: "The fifth prayer of the caveator, defining undue influence and asking that, if the jury found this will was procured through such influence, their verdict must be for the caveators, was refused upon the ground there was no legally sufficient evidence of such influence, and following the numerous decisions of this court upon this question, we are constrained to hold that we can discover no such evidence in this record. To hold otherwise would be to indulge in mere suspicion and imagination. Upon the facts of this case as disclosed by the record, the only logical ground upon which this will could be attacked would be that of a conspiracy to make a will for a man incompetent to make one for himself, and that ground has been conclusively passed upon by the jury, in the exercise of the power given to them and withheld from the courts to determine all questions of fact." It appears that the new issue, that the execution of the will was procured by fraud, was fully covered by the sixth issue suggested and decided upon in the former trial. Mr. Schouler, in his work on Wills (section 222) says: "Closely connected with the subject of fraud and force is that of importunity or undue influence. The latter involves in some degree one or both the elements of fraud and force, though not so distinctly or

easily made out." And in *Frush v. Green*, 86 Md. 501, 39 Atl. 866, this court said: "Undue influence often closely resembles and is near akin to actual fraud, and, like the latter, when most cunningly employed is exceedingly difficult to expose." Apart from this, it appears from the record in the former case that the question of fraud in procuring the will was fully considered and submitted in the trial of the sixth issue.

As to the second new issue suggested by the appellants, to the effect that "the provisions of the will do not carry out all the material and important testamentary intentions of the testator as given by him to the draftsman of the will," we need only say that this issue was submitted and covered by the findings in the third, fourth, and fifth issues on the former trial. In the opinion in *Struth v. Decker*, supra, Judge Pearce distinctly says: "The question of testamentary capacity and of the conformity of the will, as prepared and read to the testator, with the instructions said to have been given by him to Mr. Decker, and of the testator's knowledge and understanding of the provisions of the will as read to him, were all fully and fairly submitted to the jury by the caveators' first, second, third, and fourth prayers, which were granted, and the verdict of the jury upon all these questions were against the caveators. They exhausted their remedies in this regard when their motion for a new trial was made and overruled, and we have no power to review these findings of fact by the jury."

As we are of the opinion that the new issues proposed by the appellants in this case substantially embraced the same questions that had been pronounced upon in the former case, it becomes unnecessary to discuss the other questions raised on the record. The law is well settled that the orphans' courts of this state are bound to accept the conclusions of the jury, duly certified from a court of law, on trials of caveats to wills, as final, and to make them effective by proper orders. This was done here by the order of the orphans' court of Baltimore City passed on the 7th day of February, 1905, and this order is conclusive of all issues tried in that suit. Finding no error in the action of the orphans' court of Baltimore City, in the order of the 25th day of May, 1905, appealed against, it will be affirmed.

Order affirmed, with costs.

CARTER et al. v. APPLGARTH.

(Court of Appeals of Maryland. Dec. 6, 1905.)

1. PROCESS — SERVICE — LEAVING AT RESIDENCE.

Code Pub. Gen. Laws 1904, art. 83, § 24, in relation to elections, provides that, on a petition to strike from the list of qualified voters the name of any person fictitious, deceased, or disqualified, summons shall be served at his place of residence. *Held*, that the statute means that the summons shall be left at his place of residence.

2. ELECTIONS—SUSPECTED LIST—METHOD OF MAKING.

Code Pub. Gen. Laws, art. 33, § 20, in relation to elections and providing for placing registered voters on the suspected list, provides that, if any voter make oath before the board of registry that he believes any person not a qualified voter, such facts shall be noted. Section 21 provides that the board of registry shall deliver to two of their number, of opposite politics, a list of registered voters whom one of the officers of registration suspects not to be qualified voters, and section 11 prescribes the oath to be taken by an officer of registration, in which he swears that he will faithfully and honestly discharge the duties of such an officer. *Held*, that a list of suspected voters was not such as contemplated by the statute, where it was merely handed to the board of registration by a party executive of the ward, and not verified by any affidavits, and not supported by the belief of one of the officers.

Appeal from Court of Common Pleas; George M. Sharp, Judge.

Petition by William J. Applegarth against Valentine Braun and others to have the name of said Braun stricken from the list of qualified and registered voters in the Fifteenth precinct of the Fourth Ward of Baltimore City. From an order of the court of common pleas granting the petition, respondents appeal. Reversed.

Argued before McSHERRY, C. J., and PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Charles H. Carter, for appellants. James E. Godwin and Lewis Putzel, for appellee.

PEARCE, J. In an opinion per curiam, filed November 3, 1905, it was ordered that the name of Valentine Braun, which had been stricken from the list of qualified and registered voters in the Fifteenth precinct of the Fourth Ward of Baltimore City, under an order of the court of common pleas of that city, be restored to said list of qualified and registered voters, and we will now state the reasons for that decision:

Valentine Braun was registered on October 11, 1904, as a qualified voter in the Fifteenth precinct of the Fourth Ward of Baltimore City; his residence being there given as 612 East Lombard street. The building so numbered was one of those destroyed in the great fire of February, 1904, which swept over a large section of the city, and practically destroyed all the houses in that ward, but in the summer of 1904 a new house was erected upon the same site, and was numbered 612, and from that house Braun was registered. On October 10, 1905, that being the last day of registration, about noon of that day Mr. Tapscott, the Republican executive of that ward, came to the tent in which the registers were holding their office, called out Mr. Watson, the Republican register, and handed him a list of 64 names, appearing as voters upon the registry of that precinct, as a list of suspected voters. This list was not verified by the affidavit of Mr. Tapscott, or of any other person, and was not offered to the board of registers for action thereon until

4 o'clock that afternoon, when Mr. Watson presented it; and he testified that he only did so then because he had orders to do so from political headquarters. He also testified that he had never examined the registry to ascertain who were disqualified voters in that precinct; that he was not acquainted with the voters of that precinct, and that no suspicions about those appearing on the list mentioned; and that, if he had been asked to swear that they were suspected voters, he could not conscientiously have done so. The name of Braun was one of those upon this list, and the cause of disqualification was "Don't live there." Before separating that evening, the board of registers went over this list with the books of registration, and mailed to the address of each person thereon as given in the books the required notice to appear and show cause why they should not be stricken off, and also went in person and served similar notices upon such persons on said list as they could find, and left said notices on the premises where the persons could not be found. Mr. Watson, together with the two Democratic registers, went to 612 East Lombard street, and, not finding Braun there, left the notice with some one on the premises for him. Braun did not appear, but he was not stricken off by the registers, because Mr. Charles H. Carter, one of the supervisors of election, advised the board they could not properly act upon the list in question. Thereupon Mr. Applegarth filed his petition in the court of common pleas to have Braun stricken off. The court directed summons to be issued for Braun, as required by section 24 of article 33 of the Code of Public General Laws of 1904, and this was returned, "Non est as to Valentine Braun, and summons left on premises 612 East Lombard street," and at the hearing his name was ordered stricken off; the court being of opinion that the list of suspected voters was such a list as the law contemplated, and that the summons was properly served by leaving it on the premises.

With this conclusion we fully agree. Section 24 of article 33 provides that, "when the object of the petition is to strike off the name of any person alleged to be fictitious, deceased, or disqualified, summons shall also be issued to such person, which shall be served by the sheriff within the time therein designated at the place of his residence given in the registry." Three classes of persons are here provided for by one method of service. If personal service were required, there could be no rational or satisfactory reason assigned for requiring such service at the party's place of residence, since it would be as effective if made at any other place. As to fictitious or deceased persons, the reason for requiring service at the residence given in the registry is obvious and rational, since no personal service could be made upon either, and, unless some constructive service were provided, the registry lists could not be

purged from the frauds by which fictitious names are sometimes entered, and the frauds or errors through which the names of deceased persons are sometimes retained upon the lists. It would be physically possible in some cases to give personal service to one disqualified by removal, but in most cases it would be practically impossible to do so; and we think this class of persons was wisely included with fictitious and deceased persons, under the method of constructive notice. When the law says the summons "shall be served at his place of residence," it clearly means it "shall be left at his place of residence," and this works no injustice or hardship upon the voter. If he has actually changed his place of residence without losing his right to vote in the precinct where he is registered, he can preserve his right by appearing before the registers and giving his new place of residence; and, if he is temporarily absent without having changed his residence, prudence would require that he should leave his address at his residence, in order that communications of importance should reach him. In either contingency the situation is one under his own control, and for which he should provide. And if he has actually changed his residence, and has lost his right to vote where he is registered, he can have no cause of complaint that he is stricken off. It must be remembered that the right of suffrage, valuable and sacred as it is, is neither a property right nor an absolute, unqualified, personal right, of which no one may be deprived without due process of law, but that it is altogether conventional and dependent upon the regulations of the state within constitutional limitations. *Anderson v. Baker*, 23 Md. 620. It cannot, therefore, be contended that Braun was entitled to his day in court, as he would have been if an absolute right of person or property had been involved, and we cannot doubt that the constructive service provided by the law in this case was legal and sufficient.

But upon the other question decided by the court below we cannot agree with its conclusions. Braun had been duly registered as a qualified voter in that precinct, and was entitled to remain upon the list until removed by actual proof of disqualification, or in strict accord with the method provided for striking off those whose disqualification is merely suspected. There are but two legal methods of placing a duly registered voter upon the suspected list. Section 20 of article 33 provides that "if any voter of the ward or county shall go before the board of registry during its sessions and make oath that he believes any specified person upon such registry is not a qualified voter, such fact shall be noted. Section 21 provides "that before separating on the last day said board of registry shall make out and deliver to two of their number of opposite politics a list of the registered address of all those who have been registered as qualified voters, whom either one of the

officers of registration suspects not to be qualified voters, or against whom any voter of the ward or county may have made complaint as above provided. If said board of registry shall, however, know that any person so complained of is a qualified voter, then such name need not be put upon the list of suspected persons, unless required by a member of the board." Section 32 requires the voter who makes complaint against another voter to make oath that he believes the person named is not a qualified voter in the precinct, and to state in the oath the grounds of such belief. Section 15 provides that each judge of election shall also be an officer of registration in the district or precinct for which he is appointed, and section 11 prescribes the oath to be taken by him, in which he swears that he will "faithfully and honestly discharge the duties of an officer of registration and judge of election." In the discharge of his duty as an officer of registration, he cannot honestly take action against a registered voter as a suspected person, except, first, under the sanction of an oath by some voter of the ward or county that he believes such person not to be a qualified voter; or, second, upon his own belief to the same effect, entertained and held under the sanction of his own official oath. There must be a genuine honest belief or well-grounded suspicion that the voter indicated is not a duly qualified voter, and this belief or suspicion must exist either in the mind of the register of election himself upon the responsibility of his own oath, or in the mind of the voter who makes the charge upon the responsibility of the oath required to support the charge. And this responsibility is not only the moral obligation that goes with every oath, but the legal liability for false swearing which attends the taking of oaths required by law, and which is provided for by section 97 of article 33. Any other construction of the suspected list in this case would put every voter upon the registry who might happen to be absent from his residence at the time of the last sitting of the registers at the mercy of corrupt officers or unscrupulous voters.

These are briefly the reasons which led to the conclusions we have heretofore announced in this case.

APPLEGARTH v. CARTER et al.

(Court of Appeals of Maryland. Dec. 6, 1905.)

PROCESS—SERVICE—LEAVING AT RESIDENCE.

Code Pub. Gen. Laws 1904, art. 33, § 24, in relation to elections, provides that, on a petition to strike from the list of qualified voters the name of any person fictitious, deceased, or disqualified, summons shall be served at his place of residence given in the register. *Held*, that where the house in which a voter resided according to the registry had been destroyed, and there was no building there, service by laying the summons on the lot and putting a brick on it was sufficient.

Appeal from Court of Common Pleas; George M. Sharp, Judge.

Petition by William J. Applegarth against Charles O. Carter and others to strike the name of Charles R. Betts from the list of qualified voters in the Fifteenth precinct of the Fourth Ward of Baltimore City. From an order refusing to strike the name, petitioner appeals. Affirmed.

Argued before McSHERRY C. J., and PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

James E. Godwin and Lewis Putzel, for appellant. Charles H. Carter, for appellees.

PEARCE, J. This case was argued with the preceding case of Carter et al. v. Applegarth, 62 Atl. 710, and a per curiam opinion was filed in this case, also, November 3, 1905, affirming the order of the court of common pleas refusing to strike the name of Charles R. Betts from the list of qualified voters in the Fifteenth precinct of the Fourth Ward of Baltimore City, though our reasons were different from those which controlled the lower court. Charles R. Betts was duly registered in that precinct as residing at 39 Market Space, which was within the burnt district, and the building from which he was registered was among those destroyed in the great fire, and no building has since been erected upon the site. His name was placed upon the same suspected list mentioned in the preceding case, and the ground of suspecting his disqualification, as stated on that list, was that there was no building at 39 Market Space. We have detailed in the preceding case all the circumstances attending the making and handing in of this list, and they need not be repeated here. The summons issued for Betts upon the filing of Applegarth's petition to strike him from the list was returned by the sheriff: "Non est. Summons left on premises"—and the notice mailed to Betts' address by the registers was returned to them through the mail, undelivered. The deputy sheriff, to whom the summons was delivered to be served, testified that he went to the street where 39 Market Space stood before the fire, and found it to be a vacant lot, as were also Nos. 37 and 41 on either side of No. 39; that he had a map and plat of that part of the city; that he measured the distances according to this map and plat, and it was agreed by counsel that in that way he properly located and ascertained Lot No. 39 Market Space; and that, having so located said lot, he took the summons and laid it on the lot, and put a half brick upon it. Judge Sharp held this insufficient service, and therefore refused to strike him off, though holding, as stated in the preceding case, that the suspected list was such a list as justified action by the registers. As we held in the former case this list was not a proper list, we necessarily affirmed the order of Judge Sharp in

this case, though we held the service of the summons to be sufficient.

Upon first presentation it might seem that this was to push the idea of constructive notice beyond reason, and to render it, as expressed by the lower court, "a proceeding little short of grotesque"; but we think this view will readily yield to a careful consideration of the circumstances of the case and the purpose and object of the law. If the law had required that the summons should be served by leaving it at his residence, his actual residence, a different situation would have existed; but the requirement is that it be served "at his place of residence given in the registry." It is true it was no longer his actual residence, but it still continued to be "his place of residence given in the registry." If there had been no fire destroying the building, and he had removed to another location unknown to the registers, no one, we think, could doubt that service would have been good if left with the occupant of the building, or if tacked upon the door, if there were no occupant. If the house were destroyed, and a tree or a post were left standing, and the summons was tacked thereon, that would be service by leaving it on the premises, as is done in cases of notice of taxes in arrears. Voters are presumed to know the law regulating the exercise of the right of suffrage, and therefore to know that, in event of an attempt to strike one from the list, notice was required to be left at "the place of his residence given in the registry," and though the residence be destroyed, he may be properly required to resort to the place of the destroyed residence for the purpose of ascertaining if notice has been left there, if he desires to protect his right of suffrage. And it is no answer to say that there is no precedent for such service as was made in this case. Unusual situations require unusual procedure to meet them, and the action of the sheriff was in accord with the mandate of the law in this case. If Betts, when he removed after the fire to another place of residence, had communicated this to the registers, it is fair to presume that a notice would have been sent to him at that address, though not required by law.

For the reasons we have stated, we are of opinion that the service contemplated by the law has been made in this case.

JAQUES v. CHANDLER.

(Supreme Court of New Hampshire. Rockingham. Nov. 7, 1905.)

1. WILLS—ELECTION—SURVIVING HUSBAND—EXTENSION OF TIME—STATUTES.

Pub. St. 1901, c. 186, § 13, and chapter 195, § 14, provides that a husband may waive the provisions of his wife's will in his favor by writing filed within one year after her decease, and not afterwards, unless the judge of probate on petition and for good cause shown shall ex-

tend the time, *Held*, that the term "for good cause shown," should be construed to mean whenever it would be reasonable and just to do so, or whenever justice required it.

2. SAME—BURDEN OF PROOF.

Where a husband applied for an extension of time within which to waive the provisions of his wife's will, as authorized by Pub. St. 1901, c. 186, § 13, and chapter 195, § 14, the burden was on him to show that justice required such extension.

3. APPEAL—QUESTION OF FACT—REVIEW.

On an application by a husband for an extension of time within which to waive the provisions of his wife's will, whether justice requires such extension is a proper subject for investigation of the superior court, but presents no question of law for determination on appeal.

4. WILLS—WAIVER—ELECTION BY HUSBAND—EXTENSION OF TIME.

Where a husband applied for an extension of time within which to waive the provisions of his wife's will and alleged a change in the situation after the expiration of a year from his wife's death, but there was no finding that the husband was misled, or that, if he had anticipated an improvement in the value of certain stock, he would have waived the will, it could not be said, in the absence of such findings, that he should be permitted to waive the will as a matter of law because of such change which he may have anticipated.

Transferred from Superior Court; Stone, Judge.

Petition by William H. Jaques against Lucy H. Chandler, executrix of the will of Elizabeth H. Jaques, deceased, for an extension of time for the filing of a waiver by petitioner of the provisions of the will of decedent, who was his wife. The wife died April 2, 1895, but the petition was not filed in the probate court until December 28, 1897. An order was entered by the probate court denying the petition, from which petitioner prosecuted an appeal to the superior court. Case transferred to Supreme Court. Exceptions overruled.

Streeter & Hollis and Edwin G. Eastman, for plaintiff. Samuel C. Eastman and Frink & Marvin, for defendant.

PARSONS, C. J. The husband may waive the provisions of his wife's will in his favor by writing filed within one year after her decease, "and not afterwards, unless the judge of probate, upon petition and for good cause shown, shall extend the time." Pub. St. 1901, c. 186, § 13; *Id.* c. 195, § 14. The plaintiff's petition for leave to file a waiver of the will after the expiration of the year having been denied by the probate court, he duly appealed to and prosecuted his appeal in the superior court. That court, upon hearing, made a special finding of facts, and held that the facts found did "not constitute, either as matter of fact or of law, a good cause shown for extending the time in which to waive the provisions of the will," and dismissed the appeal. To the foregoing finding and order dismissing the appeal, and to the refusal of the court to enter an order sustaining the appeal and reversing the decree of the probate court, the plaintiff excepted.

It is conceded that the exception does not raise any question as to the accuracy of the special facts found and stated in the case. There are no exceptions to evidence or procedure, and the only question presented is whether the conclusion of the court that good cause had not been shown was legal error.

Prior to the Public Statutes. (1891) there was no statutory limitation of the time within which either husband or wife might waive the other's will and take instead the rights under the statute which depended upon such waiver (Gen. Laws 1878, c. 202, §§ 7-10, 15, 16), unless it appeared that the provisions of the will were intended to be in addition to those of the statute. *Brown v. Brown*, 55 N. H. 106; Gen. Laws 1878, c. 202, § 18. But conduct inconsistent with an intent to waive the will was regarded as an election to hold under the will. *Hovey v. Hovey*, 61 N. H. 599. The uncertainty whether the rights of the survivor were to be determined by the statute or the will, in the absence of any definite act establishing such election, tended to delay the settlement of estates and was without doubt the cause of the statutory addition. This prescribed a rule of evidence under which the absence of a written waiver on file at the end of the year conclusively established an election to take under the will. As the right was purely statutory, the Legislature had power to withdraw it altogether, or to impose such limitations upon its exercise as might seem to them just. It is apparent that there might be cases in which the right of election could not be intelligently exercised, and other cases where without fault the survivor might neglect or be unable to file the waiver within the year. In such circumstances a strict application of the rule might produce injustice, if no relief could be afforded. To provide for such cases is the object of the clauses which authorize the probate court to extend the time for filing such waiver "for good cause shown."

The expression "good cause shown" is not common in the statute law of the state. The only use of it that has been found which has been construed by the court is in the statute relating to costs. "In all actions or petitions in the Supreme Court, costs may, on motion and good cause shown, be limited," etc. Gen. St. 1867, c. 214, § 2. In *Whitcher v. Benton*, 50 N. H. 25, 27, it is said, in substance, that whatever would make it appear just and reasonable that costs should be limited would be good cause for so doing. In *Forster v. Farquhar* [1893] 1 Q. B. 564, 567, in construing a rule authorizing the court to limit costs "for good cause shown," it is said: "No nearer and closer definition can be given than that there will be good cause whenever it is fair and just between the parties that it should be so." See *Jones v. Curling*, 13 Q. B. Div. 262, 267. Considering the manifest reason of the provision, the probable legislative purpose, and the

definition of the term already given by this court and others, it appears probable that it was intended that permission to file the waiver after the year should be given whenever it would be reasonable and just to do so; in other words, when justice required it.

What justice requires is a question of fact which is finally determined by the tribunal trying that fact (*Cook v. Lee*, 72 N. H. 569, 58 Atl. 511), whether the question be one of costs (*Nutter v. Varney*, 64 N. H. 334, 10 Atl. 615), the allowance of an amendment (*Pub. St. 1901, c. 222, § 8*; *Morgan v. Joyce*, 66 N. H. 470, 30 Atl. 1119), whether permission should be granted to prosecute a claim against the estate of a deceased person after the time limited by law (*Pub. St. 1901, c. 191, § 27*; *Libby v. Hutchinson*, 72 N. H. 190, 192, 55 Atl. 547), whether a new trial should be granted in any case (*Pub. St. 1901, c. 230, § 1*; *Ela v. Ela*, 72 N. H. 216, 55 Atl. 358), or whether one claiming damages under the traveler's statute should be permitted to file notice thereof (*Pub. St. 1901, c. 76, § 8*; *Boyd v. Derry*, 68 N. H. 272, 38 Atl. 1005). What justice requires, whenever the question arises, is "a proper subject for investigation in the superior court; but it presents no question of law for determination in this court." *Fulton Pulley Co. v. Machine Co.*, 71 N. H. 384, 52 Atl. 457; *First Nat. Bank v. Savings Bank*, 71 N. H. 547, 551, 53 Atl. 1017; *Priest v. Railroad*, 71 N. H. 114, 116, 51 Atl. 667; *Carr v. Adams*, 70 N. H. 622, 45 Atl. 1084; *Story v. Railroad*, 70 N. H. 364, 367, 48 Atl. 288; *Parsons v. Durham*, 70 N. H. 44, 46, 47 Atl. 600; *Jaquith v. Benoit*, 70 N. H. 1, 45 Atl. 714; *Hale v. Jaques*, 69 N. H. 411, 412, 43 Atl. 121; *Lawson v. Kimball*, 68 N. H. 549, 551, 38 Atl. 880; *State v. Collins*, 68 N. H. 46, 36 Atl. 550; *Broadhurst v. Morgan*, 66 N. H. 480, 29 Atl. 553; *State v. Stone*, 65 N. H. 124, 126, 18 Atl. 654; *Powers v. Holt*, 62 N. H. 625; *Davis v. Dyer*, 62 N. H. 231; *Page v. Whidden*, 59 N. H. 507; *Webster v. Webster*, 58 N. H. 247; *Brooks v. Howard*, 58 N. H. 91; *Eames v. Stevens*, 26 N. H. 117, 121. It has been held that a statute which directs that a court may do a thing on good cause shown vests a discretion in the court. *People v. Sessions*, 62 How. Prac. 415; *Kendall v. Briley*, 86 N. C. 56; *Kerchner v. Singletary*, 15 S. C. 535. "Judicial discretion, in its technical legal sense, is the name of the decision of certain questions of fact by the court." *Darling v. Westmoreland*, 52 N. H. 401, 408, 18 Am. Rep. 55; *Bundy v. Hyde*, 50 N. H. 116, 120. It is in fact conceded in the plaintiff's brief that whether good cause exists in a given case is a question of fact. This conclusion, assented to by the plaintiff and supported by the authorities, is decisive of his exception. Whether good cause was shown—what justice required—has been found as a fact from the evidentiary facts reported, by the tribunal having jurisdiction to find the fact. Such a finding, if supported by any competent evi-

dence, cannot be set aside except under such circumstances as would authorize the setting aside of the verdict of a jury as against the weight of the evidence, i. e., that the result was produced by passion, partiality, or corruption, or that the trier of fact unwittingly fell into a plain mistake. *Colburn v. Groton*, 66 N. H. 151, 154, 28 Atl. 95, 22 L. R. A. 763; *Norris v. Clark*, 72 N. H. 442, 444, 57 Atl. 334.

In this case the appellant was the moving party; the burden was on him to establish his contention. The question, therefore, is not whether some fact found authorizes or requires the dismissal of his appeal, because the absence of sufficient evidence to prove the affirmative of the issue to the satisfaction of the trier of fact is as fatal to his case as the most conclusive evidence against his claim could be. The question is not whether this court, sitting as triers of the fact, would have found the same or a different verdict upon the facts stated, but merely whether any fact or facts reported so conclusively establish that justice requires the granting of the plaintiff's petition that the refusal to do so upon all the facts found, with all the inferences that might with reason be drawn from them, is plainly unreasonable. In other words, is it apparent that the court unwittingly fell into a plain mistake, or is any fact found inconsistent as matter of law with the verdict (*Concord Coal Co. v. Ferrin*, 71 N. H. 833, 835, 51 Atl. 283, 93 Am. St. Rep. 496); for no other ground upon which the conclusion of the court can be reversed is suggested.

By the will and codicil the plaintiff was given the real estate in fee, subject to a life estate in one-half to Mrs. Hale, Mrs. Jaques' mother. After deducting pecuniary legacies, he was also given a life estate in one-half of the personal property, the other half being given to Mrs. Hale for life, remainder to Mrs. Chandler. The problem presented to the petitioner was whether he should take such estate, or one-half of the whole, both real and personal, in fee. He was informed as to his rights, and, it is found, must have understood it was for his pecuniary advantage to insist upon his distributive share under the statute, while it was for the ultimate advantage of Mrs. Chandler that the will should not be waived. It was alleged that the parties interested to have the appellant abide by the will entertained feelings of hostility toward him, which they concealed for the purpose of inducing him to forego his right to waive the will, and it is found that, if during the year Mr. Jaques had anticipated the legal controversies and bitter feelings which have since developed, he would have waived the will. But the charge of concealment for the purpose of inducing Mr. Jaques not to waive the will is not found to be proved. It is found it was not proved. Whatever resentment or ill feeling arose during the year, it is found Mr. Jaques, as a reasonable man, ought to have anticipated would result from

the course pursued by him. Much of the trouble arose from the fact that the parties directly interested were coexecutors and were of such temperament that they could not work together without irritation, friction, and ill feeling. This, it is found, both parties must have known. A waiver of the will while both parties remained executors would probably not have lessened the difficulties encountered. Substantially the same, if not greater, trouble would probably have ensued in a division of the property which gave one-half in fee to Mr. Jaques, as in attempting to make one which gave him half for life. Most of the controversies appear to have arisen since the year expired.

It is further claimed that within the year Mr. Jaques did not know the value of the estate. Upon this point it is found that Mr. Jaques had full knowledge respecting his wife's property, and that there was no fact relating to its nature, location, situation, or amount of which he was ignorant during the year after her death. This finding would seem to be conclusive. The argument, however, is based upon another finding as to the securities of the estate. A considerable portion of the estate consisted of stock in the Manhattan Brass Company and of a claim against that company for money loaned. It is found that at the time of Mrs. Jaques' death Mr. Jaques could not accurately estimate the value of this portion of the estate. There has been no change in the value of this portion of the estate, except what has been brought about by improved management and business conditions. It appeared that Mr. Jaques was a stockholder and officer in the brass company for many years, and had full knowledge of, and was familiar with, all its financial and business interests. It is not found that Mr. Jaques was misled in any way, or that, if he had anticipated the improvement in the value of the stock and claim, which it appears to have been conceded took place, he would have waived the will. In the absence of such findings, it cannot be held as matter of law that he should be permitted to waive the will because of such change which, so far as appears, may have been anticipated by him. The substance of both claims is the same—a change in the situation after the year. If such a change is evidence which would authorize a decree for the plaintiff, a point not now decided, it does not require it as matter of law.

The question between the parties was one of fact. That fact has been tried and determined, without exception to any ruling of law by the trial court. An exception to the finding of fact upon evidence, even if the evidence is complex and conflicting, does not invoke the jurisdiction of this court. *Searles v. Churchill*, 69 N. H. 530, 43 Atl. 184.

Exception overruled.

WALKER and YOUNG, JJ., did not sit. The others concurred.

PRIOR v. FULLER.

REARDON v. SAME.

(Supreme Court of New Hampshire. Hillsborough. Dec. 5, 1905.)

TRIAL—EVIDENCE—EXCEPTIONS—SUFFICIENCY OF OBJECTION.

Where a witness testified that he saw defendant at a certain time and place and overheard a conversation between him and the plaintiff, an objection to an inquiry as to what the conversation was, on the ground that it was not sufficiently established that the person whom the witness heard in conversation with plaintiff was the defendant, presented a question of fact and not of law.

Exceptions from Superior Court; Pike, Judge.

Actions of assumpsit by James B. Prior and by Timothy F. Reardon against Herbert A. Fuller. Judgment for plaintiffs, and defendant excepts. Exception overruled.

Assumpsit, for services. The actions were tried together at the January term, 1905, of the superior court. The plaintiff Reardon testified that he saw the defendant at a certain time and place, and overheard a conversation between him and the plaintiff Prior. The defendant objected to an inquiry as to what the conversation was, upon the ground that it was not sufficiently established that the person whom the witness heard in conversation with Prior was the defendant. The objection was overruled, and the defendant filed a bill of exceptions, which was allowed.

William W. Risk and Edgar I. Kendall, for plaintiffs. Vere Goldthwaite and Wallace B. Clement, for defendant.

PARSONS, C. J. Whether the person whose conversation with the plaintiff was heard by the witness was the defendant or some other was a question of fact. There being evidence tending to show that such person was the defendant (*Glauber Mfg. Co. v. Voter*, 70 N. H. 332, 47 Atl. 612), the objection that it was insufficient to establish the fact goes merely to the weight of the evidence, and raises no question of law.

Exception overruled. All concurred.

EDGERLY v. EDGERLY et al.

(Supreme Court of New Hampshire. Belknap. Dec. 5, 1905.)

1. WILLS—PROBATE—BURDEN OF PROOF.

On an application for probate of a will, the burden is on the proponent to show that the will was not the result of undue influence, so that a mere absence of evidence on such issue is fatal to the allowance of the will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 389.]

2. SAME—PRESUMPTIONS.

A presumption in favor of the validity of a will executed with all the formalities required by law by a testator of age and of sound mind does not arise when the will is shown to have

been executed under circumstances which might have amounted to undue influence.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 889.]

3. SAME—EVIDENCE—QUESTION FOR JURY.

On an application for probate of a will, evidence held to require submission of the question of undue influence to the jury.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 769.]

Transferred from Superior Court; Peaslee, Judge.

Application by John W. Edgerly, as executor of the will of Mary F. Calef, deceased, for probate thereof, to which Frank G. Edgerly and others filed objections, on the ground of undue influence and insanity. On the first issue the probate court directed a verdict for plaintiff, subject to exception, and the jury disagreed on the second. Defendants appealed. Case transferred to Supreme Court. Exception sustained.

The parties are nephews and heirs at law of the testatrix. There was evidence that she was equally fond of them and had expressed an intention of dying intestate. The will gives substantially all her property to the plaintiff, who lived in the same town with the testatrix, managed all her business for a number of years, and was desirous that she should make a will in his favor. At the date of the will the testatrix was more than 80 years old and in feeble health. Her mind was impaired to such an extent that she was not likely to form new ideas, but could be easily influenced to accede to the wishes of others. There was evidence that she was afflicted with senile dementia, a disease which produces failure of perception, memory, reason, and judgment. While she was in this condition, the plaintiff carried her to a scrivener, and the will was executed. The plaintiff remained at the scrivener's office during all the time required for drawing and executing the will, except that he went out for the purpose of procuring witnesses.

Jewell, Owen & Veazey and Samuel C. Eastman, for plaintiff. William H. Sawyer, John H. Albin, and Shannon & Tilton, for defendants.

YOUNG, J. The question to be considered is not whether it is more probable than otherwise that Mrs. Calef's will was procured by undue influence, but whether the evidence has any tendency to prove that it was so procured. The burden was on the plaintiff to show that it was not. Patten v. Cilley, 67 N. H. 520, 42 Atl. 47; Whitman v. Morey, 63 N. H. 443, 2 Atl. 899; Hardy v. Merrill, 56 N. H. 227, 22 Am. Rep. 441; Boardman v. Woodman, 47 N. H. 120; Judge of Probate v. Stone, 44 N. H. 593; Perkins v. Perkins, 39 N. H. 163. Since this burden was on him, the mere absence of evidence would not authorize the court to order a verdict in his favor. Absence of all evidence tend-

ing to prove how the will was procured would be as fatal to his cause as the most conclusive proof that it was produced by undue influence. Jaques v. Chandler, 73 N. H. —, 62 Atl. 718. In other words, unless there was evidence tending to sustain the validity of the will, a verdict should have been directed for the defendants. If there is usually a presumption in favor of the validity of a will, when it appears that it was executed with all the formalities required by law, and that the testator was 21 years of age and of sound mind, it is a presumption of fact and not of law, and does not arise, as will hereinafter be shown, when the will is executed under circumstances which might have been found to exist in this case. If there was evidence tending to sustain the validity of the will, and also evidence tending to prove that it was procured by undue influence, that issue should have been submitted to the jury. If there was any evidence to sustain that issue, whether such an inference should be drawn from it was a question of fact. The fact that an inference unfavorable to the validity of a will, which may be drawn when it appears that a person who was dependent upon or subject to the control of another (Woodbury v. Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479) makes a will in that other's favor, may be rebutted by showing that the transaction was fair and honest, does not change the question of whether or not it has been rebutted from one of fact to one of law. Whenever facts that would sustain the will are put in evidence, together with other facts from which an inference unfavorable to its validity may be drawn, the question of whether the unfavorable inference should be drawn, and if so whether it has been rebutted, are both questions of fact, for they are the same questions which arise on every motion to set a verdict aside as against the weight of the evidence; and in this state the questions arising on such a motion are questions of fact. Prior v. Fuller, 73 N. H. —, 62 Atl. 716; Perkins v. Roberge, 69 N. H. 171, 39 Atl. 583; Willard v. Sullivan, 69 N. H. 491, 45 Atl. 400. Therefore the sole legal question raised by the defendants' exception is whether there was any evidence from which an inference unfavorable to the validity of the will could be drawn.

Experience has shown that in the great majority of cases transactions are not fair and honest in which a person procures a gift from one who is dependent upon him or in some way under his control. Consequently, whenever it appears that the donor was dependent upon or under the control of the donee, and that the latter took an active part in procuring the gift, it may be inferred that the gift was procured by undue influence. In this case, it could be found that at the time the will was made the plaintiff was the confidential adviser of the testatrix in respect

to all her business affairs, and that she was dependent upon him and subject to his control in respect to such matters; that her condition, physical and mental, was such that she was hardly capable of forming new ideas, but could be easily influenced to do as he wished; that she had formed an intention of dying intestate, but that he, anxious to have her make a will in his favor and knowing her condition, took her to a scrivener and remained with her while she executed a will giving him substantially all her property. Although there is a difference of opinion as to whether the inference which may be drawn from these facts is one of fact or of law, all courts agree that an inference unfavorable to the validity of the will may be drawn from them. In other words, all courts hold that they have a tendency to prove that the will was procured by undue influence. *Burnham v. Heselton*, 82 Me. 495, 20 Atl. 80, 9 L. R. A. 90; *Patten v. Cilley*, 67 N. H. 520, 528, 42 Atl. 47; *In re Barney*, 70 Vt. 352, 40 Atl. 1027; *Woodbury v. Woodbury*, 141 Mass. 320, 5 N. E. 275, 55 Am. Rep. 479; *Drake's Appeal*, 45 Conn. 9; *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310; *In re Smith's Will*, 95 N. Y. 516; *Gilham's Case*, 64 N. J. Eq. 715, 52 Atl. 690; *Herster v. Herster*, 122 Pa. 239, 16 Atl. 342, 9 Am. St. Rep. 95; *Waltson's Estate*, 194 Pa. 528, 45 Atl. 426; *Henry v. Hall*, 106 Ala. 84, 17 South. 187, 54 Am. St. Rep. 22; *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584; *McParland v. Larkin*, 155 Ill. 84, 39 N. E. 609; *Maynard v. Vinton*, 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276; *Severance v. Severance*, 90 Mich. 417, 52 N. W. 292; *Ross v. Conway*, 92 Cal. 632, 28 Pac. 785; *Bingham v. Salene*, 15 Or. 208, 14 Pac. 523, 3 Am. St. Rep. 152. This case is essentially different from *Page v. Billbruck*, 60 N. H. 664, 38 Atl. 1099, on which the plaintiff relies. In that case there was no evidence that the beneficiaries were present when the codicil was made, so there was no direct evidence that they induced the testator to make it; but in this case it could be found that it was the plaintiff, and not the testatrix, who made the will. *Tyler v. Gardiner*, 35 N. Y. 559, 589; *DeLafield v. Parish*, 25 N. Y. 9, 35, 92.

Exception sustained.

WALKER, J., did not sit. The others concurred.

WOODWARD'S ESTATE v. HOLTON et al.

(Supreme Court of Vermont. Windham. Jan. 28, 1906.)

WILLS—LEGACIES—INTEREST ON LEGACY.

Pecuniary legacies draw interest after one year from the death of the testator, unless the will provides otherwise, regardless of the pendency of a contest delaying the settlement of the estate and the participation in that contest by the legatees claiming interest.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1849–1855.]

Exceptions from Windham County Court; Tyler, Judge.

In the matter of the estate of Julia F. Woodward, deceased. There was a final decree of distribution, from which the executor appealed to the county court which rendered a different judgment, and the legatees excepted. Judgment reversed.

Ann J. Stoddard deceased at Westminster September 29, 1899, leaving a will which was duly probated by the probate court within and for the district of Westminster in the state of Vermont, on the 3d day of February, 1900. Ira B. Holton, Abbie L. Buck, and Anna O. Phelps, who were heirs at law of the deceased and also legatees under said will, appealed from the probate and allowance of said will, which appeal is dated February 8, 1900. The cause was tried by jury at the September term, 1901, of Windham county court, and resulted in a verdict and judgment establishing said will. Exceptions were taken by said contestants to the Supreme Court. While the case was pending in Supreme Court, said exceptions were waived, and on December 12, 1901, said judgment of the county court establishing said will was affirmed and certified to said probate court. Such proceedings were then had in said probate court that said court made a final decree of distribution of said estate on the theory that the specific cash legacies should draw interest after one year from the death of the testatrix. From this decree the executor of said will appealed to the Windham county court. Said court, at its April term, 1903, rendered judgment on the theory that said legacies should draw interest after one year from the final establishment of said will by said judgment of the Supreme Court. To this judgment said legatees excepted.

Argued before MUNSON, STARR, WATSON, STAFFORD, and HASELTON, JJ.

Clarke C. Fettes, for plaintiff. E. L. Waterman, J. L. Martin, and E. W. Gibson, for defendants.

MUNSON, J. The case calls for a determination of the time from which interest should be allowed on legacies given without testamentary provision governing the allowance. The final allowance of the will which gave the legacies in suit was delayed by an appeal from the decree of the probate court and the taking of the exceptions to the Supreme Court. The county court allowed interest after the expiration of one year from the time when the will was finally established.

This court has undertaken to state the rule governing the allowance of interest on legacies in two cases of comparatively recent date, *Bradford Academy v. Grover*, 55 Vt. 462, and *Baptist Convention v. Ladd*, 58 Vt. 95, 4 Atl. 634. In neither of these cases was the court called upon to determine the rule. In *Bradford Academy v. Grover* it was said:

that legacies ordinarily draw interest after one year from the death of the testator; but there the will directed the payment of interest after the happening of a certain event, and the scope of the decision was merely that the general rule may be controlled by an express provision of the will. In *Baptist Convention v. Ladd* the court stated the rule as follows: "Legacies in this state, unless otherwise controlled by the will, draw interest after one year from the probate of the will." In this case the legacy had been paid, and the court held, that the payment was so made and accepted, that there was an accord and satisfaction. The payment was long after the expiration of one year from the probate of the will, and no interest whatever was included in the payment. It being considered that no interest was recoverable, it was not necessary to determine the amount, and no use was made of the rule as stated. There are some well-established exceptions to the general rule, one of which was considered in *Smith v. Moore*, 25 Vt. 127; but a review of these exceptions is not essential to our inquiry.

The rule adopted by the ecclesiastical courts, which has become the settled rule of the common law, requires the payment of interest after one year from the death of the testator. But in states where the statute allows one year from the granting of letters for the payment of debts and legacies it is generally, but not universally, held that legacies draw interest only after the expiration of a year from the issuance of the letters. Some of these statutes are specific as regards the time of payment, while others are similar to ours. Our statute does not itself fix a time for the payment, nor forbid the payment before a specified time, but authorizes the probate court to allow a time which shall not in the first instance exceed one year, and provides for an extension of the time when the circumstances of the estate require it. We think that statutes of this character were not intended to change the rule regarding the allowance of interest on legacies. This view was taken, and persisted in, by the more prominent surrogate courts of New York, until the contrary was unmistakably adjudged by the Court of Appeals. *Matter of McGowan*, 124 N. Y. 526, 26 N. E. 1098. The same view was afterwards taken by the New Jersey court, in an opinion based expressly upon the reasoning of the New York surrogates. *Davison v. Rake*, 45 N. J. Eq. 767, 18 Atl. 752.

It has always been considered that convenience requires the adoption of some definite general rule to govern cases of this class, and it has always been conceded that any rule that may be adopted will work some inequality, and perhaps hardship, in exceptional cases. Courts have therefore been content to adopt such rule as seemed to them most likely to prove reasonable and convenient in cases generally. It seems un-

necessary to consider the various reasons that have been advanced in support of the rule which determines the time by the death of the testator. It may be that some of them have little force when the rule is applied in connection with the administration laws generally prevailing in this country. But the rule has certain advantages which we consider sufficient to overcome all objections. It bases the allowance of interest upon an initial point that cannot be moved by the various accidents of settlement, and thus enables a testator to give certainty to his bequests without the use of special provisions. It accords substantially with what may properly be considered the intention of a testator whose will is silent as to interest; for it is doubtless true that wills are ordinarily made in expectation of the usual course of settlement. But, if the probating of the will or the granting of letters is made the controlling factor, the value of a bequest may be lessened by a postponement of payment without interest, on the happening of a great variety of contingencies which the testator cannot be supposed to have in contemplation. When this takes place the scheme of the ordinary will is reversed, and the more favored bequests are lessened in value to increase the remainder.

Whatever the rule in this state may have been heretofore, we hold that pecuniary legacies draw interest after one year from the death of the testator, unless the will provides otherwise. This case cannot be made an exception on the ground that the contest which delayed the settlement of the estate was participated in by the legatees who are claiming the interest. *Kent v. Dunham*, 106 Mass. 590.

Judgment reversed, and judgment for the face of the legacies, with interest after one year from the death of the testator, to be certified.

BELHEUMER v. THOMAS.

(Supreme Court of Vermont. Chittenden. Jan. 31, 1906.)

RELEASE—VALIDITY—FRAUD.

Where plaintiff's attorney fraudulently procured from plaintiff a release of the cause of action and delivered the same to defendant on the payment of a sum of money by defendant, who accepted the release in good faith, believing that it was properly obtained from plaintiff, and the attorney appropriated the money to his own use, the release was a bar, although plaintiff was guilty of no negligence in relying on the representations of her attorney and in signing the same.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 209-216; vol. 19, Cent. Dig. Estoppel, §§ 188-196.]

Exceptions from Chittenden County Court; Haselton, Judge.

Bastardy proceedings by Rose Belheumer against Harry R. Thomas. The case was heard on an agreed statement of facts, in

which a release was set up. The court ruled that the release was no bar, to which ruling defendant excepted, and the case was passed to the Supreme Court before hearing on the merits. Judgment for defendant.

John J. Enright and Edmund O. Mower, for plaintiff. Brown & Hopkins and V. A. Bullard, for defendant.

TYLER, J. This is a complaint for bastardy. The defendant pleaded the general issue and the plaintiff's release of the cause of action. The case was heard below upon an agreed statement of facts, which is, in substance, that the plaintiff on March 16, 1904, brought a complaint before a justice of the peace, through one Grossman, who acted as her attorney; that on the same day she brought another suit of the same kind, upon a similar, but distinct, cause of action, against the defendant, which suit is pending in county court; that this suit was entered July 8, 1904.

The release, signed, sealed, and sworn to by the plaintiff, and witnessed, reads: "Received of H. R. Thomas satisfaction in full of all claims and demands of every kind and nature that I have or can have against him to this date, meaning hereby especially to discharge the two proceedings brought against him by me before F. G. Webster, justice of the peace, on the 16th day of March, 1904, and to discharge all claims that I have or can have against said Thomas in respect of the matters complained of in said proceedings." It was agreed that the plaintiff never gave her attorney authority to settle either of said cases, unless this release was authority, and that he obtained her signature by false representations and fraud, and that he pretended to read the contents of the paper to her before she signed it, and represented that it was drawn for the purpose of bringing another suit against the defendant. It was agreed that the plaintiff, who was 19 years of age, had no knowledge of legal matters, and that she relied entirely upon the representations of Grossman in executing the paper; that the defendant on March 26, 1904, paid Grossman \$50 for the paper, which sum the latter retained, the plaintiff receiving no part of it; and that she did not learn until April 22, 1904, that a release had been given to the defendant, and that he had paid money to Grossman for it. Immediately upon learning these facts she notified defendant's attorney, through another attorney whom she had employed, that the release had been obtained from her by fraud, that she had given Grossman no authority to settle the cases, and that she repudiated the

pretended settlement. The defendant and his attorneys had no knowledge that the plaintiff had been deceived by Grossman, and he paid the sum of \$50 in good faith in settlement of the two suits.

It is a manifest hardship to the plaintiff that she has been defrauded of her right of action, if she had one; and it would be a hardship to the defendant, if he were compelled to make a defense to the suit, having paid \$50 for a release of the cause of action. One of these parties must suffer loss in consequence of the fraudulent act of Grossman. Which shall it be? It appears that the defendant acted in good faith in paying for and taking the release. The paper was shown to him with the plaintiff's signature attached, and it was witnessed and sworn to. He accepted and paid for it, and was innocent of any wrong in that transaction. The plaintiff was innocent of any wrongdoing in signing the release and allowing Grossman to depart with it. It was not necessary that the case should show that she was negligent or careless in signing the paper and intrusting it to Grossman without knowing its contents. It was sufficient that by her act she made it possible for Grossman to accomplish what he did, to make herself amenable to the rule that, where through the fraudulent act of a third person, one of two innocent parties must suffer, he who has clothed such third person with the means of perpetrating the fraud must bear the loss. The case is in principle like *Passumpsic Bank v. Goss and Page*, 31 Vt. 315, where Page signed a note with Goss, as his surety, payable to the bank, under an agreement with Goss that the latter should not use the note unless he obtained another surety upon it; but in violation of the agreement Goss procured the note to be discounted. It was held that this agreement constituted no defense: the bank officers having no knowledge of it. In both cases the instruments were apparently perfected when they were presented, and there was nothing upon them to indicate that they were not ready for delivery. The case is different from *Goodman v. Eastman*, 4 N. H. 455, where two men signed a note for \$20, payable to a third person, and the signer, who was intrusted with it, raised it to \$120. There the court said that the alteration was in effect a forgery. In that case the alteration was made after the note passed from the hands of the defendant, and when he could not have prevented it. See *National Bank v. Baltimore, etc.*, R. R. (Md.) 59 Atl. 134, 105 Am. St. Rep. at page 331.

Judgment reversed, and judgment for defendant.

ABBOTT et ux. v. FLINT'S ADM'R.

(Supreme Court of Vermont. Orange. Jan. 31, 1906.)

1. REFORMATION OF INSTRUMENTS — CHARACTER OF PROOF REQUIRED.

Equity will not correct a mistake in a written instrument, except on clear and undoubted testimony.

2. SAME—MISTAKES IN DESCRIPTION.

Where both the grantor and the grantees in a deed supposed, when the deed was executed and for several years thereafter, that it included all of a certain farm including a tract of so-called gore land, which had once had a distinct identity, but between which and the rest of the farm there was no definite boundary, and which had lost its separate identity, equity will reform the deed so as to include the gore land on its subsequently being discovered that it was not in fact included by the deed.

Exceptions from Orange County Court; Haselton, Judge.

Bill by Eugene S. Abbott and another against Russell A. Flint's administrator. A decree was rendered for the orators, and defendant brings exceptions. Affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, and POWERS, JJ.

N. L. Boyden, for orators. March M. Wilson and Frank Plumley, for defendant.

TYLER, J. The master finds that Russell A. Flint died seised of certain real estate situated in Braintree, and, among other parcels, a certain 10-acre lot of gore land, in the northwest corner of the town, between lot No. 52, in the Second division, and the west line of the town. The title to this gore land is the subject-matter in dispute. H. W. Flitts, as administrator of Flint's estate, in October, 1893, sold by auction to the orator Eugene S. Abbott, the "Biglow Farm," which comprised, as all the parties supposed, all the land that Flint had owned in the northwest corner of that town at the time of his decease. Adjacent to this farm and lying between it and the west corner of the town is the gore land, between which and the farm there are no definite bounds. The deed was made to the oratrix, Ella M., by the direction of her husband, the farm being described by reference to deeds from certain persons to Flint. The administrator intended to convey all the land that belonged to Flint's estate situated in that part of the town, though he had no knowledge of the gore land as a separate entity. The orator Eugene S., knew of its existence, and both orators supposed it was conveyed to them by the administrator's deed. The orators occupied this land with said farm several years after the purchase, and they and the administrator for many years supposed it was theirs, when the discovery was made that it was not included in the description in the deed. The facts that Flint, after his purchase of the land in controversy, maintained no boundary between it and the Biglow farm, that he made it a part of that farm, occupied and used it as such, and had it set in the grand list as part there-

of, show clearly that its identity as a separate piece of land had been lost long before the administrator's deed was given to the oratrix. The only shortage in the deed was that it described the land conveyed as acquired from certain persons, when the 10-acre piece was in fact acquired from a different person. The administrator had no intention to except it from the conveyance. He did not know of its separate existence, but he meant to convey all the land in that corner of the town that Flint had owned at the time of his death. Eugene S. knew about the gore land, but supposed it had ceased to have a distinct existence from the "Biglow Farm," and that it then was a part of it. His wife supposed that she was purchasing all the land that Flint had owned in that locality. This piece was required to make up the 318 acres that the Biglow farm was said to contain.

A court of chancery will correct mistakes in conveyances, when clearly and unequivocally proved, and make the instrument such, both in form and effect, as will fulfill the intention of the parties. This rule is laid down in all elementary works and is recognized in *Beardsley v. Knight*, 10 Vt. 185, which is cited with approval in 33 Am. Dec. 193, where *Kennard v. George*, 44 N. H. 446, and many other cases are referred to in the notes. The rule is aptly stated in 24 Am. & Eng. Ency., in the notes upon page 650, that when through ignorance, inadvertence, negligence, or otherwise, the description in a deed does not in fact embrace the land which the parties intended it should, and which they supposed it did, it is considered a mistake of fact, and the description can be reformed, though it is exactly as the parties intended it should be. See *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228, and other cases there cited. This rule is also fully explained and illustrated both in the opinion and in the notes in *Coles v. Bowne*, 10 Paige (N. Y.) 526, 4 Lawy. Ed. 1077; Pom. Eq. Jur. §§ 852-855. It is the rule, as the defendant contends, that equity will not correct a mistake in a written instrument, except on clear and undoubted testimony. *Lyman's Adm'r's v. Little*, 15 Vt. 576. It is generally said in the books that the court must be satisfied beyond a reasonable doubt that a mistake has been committed, and in the present case the master's report makes it clear that both parties intended a conveyance of all the land in a certain locality, but by a mutual mistake, they omitted to describe it specifically in the deed, which brings the case within the rule.

The rule is different where there is a misunderstanding as to anything material contained in the deed, for there mutuality of consent is wanting. As was said by Mr. Justice Swayne, in *First National Bank v. Hall*, 101 U. S. 43, 25 L. Ed. 825, the requisite mutuality of assent as to such thing is wanting; consequently the supposed contract does not

exist, and neither party is bound. In the view of the law, in such a case, there has been only a negotiation, resulting in a failure to agree. What has occurred is as if it were not, and the rights of the parties are to be determined accordingly. Further on he says: "It is essential to the validity of a contract that the parties should have consented to the same subject-matter in the same sense. They must have contracted *ad idem*." This rule applied to the case at bar entitles the orators to relief, for the parties did consent to the same subject-matter in the same sense. There was perfect mutuality of assent in respect to the land, the title to which was to pass to the orators by the administrator's deed, but by a mutual mistake a description of the gore land was omitted.

No exception was taken to the master's report, and no question is before us, but that the master made his findings with the requisite degree of certainty.

Decree affirmed, and cause remanded.

MAHONEY'S ADM'R v. RUTLAND R. CO.
(Supreme Court of Vermont. Rutland. Jan. 26, 1908.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF VICE PRINCIPAL—SUFFICIENCY OF EVIDENCE.

In an action for the death of a railroad engineer, caused by a collision of a regular train with a train running on special orders, evidence held insufficient to show negligence on the part of the train dispatcher.

2. SAME—NEGLIGENCE OF FELLOW SERVANT—PROXIMATE CAUSE.

An engineer on an extra train received orders to proceed to the next station south, and reported his departure in accordance with his orders at 5:06, timing it ahead, in accordance with custom, to 5:10. The telegraph operator failed to transmit the report of the departure to the dispatcher in accordance with the railroad's rules. A regular north-bound train left the station to which the extra was running at 5:18. The stations were only about seven miles apart, and the two trains collided, thereby causing the death of the engineer on the regular train. *Held*, that the telegraph operator's failure to report the departure of the extra train, so that the train dispatcher could have held the regular train at the south station, was the proximate cause of the accident.

Exceptions from Rutland County Court; Tyler, Judge.

Case for negligence by Dennis Mahoney's administrator against the Rutland Railroad Company. There was a judgment for plaintiff, and defendant excepted. Reversed.

Plaintiff's intestate was the engineer on the engine drawing the "Flyer." On January 2, 1908, Cowee was the engineer running engine numbered 192, which was drawing a train from Rutland to Shelburne, and one Parris was the conductor of said train. This train left Rutland on said day about 7:30 o'clock a. m., under an order of the train dispatcher to run extra to Middlebury. On its arrival at Middlebury it received another order to run extra to Burlington. This train

was distributing salt and coal to stations from Rutland to Shelburne. It reached Shelburne about 3:30 p. m., and on completing its work at that station would return to Rutland; but it was necessary for Cowee to turn his engine, take water, and clean his fire before starting back to Rutland, and, as there was no turntable at Shelburne, it was decided to run down to Burlington, which was the station next north from Shelburne. Before leaving Shelburne for Burlington Parris and Cowee consulted the time-table of regular trains, and found that trains numbered 21 and 27, which were scheduled on said time-table and were then moving north, were then overdue, and had not then arrived at Shelburne, and that train numbered 65 on said time-table, and known as the "Flyer," was moving north, and was due to leave Shelburne at 5:18 p. m. Cowee went to Burlington with his engine 192, having with him on his engine one Chase, as fireman, and one Cockran, as brakeman, and went to the freighthouse, which was situated in the freightyard, and which was the proper place to report his arrival and to ask for orders, if any were needed. He registered his arrival at Burlington at 4:50 p. m. in a book kept at said freighthouse for that purpose, and then asked the train dispatcher at Rutland, through Tynan, the telegraph operator at Burlington, for orders. Said train dispatcher thereupon sent to Cowee the order which is quoted in the opinion, and which was taken off the wires by Tynan, read by him to Cowee, repeated back by Tynan to the train dispatcher, who gave the O. K. signal and made the order complete at 5:06 p. m.; and Tynan then delivered a copy of the order to Cowee, who thereupon registered in the book aforesaid, under the column headed "Departure," the figures "5:10." This entry of departure was not reported to the train dispatcher at Rutland until after midnight, as the collision broke down the wires, so that they were not available till near midnight. Cowee, with his engine 192, left Burlington for Shelburne at 5:10 p. m., or as soon thereafter as he could get off. The Flyer left Shelburne at 5:18 p. m. The distance from Burlington to Shelburne is between 6½ and 7 miles. At a point about 1½ miles north of Shelburne the Flyer collided with Cowee's said engine, and thereby plaintiff's intestate and his fireman, on the engine drawing the Flyer, and said Cowee, were instantly killed, and said Chase and Cockran received injuries whereof they died within an hour or two after the collision. No claim was made that plaintiff's intestate was in fault in any respect. At the close of the evidence defendant moved for a verdict on the ground that the evidence did not show any negligence of defendant which caused the death of plaintiff's intestate, and if such death was caused by the negligence of Cowee, or by that of Tynan, or by that of both com-

bined, that both Cowee and Tynan were fellow servants of Mahoney, and that the negligence of Cowee, in moving his engine onto the main line in violation of the rules and of the law of the state, was the proximate cause of Mahoney's death. The court overruled this motion, to which defendant excepted.

Argued before ROWELL, C. J., and MUNSON, START, WATSON, and HASELTON, JJ.

Butler & Maloney, for plaintiff. H. H. Powers, P. M. Meldon, and F. S. Platt, for defendant.

MUNSON, J. The court treated the train dispatcher as a vice principal of the defendant, and no question was or is made as to the correctness of this view. The court definitely instructed the jury that Cowee, the engineer of the extra train, was a fellow servant of plaintiff's decedent, and in connection therewith explained the rule applicable to that relation. The case was submitted upon grounds which assumed that Tynan, the telegraph operator at the Burlington freightyard, was also a fellow servant of the deceased. The only questions left to the jury regarding Tynan were whether he was a competent operator, and if not, whether his incompetency caused the collision, and, if it did, whether the defendant was negligent in employing him. If there was a failure in this connection to distinguish sufficiently between a mere act of neglect and the result of incompetency, no exception was taken to it.

The only other question submitted was whether the dispatcher was negligent in not taking further action after completing the order which allowed Cowee to run south from Burlington, and the only bearing given to the question of Tynan's competency was upon his failure to report Cowee's departure, and the effect of that failure on the action and responsibility of the dispatcher. The order was received by Tynan at 5 o'clock, and was thereupon made known to Cowee and repeated to the dispatcher, but was not made complete and effective by the dispatcher's reply until 5:06. The north-bound train known as the "Flyer" was due to leave Shelburne at 5:18. Cowee entered his time of leaving as 5:10 in a register that lay close by Tynan. The rules of the defendant required its operators to promptly record and report to the train dispatcher the time of departure of all trains. Tynan did not attempt to report Cowee's departure before 5:18.

The plaintiff contends that the defendant's delay of nearly six minutes in completing the order, in connection with the Flyer's time of leaving Shelburne, produced a situation which made it his duty to give further instructions; that it was at least his duty, when he failed to receive a speedy report of

Cowee's departure, to inquire in regard to it; and that in any event, if Tynan had promptly reported Cowee's time of leaving as registered, the dispatcher could have held the Flyer at Shelburne and prevented the collision. The court gave no definite construction to this order, and no instruction as to what it gave Cowee the right to do, but left it for the jury to say whether the dispatcher ought to have anticipated that Cowee would leave when the order was made effective, and have held the Flyer at Shelburne. The defendant contends that Cowee's departure was in direct violation of the order when read in connection with the rules, and that there was nothing in the situation that called for further action on the part of the dispatcher. The order received by Cowee was as follows: "Engine 192 will run extra Burlington to Rutland; will meet train 21 at Vergennes, and 27 at New Haven Junction." This order is in the form which the rules prescribe for extra trains, and under the form, as embodied in the rules, is the following direction: "A train receiving this order * * * must keep clear of all regular trains, as required by rule." Rule 86 provides that an inferior train must keep out of the way of a superior train; and Cowee's train was inferior to the Flyer. So this was not an order for Cowee to leave Burlington at once, or at any particular time. It operated merely as a clearance, which permitted him to leave subject to the rule. It authorized him to run from Burlington to Rutland, going from station to station as he might be able to without getting upon the schedule time of regular trains. The dispatcher had a right to assume that the train would be run in this manner, unless there was something in the situation, as known to him, which ought to have led him to expect the contrary.

We find nothing in the circumstances disclosed by the evidence that tends to charge the dispatcher with a further duty. The fact that the order was sent six minutes before it was put in force could not have been expected to confuse a competent engineer. The dispatcher could properly assume that the engineer would determine his action with reference to the time left available by the completed order. The distance from the Burlington freightyard to Shelburne is not less than 6½ miles. An extra is not only required to keep off the time of regular trains, but is required to allow five minutes at the place of meeting for taking the siding and closing the switch. This required that Cowee be at Shelburne at 5:13, and, making the least possible allowance for getting started after the order was made complete, it would require a run of over a mile a minute; and, if a use of three of the five minutes allowed for side tracking had been contemplated, it would then have required a speed of over 40 miles an hour. But the

dispatcher was not bound to anticipate such a gross violation of the five-minute rule, and without this it is clear that ordinary caution could not have anticipated a departure. Moreover, the question whether a train of this character can get off in season to reach another station within the time allowed by the rules will often depend upon local conditions which are known to the trainman in charge, but cannot be known to the dispatcher. These may include the location of the train in the yard, the number of switches to be passed in reaching the main track, and the condition of the yard as regards other movements. Inasmuch as an extra is required to protect itself against regular trains, it is evident that the starting of such a train must be left, within proper limits, to the judgment of the one in charge of it. In these circumstances, there was nothing in the failure to receive a report of Cowee's departure to excite the dispatcher's apprehension. So we find nothing in the evidence that tends to show negligence on the part of the dispatcher.

It remains to consider the bearing of Tynan's conduct upon the question of liability. There was evidence tending to show that Tynan was ignorant of what the rules required of him in regard to reporting the departure of trains, and that the defendant was negligent in failing to ascertain it. This required the submission of the case to the jury, if there was evidence tending to show that the accident was due to Tynan's omission operating concurrently with Cowee's negligence. So it is necessary to inquire as to the results that would probably have followed from a prompt report of Cowee's departure as registered. If Tynan had acted at 5:08, this would have given 10 minutes in which to stop the Flyer at Shelburne—an allowance which would probably have covered all chances of delay in the dispatcher's office and at Shelburne. There was evidence tending to show that one purpose of the rule requiring a prompt report of departures is to keep the dispatcher constantly advised of the actual condition of the main line, and that one benefit contemplated from the requirement of prompt transmission is the additional protection thus afforded. It is clear that, if the dispatcher had received information which indicated that Cowee was actually leaving for Shelburne on the Flyer's time, it would have been his duty to take measures to prevent the threatened collision. The rules governing the movement of the train would not justify his failure to act, if he had knowledge that the rules were being ignored. So the question will be, what would the dispatcher have understood from the report, if it had been made? It seems that it is customary for trainmen acting in these circumstances to enter their time of departure somewhat in advance of the time of registering, to give them time to get to their trains and work out to the main line, and that un-

expected delays sometimes prevent their getting off within the time they allow. But, if Cowee was intending to wait for the Flyer, his time of departure depended upon a certainty, and not a contingency. The time he set for leaving was 5:10. The Flyer was due at Burlington Station, about one-fourth of a mile north of the freightyard, at 5:30. So the time given for leaving was at least 18 minutes before he could leave, if he was to wait for the Flyer. It is to be presumed that on receiving such a report the dispatcher would have acted prudently, and would have done his duty. Ought he to have understood that Cowee had entered this time for leaving, expecting to wait for the Flyer? Or ought he to have understood that he was leaving for Shelburne in disregard of the rules? This was a matter for the jury, and justified the submission of the case, unless it be held that the negligence of Cowee was the sole proximate cause of the accident, and that of Tynan only a remote cause.

We think that upon the case which the plaintiff's evidence tended to establish, Tynan's failure to report was one of two causes which concurred directly in producing the accident. It is true that the defendant had no part in creating the dangerous situation from which the accident resulted. That situation was developed by the negligent act of Cowee. But it was the defendant's duty to exercise, through some system of rules and service, a reasonably efficient supervision of its track and trains, with a view to lessening the perils incident to the operation of a complicated organization by fallible agencies. The first neglect consisted in Cowee's leaving, but the neglect of Cowee, and the neglect of the defendant afterwards, came into a concurrent operation, which continued until the injury was received; Cowee running on the Flyer's time, and the dispatcher improperly left in ignorance of it, when a knowledge of it would have enabled him to have prevented the accident. Into the situation which existed at the time of the collision there had come the further element of the dispatcher's failure to hold the Flyer at Shelburne, when he ought to have had information that an opposing train was on the track. So Tynan's failure was a proximate cause of the accident.

The motion to direct a verdict for the defendant was properly overruled, but the court erred in its submission of the questions touching the dispatcher's duty.

Judgment reversed, and cause remanded.

In re HICKOK'S ESTATE.
(Supreme Court of Vermont. Chittenden.
Jan. 26, 1906.)

1. TAXATION — COLLATERAL INHERITANCE — EXEMPTIONS — FOREIGN CORPORATIONS.

Foreign corporations are not within the exemption to Acts 1896, p. 38, No. 46, which taxes collateral inheritances, but exempts property

passing "to or for charitable, educational, or religious societies or institutions, the property of which is exempt by law from taxation."

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1699.]

2. SAME — CONSTITUTIONAL LAW — PROPORTIONATE CONTRIBUTIONS FOR SUPPORT OF GOVERNMENT.

Const. c. 1, art. 9, providing that every member of society is bound to contribute "his proportion" toward the expense of the protection which the state affords him, is not contravened by Acts 1896, p. 88, No. 46, taxing collateral inheritances; and this, though estates not exceeding \$2,000 are exempted.

Exceptions from Chittenden County Court; Munson, Judge.

In the matter of Julia F. Hickok's estate. On appeal from the probate court the case was heard on an agreed statement, and there was judgment pro forma that the legacies were subject to a collateral inheritance tax. The legatees excepted. Affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, and POWERS, JJ.

J. E. Cushman, Tax Com'r, for the State. W. L. Burnap, for the estate.

MUNSON, J. Number 46, p. 38, Acts 1896, entitled "An act to tax collateral inheritances," exempts from its operation property passing "to or for charitable, educational, or religious societies or institutions, the property of which is exempt by law from taxation." This exemption is invoked by institutions incorporated by, and located in, the states of Massachusetts, New York, Virginia, and Illinois. The tax commissioner contends that foreign corporations are not within the exemption. It is a well-established general rule that exemptions from taxation are to be strictly construed, and that no claim of exemption can be sustained, unless within the express letter or necessary scope of the exempting clause. *Ford v. Delta & Pine Land Co.*, 164 U. S. 663, 17 Sup. Ct. 230, 41 L. Ed. 590. The particular exemption in question is found in the statutes of other jurisdictions, and has often received the construction for which the commissioner contends. *Matter of Prime*, 136 N. Y. 347, 32 N. E. 1091, 18 L. R. A. 713; *People ex rel. v. Western Seaman's Friend Society*, 87 Ill. 246; *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259. It is argued that the exemption is in recognition of the beneficent purpose of these institutions, and that, inasmuch as the purpose is common to them all, wherever located, the exemption should be held applicable to all. But we think, with the authorities above cited, that, in the absence of any language indicative of a different intent, the Legislature must be deemed to have made the exception for the benefit of its own institutions. It is suggested that the use of the word "law" instead of "statute" indicates an intention to include corporations outside our jurisdiction; but our statute is the same in this respect as those construed

in the New York and Massachusetts cases above cited. It is true, as further suggested, that in the *Matter of Prime*, which was cited as an authority in *Minot v. Winthrop*, there were features peculiar to the New York statute which entered into the consideration of the subject and bore upon the conclusion reached; but we think that these cases may nevertheless be relied upon in support of the state's contention. It was said in *Humphreys v. State*, 70 Ohio St. 67, 70 N. E. 957, 65 L. R. A. 776, 101 Am. St. Rep. 888, upon a review of the New York and other cases, that the exemption clause of this statute would have related only to their own institutions, even if the words "in the state" had been omitted.

But the main contention of the estate is based upon the phraseology of our Constitution, which declares, in effect, that every member of society is bound to contribute "his proportion" towards the expense of the protection which the state affords him. It is said that this excludes all methods of taxation that are not uniform, equal, and proportional, and that the law in question lacks the required qualities. The case of *Curry v. Spencer*, 61 N. H. 624, 60 Am. Rep. 337, decided in 1882, supports this position. The New Hampshire Constitution provides for the laying of "proportional" taxes, and declares that an inhabitant is bound to contribute only his share. The court considered that these provisions precluded the imposition of an inheritance tax, whether it was regarded as a tax upon property, or upon a civil right or privilege. It is said in the note to *State v. Hamlin*, 86 Me. 495, 30 Atl. 76, 25 L. R. A. 632, 41 Am. St. Rep. 569, that *Curry v. Spencer* is the only case which holds that a tax on inheritance is unconstitutional because not equal and uniform in its operation. But it is claimed in argument that the cases holding the contrary were decided under Constitutions which provide specially for the imposition of excises, or which make the requirements of equality and uniformity applicable only to taxes imposed on real and personal property. It is certain, however, that in one of these cases this restriction to property was not found in any express statement, but was arrived at by inference and construction. *Eyre v. Jacob*, 14 Grat. 422, 73 Am. Dec. 367. It was said in the New Hampshire case above cited, in arguing the inapplicability of *Eyre v. Jacob*, that the Virginia Constitution required that taxes on property should be uniform, and that the decision of that case was put expressly upon the ground that the requirement of uniformity applied to property only. The provision referred to was that all property other than slaves should be taxed in proportion to its value. But this clause was preceded by the general declaration that taxation should be equal and uniform throughout the commonwealth, and the court considered the effect of this provision, and said that the inference

was strong that property only was in the minds of the framers.

It is clear that the language of our Constitution will not permit this treatment of the question of equality. The provision requiring a proportional contribution cannot be restricted to any particular subject of taxation, for it relates to the entire burden cast upon the taxpayer. It provides that the expenses of government shall be apportioned equally, and not merely that exactions levied upon property shall be equal. The question is what constitutes equality of apportionment within the meaning of this provision; and, in determining this, the basis of the tax in question must be considered. It is now universally conceded that taxes of this character are not taxes upon property, but taxes upon the transmission of property. It is considered that the acquirement of property by descent or will is not a natural right, but a privilege accorded by the state. It is argued that the power to determine the devolution of estates includes the power to exact just and proportional contributions as they pass. And it has been said repeatedly in judicial discussions upon this subject that inheritance charges are not precluded by constitutional provisions requiring uniformity and equality of taxation. We think our constitutional requirement of proportional contributions for the support of the government was not intended to restrict the state to methods of taxation that operate equally upon all its inhabitants, regardless of the variety and measure of the advantages derived from its protection and regulation. A member of the body politic has from the state not only the protection of his property, but the privilege of taking property by descent and by will. It seems clear that privileges of this character, as well as property, are to be considered in determining the just proportion of the individual.

It is suggested, further, that the law is invalid because of the inequality arising from the exemption of estates not exceeding \$2,000 in value. The constitutional provision under consideration does not prevent the making of exemptions. *Colton v. Montpelier*, 71 Vt. 413, 45 Atl. 1039.

Judgment affirmed, to be certified to the probate court.

ALBRIGHT v. UNITED CLAY PRODUCTION CO.

(Superior Court of Delaware. New Castle. Dec. 14, 1904.)

1. AFFIDAVITS—VENUE.

Where an affidavit in support of a foreign attachment did not show that it was taken without the jurisdiction of the notary, it would be presumed that it was taken within his jurisdiction, and was therefore not void for failure to recite the venue.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Affidavits, § 86.]

2. CORPORATIONS—FOREIGN CORPORATIONS—ATTACHMENT.

That a corporation had filed a copy of its articles with the Secretary of State, and had appointed an authorized agent within the state, as required by Act March 23, 1903 (22 Del. Laws, p. 824, c. 395), did not make it a domestic corporation to such an extent as to relieve it from liability to be sued by process of foreign attachment.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2628-2639.]

Action by Joseph S. Albright against the United Clay Production Company, a foreign corporation. On rule to show cause why judgment against defendant should not be opened and vacated. Rule discharged.

The affidavit on which the writ was issued was in the following form:

"In the Superior Court of the State of Delaware, in and for New Castle County.

"Joseph S. Albright v. United Clay Production Co., a Corporation Organized and Existing under the Laws of New Jersey.

"Bail, \$2,500.00.

"And now, to wit, this twenty-second day of October, A. D. nineteen hundred and three, personally appears before me, Clifford V. Mannering, a notary public for the state of Delaware, Joseph S. Albright, a credible person, who, being by me duly sworn according to law, deposes and says that he is the plaintiff in the above-stated case; that the United Clay Production Company, the defendant in the above-stated case, is a corporation not created by or existing under the laws of the state of Delaware, and is justly indebted to the said plaintiff in the sum of money exceeding fifty dollars, to wit, the sum of twelve hundred and fifty dollars.

"Joseph S. Albright.

"Sworn and subscribed to before me the day and the year first above named.

"Clifford V. Mannering, Notary Public.

"[Clifford V. Mannering, Notary Public. Appointed Feb. 21, 1901. State of Delaware. Term 4 Years.]

"Commission recorded in Deed Record O-18, 384. No restriction."

Special appearance by defendant's attorney to move to set aside the judgment and inquisition thereon, and to quash the writ of foreign attachment and the execution issued on said judgment for the following reasons: (1) That the alleged affidavit of the above-named plaintiff, which was filed in said action and upon which said writ of foreign attachment was issued, is insufficient, illegal, and void, because it wholly fails to state or aver at what place the said supposed affidavit was made, or sworn to, or to lay any venue for the same. (2) That when said writ of foreign attachment was issued, the said defendant was not subject to the process of foreign attachment, because, in compliance with an act of the General Assembly of the state of Delaware entitled "An Act in Relation to Foreign Corporations Doing Busi-

ness in this State," approved March 23, A. D. 1903 (22 Del. Laws, p. 824, c. 395), the said defendant did on or about the 18th day of April, A. D. 1903, file in the office of the Secretary of State of the state of Delaware, a certified copy of its charter or certificate of incorporation, and the name of its authorized agent for this state, which said agent is the Delaware Trust Company, a corporation of the state of Delaware, and did also file in said secretary's office a sworn statement of its assets and liabilities, and did pay to said Secretary of State for the use of the state the sum of \$50, and the said Secretary of State did deliver to said agent his certificate under the seal of his office of the filing of such charter.

Argued before LORE, C. J., and GRUBB, J.

J. Frank Ball, for plaintiff. C. W. Smith, for defendant.

LORE, C. J. In the case of Joseph S. Albright v. United Clay Production Company, a corporation organized and existing under the laws of New Jersey, being a rule to show cause why the judgment should not be opened and vacated, two grounds were presented and argued before the court. The first was that the affidavit on which the writ of foreign attachment was issued contained no venue and was therefore void. We have examined the affidavit, and, while it does not show venue, it does not show in any way that it was taken without the jurisdiction of the notary, and the presumption of law would be therefore that it was taken within his jurisdiction, and it would not be void from the mere absence of venue.

As to the second ground, that when said writ of foreign attachment was issued the said defendant was not subject to process of foreign attachment because he had complied with the act of the General Assembly of the state of Delaware entitled "An Act in Relation to Foreign Corporations Doing Business in this State" (22 Del. Laws, p. 824, c. 395), authorizing and requiring them to designate some agent upon whom process could be served, we do not think that the statute referred to deprives the creditor of the right to attach any property that he may find within the jurisdiction of this state.

For these reasons we discharge the rule.

Rule discharged.

CLAREMONT RY. & LIGHTING CO. v. PUTNEY et al.

(Supreme Court of New Hampshire. Sullivan. Dec. 5, 1905.)

1. EMINENT DOMAIN—PRODUCTION OF POWER—CONDEMNATION BY STREET RAILROAD—CHARTER PROVISIONS.

The charter of a street railroad company, authorizing it to acquire such real and personal estate as may be necessary and convenient in the prosecution of its business, does not confer the power of eminent domain; the charter not

conferring the power expressly, pointing out any steps to be taken in its exercise, or making any provision for compensation.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 43-45.]

2. SAME—STATUTES—CONSTRUCTION—EXTENT OF AUTHORITY.

General Street Railway Law, § 4 (Laws 1895, p. 868, c. 27, as amended by Laws 1901, p. 586, c. 93), providing that such corporations may take and hold such lands as may be necessary to install and maintain power plants, does not authorize a street railway corporation to condemn land and water privileges to divert streams and procure power with which to operate power plants erected on its own land; but the authority is limited to taking such land as may be necessary for locating or placing power plants in position for use, and maintaining the same.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 43-45.]

Exceptions from Superior Court; Wallace, Judge.

Petition for mandamus by the Claremont Railway & Lighting Company against Henry M. Putney and others, as railroad commissioners, to require them to assess damages occasioned by an alleged taking by plaintiffs of land, etc., belonging to Alexander Roberts. The petition was dismissed, and plaintiffs bring exceptions. Exceptions overruled.

Roberts owns a dam across Sugar river in Claremont, by which he operates a woolen mill. The dam flows back the water of the stream easterly for a distance of 300 feet or more. He also owns a tract of land situated on the south side of the river, the north line of which is the middle of the stream, extending easterly from the easterly limit of the back-flow of the dam about 203 feet. In the last 203 feet there is a natural fall in the river of about 15 feet, which creates a water power that has never been utilized. The plaintiffs own land on the north side of the river, extending the entire length of the unutilized water power, and a distance of about 100 feet further east. They also own a tract of land on the south side of the river, above the Roberts land and adjoining it at its easterly boundary. At the point where the plaintiffs own both sides of the river they have erected a dam, from the northerly end of which they have constructed a canal along the north side of the stream to a power house located on that side of the river at the lower or easterly end of the unutilized water power. By means of the dam and canal the plaintiffs divert substantially all the water of the stream, and do not return it to the channel of the river until it reaches the power house, thereby depriving Roberts of the privilege of having the water flow by his land. In August, 1902, the plaintiffs filed a petition with the Secretary of State for the purpose of condemning the unutilized water privilege and land of Roberts adjoining the same, in accordance with the requirements of chapter 158, Pub. St. 1891, and requested the board of railroad commissioners to assess

the damages occasioned thereby. The commissioners, being in doubt as to their authority to assess damages for land and water power taken for the purpose of producing electric power for the operation of an electric railway and an electric lighting plant, declined to proceed, and this petition was thereupon brought.

Frank H. Brown and Mitchell & Foster, for plaintiffs. Hermon Holt and Streeter & Hollis, for defendants.

BINGHAM, J. The plaintiffs are authorized by their charter "to acquire by contract all the property, assets, and franchises" of the Claremont Street Railway Company and the Claremont Electric Light Company; to "construct, maintain, and operate a railroad," using any power, except steam, for the "transportation of passengers, freight, express, and mail" over and upon such highways and lands within the limits of the town of Claremont "as may be necessary for the public accommodation"; to carry on in the town the business of "generating, manufacturing, producing, and supplying electricity for purposes of light, heat, and mechanical power"; to make use of the streets of the town in distributing the same; to "construct and maintain suitable buildings, dams, boilers, water and other motors, engines, electrical machinery and works as may be needed and convenient for conducting the business of said corporation"; and to "lease, hold, purchase, and acquire such real and personal estate as may be necessary and convenient in the prosecution of its business." Laws 1901, p. 787, c. 276.

The first contention of the plaintiffs is that it is to be implied from the use of the word "acquire" in their charter that the Legislature intended to confer upon them the power to take by eminent domain such property, real and personal, as might be necessary to the prosecution of their business. But the answer to this is that as the exercise of this power is against common right, and the plaintiffs' charter does not expressly confer the power, or point out the steps to be pursued in its exercise, or make provision for compensation, the presumption is that the Legislature did not intend to confer it. Private property cannot be invaded by this power without statutory authority, and statutes which are claimed to authorize its exercise are to be strictly construed. 1 *Lew. Em. Dom.* § 240.

The plaintiffs also contend that the right of eminent domain is conferred upon them by section 4, c. 27, p. 368, Laws 1895, as amended by chapter 93, p. 586, Laws 1901, and that under the provisions of this statute they are authorized to condemn the land of the defendant Roberts and the water privilege thereto appertaining, so that by means of their dam and canal they may divert the water of the stream from its natural channel and conduct it to their power house, to be

there used in developing electrical power. Section 4, as amended, reads as follows: "All parts of street railways, not located in a public highway, shall be laid out, located, and the location changed, under the provisions of chapter 158 of the Public Statutes; said railway corporations may take and hold in the manner provided by said statute such land as may be necessary for the purposes of installing and maintaining power plants, carhouses and depots, repair shops, pole lines, wires, side tracks, and gravel pits; and said railway corporation and all persons whose property shall be taken for the use of such railway corporation shall have respectively all the rights and privileges, and be subject to all the duties, restrictions, and liabilities contained in said chapter." This section is a part of the general street railway law, and such power as is there conferred the plaintiffs, as a street railway corporation, are entitled to exercise. Laws 1895, p. 367, c. 27, § 1. The portion of the section upon which they base their claim to condemn the land and water privilege in question is: "Said railway corporations may take and hold * * * such land as may be necessary for the purposes of installing and maintaining power plants." But this provision does not authorize street railway corporations to condemn land and water privileges for the purpose of diverting streams and procuring power with which to operate power plants erected or to be erected on their own land. On the contrary, the authority there conferred is limited to taking such land as may be necessary for locating or placing power plants in position for use, and maintaining the same. This construction gives to the words used their natural and usual meaning, and such as is recognized by leading lexicographers. The plaintiffs' contentions cannot be sustained.

Exception overruled. All concurred.

DAVIS v. UNITED STATES HEALTH & ACCIDENT CO.

(Supreme Court of New Hampshire. Hillsboro. Dec. 5, 1905.)

1. INSURANCE—POLICY—TIME BEFORE WHICH ACTION CANNOT BE MAINTAINED.

Where a policy contained a provision that no action at law should be maintainable before three months from the date on which the policy requires proof of loss to be filed, the insured was bound thereby.

[Ed. Note.—For cases in point, see vol. 28, *Cent. Dig. Insurance*, §§ 1542, 1543.]

2. SAME—WAIVER OF LIMITATION.

Where a policy provided that no action should be maintainable before three months from the day on which the policy required proof of loss to be filed, a waiver of the provision requiring formal proof of loss did not constitute a waiver of the provision as to time of bringing the action.

[Ed. Note.—For cases in point, see vol. 28, *Cent. Dig. Insurance*, §§ 1542, 1543.]

Young, J., dissenting.

Transferred from Superior Court; Peaslee, Judge.

Action by James A. Davis against the United States Health & Accident Company. From a judgment of nonsuit, plaintiff excepted. Exception overruled.

No proof of loss was given to the defendant as required in the policy, but the plaintiff claimed the defendant waived the right to insist upon a formal proof. It was provided in the policy that "no action at law shall be maintainable before three months or after six months from the date on which this policy requires proof of loss to be filed." The action was begun within three months of that time. The defendant's motion for a nonsuit was granted, and the plaintiff excepted.

David W. Perkins, for plaintiff. John O'Neill, for defendant.

WALKER, J. In *Tasker v. Insurance Co.*, 58 N. H. 469, it was held that a condition in a policy of fire insurance that no recovery shall be had unless suit is brought within a given time is valid at common law. *Id.*, 59 N. H. 438, 445. Although the Legislature has to some extent modified or changed this common-law rule with reference to suits upon policies of fire insurance (Laws 1879, p. 336, c. 13; Pub. St. 1901, c. 170, § 18; *Franklin v. Insurance Co.*, 70 N. H. 251, 257, 47 Atl. 91), it is not claimed that the parties to a contract of indemnity against sickness could not bind themselves by a stipulation limiting the time before which or after which an action might be begun for the recovery of the benefit (*Dwyer v. Insurance Co.*, 72 N. H. 572, 573, 58 Atl. 502). As it was competent for the parties to so agree, and as there is no suggestion of fraud practiced by the defendant to induce the plaintiff to enter into the contract, he became bound thereby. Nor, if it is assumed that the defendant waived the provision requiring formal proof of loss, can it be inferred that it also waived the provision protecting itself from an action at law for three months from the time when the proof should be filed under the terms of the contract. The policy provided a definite time when the proof should be filed, and the fact that it was not filed at that time had no necessary effect upon the limitation of time for the bringing of a suit. The waiver of one condition does not involve the waiver of the other. As the plaintiff had voluntarily agreed not to sue the defendant at the time this action was begun, and as the restriction of his right in this respect does not appear to be frivolous, but may be a matter of some importance to the defendant, no error appears in the order for a nonsuit.

Exception overruled.

YOUNG, J., dissented. The others concurred.

McKEAN v. COOK.

(Supreme Court of New Hampshire. Carroll. Dec. 5, 1905.)

1. BILLS AND NOTES—PAYMENT—BURDEN OF PROOF.

Where, in a suit on the last of a series of three notes secured by mortgage, defendant pleaded payment after the note became due, when plaintiff appropriated the mortgaged land by foreclosure of his mortgage under a judgment on the first two notes of the series, the burden was on defendant to show by a preponderance of the evidence that the value of the land equaled or exceeded the amount due on the notes.

2. SAME—MORTGAGE—FORECLOSURE.

The foreclosure of a mortgage given to secure a series of notes operated as a payment of the notes only to the extent of the value of the land acquired by the holder of the notes under the foreclosure proceedings.

Transferred from Superior Court; Stone, Judge.

Action on a note by Eliphalet McKean against Addison G. Cook. Defendant's motion for a nonsuit and plaintiff's motion for an order of judgment in his favor for the amount of the note were both denied, subject to exception, and the case was transferred from the superior court. Defendant's exception overruled. Plaintiff's exception sustained.

The defendant gave the plaintiff, for an adequate consideration, three promissory notes, for \$833.33 each, dated May 15, 1901, payable to the plaintiff, or order, in one, two, and three years from date, respectively, with interest, and a mortgage of a certain tract of land to secure their payment. The notes due in one and two years not being paid, the plaintiff recovered, June 26, 1903, a conditional judgment for their amount in an action at law, and was put in possession of the land mortgaged September 23, 1903, by virtue of a writ of possession that was issued upon the judgment. He held the possession for more than a year. The note in suit is the one that became due in May, 1904. The plaintiff took no steps to determine the value of the land acquired by the foreclosure. The defendant's motion for an order of nonsuit and the plaintiff's motion for an order of judgment in his favor for the amount of the note were both denied, subject to exception.

Jewell, Owen & Veazey, for plaintiff. Jewett & Plummer, for defendant.

CHASE, J. The defense is payment, not at or before the time the note became due, but subsequently (September 23, 1904), when the plaintiff appropriated the mortgaged land by the foreclosure of his mortgage. In other words, the defendant confesses the making of the promise, its validity, and a breach of it, but attempts to avoid the breach by showing a state of facts which he says atoned for it, or paid all damages to which the plaintiff is entitled by reason of it. In such case the burden is upon the defendant to support his

defense by a preponderance of the probabilities. *Buzzell v. Snell*, 25 N. H. 474; *Kendall v. Brownson*, 47 N. H. 186 (both the opinion of the court and the dissenting opinion of Judge Doe); *Benton v. Burbank*, 54 N. H. 583; *Smith v. Steam Mill*, 66 N. H. 613, 84 Atl. 153. The plaintiff was under no obligation to prove in the first instance the value of the land acquired by the foreclosure.

The foreclosure paid the plaintiff's notes only to the extent of the value of the land acquired by it. *Hunt v. Stiles*, 10 N. H. 466; *Smith v. Packard*, 19 N. H. 575; *Green v. Cross*, 45 N. H. 574; *Dearborn v. Nelson*, 61 N. H. 249; *Fletcher v. Chamberlin*, 61 N. H. 438, 494; *Clark v. Jackson*, 64 N. H. 388, 11 Atl. 59; *Colby v. McClintock*, 68 N. H. 176, 40 Atl. 397, 73 Am. St. Rep. 557. There is no presumption of law that the value of the land was sufficient to pay any part of the note in suit, in addition to the payment of the two notes included in the conditional judgment. The question of value and of the amount of the payment effected by it is purely one of fact. *Lane v. Barron*, 64 N. H. 277, 9 Atl. 544; *Stevens v. Fellows*, 70 N. H. 148, 47 Atl. 135. As the value was not agreed to, and the defendant offered no evidence regarding it, he failed to support his defense in whole or in part; and the plaintiff is entitled to judgment for the amount of his note.

Defendant's exception overruled. Plaintiff's exception sustained. All concurred.

STOORS v. BURGESS et al.

(Supreme Judicial Court of Maine. Dec. 28, 1905.)

1. WILLS — CONSTRUCTION — INTENT OF TESTATOR—VESTED ESTATE.

The law favors the early vesting of an estate, when such construction will not defeat the intent of the testator as expressed in the will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1461, 1462.]

2. SAME—GIFT TO A CLASS.

It is a general rule in the construction of wills that where there are in a will no words importing a gift to a class as grandchildren, except in the direction to make division among them at a period subsequent to the testator's death, the members of that class are to be ascertained as of the time fixed for the division.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1116-1127.]

3. SAME.

Held that, upon a consideration of the provisions of the will in the case at bar, the foregoing rule appears to exactly express the intention of the testator.

(Official.)

Report from Supreme Judicial Court, Cumberland County.

Bill by Leonard K. Stoops, trustee, against Mary M. Burgess and others. Case reported, and decree rendered.

Bill in equity to obtain the construction of the last will and testament of the Right

Reverend George Burgess, D. D., late of Gardiner, deceased, who was the first (Episcopal) Bishop of the diocese of Maine. This cause came on for a hearing on bill and answer at the April term, 1905, of the Supreme Judicial Court, Cumberland county, and the presiding justice, with the consent of the parties, ordered the same to be reported to the law court for determination.

Will of George Burgess.

"In the name of God. Amen. I, George Burgess, of Gardiner, in the county of Kennebec, in the state of Maine, being in health and in the possession, through God's mercy, of all my powers, but deeply conscious of my own frailty, and mindful of my liability to sudden removal, do make this my last will and testament, revoking, and intending to destroy, all previous instruments of the same kind, though substantially identical herewith.

"I commend my soul to the precious mercies of Almighty God, my Heavenly Father, through our Lord Jesus Christ; beseeching him that, all my sins being washed away by the blood of the Lamb, and my whole spirit sanctified by the Holy Ghost, I may, unworthy as I am, be admitted by grace to the society of just men made perfect.

"Of my worldly estate, I give and bequeath the sum of seven thousand dollars, being nearly that part of it which was not inherited from my father, to the trustees of the fund for the support of the episcopate of the diocese of Maine, to be duly invested, and the income thereof to be applied to the support of future bishops of the said diocese; and in the event of its division, to the support of that bishop within whose diocese the city of Gardiner may fall.

"The remainder of my property, real and personal, I give and bequeath as follows:

"I desire my dear brothers, Frederick Burgess and Alexander Burgess, to act as trustees under my will; and it is my wish that no bonds should be required of them for the faithful execution of their trust.

"I appoint my dear brother, Alexander Burgess, executor of this, my will, and desire that no bonds may be required of him; and I give and bequeath unto him all my theological books, except any which my dear wife may desire to retain.

"I give and bequeath to my dear wife, Sophia Kip Burgess, all other things in my house.

"I give the residue of my estate, real and personal, in trust, to my said brothers, Frederick Burgess and Alexander Burgess, with authority to sell, change and reinvest the same at their discretion; and I hereby appoint that they shall hold the same in trust for my dear wife, and for my beloved daughter, Mary Georgiana Burgess, as follows:

"The whole income to be paid to my dear

wife, if she should survive and remain unmarried, till my daughter shall attain the age of twenty-five; and should my daughter be removed by death before that age and without being married, then the whole income to be paid to my dear wife throughout her own lifetime.

"When my daughter shall attain the age of twenty-five, the half of the income to be paid to her; and also to be held in trust for her and used for her benefit, should my dear wife at any time previous to her attainment of that age, be herself married a second time.

"Should my dear wife die before my daughter attains the age of twenty-five, the whole income to be held in trust for my daughter, and used in her behalf, till she attains that age, and then to be transferred to her with the whole estate, and the trust to cease.

"Should my dear daughter be married and depart this life before the age of twenty-five, leaving issue, then at her death the half of the estate hereby bequeathed to the said trustees to become vested in such issue, if my dear wife should still be living; and if not, the whole to pass to such issue and the trust to cease.

"Should my dear daughter, married or unmarried, attain the age of twenty-five, half the income to be paid to her, and half to her mother, till the death of the one or the other; and then, and thereupon—

"Should my daughter survive her mother, the whole estate to vest in her, and the trust to cease; and

"Should my dear wife survive our daughter, she dying without issue, the whole income to be paid to my dear wife during her lifetime, and at her death, the estate to be divided into two equal parts; one of which shall be transferred to such charitable or religious purposes as she may direct, or, if she make no direction, then to the trustees aforesaid of the fund for the support of the episcopate of the diocese of Maine, to constitute a fund for the assistance of missionaries and other clergymen of the said diocese, and to be applied under the direction of the bishop and standing committee, especially for the relief of sick, infirm, or aged clergymen in the said state, without regard to any division of the diocese; and the other half to be divided equally amongst the grandchildren of my deceased father.

"Should my dear wife survive our daughter, she leaving issue, then at the death of my wife, the remaining half of the estate to pass to such issue, and the trust to cease.

"In witness whereof, I have hereunto set my hand and seal, this eighth day of January in the year of our Lord one thousand eight hundred and sixty-one; and also to another sheet, prefixed hereto, and forming a part of the same will and testament. Signed, sealed and published and declared as

his last will and testament, by George Burgess, in our presence, who, in his presence, and in the presence of one another, have subscribed our names.

"George Burgess. [L. S.]

"Robert Williamson.

"W. E. S. Whitman.

"Chas. Danforth.

"I hereby append the following provision as a codicil to my last will and testament:

"It is my will that the house and land which I occupy at Gardiner should be a part of the legacy of seven thousand dollars which I have bequeathed for the benefit of the diocese, and should be estimated at not less than four thousand dollars in making up the same; but that it should not be transferred, but should be the property of my wife, and, in the event of her decease, of my daughter, so long as either of them shall continue to occupy it as a residence. It is also my will that the mortgage to me from Emma J. Lord, if unpaid at the time of my decease, should be included in the said legacy, as a part of the payment of the same.

"In witness whereof, I have hereunto set my hand and seal, this twelfth day of March, in the year of our Lord, one thousand eight hundred and sixty-four.

"George Burgess [L. S.]

"Signed and sealed, and declared to be a codicil to his last will and testament, by George Burgess, in presence of us, who at his request, in his presence and in the presence of each other, have subscribed our names as witnesses thereto.

"Daniel Nutting.

"William Cooper.

"Nathan B. Norton."

Argued before STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Aaron H. Latham and Bird & Bradley, for plaintiff. H. Charles Royce, for defendants Burgess and others. Anthoine & Talbot, for defendants Stoors and others.

POWERS, J. Bill to obtain the construction of the last will and testament of George Burgess, late of Gardiner. The will was executed January 8, 1861, and the testator died April 23, 1866. After providing for the payment of certain legacies the will contained the following paragraph in relation to the residue of his estate:

"I give the residue of my estate, real, and personal, in trust to my said brothers, Frederick Burgess and Alexander Burgess, with authority to sell, change, and reinvest the same at their discretion; and I hereby appoint that they shall hold the same in trust for my dear wife and for my beloved daughter, Mary Georgiana Burgess, as follows: The whole income to be paid to my dear wife, if she should survive and remain unmarried, till my daughter shall attain the age of 25; and should my daughter be removed by death before that age and without being married,

then the whole income to be paid to my dear wife throughout her own lifetime.

"When my daughter shall attain the age of twenty-five, the half of the income to be paid to her; and also to be held in trust for her and used in her benefit, should my dear wife any time previous to her attainment of that age, be herself married a second time.

"Should my dear wife die before my daughter attains the age of twenty-five, the whole income to be paid in trust for my daughter, and used in her behalf, till she attains that age, and then, to be transferred to her with her whole estate, and the trust to cease.

"Should my dear daughter be married and depart this life before the age of twenty-five, leaving issue, then at her death the half of the estate hereby bequeathed to the said trustees to become vested in such issue, if my dear wife should still be living; and if not, the whole to pass to such issue and the trust to cease.

"Should my dear daughter, married or unmarried, attain the age of twenty-five, half the income to be paid to her, and half to her mother, till the death of the one or the other; and then and thereupon—

"Should my daughter survive her mother, the whole estate to vest in her, and the trust to cease; and

"Should my dear wife survive our daughter, she dying without issue, the whole income to be paid to my dear wife during her lifetime, and at her death, the estate to be divided into two equal parts; one of which shall be transferred to such charitable or religious purposes as she may direct, or, if she make no direction, then to the trustees aforesaid of the fund for the support of the episcopate of the diocese of Maine, to constitute a fund for the assistance of missionaries and other clergymen of the said diocese, and to be applied under the direction of the bishop and standing committee, especially for the relief of the sick, infirm, or aged clergymen in the said state, without regard to any division of the diocese; and the other half to be divided equally amongst the grandchildren of my deceased father.

"Should my dear wife survive our daughter, she leaving issue, then at the death of my wife, the remaining half of the estate to pass to such issue, and the trust to cease."

Mary Georgiana Burgess died May 1, 1873, before reaching the age of 25 years and without issue. Sophia K. Burgess died July 7, 1904 never having remarried, leaving a will which has been duly probated containing the following paragraph:

"Whereas by the last will of my husband I am authorized, in the event which has happened of the death without issue and before me of my daughter, to dispose for such charitable or religious purposes as I may direct of one-half of the trust fund by his said will established: Now, therefore, I hereby direct that said one-half of said trust fund shall be transferred and paid over

to the trustees of diocesan funds in the diocese of Maine, a corporation organized under the laws of the state of Maine, to be held by it for the purposes of the Burgess-Neely Endowment or Memorial Fund."

At the time of the testator's death there were 15 living grandchildren of his deceased father. At the time of the daughter's death 13 of these were living and one additional grandchild, Christina Burgess Royce, had been born. Upon the death of the wife, there were 8 living grandchildren of the deceased father of the testator of whom said Christina Burgess Royce was one.

The following questions are asked of the court:

"First. Shall the trustee pay over one-half of the trust fund to the trustees of the diocesan funds in the diocese of Maine?

"Second. Shall the trustee pay over one-half of the trust fund to the grandchildren of Thomas Burgess, the deceased father of the testator, who were living at the time of the death of the testator April 23, 1866, and to the legal representatives of such of said grandchildren as have since deceased, and if so, in what proportions, per stirpes or per capita?

"Third. Shall the trustee pay over one-half of the trust fund to the grandchildren of Thomas Burgess, the deceased father of the testator, who were living at the time of the death of Mary Georgiana Burgess, May 1, 1873, and to the legal representatives of such said grandchildren as have since deceased, and if so, in what proportions, per stirpes or per capita?

"Fourth. Shall the trustee pay over one-half of the trust fund to the grandchildren of Thomas Burgess, the deceased father of the testator, who were living at the time of the death of Sophia K. Burgess, July 7, 1904, and if so, in what proportions per stirpes or per capita?"

It will be seen from the facts above stated that of the many contingencies provided for in the will only one happened, viz.: The death of the testator's daughter without issue before the death of his wife. It is therefore with the construction of only the next to the last paragraph above quoted from his will that we have to do; the other parts of the will being of importance simply as they may help to reveal the intention of the testator, and thus throw light upon that part a construction of which is sought.

If Sophia K. Burgess survived her daughter, she dying without issue, then at the death of said Sophia, the estate was to be divided in two equal parts, one of which was to be transferred to such charitable or religious purposes as she might direct. This gave her a power of testamentary disposition over one-half of the estate, subject only to the limitation that it must be exercised for charitable or religious purposes. The disposition of this part of the estate in her will was in strict conformity to the power con-

ferred, and the first question is answered in the affirmative.

The gift of the other half of the estate is to a class, and the answer to the remaining questions depends upon the time at which the class is to be ascertained. Many general rules of construction are invoked, that the law favors the early vesting of estates, that the will speaks from the death of the testator, and that in case of contingent remainders the estate vests upon the happening of the contingency. The estate bequeathed to the grandchildren was a contingent remainder, and its vesting was suspended until the happening of the contingency. The law favors the early vesting of the estate when such construction will not defeat the intent of the testator as expressed in the will. In this case a contrary intention is shown. By the terms of the will if the testator's wife died before his daughter attained the age of 25, then, upon his daughter arriving at that age, the whole estate was to be transferred to her, and the trust to cease. Again, if the daughter died before the age of 25, leaving issue, then at her death one-half, and if the wife was not living, the whole of the estate was to vest in such issue and the trust to cease. Still, again, if the daughter survived the mother, the whole estate was to vest in her, and the trust to cease. In any of these contingencies the grandchildren of the testator's deceased father received nothing. A remainder is contingent when so limited as to take effect upon an event which may never happen. *Woodman v. Woodman*, 89 Me. 128, 35 Atl. 1037; *Hunt v. Hall*, 87 Me. 363. The only event in which the grandchildren were to share in the fund was in case the testator's daughter died before attaining the age of 25, without issue, and his wife survived her. This even might never happen and the remainder was contingent. The estate did not vest, therefore, in the grandchildren at the testator's decease. It was the death of the testator's daughter, under the conditions just named, which first made it certain that any part of the estate would come to the grandchildren.

These rules invoked must be considered with reference to this particular will. What does the will say, and what is the testator's intention expressed in the will? It is at the death of the testator's wife that the estate is to be divided and one-half of it to be distributed among the grandchildren of his deceased father. The testator must have had in mind those who answered to that description at the time of the distribution. He was speaking of the grandchildren of his deceased father not at the time of his own death, not at the time of the death of his daughter, but at the time of his wife's death. "At her death," he says the division is to be made. There are in the will no words importing a gift to his father's grandchildren, except in the direction to make the division among them at the time of his wife's death. His

language must refer to that time, the time when the division is to be made. Nowhere in the will is any mention made of the heirs or legal representatives of such grandchildren, nor are they themselves named even as a class, except in the direction to divide one-half the estate among them after the death of both his daughter and his wife. If the estate vested at the death of the daughter before arriving at the age of 25, without issue, her mother surviving her, then the estate so vesting was, not only heritable, but transmissible and devisable. It might happen thus that a large portion of the estate would at the time of the division go, not to the grandchildren of the testator's father, but to their husbands or wives or devisees, strangers in blood to both the testator and his father. We find nothing in the will to lead us to infer that such a result was within the contemplation of the testator or ever intended by him. The conclusion is strengthened by the fact that while the will contains careful provision for the testamentary disposition of one-half of the estate by the testator's wife before the division of the estate, no such power is given to the grandchildren.

"When a legacy is made to a class as 'grandchildren,' and there is by the will a postponement of the division of the legacy until a period subsequent to the testator's death, everyone who answers the description, so as to come within that class at the time fixed for the division, is entitled to share, but no others. By this rule the heirs of a grandchild, who was living at the death of the testator, but who died before the time fixed for distribution, will take nothing; but an after-born grandchild, if living at the time of the distribution, will share." *Webber v. Jones*, 94 Me. 429, 47 Atl. 903. There is nothing in the will under consideration to show a contrary intention. In fact, the rule laid down in *Webber v. Jones*, seems to exactly express the testator's intention in this case.

In *Hale v. Hobson*, 167 Mass. 399, 45 N. E. 914, it is said: "The testator provides for his widow and children and grandchildren, and gives various legacies and life annuities, and then, contemplating that a portion of his estate remains undisposed of, and looking forward to the time when the last life annuity shall have ceased and the residue be free for distribution, he directs his trustees then to divide the residue and the remainder with its accumulated interest equally among his grandchildren. What grandchildren? It seems to us more reasonable to suppose that the grandchildren at the time of distribution are intended than the grandchildren living at his death. It is true that there are no words of survivorship, but it is as if the testator took his stand at the time of the death of the last life annuitant, and said: 'I direct the remainder and its accumulations to be divided amongst my grandchildren,' in which case no words of surviv-

orship would be necessary, and those living then would take." This language is used in *Eager v. Whitney*, 163 Mass. 463, 40 N. E. 1046: "There is no gift to the legal representatives, independently of the direction of the trustees to pay over to them in the year 1901. The time is thus annexed to the gift. It is a legacy given as of that year. An arbitrary date is fixed, at which the trust is to end, and the property to be paid over. The form of the expression used may not be necessarily conclusive, but it has a tendency to show that the gift was to those who should then be his legal representatives." See, also, *In re Brown's Estate*, 86 Me. 572; *Clark v. Cammann*, 160 N. Y. 315, 54 N. E. 709; *Matter of Baer*, 147 N. Y. 348, 41 N. E. 702; *Matter of Crane*, 164 N. Y. 71, 58 N. E. 47; *McLain v. Howald*, 120 Mich. 274, 79 N. W. 182, 77 Am. St. Rep. 597; *Jones v. Colbeck*, 8 Ves. Jr. 38; *Mitchell v. Mitchell*, 73 Conn. 303, 47 Atl. 325; *Clark v. Shawen*, 190 Ill. 47, 60 N. E. 116. We therefore answer the second and third questions in the negative.

The will provides that the division shall be among the grandchildren equally. In answer to the fourth question the trustee is directed to pay over one-half of the trust fund to the grandchildren of Thomas Burgess the deceased father of the testator, who were living at the time of the death of Sophia K. Burgess, July 7, 1904, and such division among them is to be made per capita.

Costs, including reasonable counsel fees, to be paid all parties by the trustee and charged in his account.

Decree accordingly.

COTE v. LETERNEAU.

(Supreme Judicial Court of Maine. Dec. 20, 1905.)

1. REAL ACTION—LACHES.

The owner of land is not obliged to begin an action for its recovery as soon as he is aware of the defendant's occupation.

2. SAME—RECOVERY OF RENTS AND PROFITS.

That the plaintiff in a real action was aware of the defendant's occupation of his land, and made no objection until beginning his suit, does not bar his claim for rents and profits; they having been duly demanded in the action.

(Official.)

On Motion from Supreme Judicial Court, Androscoggin County.

Action by Agnes Cote against Arsene, A. Leterneau. On motion by defendant. Overruled.

Real action, wherein the plaintiff demanded against the defendant the possession of certain real estate situate in Auburn, Me. The plaintiff also claimed rents and profits for the use of the demanded premises while in the possession of the defendant. Plea, the general issue, nul disseisin, and also a brief statement of special matter of defense as follows: "And the defendant says he has done nothing to in any way interfere with

the rights of the plaintiff in and to the land, but may have trespassed technically upon her land, but that he has committed no damage thereby." No disclaimer was filed by the defendant.

Verdict for plaintiff, and damages assessed at \$77.25. Defendant then filed a general motion for a new trial.

Argued before EMERY, STROUT, SAVAGE, PEABODY, and SPEAR, JJ.

Oakes, Pulsifer & Ludden, for plaintiff. McGilliduddy & Morey, for defendant.

EMERY, J. The only question of law presented by this motion is whether, upon the evidence, the defendant was liable for rents and profits; they having been demanded in the declaration and assessed by the jury. The demanded land was a strip five feet wide, which the plaintiff had annexed to a lot previously mortgaged. Her title to the lot mortgaged came through the mortgage to the defendant, who supposed the five-foot strip was included in the mortgage, and entered into occupation of it. He built a barn partially over it, but was allowed to remove it, and did so. He pleaded the general issue, nul disseisin, to this real action but made no actual contest on the question of title, and does not object to the verdict on that question, but only on the question of rents and profits. There was uncontradicted evidence that the plaintiff was aware of his occupation, but did not demand any rent, nor make any objection, until she brought this action.

Upon this evidence we see no reason why the defendant is not liable for the rents and profits of this strip for the time he occupied it within six years before the date of the writ, assuming that the strip would have yielded rents and profits. He was in occupation claiming title, and had thereby disseised the plaintiff. She was not bound to regain seisin at once by suit or by entry. When she did assert her title by this suit, he did not disclaim, but pleaded nul disseisin. It turns out that she was entitled to the strip, and hence to such rents and profits as it should have yielded during his occupation. It is only just that he should hand them over. The injury caused her by his disseisin is not fully compensated until that is done.

Of course, there may be cases where a plaintiff in a real action may be estopped in equity, and even in law, from recovering rents and profits, such as the case of *Jewell v. Harding*, 72 Me. 124, cited by defendant. In that case the defendant had a title good in equity, derived directly from the plaintiff, a title which the plaintiff was bound and could be compelled to make good in law. He practically put the defendant in possession under this title. It was properly held that he could not recover rents and profits. In this case the plaintiff is not claiming any improvements made by the defendant with her knowledge. He was allowed to remove them. The estop-

pel upon her, if any, does not extend to rents and profits.

The defendant, besides the general issue, pleaded, by way of brief statement, that he had "done nothing in any way to interfere with the rights of the plaintiff in and to the land, but may have trespassed technically upon her land, but that he has committed no damage thereby." This was not a disclaimer of the demanded land, nor any part of it. His plea of the general issue still stood as an admission of his possession and a denial of the plaintiff's title. The action was tried upon that issue. Recovery of rents and profits follow.

The defendant urges that the amount assessed by the jury for rents and profits was far too large. We must assume they were instructed to make the proper deductions, and to award only "the clear annual value of the premises, while he was in possession," after such deductions. Though the amount awarded seems large to us, it is not so large as to convince us that the jury clearly erred. We think the motion must be overruled upon both questions.

Motion overruled.

Judgment on the verdict.

COPP v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine. Dec. 19, 1905.)

1. RAILROADS—NEGLIGENCE—TRESPASSERS ON RAILROAD TRACK.

That a railroad company does not prosecute persons walking upon its railroad track between crossings and stations, in violation of Rev. St. c. 52, § 77, does not authorize persons to so use its tracks.

2. SAME.

Persons walking upon railroad tracks are bound to apprehend that locomotives may be swiftly approaching at any time, and are bound to be continually on the watch for them, and to leave the track in season to avoid collision with them.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1285, 1305.]

3. SAME—NEGLIGENCE OF ENGINEER.

Engineers running locomotives are not bound to stop, or even decrease the speed of the locomotive, merely because they see persons walking upon the track. They may ordinarily assume that such persons have made themselves aware of the approach of the locomotive and will seasonably leave the track for its free passage.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1276, 1279, 1280.]

4. SAME.

If such engineer makes all possible effort to stop the locomotive as soon as he has reason to believe that a person walking upon the track is in fact not aware of the approach of the locomotive, he is not guilty of negligence.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1276, 1279.]

5. SAME—EVIDENCE.

In this case the engineer, besides the customary whistles at crossings, blew sharp warning whistles as he approached the plaintiff, who was walking on the outside of the left rail. He also shut off steam, but let the locomotive drift, ex-

pecting the plaintiff would, at the last, step off out of the way of the locomotive. As soon as it became evident to him that the plaintiff might not do so, he did all he could to avoid running upon her, but without avail. He was not guilty of negligence in not sooner apprehending she would not leave the track.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1276, 1279.]

(Official.)

Report from Supreme Judicial Court, Somerset County.

Action on the case by Lillian G. Copp against the Maine Central Railroad Company to recover damages for personal injuries sustained by the plaintiff, and caused by the alleged negligence of the defendant by one of its servants, a locomotive engineer. Tried at the March term, 1905, of the Supreme Judicial Court, Somerset county. Plea, the general issue. At the conclusion of the evidence the case was reported to the law court for decision upon so much of the evidence as was competent and legally admissible. Judgment for defendant.

Argued before EMERY, STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

S. W. Gould and Fred F. Lawrence, for plaintiff. Nathan & Henry B. Cleaves, Stephen C. Perry, White & Carter, and Walton & Walton, for defendant.

EMERY, J. While the plaintiff, a woman 28 years old, was walking along on the defendant company's railroad track on her way to visit a friend, she was overtaken and injured by a locomotive operated by the defendant in the regular course of its business at that place. She did not look behind her, nor take any other measures to become apprised of the approach of trains or locomotives, though she was aware that the track where she was walking was used, not only for the passage of regular trains, but also for shifting cars, making up trains, etc.

To extricate herself from the position of a trespasser upon the track, she showed that other persons frequently, and even habitually, walked upon the track at that place without being forbidden by the defendant company. This however did not give her any right to walk on the track. Not only was the railroad company entitled to the exclusive use of its track between crossings and stations, as this place was, but she was forbidden by statute to walk upon it. Rev. St. c. 52, § 77. That the defendant company did not prosecute violators of this statute did not legalize her act, nor protect her from its consequences.

To relieve herself from the inference of gross carelessness on her part, she says she was walking on the outside of the left-hand rail, and thought she was walking far enough from it to be out of danger. Her opinion that she was in no danger does not alter the patent fact that she had voluntarily placed herself, and was voluntarily remaining, in a position conspicuously fraught with imminent danger. She says she was hard of hearing,

but that very fact made it all the more reckless for her to walk on the track.

Finally she claims that, however great her own negligence, it was past and over before the locomotive struck her, and hence was no part of the proximate cause of the collision and her injury; that the engineer was negligent in not stopping the locomotive, as he might have done after he saw her and before he reached her; that her negligence was anterior to his, and hence his was the sole proximate cause of the injury.

Of course, even if she were a trespasser, the defendant company's servants could not lawfully disregard her presence on the track, and recklessly run over her, but even if she were a licensee, as she claims, they owed her no special duty of care such as they owed to those whose right or duty it was to be on the track.

It is common knowledge that people frequently walk on railroad tracks, and, if locomotive engineers were bound to stop or decrease speed every time they saw a person on the track, the operation of the railroad would be greatly hindered, to the detriment of the public. It is also common knowledge that persons thus walking on railroad tracks, and aware of the approach of a locomotive, will often remain on the track until the locomotive is within a few feet of them before they step aside.

In this case the engineer could rightfully assume that the plaintiff was of ordinary intelligence, that she was aware of the danger of her position, that she would exercise the care due in such a position, that she would seasonably look or listen for trains and locomotives, and seasonably step out of their way. He had given the usual warning signals, loud enough for the neighborhood to hear distinctly. He even shut off steam, and let the locomotive drift, when he saw she did not step off at once. As she was on the left of the track and he on the right, he supposed she had stepped off, and, when it was seen by the fireman on the left that she had not, it was too late to prevent the collision, though every reasonable effort was made to do so. In all this there is no evidence that the engineer was negligent.

The plaintiff, however, claims that a high bank of snow at her left, formed by railroad snowplows, prevented her stepping aside, and that the engineer should have known it. The evidence does not support that theory. She did not try to step aside, and it is not established that she could not, much less that the engineer should have known that she could not.

The case is similar in principle to the case *Garland v. Maine Central R. R. Co.*, 85 Me. 519, 27 Atl. 615. There the plaintiff, in driving a loaded team across the railroad track at a highway crossing, became stuck on the crossing. The engineer saw the team, and even saw it was not moving, but did not then proceed to stop his train. As soon as he saw

that the team could not be moved, he did all he could to stop his train, but it was too late to avoid the collision. It was held that there was no evidence of his negligence; that he was not in fault in not sooner comprehending that the plaintiff would haul a load on the crossing he could not haul off. So, in the case now at bar, we hold that the engineer was not in fault in not sooner comprehending that for any reason the plaintiff would not at last step aside.

We base our decision on the absence of sufficient evidence of negligence on the part of the engineer, and hence have no occasion to determine whether the plaintiff's negligence was contributory.

Judgment for the defendant.

HORNER et al. v. BELL et al.

(Court of Appeals of Maryland. Jan. 10, 1906.)

1. CANCELLATION OF INSTRUMENTS — FRAUD AND UNDUE INFLUENCE — PLEADINGS — REQUIREMENTS OF ANSWER.

Where, in a suit to set aside deeds executed by a deceased grantor, the bill alleged that the grantor, at the time of the execution of the deeds, was old, infirm in body and mind, and unfit to transact any business; that defendants took advantage of her incapacity, and induced her by fraud and undue influence to execute the deeds, and the exhibits, consisting of copies of the deeds, showed that the grantor conveyed away all of her property, without reservation, for a nominal consideration; that in making the disposition of all her property none was granted to her son, and a comparatively insignificant part was given to her grandchildren and a daughter; that the bulk of the property was granted to a son-in-law; and that the property disposed of had been conveyed to the grantor by her husband, whose children and grandchildren received such small consideration, and without suggesting a reason for the disposition made—defendants were required by their answers to meet the charges with a full and direct statement of all the facts within their knowledge connected with the execution of the deeds.

2. DEEDS—VALIDITY—BURDEN OF PROOF.

In a suit to set aside deeds executed by a deceased grantor, the evidence showed that the grantor had lived with defendants, her daughter and son-in-law, for 30 years; that the bulk of the property was conveyed to the son-in-law; that defendants were present with the grantor at the time of the execution of the deeds; that for several years before the execution of the deeds the grantor was an invalid, dependent on her daughter; that the grantor, at the time of the execution of the deeds, was very ill. *Held* to show the existence of confidential relations between the grantor and defendants, so as to place on the latter the burden of proving that the deeds were the voluntary act of the grantor, executed with full knowledge as to their effect.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 587-591.]

3. DEPOSITIONS—BILL IN EQUITY—APPENDED INTERROGATORIES — EVASIVE ANSWERS—EFFECT.

In a suit to set aside deeds alleged to have been procured by fraud and undue influence, a special interrogatory appended to the bill asked a defendant to state when and under what circumstances the deeds came into his possession or his codefendant's. The answer was that the deeds were delivered to and accepted by him on the date of their delivery, that the whole

transaction emanated from the grantor without any suggestion on defendant's part, and that the deeds were her voluntary act. The co-defendant replied to the same interrogatory by stating that the deeds were delivered to defendant by the grantor, and that it was the free act of the grantor after deliberate consideration. *Held*, that the answers were evasive and not entitled to consideration, under Code Pub. Gen. Laws, art. 16, § 160, unless sustained by proof on the final hearing.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, § 272.]

4. DEEDS — VALIDITY — SUFFICIENCY OF EVIDENCE.

Evidence in a suit to set aside deeds on the ground that they were not the voluntary act of the grantor examined, and *held* to justify a decree setting them aside.

Appeal from Circuit Court No. 2 of Baltimore City; George M. Sharp, Judge.

Suit by Elizabeth H. Bell and others against Albert N. Horner and another. From a decree for plaintiffs, defendants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, JONES, SCHMUCKER, and BURKE, JJ.

Charles F. Harley, for appellants. Joseph B. Seth, for appellees.

JONES, J. This is an appeal from a decree of circuit court No. 2 of Baltimore City, which set aside and annulled certain deeds to which specific reference is made in the decree, and the nature and purport of which will appear in the following statement of the facts which gave rise to the controversy involved in the case: Elizabeth B. Hammersley, a widow, and a resident of the city of Baltimore, died in that city on or about the 4th day of June, 1902. In her lifetime she had been possessed of considerable property, real, leasehold, and personal. About a week after her death, on the 13th day of June, 1902, the deeds dealt with by the decree in the case were left for record in the clerk's office of the superior court of Baltimore City, which was the proper place for such instruments to be recorded, by Albert N. Horner, one of the appellants in this case. She left as her heirs and next of kin a daughter, Mary D. Horner, one of the appellants, and wife of her coappellant, Albert N. Horner; a son, William H. Hammersley; and two grandchildren, Elizabeth H. Bell, and George D. Hammersley, the appellees, who are the children of a son who predeceased her. The deeds, which are the subject of controversy, four in number, all purport to have been executed and acknowledged by the deceased, Elizabeth B. Hammersley, on the 29th day of July, 1899, and were all left for record by Horner on the 13th day of June, 1902, and were noted consecutively as having been received at 2:15, 2:16, 2:17, and 2:18 o'clock p. m. One of them conveyed to Elizabeth H. Bell, one of the appellees, "in consideration of five dollars and other good and valuable consideration," a certain

leasehold property on Pearl street in the city of Baltimore for life, on condition "that she promptly pays all necessary expenses on said property within sixty days after their maturity," and if this condition "be fulfilled then after the death of the said Elizabeth Hammersley Bell — to go to and become the property of each of the children of the said Elizabeth Hammersley Bell as may be living at the time of her death and to the descendants of any deceased child." But if there shall be a failure "to pay said necessary expenses within sixty days after their maturity then the property [assigned by the deed] is to immediately vest in and become the property of Mary D. Horner wife of Albert N. Horner free of all trusts and uses," etc. Another conveyed for a like consideration a certain other leasehold property on Pearl street, said city, to George D. Hammersley, the other appellee, for life, upon the same condition, that he pay all necessary expenses within 60 days after their maturity, and, if this condition be fulfilled, at his death, the property "to go to and become the property of Mary D. Horner wife of Albert N. Horner"; but, upon a failure to comply with the said condition upon the part of the said George D. Hammersley, the property was to vest immediately in the said Mary D. Horner, "free of all trusts and uses," etc. Another of these deeds conveyed, for a like consideration, to the appellant Mary D. Horner "all of the personal property goods and chattels and personalty contained in the two dwelling houses 108 North Green street and 2045 North Fulton avenue this [Baltimore] city therein belonging to the said Elizabeth B. Hammersley, to have and to hold," etc., "absolutely." The fourth one of the deeds in question is a conveyance to the appellant Albert N. Horner in the terms following: "In consideration of five dollars and other good and valuable consideration the said Elizabeth B. Hammersley doth hereby grant, assign and convey unto the said Albert N. Horner his heirs personal representatives and assigns all of the real estate fee simple leasehold, ground rents and all other property and evidences of debt due of all kinds and description not mentioned in a personal property goods and chattel deed priorly executed by me—this shall include all notes book accounts and insurance policies, and all persons and corporations are hereby authorized to accept a certified copy of this paper as full authority and acquittance to them, and this paper shall be a full release to them as against all other claimants at law or in equity the purposes and intent of the deed being to make an absolute grant of all the estate (not before deeded) of myself Elizabeth B. Hammersley and to include all the property deeded to me by my late husband David L. Hammersley, deceased, to Albert N. Horner. To have and to hold all of said property to the said Albert N. Horner, his heirs executors per-

sonal representatives and assigns with all the right and appurtenances thereto belonging," etc.

The appellees, as soon as they became aware of the deeds in question having been left for record, filed the bill in this case in the court below to have them set aside and annulled, alleging that they knew nothing of the said deeds "until they saw the notice of their having been recorded in the daily newspapers"; that the deeds purporting to have been executed to them were never delivered to nor accepted by them; that the property pretended to be conveyed to them was subject to heavy ground rents, was in a dilapidated condition, was located in a part of the city "which is steadily deteriorating in value," and that it was comparatively of "little or no value, while the estate and property so pretended to be conveyed to the said defendants, Albert N. Horner and Mary D. Horner, is of very large quantity and value"; that the deeds to the appellants were never legally delivered to them in the lifetime of the grantor; and that, if the said deeds were executed at all by the said deceased, they "were never intended to take effect in her lifetime, and are therefore null and void." They further charged that "Elizabeth B. Hammersley was advanced in age, being 77 years old, and was not only infirm in body, but was also, for a long time before her death, and at the time when said paper writings are alleged to have been executed, enfeebled and impaired in mind to such an extent as to render her unfit for the transaction of any business, and wholly incapable of making a valid deed or contract; that she was particularly susceptible to influences surrounding her, and, residing with the said Albert N. Horner and Mary D. Horner, her feebleness and incapacity were taken advantage of by them, and she was induced, influenced, and persuaded by said defendants —, through fraud, misrepresentation, and undue influence practiced by them, to sign said paper writings," etc.

The question is whether, upon the record before us, these allegations of the appellees' bill are so far sustained as to justify the decree which is here under review. And this question is largely one of fact, as to which we are not aided by any direct proof going to the charges made in the bill as grounds of relief; but the irresistible inferences from the disclosures of the record leave no doubt as to the propriety of the decree. In reaching our conclusions the testimony which has been made the subject of exceptions has been laid out of the case. It will not be necessary, therefore, to notice these exceptions further. With the bill, making the allegations that have been set out, there were filed as exhibits certified copies of the deeds assailed; and from these, in connection with admitted facts already recited, it appears that the grantor in the deeds, Mrs. Hammersley, conveyed away, and divested herself of, all of her prop-

erty of every description, reserving to herself no part thereof, nor any interest therein; that the only specified consideration for this was a nominal one; that in making this disposition of all of her property none was granted to her only living son; that but a comparatively insignificant part was granted to her grandchildren, who, next to her son and daughters, had naturally the strongest claim upon her bounty; that what was conveyed to the grandchildren was hampered with an embarrassing and drastic condition; that the conveyance to her daughter embraced only the personal and household effects in the two dwelling houses named in the conveyance to her; that all the rest of her property of every description was in terms admitting of no exception granted to her son-in-law; and that, to emphasize the unnatural character of the disposition made of her property by the deeds in question, it appeared that the property thus disposed of had been conveyed to her by her husband, whose children and grandchildren received such small consideration at her hands. The deeds in themselves give no explanation of, and suggest no reason for, the remarkable dispositions of the property which they make. Confronted with charges thus made, and with disclosures thus appearing, it became the duty of the defendants by their answers to meet them with a full, frank, and direct statement to the court of all the facts and circumstances within their knowledge connected with and attending upon the transaction called in question, that it might be seen in its true and real character; and there is no reason to doubt that they would have met this duty, if they had seen in such facts and circumstances what would have gone to refute the charges made, and to explain conditions calculated to excite suspicion and to give rise to unfavorable inferences. The answers of the defendants (appellants) do not measure up to this standard of duty and just expectation. They content themselves with answers of a very perfunctory character. These answers are evasive, and make only general, categorical, and formal denial of the charges in the bill, and are framed, if not with the purpose, at least with the effect, to make the burden of the plaintiffs (appellees) with respect to proof as difficult as possible. The plaintiffs (appellees) accompanied their bill with special interrogatories appended thereto, and what has been said of the appellants' answers to the bill is equally true of their responses to these interrogatories. The attitude of the appellants before the court, upon the pleadings, to which reference has been made, is the more significant because an inspection of the proceedings in the cause makes it entirely manifest that they possessed information in reference to the transaction that these call in question which they have not chosen to disclose.

We proceed to examine the transaction in controversy in the light of the proof. There is open no question as to its nature.

The appellant Albert N. Horner, in answer to one of the special interrogatories, said: "The deeds were in the nature of a gift, although I paid considerable sums for her [Mrs. Hammersley's] account. I lived with her 30 years. Our relations were very friendly, and my purse was always open to her." The exorbitant character of the gifts is made manifest by what appears on the face of the deeds which show that the donor stripped herself of all of her property of every kind, and placed herself in a position of absolute dependence, if the purporting intention of the deeds was to be given effect. Of this property the great bulk of it passed under the deed to Albert N. Horner. The appellees were to take what has already been mentioned. The property embraced in the deed to Mary D. Horner was admitted by the appellants to be of the value of \$400. Besides the property embraced in the deeds to Mrs. Horner and the appellees, the grantor is shown, by the admission of the appellants, to have been possessed, at the time of the execution of the deeds, of five houses and two ground rents in good localities in the city of Baltimore; and there was evidence going to show she also had valuable securities to the amount of \$4,000 or \$5,000. A pertinent inquiry, now, is what was the relation between the grantor and the other parties to the deeds in question at the time they purport to have been executed, and what connection such other parties had with their execution. It is not shown that the appellees had any connection with, or knowledge of, the making of the deeds until they were filed for record. The appellants both admit that they were present with the grantor at the signing and acknowledging of the deeds, and that the only other person present, or who is named as being present, was the justice of the peace, who took the acknowledgments. Mrs. Mary D. Horner was the daughter of the grantor, and she and her husband and coappellant had, before the time in question, resided with her in the home of the grantor for about 30 years. This appears by the admission of Albert N. Horner. It further appears from testimony upon the part of the appellants from the physician who attended her that Mrs. Hammersley, the grantor in the deeds, was, for several years prior to her death, an invalid suffering from organic heart trouble. This same witness, testifying for the appellants, said: "Mrs. Horner lived in the house with her mother, nursed her day and night, and in all manners discharged the duties of a loving and affectionate daughter. Mrs. Hammersley impressed me as being measurably dependent on Mrs. Horner. She preferred the attentions of Mrs. Horner to that of her nurse, whoever the nurse might be." This witness further testified that the feelings of Mrs. Hammersley towards Mrs. Horner (appellant here) were those "of a mother to her child, affectionate and sincere," and that "Mr. Horner [appellant] was a resident of the same home. His attentions to Mrs. Ham-

mersley were those of a son to a mother, and on the part of Mrs. Hammersley she invariably spoke of him, or to him, in the most respectful and affectionate manner." Such were the general relations between the grantor, Mrs. Hammersley, and the appellants at the time the deeds in question were executed; and these are shown to have been close and intimate from family ties and long association, and as involving a peculiar dependence of the grantor upon the good offices of the appellants by reason of her feeble and failing health. This same witness testified in chief for the appellants that in July, 1899, the month in which the deeds in question bear date, Mrs. Hammersley was very ill; that he then visited her "probably twice a day"—thus showing a condition calling especially for nursing and care, and emphasizing her dependence upon the appellants at the particular juncture of time when it becomes of most importance as a circumstance in this case.

This evidence goes to show that, when the deeds were executed, the grantor was not in a condition physically to transact business of that character without aid and co-operation from some source. It is not shown that she had advice or assistance from others than the appellants, and they were with her and in a position to make suggestions, give advice, and aid her in carrying the business through. It is not shown who wrote the deeds, nor who notified the justice of the peace and procured his attendance. It is shown that the appellants were with her at the time in question, one of them acting as a witness; that with the justice of the peace who took the acknowledgments of the deeds the grantor was not known to have ever had business transaction before; that this official was one who had been frequently employed by Albert N. Horner to act in his official capacity for him; that immediately upon the execution of the deeds they were given or passed into the possession and custody of Albert N. Horner; that he advised that the deeds be not placed on record at the time, but that they be withheld for the purpose of preventing some of the beneficiaries from becoming aware of their execution, and this advice, as affirmed by the appellants, was followed; that he also advised that, notwithstanding the deeds, the grantor should continue to collect rents from the property, and this advice was followed; that he retained the custody of the deeds from the time of their execution till the death of the grantor, a period of about three years; that at her death he, without notice to, or consultation with, any one, delivered the deeds for record; and that in leaving them for record he felt himself authorized to instruct as to the order in which they should be placed upon record. Now, all this appears from the admissions of the appellants, or from evidence which they do not dispute; and if it be true that the de-

ceased grantor, in the deeds in question, placed these instruments, which she adopted and used as a means of disposing of the whole of her property, in the custody and control of Albert N. Horner, with authority to him to see that they were given effect, and in the meantime was acting under advice from him in regard thereto, there was undoubtedly between the deceased grantor in the deeds and Horner, in respect to this transaction, a relation of trust and confidence of a grave and responsible character. The appellants are scarcely in a position to deny or repudiate such relation. And the inference seems inevitable, from the circumstances surrounding the parties at the time, that prior and assisting to the execution of the deeds in question there must have been, in respect thereto, as between the parties, a relation of agency on the part of the appellants, and of confidence on the part of Mrs. Hammersley. Mrs. Horner testified: "I knew my mother's every thought"—and, when asked whether she knew that the deed from her mother to herself "was to be prepared beforehand," answered: "I heard mother speak of it." It would seem from this review of the evidence in the cause as to the character of the transaction here in question and the relations of the parties thereto, and to each other in connection with it, that it is clearly brought within the principle recognized and applied in a number of cases in this court, and notably in the recent case of *Zimmerman v. Bitner*, 79 Md. 115, 28 Atl. 820, that when "a gift or conveyance," such as here is the subject of controversy, "is in question, the onus is upon the donee to prove to the satisfaction of the court that the conveyance was the free, deliberate, and voluntary act of the donor, and made by him with the full knowledge as to its effect and operation; in other words, that he knew that the conveyance itself operated to divest him of all title to the property, and to vest it in the donee." After laying down this principle the case just cited goes on to say: "A good deal has been said as to what constitutes a confidential relation within the operation of the principle, but courts have always been careful not to fetter the operation of the principle by undertaking to define its precise limits. The cases of parent and child, guardian and ward, trustees and cestui que trust, principal and agent are familiar instances in which the principle applies in its strictest sense. But its operation is not confined to the dealings and transactions between parties standing in these relations, but extends to all relations in which confidence is reposed, and in which dominion and influence resulting from such confidence may be exercised by one person over another. No part of the jurisdiction of the court, it has been said, is more useful than that which it exercises in watching and controlling transactions between parties standing in

a relation of confidence to each other. And, being founded on the principle of correcting abuses of confidence, it ought to be applied to every case in which a confidential relation exists as a fact, where confidence is reposed on the one side, and the resulting superiority and influence on the other." For a statement of the same general doctrine as is outlined in the foregoing citation, we may refer to 1 Story's Eq. Jur., § 823.

The defendants seem to have sought to meet the burden of proof cast upon them, by the rule of law just adverted to, in their responses to certain of the special interrogatories appended to the bill of complaint. Of these No. 3 to Albert N. Horner asked him to "state when and under what circumstances said alleged deeds came into your possession or the possession of your wife," to which he answered: "The deeds were delivered to me and accepted by me upon the date of their execution by the grantor. The whole transaction emanated from her without any suggestion on my part, and it was her free and voluntary act." And interrogatory No. 3 to Mary D. Horner asked her to "state when and under what circumstances said alleged deeds came into your possession or the possession of your husband," to which she answered: "The deeds were delivered to my husband, Albert N. Horner, by my mother on 29th July, 1899, and it was the free and voluntary act of my mother after careful and deliberate consideration." These answers were evasive, and were not "directly responsive" to the interrogatories. The inquiries called for the facts and circumstances attending the transaction indicated. The answers did not give any facts and circumstances, but a conclusion that might or might not be drawn from these. They gave what the respondents claimed to be the effect and result of a knowledge of the facts and circumstances to which the inquiries related. These answers, therefore, "not being responsive to the bill" unless "sustained by the proof, at the final hearing of the cause * * * are entitled to no consideration." *Gardiner et al. v. Hardey et al.*, 12 Gill & J. 365; Code Pub. Gen. Laws 1904, art. 16, § 160. Now, what evidence did the appellants produce at the final hearing to support the averments made in these answers? The only evidence from them which appears as being intended to meet the particular inquiry now under consideration consists of certain papers filed with the examiner as exhibits under agreement of counsel that the appellant Mrs. Mary D. Horner, who was absent by reason of illness, would, if present, "testify that she was present and saw Mrs. Elizabeth B. Hammersley sign and execute each and all of them" at her home, No. 108 N. Greene street, upon the dates mentioned in said papers; that at the signing of the papers dated July 29, 1899, Mrs. Elizabeth B. Hammersley, Albert N. Horner, Andrew J. Collars, and Mary D. Horner were

present; and that at the signing of the papers dated February 14, 1900, Mrs. Hammersley, Mr. Collars, and Mrs. Horner only were present." These papers are offered without any explanatory or accompanying evidence whatever beyond that just alluded to, that they were signed by Mrs. Hammersley, and are left, for the effect they are to have in the cause, to rest on the presumption arising from the bare fact that they were signed, and such evidence as they intrinsically afford. There were the apparent means and opportunity for the appellants to have furnished this explanatory evidence, the importance of which will be presently seen, for, although it is shown that Andrew J. Collars is dead, Mrs. Horner, the other witness who was present on both occasions mentioned in the agreement, and saw all of the papers signed, according to her testimony, was twice on the stand in the course of the proceedings below as a witness—once when called by the plaintiffs, and again on the call of the defendants (appellants). These papers are worthless as proof in the cause in discharging the burden of proof the appellants are called upon to gratify, as has heretofore, been pointed out, and only serve to arouse suspicion and to give suggestion of fraudulent contrivance. One of them was executed, or purports to have been, on the 29th of July, 1899, and is as follows: "This memoranda or paper is to certify that whereas I have made certain provision for George D. Hammersley and Elizabeth Bell (wife of John Bell) my only grandchildren, and by way of explanation why these bequests are not more, I have to say that George W. Hammersley, my son (now deceased), received during his lifetime house rent free for about 20 or 25 years, amounting to five or six thousand dollars, in addition one or two insurance policies on his life. The premiums or assessments were nearly always paid for by myself, from my individual purse, or that of my husband. And these policies were paid to the above-named grandchildren. All this was in addition to his weekly salary for his services. This statement is made in order that I show that I have not been illiberal with them. And what Mary D. Horner may do for them in future is left with her to use her own free will, discretion and judgment. Witness my hand and seal this 29th day of July, 1899. [Signed] E. B. Hammersley. [Seal.]" Sworn to, etc.

It may be said of this paper in passing that in itself it gives no evidence that Mrs. Hammersley had knowledge of the character and effect of the instruments she is alleged to have executed on the day it bears date. On the contrary, it would indicate that she did not have such knowledge. The paper speaks of "bequests," and not of deeds, to take immediate effect. It also indicates that there was in her mind some idea of Mrs. Horner doing something for the grandchild-

dren in the future, which is inconsistent with the knowledge that the transaction in question here had given to Mrs. Horner a mere pittance, and left her powerless to help anybody. Again, while it mentions considerations that might reasonably have had effect in distributing the property as between her children and her grandchildren, it is far from the suggestion of a reason why practically all of her property, acknowledged to be considerable, should go "in the nature of a gift" to Albert N. Horner, to the entire exclusion of one of her children, and to the putting of herself in a state of absolute dependence. Others of the papers or exhibits, to which reference is now being had, are four deeds and a paper referring to the deeds as confirmatory of those of the 29th of July, 1899. These confirmatory deeds all purport to have been executed and acknowledged on the 14th of February, 1900, and are identical in every respect, excepting only dates of execution and acknowledgment, and being witnessed alone by Andrew J. Collars, instead of by both Mrs. Horner and Collars, with the deed of the 29th of July, 1899.

The paper just mentioned as referring to the deed as confirmatory bears the same date as the deeds, and is as follows: "Whereas on the 29th day of July, 1899, I executed sundry papers qualified to them before Justice Andrew J. Collars, J. P., and now I again execute confirmatory deeds of them and sundry other papers confirming those first signed in July, 1899, and hereby confirm and affirm each and all of them as being my own opinion in writing—my suggestions in writing, my hope and expectations. I have made no will. These affidavits and suggestions are specifically not intended to be a will, and are not to be so construed under any circumstances to be a will in any sense whatever. And while I am aware the way I have disposed of my property which suits me, if it is contested by any person or persons this writing and suggestions and requests, will to the legal mind, in order to thwart the end I wish to accomplish, look suspicious of future trouble and by employing fine points of law, citing of authorities on insanity, old age, collusion, and my yielding to persuasion of others, and by oratorical effect seek to have my deeds and papers annulled; my only reason for such forestallment of what might occur, is the already and before this date, attempted connivance with my own offspring to frustrate what may be arranged by me for the welfare of them that will in all human probability live after I am no more. This feature of intention to try to annul anything I may do has already come to my knowledge, and for me to prepare for such a contingency is only common sense. I have deeded my property to others for a consideration, as deemed best by me, that no one understands as well as myself and to avoid any of my family matters being aired in court is surely a privilege that is, to say the least, proper and reasonable

and all courts of law and equity, and all judges and juries that may in the course of events be called upon to hear contests of the deeds executed, or pass judgment upon these papers or deeds executed, and qualified to by me at this date while I am sound in mind are hereby requested to uphold the same to the letter, no matter by whom assailed. This paper has been, as well as all other papers before signed and now signed, in my possession for many hours, yes days, and with assistance have expressed my own ideas fully I believe I have read them over and over and I am fully cognizant of their import and effect and I hereby suggest, request and implore, that no court of justice, law or equity will annul or change them. Witness my hand and seal and affidavit to the same this 14th day of February A. D. 1900. [Signed] Elizabeth B. Hammersley. [Seal.] Sworn to, etc.

The two accessory papers, which have been fully set out, appear to have been sworn to. Why they should have been executed, and with this solemnity, is not attempted to be explained, except by the vague suggestions in the papers themselves, and it does not appear that there was the slightest foundation for the intimations contained in the papers of the purpose of their existence beyond the imagination and the fears of their author. If the transaction to which they related was the free, uninfluenced, voluntary, and deliberate act that the appellants claim it to have been, much less secretive and suspicious, and more effective, means could have been employed to make this appear. A circumstance having significance in connection with these papers appears in the evidence. Mrs. Horner, as a witness, was asked if her mother (Mrs. Hammersley) had, at the time of the making of the deeds in controversy, made any provision for her (Mrs. Hammersley's) son, William H. Hammersley, and answered, "No." Asked, further, if he (the son) was not at the time "almost wholly dependent upon his mother for his support," she answered, "He was." Being then asked: "How has he been supported since her death?" she answered: "By what I give him." This shows William H. Hammersley, the son, to be dependent upon Mrs. Horner and her husband (appellants). It is to be observed that in the papers now being considered as the principal evidence of the appellants no explanation is thought necessary to be made why, in making disposition of her property, Mrs. Hammersley should altogether have ignored her son, William, while care is taken to explain why she was not more liberal with her grandchildren. The radical defect, however, in the papers in question as proof to the point upon which they were offered, is that it nowhere appears in evidence that the deeds involved in the controversy here were ever, as a matter of fact, read by, or read to, the grantor; and these papers do not upon their face indicate that Mrs. Hammersley had knowledge of

the contests of such deeds by any reference to such contents. General and vague reference is made in them to instruments executed and provisions made, but they give no information of what the instruments contain or what provisions had been made. Upon the assumption, therefore, that she read over the papers now being discussed, she might have had in mind, as far as here appears, very different provisions in reference to her property from those which the deeds made. The futility of this evidence is enforced by the fact that it is not shown as a fact, but merely as a presumption, that she knew what was expressed in the papers we are now considering. With the exception of the evidence which has been adverted to, there is none in the record even designed to show that prior to the execution of the deeds in controversy Mrs. Hammersley ever expressed an intention to dispose of her property as the deeds disposed of it, or that after the deeds had been executed she ever expressed or indicated a knowledge of how she had disposed of it. It is not perceived just what office the so-called confirmatory deeds were intended to perform. The execution of these deeds to confirm the deeds previously made would seem to be an admission, or would indicate a fear, upon the part of somebody, of infirmity in the prior deeds. The execution of the confirmatory deeds, and of the paper in connection with them, indicated a good deal of anxiety and pains on the part of somebody to cure such infirmity. The inquiry naturally arises why this anxiety and pains on the part of Mrs. Hammersley to confirm and render secure a transaction which left a dependent son penniless, and gave comparative pittance to her daughter and grandchildren, and nearly all of a considerable property to a son-in-law.

We search the record in vain for any explanation of this; or for any reason impelling or inducing Mrs. Hammersley to such an act. It is pregnant, however, with motive and inducement for the appellants to have been at this pains. If there was infirmity in the deeds of the 29th of July, 1899, and the confirmatory deeds of the 14th of February, 1900, were necessary to confirm and complete the transaction of the former date, then the "gift" which was intended to be made by Mrs. Hammersley was really made by the deeds of the later date. At that time there could be no doubt of the confidential relations existing between her and the appellants, nor of the agency of Albert N. Horner in respect to the transaction which was thus perfected. He had had, at the time, for months, in his keeping the instrumentalities for disposing of the whole of her property, and was guiding her by his advice in relation thereto. The same burden of proof that the appellants would have to gratify to establish the deeds, which were set up as the effective deeds, would devolve upon them with respect to the so-called confirmatory deeds in the attempt to give these

latter instruments effect. All that has been said with respect to the proof in the case applies as well to the so-called confirmatory deeds as to those originally executed. We do not think it necessary to extend this already lengthy opinion to present other considerations suggested by the record and going to show the propriety of the decree here appealed from.

We approve of the decree, and the same will be affirmed, for reasons we have given.

Decree affirmed, with costs to the appellees.

DULANEY et al. v. DEVRIES et al.

(Court of Appeals of Maryland. Dec. 7, 1905.)

1. SPECIFIC PERFORMANCE—EVIDENCE — SUFFICIENCY.

A bill for specific performance of a contract whereby complainants advanced moneys to the trustees of a lunatic, the moneys to be repaid from the proceeds of a sale of his real estate, could only be sustained on a clear showing that the contract was actually made, that it was one which the court would have authorized or approved at the time, had it been in possession of all the facts, and that the money sought to be recovered was advanced on the faith of the contract.

2. SAME—MAKING OF CONTRACT.

In a suit for the specific performance of an alleged contract, whereby complainants advanced moneys to the trustees of a lunatic, the moneys to be repaid from the proceeds of a sale of his real estate, evidence considered, and held insufficient to show the contract.

3. INSANE PERSONS—ADVANCEMENTS TO COMMITTEE—LEGALITY OF CONTRACT.

The court would not approve a contract whereby the trustees of a lunatic borrowed moneys which were to be repaid from the proceeds of a sale of the lunatic's real estate, the contract being made on the ground that a sale of such real estate at that time would be unadvisable, where at that time one of the trustees was indebted to the trust estate to the extent of \$4,000 and there was \$1,000 belonging to the lunatic in a bank.

Appeal from Circuit Court, Baltimore County, in Equity; David Fowler, Judge.

Suit by Henry S. Dulaney and others as trustees of the Charles A. Vogeler Company, against Henry A. Devries and others. From an order dismissing the bill, complainants appeal. Affirmed.

Argued before McSHERRY, C. J., and BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

R. E. Lee Marshall, Joseph C. France, Francis T. Holmer, and James McEvoy, for appellants. Randolph Barton, for appellees.

BURKE, J. This is an appeal from an order of the circuit court for Baltimore county dismissing the bill of the appellants which sought to have the contract alleged in the bill recognized as a valid and subsisting obligation, and to have the personal estate of Samuel K. George Devries, deceased, applied to the payment of a debt which it is alleged was due under said contract by the deceased to the plaintiffs, and that the interest of

said deceased in certain real estate mentioned in the bill might be sold, and the proceeds thereof applied to the payment of so much of said debt as might remain unsatisfied after the application of said personal estate to the payment of said debt. The debt alleged to be due by the deceased to the plaintiffs, as of the 6th day of February, 1904, is \$17,290.83. The position of the plaintiffs is that the contract set forth in the bill should be treated as an equitable lien upon the real and personal property of the deceased therein mentioned, and that the court should recognize and enforce said contract by granting the specific relief sought by the bill.

A brief statement of some of the more prominent facts and circumstances in the history of events which gave rise to this litigation would make more easy the decision of the issues raised by the pleadings. William Devries, of Baltimore, died in November, 1877. At the time of his death he was the head of the firm of William Devries & Co., a large and successful dry goods firm, whose place of business was located on Baltimore street. The members of this firm consisted of himself, William R. Devries, a son, and Christian Devries. William Devries left surviving him six children, three sons and three daughters, who were his only heirs at law and next of kin. His sons were William R. Devries, Samuel K. George Devries, and Henry A. Devries. His daughters (using their married names) were Grace G. Tuck, Belle D. Goodwin, and Eliza Boynton. Samuel K. George Devries and William R. Devries died before the institution of this suit. William R. Devries left surviving him three children, who were made defendants to the bill of complaint, and whose names are Lydia Whitridge, Mary Frick, and William Devries. Henry A. Devries, the only surviving son of William Devries, is made a party defendant as the administrator of Samuel K. George Devries. William Devries died intestate, seised and possessed of a large real and personal estate situated in Baltimore City and Baltimore county. Letters of administration upon his estate were granted to Christian Devries, who accounted for and distributed the personal estate in the orphans' court for Baltimore county, and who also, as trustee appointed under appropriate equity proceedings, sold all the real estate of said deceased, except the property known as the "Pill Box Farm" located in Baltimore county. Shortly after the death of William Devries, Samuel K. George Devries was, by an inquisition had in the circuit court for Baltimore county, found to be a non compos mentis, and by an order of that court passed on the 17th day of December, 1877, Christian Devries and Henry A. Devries were appointed committee of the person and trustees of the estate of said lunatic. They each qualified under their appointment, and assumed the discharge of the trust. Samuel K. George Devries was a member of the firm of Devries,

Young & Co. Upon their qualification as committee and trustees of said lunatic, it was agreed between them that Henry A. Devries should look after the personal wants and comfort of said lunatic, and that Christian Devries should have entire charge of his property and estate, and attend to the investment of all funds of the lunatic coming into their hands as trustees.

A large estate, to which Samuel K. George Devries was entitled from the estate of his father and as a member of the firm of Devries, Young & Co. passed into the hands of his trustees. It appears from the plaintiffs' Exhibit X that on June 1, 1884, the net balance which should have been in the hands of the trustees of the lunatic on that date was \$60,504.82. Subsequently, to wit, in 1886, the warehouse property belonging to the estate of William Devries was sold, and the share of the lunatic in the net proceeds of sale was \$14,004.20. In 1895 the property of William Devries located on Charles street was sold, and the share of the lunatic was ascertained by the auditor's account to be \$2,274.78. In addition thereto, there was to the credit of the lunatic in the Eutaw Savings Bank the sum of \$949. Allowing \$6,000, a most liberal allowance, for the maintenance of the lunatic from June 1, 1884, to April 1, 1887, the date when the first charge on the account sought to be recovered in this case was made, there ought to have been in the hands of the trustees, as principal belonging to the estate of Samuel K. George Devries at the time the alleged contract was entered into, the sum of \$68,509.02. But the bill alleges "that in or about the year 1887 practically the only property or estate then belonging to or owned by said lunatic consisted of the right and interest of the said lunatic, as one of the heirs at law and distributees of his said deceased father, to certain real and personal property, being a part of the estate of his said father; said property consisting of 28 shares of the capital stock of the Peabody Heights Company, a corporation incorporated under the laws of the state of Maryland, and a certain tract or parcel of land, containing 198 acres more or less—the interest of said lunatic in said real and personal property being a one undivided one-sixth interest therein."

What had become of the large amount of money which the testimony shows to have passed into the hands of the trustees? How had it been dissipated and lost? An examination of the evidence will disclose a most lamentable case of mismanagement of the trust funds, and an utter disregard of duty on the part of Christian Devries, and at the same time will aid us in fixing the value of his testimony in support of the contract alleged in the bill. Upon the dissolution of the old firm of William Devries & Co. in 1877, by the death of William Devries, a new partnership was formed, trading under the old firm name of William Devries & Co., to

carry on the business in which the former firm had been engaged. This partnership was subsequently renewed. It was composed of Christian Devries and the five children of William Devries, deceased, viz., William R. Devries, Henry A. Devries, Mrs. Tuck, Mrs. Goodwin, and Mrs. Boynton. In 1882 Christian Devries formed a partnership with Mrs. Minnie Vogeler to carry on the business of manufacturing and selling proprietary medicines, among which was St. Jacob's Oil. In this partnership the members of the firm of William Devries & Co. acquired a three-fifths interest in the profits; the other two-fifths being the property of Mrs. Vogeler. The interest of the members of the firm of William Devries & Co. in the profits of the Charles A. Vogeler Company is in the same proportion as their shares in the firm of William Devries & Co.; that is to say, 30 per cent. to William R. Devries, 30 per cent. to Christian Devries, and 10 per cent. each to Henry A. Devries, Mrs. Tuck, Mrs. Goodwin, and Mrs. Boynton. Christian Devries was the general managing partner in the Vogeler Company, which did a large and profitable business for a number of years, but finally became embarrassed and made a deed of trust for the benefit of creditors on the 18th day of December, 1899. The firm of William Devries & Co. ceased to do business in 1884, at which time the testimony shows it to have been insolvent. The record shows that the children of William Devries had the most implicit confidence in the integrity and business capacity of Christian Devries. He was a man of large and varied business experience, and they looked to him for guidance and advice in business matters. Mrs. Goodwin in her testimony said: "We looked to Mr. Christian Devries for everything, and consulted him about the most minute details of our living." And to the same effect is the testimony of Mrs. Tuck. Upon the failure of the Vogeler Company there was found upon its books the account, which is the subject of this suit, of loans and advances made for the support and maintenance of Samuel K. George Devries, and it was also discovered that practically the whole estate of the lunatic, except the small portion thereof mentioned in the bill, had been loaned by Christian Devries, as trustee, without authority, to the firm of William Devries & Co., and had been lost, or had been applied by him to the payment of the debts of the firm. This suit was not brought until more than three years after the failure of the Vogeler Company, and not until after the death of William R. Devries, who would have been a most important witness as to all the transactions in connection with the contract sought to be enforced in this case.

We will now state such material allegations of the bill as may be necessary to a proper disposition of the case. It alleges the appointment and qualification of the

plaintiffs as the trustees of the Vogeler Company; that it became the duty of the plaintiffs under their appointment to collect and reduce to money all debts due to the Vogeler Company. It alleges the proceedings by which Samuel K. George Devries was adjudged to be a lunatic, and the appointment and qualification of Christian Devries and Henry A. Devries as committee and trustees; that said committee and trustees maintained and supported said lunatic at an asylum for the insane from 1877 until 1887, during which period they paid the necessary and reasonable expenses of his maintenance and clothing; that the estate of the lunatic consisted in a large part of his interest in the estate of his deceased father. It then alleges "that the expenses so incurred and paid by said committee and trustees, during the period aforesaid, exhausted the estate of said lunatic in the hands of said trustees," and that about the year 1887 the only estate belonging to said lunatic was his undivided one-sixth interest in the "Pill Box Farm" and in the 28 shares of the capital stock of the Peabody Heights Company, both of which properties were unproductive, but that neither of said properties could be sold without great loss and injury to the best interest of the lunatic; "that under these circumstances it was impossible for said trustees to maintain and provide for said lunatic out of his own estate, or by a sale thereof in the usual course to provide sufficient means to maintain him, except by the application of the principal of the proceeds of any such sale, or pledge, in consequence whereof it was apparent that the entire estate of said lunatic would soon be exhausted, and that said lunatic would be left without any means of support, and dependent upon public or private charity"; that as the best and most available means of preserving and protecting the estate and property of said lunatic, and at the same time of furnishing the present means of providing for his reasonable and necessary wants and comforts, and of keeping and maintaining said lunatic in the manner best adapted to his welfare and interest, the contract which forms the basis of this suit was entered into. That contract is stated in the bill in the following words: "Said trustees in the discharge of the duties of their office, entered into an arrangement with the said Charles A. Vogeler Company, in which company the defendants were all largely interested, whereby the said Vogeler Company undertook and agreed to advance and loan to the said lunatic, and to pay to the said trustees for his use and benefit, from time to time, as and when the same might be required for the needs of said lunatic such sum or sums of money, as might be required for the maintenance of said lunatic and for providing him with reasonable necessities and comforts, and to this end to pay over

such sum or sums to said trustees to be so expended as aforesaid, and at such times and places as the said trustees should require. And in consideration thereof, said trustees promised and agreed on behalf of said lunatic to repay any and all sums so advanced by said Charles A. Vogeler Company for the purpose aforesaid, with interest on said several sums from the date of the loan thereof, whenever and as soon as said trustees should determine that the principal of said lunatic's estate as aforesaid could be sold and disposed of without loss or injury to the best interest of said lunatic. It being understood that the money so loaned and advanced as aforesaid should be paid out of the proceeds of the sale of said estate, and that the sale thereof should be made only when, in the judgment of said trustees, a sale would be to the best interest of said lunatic. And it being further understood and agreed that at the proper time, the said trustees would report the facts and circumstances hereinbefore set out to the court, having jurisdiction, and that an order should be passed ratifying and confirming said contract and agreement and authorizing and empowering said trustees to give full force and effect thereto." The bill then alleges that the Vogeler Company, in pursuance of said contract and agreement, advanced to said trustees, for the use of said lunatic, the sum of money sought to be recovered in this suit; that said contract was greatly to the advantage of said lunatic, and "that unless the said Charles A. Vogeler Company had consented to enter into said agreement, and to supply, in pursuance thereof, the money necessary for the maintenance of said lunatic, said trustees would have been compelled to sell and dispose of the only estate and property possessed by said lunatic, at a ruinous sacrifice, and said lunatic would have long since been left without resources or estate of any kind, thereby of necessity becoming a charge upon the public or private charity; that by virtue of said agreement, said trustees were enabled not only to continue to provide for the needs of said lunatic, but to preserve his said estate and property until the same should increase in value, to the great benefit and advantage of said lunatic."

It is to be observed that the allegations of the bill are so framed as to induce the court to believe that there was an urgent necessity for making the contract, and that the trustees of the lunatic were governed by what they considered to be his best interests. But from what we have said it will appear that the bill omits important and controlling facts and circumstances which should have been brought to the attention of the court, and which were within the knowledge of Christian Devries, from whom it is fair to presume the plaintiffs derived the information upon which the bill was filed. It omits to state the extent of the lunatic's estate

which came into the hands of his trustees, and which, as we have shown, was quite large. It fails to state that the greater portion of this estate was lost by the unwarranted act of Christian Devries. It makes no mention of the fact that at the time the alleged contract was made there were funds on deposit in the savings bank belonging to the lunatic approximating \$1,000, and that Christian Devries was indebted to the trust estate, at the time the alleged contract was made, to the extent of \$3,975, money loaned, and which the evidence shows he was amply able to pay. We need not multiply authorities to show that in cases for specific performance of contracts the plaintiff must establish the very contract set up in his bill, and where he seeks to charge real or personal estate with the payment of money expended under the contract he must show that the contract was entered into with reference to said property, and that the money was advanced upon the faith of the pledge of the property for its repayment. The agreement to be enforced must be certain, and defined and proved by clear and satisfactory evidence; otherwise, the court will refuse its specific execution. It was said in *Semmes v. Worthington*, 88 Md. 299, that "in all cases for specific performance the contract must be accurately stated in the bill, and the proof must in every essential particular correspond with the contract thus set out." The general principles by which the court is guided upon applications of this kind were stated with clearness and accuracy by Schmucker, J., in *Horne v. Woodland*, 88 Md. 512, 41 Atl. 1080, as follows: "Specific performance is not a matter of right in the litigant, but is one of sound judicial discretion controlled by established principles of equity, and it will be granted, or withheld by the court upon a consideration of all the circumstances of each particular case. The contract sought to be enforced must be certain and definite in its terms, and must be so clearly proven as to satisfy the court that it constitutes the actual agreement between the parties, if any of these ingredients are wanting the specific performance will not be decreed."

In order to sustain the bill, the court must be satisfied (1) that the contract alleged was actually made; (2) that, if made, it was one which the court would have authorized or approved at the time had it been in possession of all the facts and circumstances; (3) that the money sought to be recovered was advanced upon the faith of the contract. The proof of the contract rests upon the testimony of Christian Devries. He was the only witness called by the plaintiffs. It is a singular circumstance that, of all the persons now living who had been connected with the firm of William Devries & Co. and with the Vogeler Company, he alone appears to be the only person who had knowledge of the making of the contract. None of the other witnesses knew, or ever heard of,

any such contract until the institution of this suit. In his testimony he states that William R. Devries, who is now deceased, represented the interests of his brothers and sisters in the firm of William Devries & Co., and he seeks to convey the impression that he believed they had knowledge, not only of the contract, but of the investment of the lunatic's funds in the firm of Devries & Co. It is difficult to credit this testimony in view of the great weight of evidence that he, and not William R. Devries, was their representative in all business matters. Mrs. Goodwin testified that she looked to Christian Devries for everything; and Mrs. Tuck said: "I never went to Mr. William R. Devries in my life for anything of that kind, and Christian Devries knows that he, Christian Devries, made every arrangement for us. He was our representative." And Mrs. Boynton testified that William R. Devries "never represented us in anything whatever." As to his statement that he believed that the family of William Devries had knowledge of the investment and loss of the moneys of the lunatic, the evidence is convincing that he studiously concealed the loss from them, and misled them to the very last. Mrs. Goodwin says that they "believed that everything was all right, and that he made everything as clear as possible for us, and that we were made to think that we were people in the most comfortable circumstances." In the testimony of Mrs. Tuck it appears she had an interview with Christian Devries as late as June, 1899, in which she asked him about the lunatic's estate, at which time he told her that his estate was intact. In January, 1900, after the failure of the Vogeler Company, she had another interview with him, in the course of which he told her "that George's money was all gone." "I reproached him," she says, "with having deceived us, and his reply was: 'If I had told you the real condition of affairs, you would have changed your way of living, and that would have affected the credit, and the crash would have come sooner than it did.'"

We will now examine the testimony of Christian Devries upon which the plaintiffs rely to support the contract. He has given three distinct versions of this contract. After referring to the dissolution of the last firm of William Devries & Co., and the application of the entire assets of the firm, including the lunatic's money, to the payment of its debts, he stated that "there was then nothing to pay the debt due and owing to the estate of the lunatic," and that the attention of William R. Devries was called to that fact "as soon as we had arrived at that point when we had ascertained the condition of the firm's affairs about the interest of the lunatic, as he [William R. Devries] was largely overdrawn in the firm of William Devries & Co., as well as his sister, Mrs. Goodwin, and, as they both had an interest in the firm of Charles A. Vogeler Company,

which at that time was a very profitable business, that the interest of the two mentioned would reimburse the trustees of the estate of Samuel K. George Devries." It was apparent that this statement did not prove the contract, and therefore the counsel for the plaintiffs propounded this question: "Now, Mr. Devries, in this situation, being without, as you testify, any income to support the lunatic, just recount what measures were taken and what led up to those measures to continue to support him?" To which the witness replied that he had already stated that arrangement in the testimony we have quoted. Counsel then said: "Well, I want you to get that thoroughly straightened out." Whereupon the witness answered as follows: "William R. Devries, who had charge of the finances of William Devries & Co., was a member of that firm, stated to me that he thought the simplest way to provide funds for the lunatic was to borrow the money from the Charles A. Vogeler Company, and, if there were funds sufficient coming from that firm collected hereafter, the Charles A. Vogeler Company could be reimbursed, and, if not, his interest in the two pieces of property, the farm in Baltimore county and the Peabody Heights Company would be sufficient, and, as he and his sister had largely overdrawn their accounts in the firm of William Devries & Co., what they paid into that firm would reimburse the trustees for any money advanced by the Charles A. Vogeler Company." Under these arrangements it appears that the primary source from which the money advanced by the Vogeler Company was to be returned by payments made by William R. Devries and Mrs. Goodwin out of their interest in future collections, made on account of the firm of William Devries & Co. That Christian Devries believed that these collections would be ample to repay the amounts advanced is quite clear from his testimony. There was no attempt made to prove that there was any understanding to report the contract or arrangement, whatever it might have been, to the court for its ratification, as alleged in the bill. The two accounts already given being insufficient to establish a lien against the real and personal estate of the lunatic, the witness was afterwards, at a subsequent sitting, asked this leading question: "Do I understand you to mean that any promise or undertaking on the part of William R. Devries, or on the part of his sister, Mrs. Goodwin, constituted any part of the arrangement or consideration of the loan made to you as trustees?" To this question he replied that he looked entirely to the interest of the lunatic in his father's estate for the payment of the advances, and that was the sole consideration which induced the loan. This evidence is utterly inconsistent with his previous testimony.

It is not pretended that his co-trustee had any knowledge of the making of the alleged

contract, and we are satisfied that he was never aware of the fact that any such contract was claimed to have been made until after the institution of this suit. Henry A. Devries, his co-trustee, testified that after the failure of the Vogeler Company Christian Devries told him that "he had lost George's money, and that there was an account on the Vogeler Company's books against him, and when the time came he would go on the stand and testify that he had no right whatever to advance that money." The attention of Christian Devries was called to this testimony, and he did not deny it. We are of opinion, upon a careful examination of the record, that the contract alleged in the bill is not proved. But, if it be conceded that it was made, it would not have received the sanction of the court had the trustees made a full and candid disclosure of all the facts and circumstances connected with their management of the trust, and of its exact condition at the time.

The order appealed from will therefore be affirmed. Order affirmed, with costs to the appellees.

SHARP v. BATES.

(Court of Appeals of Maryland. Dec. 6, 1905.)

1. CONTRACTS — ACKNOWLEDGMENT UNDER SEAL OF DEBT—OBLIGATION TO PAY.

A memorandum in writing under seal, executed by a debtor, whereby a debt is acknowledged to be owing, obligates the debtor to pay it.

2. SAME—ACCEPTANCE—PERFORMANCE OF ACT REQUIRED.

Indorsers on a note, by a writing under seal executed by them, requested plaintiff, an indorser, to pay the note at maturity, and agreed to refund the amount in accordance with an agreement, and to severally pay plaintiff the amounts set opposite their respective names within 30 days after the maturity of the note. *Held*, that the obligation created by the instrument became operative, without acceptance under seal, on plaintiff paying the note at maturity.

3. SAME.

The right of plaintiff to recover on his paying the note at maturity was founded on the instrument, and the question whether the facts set forth in the declaration in a suit on the instrument formed by operation of law a valid contract by offer and acceptance was immaterial.

4. SAME—TIME TO SUE.

Indorsers on a note, by writing under seal executed by them, requested plaintiff, an indorser, to pay it at maturity, and agreed to refund to him the amount paid within 30 days after maturity, and stipulated that, if any indorser failed to pay his share within 30 days, his share should be prorated among the solvent indorsers, such increase to be paid within 10 days after the expiration of the 30 days. *Held*, that a suit by plaintiff, who paid the note at maturity, against one of the indorsers, for his share, was not prematurely brought, when brought after the expiration of 30 days after the payment of the note, though before the expiration of 10 days thereafter.

5. JUDGMENT — FINAL JUDGMENT — WHAT CONSTITUTES.

A default judgment merely establishes plaintiff's right to recover, the amount of which

must be ascertained, and is not a final judgment until the amount is ascertained.

6. APPEAL — DEFAULT JUDGMENT — APPEAL-ABILITY.

No appeal lies from such default judgment.

Appeal from Baltimore City Court; Henry Stockbridge, Judge.

Action by James W. Bates against Ernest Sharp. Judgment for plaintiff, and defendant appeals. Dismissed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, SCHMUCKER, JONES, and BURKE, JJ.

Arthur L. Jackson, for appellant. John Hinkley, for appellee.

McSHERRY, C. J. The appeal in this case must be dismissed because no final judgment has been entered; but, inasmuch as the record can again be brought here after the rendition of such a judgment if the merits of the controversy are not now disposed of, we will consider and determine the merits before passing an order of dismissal.

On December 9, 1904, an action of debt was brought by the appellee against the appellant in the Baltimore city court on a certain writing obligatory which was filed with the declaration. It appears, from the declaration and the papers forming part of it, that the Maryland Stamping Company was indebted to the Second National Bank of Baltimore on a promissory note for \$1,100 falling due November 2, 1904, and that the appellant, the appellee, and three other persons were indorsers on that note. It further appears that on October 29th of the same year the appellant and three other indorsers of the note just mentioned wrote to the appellee, and signed and sealed the following instrument, which is the cause of action in the pending controversy, viz.:

"October 29th, 1904.

"Mr. James W. Bates: The note of the Maryland Stamping Company for \$1,100 held by the Second National Bank will fall due on November 2, 1904. We request you as one of the indorsers to pay the said note at maturity, hereby waiving protest, and agree to refund the said amount to you in accordance with agreement of January 2, 1904, in the proportion of our holdings of stock as shown by the following table:

	Stock.	Per Ct.	2nd Natl. Bank.
James W. Bates	\$ 5,000 00	12 00	\$ 133 10
Abraham Sharp	1,500 00	3 63	39 93
Ernest Sharp	7,925 00	19 18	210 98
John R. Korb	21,900 00	52 99	582 89
John B. Stansbury	5,000 00	12 00	133 10
	\$41,325 00	100 00	\$1,100 00

"We severally agree to pay you the amounts of our respective shares, as above within 30 days from November 2, 1904, with interest from that date. Should any indorser fail to pay his share within said period of 30 days, the share of the one so failing to pay is to be prorated among the solvent indorsers, each contributing with you a pro-

portionately increased share, and such increase to be paid within 10 days after the expiration of said 30 days.

"John Korb. [Seal.]

"John B. Stansbury. [Seal.]

"Abraham Sharp. [Seal.]

"Ernest Sharp. [Seal.]"

It further appears that the appellee, to whom the above paper was addressed, paid to the Second National Bank the \$1,100 note upon its maturity, as he had been requested by the other indorsers to do. He now demands from the appellant the sum of \$210.98, being the amount which the latter agreed by the above-quoted instrument to repay to the appellee.

To the declaration the appellant demurred. The demurrer was overruled, and, upon his declining to plead over, a judgment by default was entered against him, and thereupon he took this appeal, though the judgment by default had not been extended in dollars and cents. The grounds of demurrer are, first, that the writing obligatory, referred to in the narr. and above transcribed, does not constitute a valid completed contract; secondly, that the facts alleged in the declaration do not form, by operation of law, a valid contract by offer and acceptance; and, thirdly, that the suit was prematurely brought. We do not think any of these grounds can be maintained.

No precise form of words is necessary to create a bond or obligation, and therefore any memorandum in writing under seal, whereby a debt is acknowledged to be owing, will obligate the party to pay; for it is said that any words which prove a man to be a debtor, if they be under seal, will charge him with the payment of the money. Cover v. Stem, 67 Md. 451, 10 Atl. 231, 1 Am. St. Rep. 406, and cases there cited. The argument of the appellant, however, is that the paper writing, though under seal, is merely an offer to pay, and therefore not an obligation to pay, and that it did not and could not become binding as a writing obligatory until accepted by the appellee by an instrument under seal. We do not so interpret it. The paper embodied the several and distinct obligation of each of the signatories to pay a definite and ascertained sum at a specified time upon the happening of a named condition. It therefore constituted a perfectly valid writing obligatory, and required no formal acceptance under seal on the part of the appellee to give it legal efficacy. By the proper construction of the paper it was to become binding on the parties to it when the appellee actually paid the \$1,100 note to the bank. It was to be operative as soon as the contingency happened. By its express terms it was designed to be binding, and in reality was binding, when that event did occur, and therefore nothing but the happening of the contingency was required to definitely fix the liability of the parties who signed it. An acceptance under the seal of the appellee would not have

fastened any obligation on the appellant to pay the sum sued for in this action, because the promise to pay was not founded or made dependent on such an acceptance, but was based solely upon the condition that the appellee would satisfy the note at its maturity, and the writing obligatory "would become operative as soon as that contingency happened, and not before." *King v. Warfield*, 67 Md. 249, 9 Atl. 539, 1 Am. St. Rep. 384. In the case of *Boyd v. Klenzle et al.*, 46 Md. 294, a bond signed by 12 persons bound them to pay the sum of \$2,500 each, "making in all the sum of \$30,000," for the purchase of hops and malt, which one Peter Schnider might buy for the use of the Baltimore County Brewing, Malting & Distilling Company. No payee was named in the bond. The appellant furnished to the brewing company hops and malt, and then sued all the makers of the bond jointly. It was not pretended that the bond was not valid, and the only question considered by the court was whether the obligation was the joint or the several undertaking of the obligors whose seals were affixed thereto. The liability of the makers was contingent until some one actually sold to Schnider hops and malt for the brewery, and after such a sale had been made the liability of the obligors became fixed to the vendors to the extent of the several undertakings assumed by each one of the 12 persons who signed and sealed the paper. It is wholly immaterial whether the facts set forth in the declaration now before us form by operation of law a valid contract by offer and acceptance, because the right of the appellee to recover in this action does not depend upon any contract evidenced in that way. His right of action is founded on the written paper, which is complete in itself, and which, as we have already observed, fixed by its own terms the liability of each signer as soon as the extrinsic event—the payment of the note—occurred. The money due on the \$1,100 note was paid to the Second National Bank by the appellee, and, 30 days having expired after the date of that payment and before the suit was brought, the right of the appellee to recover cannot be questioned or disputed.

The second clause of the writing sued on covered the contingency of some of the indorsers failing to pay to the appellee their ratable proportions within 30 days after the 2d of November, 1904. If that event had happened, 10 days' additional time was given to the solvent indorsers to repay to the appellee their proportions of such delinquent's share. This suit, however, was not brought to recover any portion of such a share, but only to compel the appellant to pay the specific sum he undertook primarily to pay. Thirty days elapsed between the 2d of November, the date upon which the appellee paid the \$1,100 note to the Second National Bank, and the 9th of December, when this suit was

instituted; and hence the suit was not prematurely brought.

No final judgment has been entered in this case. The judgment by default does no more than establish the right of the appellee, the plaintiff below, to recover something. The amount which he is entitled to recover remains yet to be ascertained. *Green v. Hamilton*, 16 Md. 317, 77 Am. Dec. 295. The judgment by default is merely interlocutory, and is not a lien until the amount is ascertained. *Davidson v. Myers*, 24 Md. 538. No execution can be issued upon the judgment by default. It cannot be superseded, and it possesses none of the attributes or qualities of a final judgment. From such a judgment no appeal will lie. The motion to dismiss must therefore prevail, and it is so ordered.

Appeal dismissed, with costs.

WHITCOMB v. MASON.

(Court of Appeals of Maryland. Dec. 6, 1905.)

1. LANDLORD AND TENANT—DUTIES OF LANDLORD—CARE OF HALLWAYS.

Where a landlord leases separate portions of the same building to different tenants, and reserves under his control the halls, stairways, and other portions of the building used in common by the tenants, he is bound to use reasonable diligence to keep the portions of the building so retained under his control in a safe condition, and free from improper obstructions; but his duty in that respect is measured and limited by the uses and purposes to which it is reasonable, from the situation and nature of the building, to infer that the halls, stairways, etc., were intended to be subjected in making the leases.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 629, 633.]

2. SAME.

An owner of an office building, the apartments in which are rented principally to lawyers, is under no obligation to keep an outer door of the building, situated on the second floor, open or unlocked on Sundays, and is not liable for the destruction of a tenant's furniture caused by the tenant's inability to remove the same from the building through the second story doorway during an unusual and unprecedented fire occurring on Sunday.

3. SAME — ACTIONS AGAINST LANDLORD — PRAYERS.

In an action against the owner of an office building for the destruction of a tenant's furniture, caused by his being unable to remove the same from the building during a fire, where there was evidence that the only door by which plaintiff's furniture could be removed was securely locked during the fire, a request to take the case from the jury for want of evidence that defendant prevented plaintiff from removing his furniture was properly denied.

4. APPEAL—ORDERS APPEALABLE—DENIAL OF NEW TRIAL.

A motion for a new trial is addressed to the sound discretion of the court, and no appeal will lie from the order granting or refusing the same.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 533.]

5. SAME — PRESERVATION OF ERROR — MOTION FOR NEW TRIAL—OFFICE OF MOTION.

A motion for a new trial cannot be made to serve the purpose of bringing before the Court

of Appeals for review a matter occurring during the trial to which no objection was made at the time.

Appeal from Court of Common Pleas; George M. Sharp, Judge.

Action by Thomas J. Mason against James A. Whitcomb. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

John Hinkley, for appellant. M. Albert Levinson and Thomas Ireland Elliott, for appellee.

SCHMUCKER, J. This is an appeal from a judgment of the court of common pleas of Baltimore City. The suit was instituted to recover damages alleged to have been caused by the fault and negligence of the appellant in preventing the appellee from removing his furniture from an office, rented by him from the appellant, in time to prevent its destruction by fire. No questions of pleading or admissibility of evidence are raised by the appeal. The only exceptions taken at the trial of the case were to the court's rulings on the prayers, which will be referred to later on in this opinion.

It appears from the record that at the time of the great fire which occurred in Baltimore City on February 7, 1904, the appellee, Mason, occupied, as tenant of the appellant, Whitcomb, a room on the second floor of the office building No. 110 St. Paul street. Whitcomb, who owned the building, was a non-resident, and it was in charge of his resident agent, J. A. Miller. The suit was originally brought against both Whitcomb and Miller, but it was dismissed as to the latter at the trial. The building was about 123 feet deep. A hallway running through it from front to rear on each floor afforded ingress and egress from the rooms rented as offices, and was used in common by their tenants. On one side of this hallway, and about 30 feet back from the front of the building, there was an elevator, and also a stairway, affording access to the different floors. There were two entrances to the building from the street—one at the front end of the hallway on the first floor; and the other at a similar position on the second floor. The entrance on the first floor was on the level of the street, and the one on the second floor was reached from the street by a flight of stone steps ascending sidewise on the outside of the building. The office rented by the appellee was on the second floor, adjoining the elevator and stairway. There is evidence in the record tending to prove that at about 3 o'clock p. m. on the day of the fire Mason, having been informed of its threatening character, went from his home at Hampden in the suburbs of the city to his office in Whitcomb's building, and took from it his insurance policies, and then went out to see the fire. At that time he found the door to the second-story

entrance locked, and he went to his office through the door on the first floor, which was open. Becoming alarmed at the increasing speed and fury of the fire, he returned in about an hour and a half, with a wagon, to his office for the purpose of removing its contents to a place of safety. With the aid of several other persons he removed his valuable papers and some of his books by way of the passage and door on the ground floor, but, when he attempted to take his desk and other large articles of furniture out by that way, he found the stairway too cramped to permit them to be carried down to the first floor. He then, with a view of taking those articles out of the building by way of the front door on the second story, again tried that door, but found it still locked, and was unable to open it. It being Sunday, the elevator was not running. About that time he heard that a house in the rear of the building was about to be dynamited in the effort to check the progress of the fire. He thereupon abandoned the attempt to save the residue of his office furniture, and it was soon overtaken and destroyed by the fire. He did not see Mr. Miller, the landlord's agent, on the premises at either visit to his office, nor did he know who had locked the second-story front door. There was evidence, on the contrary, tending to prove that on the afternoon of the fire the second-story front door of the building was not tightly locked, but was held only by a night latch or other fastening that could be easily opened from the inside without a key. In fact, the tenant of one of the other rooms in the building testified without contradiction that at about 2 o'clock on the same afternoon he had opened that door from the inside without difficulty, and gone out through it to the platform of the outside steps leading up to it, and stood there 10 or 15 minutes looking at the passers-by, and then re-entered the building by the same door, which he closed after him without locking it. The amended narr. on which the case was tried, in setting forth the conduct of the defendant complained of by the plaintiff, alleges that the removal of the furniture "was prevented by the fault and negligence of said defendant, who, notwithstanding and in spite of repeated demands by this plaintiff, made by him of the agent of defendant then in possession, the said agent barred and maintained barred the necessary means of exit from said building and office," and by that means alone the plaintiff was unable to remove his furniture, and it was destroyed by the fire. There is, however, no evidence in the record tending to show the making of the alleged demand by the plaintiff upon the defendant's agent.

The theory of the plaintiff's case, as stated on his brief, is that it was the duty of his landlord to secure to him at all times free ingress and egress to and from his office, and the unobstructed use of such passageways and means of exit as to enable him to re-

move his goods and save them from an impending destruction. The precise question thus arising is one of first presentation, but its solution, in a case like the present one, where there is a mere verbal renting with a total absence of any express covenant on the part of the landlord, must be found in a consideration of the implied obligation resting upon a landlord as such in reference to the physical condition of the demised property. The general doctrine applicable to this subject has recently received careful consideration by us in the case of *Smith v. State*, 92 Md. 529, 530, 48 Atl. 93, 51 L. R. A. 772. We then said: "There is no implied covenant requiring the landlord to make repairs. *Gluck v. Mayor*, etc., of Baltimore, 81 Md. 326, 32 Atl. 515, 48 Am. St. Rep. 515. 'There is no implied warranty on a lease of a house or land that it shall be reasonably fit for habitation or cultivation. The implied contract relates only to the estate, not to the condition of the property. When a lease contains no express contract of warranty that the property is or shall be fit for the purpose for which it may be rented, there is no implied warranty to that effect, and in case the property falls down in consequence of some inherent defect the lessor is not bound to repair, and yet the lessee will be compelled to pay the rent.' *Hess v. Newcomer*, 7 Md. 337. After fully recognizing the landlord's liability to third persons not claiming under the tenant, it is said in *Taylor on Landlord and Tenant*, § 175 A, that the lessor's liability to the lessee is, however, much more restricted, as the former does not warrant the condition of the premises, and the tenant, because he can inspect them, assumes the risk of their state. For any injury suffered by him during his occupancy by their defective condition, or even faulty construction, he cannot make the lessor answerable, unless there was misrepresentation, active concealment, or perhaps a total inability on the tenant's part to discover the defect before entering." After citing many cases in support of the doctrine there stated we further say in that case: "The reason of the rule is perfectly apparent. If the lessee knows the condition of the premises, and rents it without requiring the owner to repair it, he takes it as he finds it, and has no right to complain of injuries sustained on account of its condition."

Although the liability of the landlord as to the physical condition of the premises covered by the lease is as above stated, the weight of modern authority supports the rule that, where he leases separate portions of the same building to different tenants, and reserves under his control the halls, stairways, and other portions of the building used in common by all of the tenants as means of access to their respective rooms or apartments, he is under an obligation to

use reasonable diligence to keep the portions so retained under his control of the building in a safe condition and free from improper obstructions. 18 A. & E. Encyc. of Law (2d Ed.) pp. 220, 221; *Gillvon v. Rellily*, 50 N. J. Law, 26, 11 Atl. 481; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295; *Vanderbeck v. Hendry*, 34 N. J. Law, 471, 472; *Brunker v. Cummins*, 133 Ind. 443, 32 N. E. 732; *McGinley v. Alliance Trust Co.* (Mo. Sup.) 66 S. W. 153, 56 L. R. A. 334; *Dollard v. Roberts*, 14 L. R. A. 238, and notes thereto. This obligation of the landlord to the tenants of different parts of the same building in reference to the halls, stairways, doors, etc., of which he has kept possession for their common use, has been held not to result from the implied covenant for quiet enjoyment incident to the leases of the several portions of the building, but to be of the same character as that of any other owner of real estate, who permits or invites others to use it for a particular purpose, to keep it safe for those using it within the scope of the invitation. *Gillvon v. Rellily*, supra; *Looney v. McLean*, supra; *Vanderbeck v. Hendry*, supra; *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282. Whatever may be the true origin and character of this obligation of the landlord, it ought not to be extended beyond the uses and purposes to which it is reasonable, from the situation and nature of the building containing the demised apartments, to infer that the halls, stairways, etc., were intended to be subjected in making the leases to the respective tenants.

Now, what were the reasonable uses for which the appellant, as landlord, was under obligation to keep in proper condition the halls, stairways, and outer doors of the building containing the office leased by him to the appellee? It appears from the evidence that it was an office building located in the business portion of the city opposite the courthouse. With the exception of a lunch-room and restaurant on the ground floor, the entire building was rented out as offices, mainly to lawyers. The reasonable use of the outer doors, halls, and stairways of such a building so located, so far at least as related to the lawyers' offices, required that they should be kept open and free from improper obstruction during such hours of the day and evening as their tenants and persons having business with them might reasonably be expected to desire access to the offices. But such use did not require that the doors, halls, etc., should be kept in that condition throughout the entire night, nor on Sunday, which is a dies non when secular avocations are presumed to be suspended. It certainly did not require the outer doors of the building to be kept open on Sunday to such an extent as to admit of the removal by the tenants of large pieces of furniture. The access afforded to the building on Sunday,

as shown by the evidence, through the open door and hallway on the ground floor, which connected with the stairway, was, in our opinion, reasonable and adequate for all ordinary occasions. The occurrence of the great fire of February 7, 1904, which destroyed the entire center of the city, was a sudden and unexpected calamity. Even then at 3 o'clock in the afternoon, when the appellee first went to his office, he did not regard the danger of its destruction as serious, for he merely took from it his insurance policies, and made no effort to remove its other contents until an hour and a half later. There is no evidence that the landlord or his agent were on the premises at the time when the appellee alleges that the second-story front door was locked, or were aware that the destruction of the building was so seriously threatened by the fire that any of the tenants desired to remove their furniture. Under these circumstances we are of opinion that the appellant, as owner and landlord of the building, discharged his obligation in reference to access to it on Sunday by having the door and hallway on the ground floor open and unobstructed.

At the close of the case the plaintiff offered one prayer, and the defendant offered six. The plaintiff's prayer which related to the measure of damages in the event of a verdict in his favor was unobjectionable in form, and was properly granted by the court.

The defendant's first prayer asked the court to take the case from the jury for want of legally sufficient evidence that the defendant or any of his agents denied the plaintiff access to his office, or prevented him from removing his goods therefrom on the day of the fire. This prayer was properly rejected, because, although there was no such evidence that the plaintiff was denied access to his office by any one, there was evidence tending to prove that the only door by which the furniture could be removed was securely locked at both visits of the plaintiff to the building. If the jury had believed this evidence, they might have concluded that the defendant did prevent the removal of the furniture, for, the doors being under the control of his agents, he was primarily responsible for their open or closed condition. The court should, therefore, not have taken the case from the jury on that prayer.

There was, however, fatal error in the rejection of the defendant's fourth and fifth prayers. The fourth prayer asserted the proposition that as the fire occurred on Sunday, and was an emergency which could not have been foreseen by ordinary care, the defendant was, as a matter of law, under no obligation to provide at that time means of egress from the building suitable for the removal of furniture therefrom. The fifth prayer in effect instructed the jury that if they believed from the evidence that the plaintiff, at the time he attempted to remove his furniture from the building, could by rea-

sonable efforts have opened the upper front door, he was not entitled to recover. From what we have said concerning the legal obligation as to the condition of the hallways and doors of the building resting upon the defendant as landlord, it is apparent that both of these prayers should have been granted. We find no reversible error in the action of the lower court upon the other three prayers of the defendant.

There is an exception in the record, taken after the trial of the case, at the hearing of a motion for a new trial, to the court's refusal to grant the motion. The main ground of the motion was the fact that the plaintiff's counsel, in his argument before the jury at the trial of the case, had made certain statements which the defendant's counsel claimed were improper, but to which he neither made objection or took any exception at the time they were made, or at any time prior to filing the motion for a new trial. It is well settled that no appeal will lie from an order granting or refusing a new trial, the motion for which is always addressed to the sound discretion of the court. Nor will a litigant be permitted to employ a motion for a new trial as a means of bringing to this court for its review any matter occurring during the trial of the case to which objection was not made at the time of its occurrence.

For the error committed in rejecting the fourth and fifth prayers of the defendant, the judgment must be reversed, and, as the case made out by the record does not show the plaintiff entitled to recover, no new trial will be granted.

Judgment reversed, with costs, without a new trial.

PHILADELPHIA, B. & W. R. CO. v. McGUGAN.

(Court of Appeals of Maryland. Dec. 6, 1905.)
CARRIERS—INJURY TO PASSENGER—QUESTIONS
FOR JURY.

In an action for injuries to a passenger, owing to his having fallen into a drain box while crossing defendant's yards for the purpose of changing cars, the question of defendant's negligence and plaintiff's contributory negligence held for the jury.

Appeal from Circuit Court, Kent County;
Edwin H. Brown, Judge.

Action by Barnard J. McGugan against the Philadelphia, Baltimore & Washington Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, SCHMUCKER, and JONES, JJ.

Marion De K. Smith, for appellant. Wm. W. Beck and Richard D. Hynson, for appellee.

BRISCOE, J. The plaintiff brought a suit in the circuit court for Kent county, and recovered a judgment against the defend-

ant for personal injuries received whilst a passenger on the defendant's railroad from Elkton, Cecil county, to Massey, Kent county, Md. The declaration states that the plaintiff, at the time of the injuries, was a tenant farmer and earning his living by that occupation; that the defendant was a corporation and common carrier of passengers and freight by railroad from Newark, in the state of Delaware, to Massey, in Kent county, Md. through Townsend, in the state of Delaware; that on the 15th day of December, in the year 1904, the plaintiff bought a ticket of the defendant entitling him with his baggage to a safe passage on the railroad from Newark, Del., to Massey, Md.; that on the 17th day of December, 1904, while he was traveling on said ticket, using due care and caution in crossing the property of the defendant, in order to make the necessary changes as required by his ticket, at or near the village of Townsend, was injured and made permanently lame by reason of the defendant negligently suffering its property to be out of repair over which the plaintiff had the right to pass. At the trial the verdict and judgment were in favor of the plaintiff, and the defendant has appealed.

There is but one bill of exceptions set out in the record, and that presents the correctness of the action of the court in granting the plaintiff's prayers and in the rejection of the defendant's first and second prayers. To the action of the court in rejecting the plaintiff's fifth prayer and to the granting of the defendant's third to the eighth prayers, inclusive, no exception appears to have been taken, and it will not be considered by us. The single question in the case is whether the trial court erred in its rulings on the prayers; that is, in granting the plaintiff's prayers and in rejecting the defendant's first and second prayers.

The plaintiff's prayers were properly granted. They are copies of prayers approved by this court in *P., W. & B. Railroad Company v. Anderson*, 72 Md. 519, 20 Atl. 2, 8 L. R. A. 673, 20 Am. St. Rep. 483. In *P., B. & W. R. Co. v. Hand*, 101 Md. —, 61 Atl. 285, it is said that similar prayers "were free from objection, and it was unnecessary to discuss them again."

The defendant's first and second prayers are the usual ones submitted on behalf of the defendant in damage suits, and were to the effect that there was no evidence in the case legally sufficient to entitle the plaintiff to recover, and the evidence was not legally sufficient to show that the injury was caused solely by the negligence of the defendant. These prayers being in the nature of a demurrer to the evidence, it becomes necessary for us to briefly consider the material evidence as set out in the record.

The defendant is a corporation, and operates and controls a railroad from Newark, Del., to Massey, in Kent county, Md. The plaintiff was a passenger of the defendant

railroad at the time of the alleged injuries, and had purchased a round-trip ticket for passage over the road from Massey to Elkton. It was necessary for him to change cars at Townsend, Del., and take the train at that place to Massey on his return trip home. On the 17th of December, 1904, while traveling from Elkton to Massey, and at Townsend, Del., he left the rear end of the rear car, upon which he was riding, and proceeded to take the train to Massey, his point of destination. While proceeding to his train on the Queen Anne & Kent Railroad, which was about 98 feet from the rear of the car he had left, he fell into an uncovered drain box, or open culvert, filled with snow, on the defendant's premises, and was injured. The place where the accident occurred was only a few feet from the car the plaintiff had left, and, while beyond the passenger platform for passengers to leave the car, it was the most direct route and the nearest one for him to take in crossing to his train. At Townsend, where the accident happened, there are three tracks running north and south. The easterly one is used by the north-bound, the middle by the south-bound trains, and the westerly track is known as the "Queen Anne & Kent Railroad siding." The passenger platform is on the east side of the tracks, and on the west side of the tracks there is a platform used for baggage and mail to be carried over the Queen Anne & Kent Railroad. The train upon which the plaintiff was riding on the day of the accident was a long one, and the car was stopped about 235 feet beyond the platform. He and two other passengers left the rear platform of the last car, where they were seated, and from the west side of the freight platform proceeded to cross to the Queen Anne & Kent Railroad. The plaintiff and the two witnesses, who were alone in the rear car and who left in company with the plaintiff, testified that before the train reached Townsend the conductor came into the car, took up the tickets, and told them the next stop was Townsend. Then he hollered "Townsend!" and the car stopped; that they were not directed to leave the car from the front platform and not the rear one, and no notice was given them that passengers should leave the car from the east side, and not the west side; that the rear door of the car was not fastened, and there was no one on the rear platform to warn them, or tell them on which side to leave the car. There was further evidence on the part of the plaintiff that it was the custom of people leaving the rear car, when the train was a long one, to get off on the right platform, and as a rule passengers were not instructed by the railroad officials from which end of the car it would be the safest to reach the Queen Anne & Kent Railroad, and that the right side was the nearest to the train. On the part of the defendant the evidence tended to show that the plaintiff was directed by the conductor

to leave the car by the front platform, and that he was not required to get off on the side away from the passenger station and platform; that the plaintiff consulted his own convenience in leaving the car, and thereby exposed himself to the risk which caused the accident.

There being, then, a manifest conflict in the evidence, the question of negligence and contributory negligence was one of fact and for the jury to determine. This is well settled and needs no citation of authority to establish it. In *B. & O. R. R. Co. v. Kane*, 69 Md. 11, 13 Atl. 387, 9 Am. St. Rep. 387, it is said, although a railroad company may have provided a platform where the trains regularly stop for the ingress and egress of passengers, it is not per se contributory negligence for a passenger to attempt to enter a train at a place other than the platform provided, in the absence of notice that passengers would be received only at such platform and were prohibited from attempting to enter the cars at any other place. And in *McMahon's Case*, 39 Md. 449, this court said: "In no case ought the court to take the question of negligence from the jury, unless the conduct of the plaintiff relied on as amounting in law to contributory negligence is established as clear and uncontradicted evidence." The law of the case in our opinion was clearly and fully submitted to the jury in the plaintiff's and defendant's granted prayers. The defendant's first and second prayers, under the facts of the case, were therefore properly rejected. There being no error in the rulings of the court below, the judgment will be affirmed.

Judgment affirmed, with costs.

STATE, to Use of MANFUSO et al., v.
WESTERN MARYLAND R. CO.

(Court of Appeals of Maryland. Dec. 6, 1905.)

RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

One who, without stopping, looking, and listening, drove upon railroad tracks at a point where his view of the tracks was obstructed, was guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1044, 1170, 1307–1379.]

Appeal from Superior Court of Baltimore City; Daniel Girard Wright, Judge.

Action by the state, to the use of Jelsomina Manfuso and others, against the Western Maryland Railroad Company. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

William Colton, for appellants. Leon E. Greenbaum, for appellee.

BURKE, J. John Manfuso was struck and killed by a locomotive of the defendant com-

pany on the 18th day of November, 1903, at Mt. Hope Station in Baltimore county. This suit was brought by his widow and infant children to recover damages for his death, which is alleged to have been caused by the negligence of the company. Manfuso was in the act of crossing the tracks of the railroad company at Mt. Hope, and was struck by an engine of the company and killed. The tracks at the point where the accident occurred were crossed by a private road, much traveled, leading from the Reisterstown Road into the grounds of Mt. Hope Retreat.

The record contains two bills of exceptions, one to the ruling of the court on a question of evidence, and another to the action of the court in granting the prayers submitted by the counsel of the defendant at the conclusion of the plaintiff's case. In the argument before this court, counsel for the appellant abandoned the exceptions to the testimony, and, consequently, the only question to be determined is: Was the court right in withdrawing the case from the consideration of the jury? This involves an examination of the facts and circumstances under which the injury which caused the death of John Manfuso was received.

Manfuso was a fruit dealer, and on the morning of the accident had borrowed a horse and wagon from Dominick Salo for the purpose of delivering some fruit at Mt. Hope Retreat. Salo accompanied him on the journey, and was with him in the wagon when the accident occurred. In traveling to the institution they went out the Reisterstown Road, and went down the private road or lane above mentioned, crossed the tracks of the railroad, and entered the grounds of the institution. As they approached the crossing, a train passed, and Manfuso told Salo the crossing was a dangerous place. He delivered the fruit, and began the return trip to the city, and while in the act of crossing the tracks at Mt. Hope Station the wagon was struck by an express train of the defendant company—the York Limited—and Manfuso was killed, and Salo injured. The accident occurred between 9 and 10 o'clock in the morning. The day was clear and cold, and the sun was shining. The road over which they were traveling was smooth, and the wagon in which they rode was new and made little noise. It appears from the evidence that after passing the station at Mt. Hope the tracks of the company curve, and at a distance of about 600 feet from the station there is an abrupt curve, which obscures the view of an approaching train, and renders its presence at that curve invisible to one standing at the distance of 10 feet from the west-bound track; and that a fast train would cover the distance from this curve to the crossing in about 10 or 11 seconds. In approaching the crossing in the direction in which the deceased was traveling, there were trees and shrubbery which cut off the view of the tracks to the northwest, and at the

entrance to the grounds of Mt. Hope there was a gate house and station house which obscured the view of the tracks as one approached more closely the crossing, and when the gate house was reached only about 25 or 30 feet of the track was visible. Near the railroad crossing there was a danger signal, warning travelers to stop, look, and listen, which notice Manfuso saw and read. The train which struck the deceased was coming from the west.

The witness Salo gives the following account of the accident: "Q. And you were looking for trains coming towards Baltimore? A. Yes, sir. Q. And he was looking for trains coming from Baltimore? A. Yes, sir. Q. And it was agreed between you that you would watch out? A. Yes, sir. Q. How fast were you going? A. Very slow. We ran fast when we first started but when we got near there he said he would go quite easy, so we see if any train was coming, because he said this is a dangerous place. Q. What did you do with the way of keeping on easy, how slow did you go? A. We went right slow, and we passed a little house. Q. That is the gate house? A. Yes, sir. Q. And you came out the gate? A. Yes, sir. Q. Then what? A. We went real slow, almost stopped. Q. Which way were you looking? A. On the left side way. Q. That way [indicating]? A. I could not look all the way though, because the house was against me. Q. But when you got outside the gate, and got near the track, you could see up the track could you? A. Yes, sir; I stuck my head through the wagon to see if any train was coming. Q. Could you see up as far as the curve? A. I could not see all the way through, because I didn't have a chance. Q. How far was your horse from the track here [indicating] when you got sufficiently open view to see up the track? A. We were near the track, and all at once, crack! and I see black smoke coming fast, and I don't know where we went to." On cross-examination Salo testified as they approached the crossing he and Manfuso "were talking about that dangerous place, because he knew it was a dangerous place there, and that is the reason we were talking. He told me to look up, and he was looking down, to pay attention to a dangerous place."

It is thus apparent from the testimony that the crossing was a peculiarly dangerous one, and that Manfuso was acquainted with its surroundings and was aware of its danger. The danger attending the crossing is made more evident by the testimony of Salo to which we have alluded. Notwithstanding the danger which confronted him, and of which he was well aware, Manfuso, without stopping, drove upon the tracks of the railroad, and was killed by a passing train. Was Manfuso guilty, as a matter of law, of contributory negligence in attempting to cross the track of the defendant company under the circumstances we have stated? If so, the court was clearly right in withdrawing

the case from the consideration of the jury, and in directing a verdict for the defendant. By the settled law of this state certain well-defined and imperative duties are imposed upon persons before they make the attempt to cross the tracks of a railroad company. They are bound under all circumstances to look and listen for approaching trains, and if the crossing is one of more than ordinary danger and the view of the tracks is obstructed at or near the place of crossing, it is the duty of the traveler to stop, look, and listen before he attempts to cross; and if a person neglects these necessary precautions, and in consequence of such neglect is injured by the collision with a passing train, he will be held to have contributed by his own negligence to the occurrence of the accident, and will not be allowed to recover for any injury he may have sustained.

The circumstances under which a person is bound to stop before attempting to cross have been indicated in a number of cases in this state. In the case of Maryland Central Railroad Company v. Neubeur, 62 Md. 399, this obligation upon the part of the traveler to stop, look, and listen before making the attempt to cross was considered by the court. Referring, in that case, to this obligation, Alvey, C. J., said: "A large number of the decisions go to the extent of holding that it is incumbent upon the traveler, at ordinary street crossings, to stop, look, and listen before attempting to cross the rails; and, if he fails to observe this precaution, he forfeits all right to recover for injuries received. This precaution is not only reasonable and proper to be observed on the part of the traveler on a public road, crossing railroad tracks, for his own safety, but it is equally necessary for the safety of the multitude of the people riding in the railroad train, liable to be killed by collision of the train with obstacles on the track." While referring to the rule with approval, the court, however, declined to follow the authority of cases in many other states, and declare it to be the duty of the traveler in all cases to stop before attempting to cross. In the case of Philadelphia & Baltimore Railroad Company v. Hogeland, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159, the question was again presented for consideration, and Alvey, C. J., speaking for the court, said: "The rule is now firmly established in this state, as it is elsewhere, that it is negligence per se for any person to attempt to cross tracks of a railroad company without first looking and listening for approaching trains, and, if the track in both directions is not fully in view in the immediate approach to the point of intersection of the roads, due care would require that the party wishing to cross the railroad track should stop, look, and listen before attempting to cross." And it was said in *State, Use of Price, v. C. & P. Railroad Co.*, 87 Md. 188, 39 Atl. 610, that, "If the traveler's view of the railroad is obstructed

so as to prevent him from seeing whether a train is approaching, it is his duty to stop, look, and listen before attempting to cross." And in Watson's Case, 91 Md. 355, 46 Atl. 996, it is said that the obligation to stop "should be applied to all crossings where the view is obstructed, or when, for any reason, it is evident that the traveler can hear better and avoid danger by stopping to listen in a place of safety." In Holden's Case, 93 Md. 417, 49 Atl. 625, where the view of the track was obstructed in one direction only, the defendant's sixth prayer, which had been refused by the trial court, was under consideration. By this prayer the court was asked to instruct the jury that, if they found that the plaintiff's view on his near approach to the track was in any manner obstructed, then it was the duty of the plaintiff before going on the track to stop, look, and listen for the train, and, if he violated this rule by failing to stop, he was guilty of contributory negligence, and could not recover. In delivering the opinion in that case, Fowler, J., speaking in reference to that prayer, said: "The plaintiff's first contention is that the language of the prayer is too broad, but we cannot agree with him. We think it clearly announces the established rule, which we said, in Hogeland's Case, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159, 'is one which the courts ought not to relax,' as its enforcement is necessary as well for the safety of those who travel on railroad trains as for those who travel on the common highways." In the case just cited the rule is thus expressed: "If the track in both directions is not fully in view in the immediate approach to the point of intersection of the roads, due care would require that the party wishing to cross the railroad track should stop, look, and listen before attempting to cross."

The prayer we are considering declares that, if the view was in any manner obstructed, it was the duty of the plaintiff to stop, etc. This is equivalent to saying that, if the track was not "fully in view"—that is to say, if there was an obstruction of the view by a hill, a bank, trees, or in any manner—due care requires the travel on the common highway to stop and listen before attempting to cross. The prayer in the opinion of the court announced the correct principle of law applicable to the case, and was in itself free from objection, but its refusal by the court below was not pronounced to be error, because the concession of the plaintiff's first prayer estopped the defendant from complaining of the rejection of its sixth prayer. It may be declared to be the fixed and inflexible rule of law in this state that it is the duty of the traveler to stop, look, and listen before attempting to cross the tracks of a railroad, where the crossing is one of more than ordinary danger, because of obstructions at, or near, the immediate approach to the point of intersection of the roads, by reason of which the track is not fully in

view; and, if he attempts to cross in disregard of this duty, and in consequence thereof is injured, he will be held to be guilty in law of contributory negligence. The undisputed evidence in this case shows that the crossing in question was of more than ordinary danger; that the view of the tracks, in the immediate approach to the crossing, on the northwest, from which direction the train which struck and killed Manfuso came, was obstructed by shrubbery, trees, a gate house, and a station house; that, without stopping, he attempted to cross and was struck by a passing train and was killed; and that his failure to stop, look, and listen was the direct and proximate cause of his injury. Therefore he was guilty of contributory negligence as a matter of law.

It was the clear duty of the court, under the facts, to have granted the defendant's second prayer, by which the jury was instructed to find their verdict for the defendant.

Judgment affirmed.

MULLER et al. v. WITTE.

(Supreme Court of Errors of Connecticut. Jan. 26, 1906.)

1. ASSIGNMENTS—CONSIDERATION—RIGHT TO SUE.

Where a married woman assigned to plaintiff without consideration a claim against her husband for money alleged to have been loaned to him, that the assignee might sue in his own name for the assignor's benefit, the assignee was not the bona fide owner of the cause of action, and was not entitled to sue thereon.

2. EQUITY—PLEADING—RELIEF DEMANDED.

A party seeking equitable relief must specifically demand it, unless the nature of the demand itself indicates that the relief sought is equitable.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 319-321.]

3. ACTIONS—NATURE—LEGAL OR EQUITABLE.

An action merely to recover a debt arising out of an alleged loan made by a wife to her husband, or out of an agreement made between them concerning it, in which money damages alone are prayed, is an action at law, and not a proceeding in equity.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, §§ 125, 133, 143.]

4. HUSBAND AND WIFE—EXISTENCE OF RELATION—SUITS BETWEEN SPOUSES.

Where a wife had not been abandoned by her husband, but voluntarily left him without cause, she was not entitled to sue her husband on an alleged indebtedness for money loaned; such right having been conferred, by Gen. St. 1902, § 4543, only on a married woman abandoned by her husband.

Appeal from Court of Common Pleas, Hartford County; John Coats, Judge.

Action by Louis J. Muller and others against Charles R. Witte to recover money only alleged to be due from defendant to plaintiff Muller, in which Henrietta S. Witte was joined as a party plaintiff. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Bernard F. Gaffney, for appellant Witte.
Frank L. Hungerford, for appellee.

TORRANCE, C. J. This action was brought at first by the plaintiff Muller alone upon the common counts. He claimed to be the bona fide owner, by assignment from Henrietta S. Witte, who was in fact the wife of the defendant, of a debt alleged to be due from the defendant to his said wife. Subsequently, upon the motion of said Muller, said Henrietta was made a coplaintiff in the action. The bill of particulars as filed in the case was for money loaned to, and paid out for, the defendant by his said wife. After this the plaintiffs filed an additional count, alleging in substance these facts: That Henrietta was the wife of the defendant, married to him in 1874, but that he had abandoned her before this suit was commenced; that on or before February 2, 1898, she loaned to him \$900 under an oral agreement that he would convey to her certain real estate of his in New Britain; that he has refused to make said conveyance; and that she had assigned said claim to Muller without consideration, and under a misapprehension of the law relating to married women abandoned by their husbands. This last allegation, as also the allegation that Henrietta was the wife of the defendant, married to him in 1874, were admitted in the answer, and the other allegations were denied.

The material facts found are these: The defendant and said Henrietta intermarried in 1874, and lived together until some time in February, 1898. In 1892 Henrietta received the sum of \$950 as the proceeds of a policy of life insurance paid to her upon the death of her mother. Between November, 1892, and May, 1893, she, at the request of the defendant, "delivered to him a considerable portion of said sum of \$950; not as a loan, but to enable the defendant to use the same in the payment of his personal debts and obligations." The defendant used said money for the purposes specified, has never repaid the same, "and claims the right to retain the same as statutory trustee of his wife." The assignment of said Henrietta's claim against her husband to the plaintiff Muller, set up in the complaint, was made without valuable consideration, and "for the sole purpose of enabling said Muller to bring this action in his own name for the benefit of Henrietta S. Witte." In February, 1898, said Henrietta voluntarily, and without lawful cause or excuse, left her husband and her home, and since that time has voluntarily continued to live apart from her husband and to support herself, and her husband has not abandoned her. The only relief claimed was "\$1,000 damages."

Upon these facts the court rendered judgment for the defendant, and we think it did not err in so doing. Upon the facts found Muller clearly had no right to maintain this action, for he was not the assignee and equitable and bona fide owner of the cause of ac-

tion. *Bixby v. Parsons*, 49 Conn. 488, 44 Am. Rep. 246; *Olmstead v. Scutt*, 55 Conn. 125, 10 Atl. 519; *Gaffney v. Tammany*, 72 Conn. 701, 46 Atl. 156. It is, we think, equally clear that the other plaintiff, the wife, cannot maintain this action against her husband. She was married to the defendant in 1874, and this is an action at law for the recovery of money not alleged nor shown to be her separate property, and not a proceeding in equity for the recovery or protection of her separate property.

The rule is that "a party seeking equitable relief shall specifically demand it, as such, unless the nature of the demand itself indicates that the relief sought is equitable." *Practice Book*, p. 43, § 138. Nothing of that kind is indicated in the complaint in this case. It seeks merely the recovery of a legal debt arising out of a loan made by the wife to her husband, or out of an agreement made between them. It asks only for money damages, and it must be regarded as an action at law, and not a proceeding in equity. *Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514, 71 Am. St. Rep. 169. Arising out of the common-law doctrine of the legal unity of husband and wife is the wide general rule that neither spouse can, during the existence of the marriage relation, sue the other at law, except as authorized by statute.

If the wife of the defendant had been abandoned by him, as alleged, she might, under our law, sue and be sued "as a feme sole" (*Gen. St.* 1902, § 4543; *Moore v. Stevenson*, 27 Conn. 14), and this might perhaps be held to include her right to maintain an action at law against her husband (*Adams v. Adams*, 51 Conn. 135); but the court has found that she had not been abandoned by her husband, and that, we think, is conclusive against her right to maintain this action.

Upon the question whether the defendant is entitled to hold, as statutory trustee, the money delivered to him by his wife, we express no opinion.

There is no error. The other Judges concurred.

CLARKE v. BLACK et al.

(Supreme Court of Errors of Connecticut. Jan. 4, 1906.)

1. FRAUDULENT CONVEYANCES — ACTIONS — QUESTIONS OF LAW.

Where the facts concerning a conveyance claimed to be fraudulent as against creditors of the grantor are ascertained and determined by the trial court, the conclusion to be drawn from the facts so found, including the determination of the existence of constructive fraud and of a valuable consideration, is a question of law.

[Ed. Note.—For cases in point, see vol. 24, *Cent. Dig. Fraudulent Conveyances*, §§ 923, 928.]

2. SAME—CONSIDERATION FOR CONVEYANCE.

While a good consideration may support a conveyance by a grantor who is not indebted, or whose indebtedness is not unreasonably disproportionate to the value of the property con-

veyed, yet, where the conveyance leaves the grantor without sufficient property to meet existing debts, it cannot be supported as against creditors unless the consideration is one which the law terms valuable.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 193.]

3. HUSBAND AND WIFE—CONTRACTS BETWEEN SPOUSES—VALIDITY AND EFFECT.

A transaction between a husband and wife, by which the wife obtained money from the husband to use in a business conducted by her, with the understanding that she should, from the proceeds of the business, build a house and convey it to the husband as his property, was valid, and created the relation of creditor and debtor between the husband and wife, although the latter gave no note or written obligation for the money received by her, and there was no agreement for the repayment of the money in kind, and no interest was paid or calculated upon the loan.

4. FRAUDULENT CONVEYANCES—VALIDITY OF TRANSACTION — CONSIDERATION FOR CONVEYANCE.

A wife obtained \$3,500 from her husband and used it in her business, with the understanding that she should build a house with the proceeds of the business and convey it to her husband. Under this arrangement she used the money for 10 years, and at the expiration of that time built the house as contemplated, at a cost of \$8,000. About four years after the house was built it was conveyed to the husband, in accordance with the previous understanding of the parties; the conveyance depriving the wife of sufficient assets to meet the claims of creditors. There was, however, no actual fraud in the conveyance, as the wife fully expected to successfully defend the only claims brought against her. *Held*, that the conveyance was based on a valuable and adequate consideration, and was not fraudulent as to creditors of the wife, although both husband and wife knew of the claims asserted against the wife, and that the conveyance might operate as a preference.

Appeal from Superior Court, Hartford County; Edwin B. Gager, Judge.

Action by Sidney E. Clarke, administrator de bonis non of the estate of Lucy H. Black, deceased, against Madison J. Black and others. From a judgment for plaintiff, defendants appeal. Reversed.

In 1896, Lucy H. Black (the plaintiff's intestate) became owner of the land described in the complaint and on September 28, 1900, conveyed the land through a third party to her husband, Madison J. Black, the defendant. At the time of this conveyance a suit was pending in the court of common pleas for Hartford county in favor of one Edward E. Rogers and against Mrs. Black, in which suit the land conveyed had been attached. Mrs. Black denied any indebtedness to Rogers, and fully expected to win the pending suit. She had no creditors other than said Rogers and after the conveyance did not have sufficient property, subject to attachment, to meet the debt claimed by Rogers. No action was taken by Rogers in his suit until May 18, 1901, when he filed a bill of particulars and no other action was taken by either party prior to February 22, 1902, when Mrs. Black died, and the attachment in the suit was dissolved. Mrs. Black left substantially no assets and no debts

except the Rogers claim. About a year after Mrs. Black's death, Rogers cited in as defendant in his pending suit Mrs. Black's administrator who had been appointed for the sole purpose of defending that action and subsequently recovered judgment against the estate of Mrs. Black for \$861.66. The present plaintiff having been appointed administrator de bonis non of Mrs. Black's estate brought this action. The complaint alleges in substance that the conveyance from Mrs. Black to the defendant was fraudulent, because it was made in fraud of the said Rogers, and to avoid the payment of her debt then due to said Rogers as adjudged by the judgment recovered by him against her estate, and because the conveyance was made without any valuable consideration therefor. These allegations were denied by the defendant.

Upon the trial the defendant claimed as the legal conclusion from the facts admitted and found proven, that the conveyance to the defendant was not fraudulent, and that the consideration for the conveyance was a valuable one. The court overruled this claim, and states in the finding all the facts from which the court drew its conclusion that the conveyance was fraudulent. The material facts, in addition to those above mentioned, are as follows: The conveyance was not made for the purpose of escaping or in any way avoiding the Rogers claim, or for the purpose of defeating his attachment, and was made with no intent on the part of the grantor or grantee to defraud said Rogers or any one else. The facts determining the character of the consideration for a conveyance of September 28, 1900, are in substance these: In 1886 Lucy H. Black desired to purchase a boarding house to be managed as her separate and independent business for her sole benefit. She did not have sufficient means to make said purchase and obtained from the defendant the sum of \$3,500 to be used in making the purchase. She bought the boarding house, using the \$3,500, obtained from the defendant in paying for the same and managed the boarding house as her separate and independent business, the defendant receiving no part of the income therefrom. The defendant and Mrs. Black often talked about the \$3,500 and the general purport of their conversation was that Mrs. Black desired to retain the money in her business and make what she could out of it, and that some time she would be able to build a house, and that when she built her house, she would turn it over to the defendant, and retain as her own whatever was not required for the building of the house. At the time the money was paid by the defendant to Mrs. Black no note or other obligation was given to him, nor was he furnished any security for said sum, nor was there any agreement between them with reference to the repayment of said

money; Mrs. Black did not pay interest upon said sum, and it did not appear that there was ever any calculation of interest or any conversation with reference to any specific sum that was or might be due to the defendant, or any promise of hers except her statement with reference to building a house and turning it over to the defendant. Ten years later, in 1896, Mrs. Black purchased the land in question, and built a house thereon, and told the defendant it would be his. At different times there was conversation between them about conveying the property to the defendant, but he did not urge her, and the matter was put off without any special reason until September 28, 1900, when the property was conveyed to the defendant as above stated. At the time of the conveyance the attachment of the land by Rogers was known to Mrs. Black and the defendant, and they both supposed and understood that in case Rogers recovered judgment, said judgment would hold said land to respond thereto. Said transfer from Mrs. Black to the defendant was made in good faith, and for the purposes aforesaid. The value of the property transferred was about \$6,000.

Joseph P. Tuttle and James J. Quinn, for appellants. John W. Coogan and John J. McKone, for appellee.

HAMERSLEY, J. (after stating the facts). The finding of the trial court conclusively negatives the allegations of the complaint, in so far as they aver that the conveyance to the defendant was in fact made in fraud of Edward E. Rogers with intent to avoid the payment of a debt then due from the grantor to said Rogers and for this reason was fraudulent. As to the remaining allegation of the complaint, namely, that the conveyance to the defendant was made without any valuable consideration therefor, and for this reason was fraudulent, the court finds that at the time of the conveyance the grantor was indebted to Rogers to an amount in excess of the value of her attachable property other than the land conveyed, that the land conveyed was subject to an attachment lien in a suit then pending between Rogers and the grantor for the enforcement of her debt to him, and states the facts which constitute the consideration upon which the conveyance was made by the grantor. These facts being ascertained and determined by the trial court, the conclusion therefrom, including the existence of constructive fraud and of a valuable consideration, is a question of law. *Pettibone v. Stevens*, 15 Conn. 19, 25, 38 Am. Dec. 57; *Winsted Hosiery Co. v. New Britain Knitting Co.*, 69 Conn. 565, 575, 38 Atl. 310. If the conveyance to the defendant was made without a valuable consideration, the fact that such conveyance left the grantor without sufficient means to meet her existing indebtedness to Rogers might

render the conveyance fraudulent, notwithstanding there was in fact no intent to defraud and no intent to avoid that indebtedness. *Quinnipiac Brewing Co. v. Fitzgibbons*, 71 Conn. 80, 40 Atl. 913. On the other hand, if there was a valuable consideration for the conveyance, the bona fide transfer of the property upon such consideration might be valid, notwithstanding such transfer was calculated to hinder other creditors in the collection of their claims. *Meade v. Smith*, 16 Conn. 346, 358; *Warner Glove Co. v. Jennings*, 58 Conn. 74, 82, 19 Atl. 239. A controlling question, therefore, in determining the validity of the conclusion reached by the trial court is this: Was the consideration for the conveyance as set forth in the finding a valuable one? A good or meritorious consideration may be sufficient to support a conveyance by a grantor, who is not indebted or whose indebtedness is not unreasonably disproportioned to the value of the property conveyed (*Salmon v. Bennett*, 1 Conn. 525, 7 Am. Dec. 237); but where the conveyance leaves the grantor without sufficient property to meet existing debts, it cannot be supported as against those creditors unless the consideration is one which the law terms valuable. In general, a consideration may be valuable which involves the payment of money, satisfaction of some debt, or binding obligation or duty or some substantial benefit which is regarded as property as, for instance, an intended marriage or an understanding that the grantee shall be supported for life by the grantor. 1 Sw. Dig. (280), (281); *Graves v. Atwood*, 52 Conn. 512, 516, 52 Am. Rep. 610.

The answer to the question in the present case depends upon two transactions, related but in a way distinct. First, the transaction in which Mrs. Black obtained from Mr. Black \$3,500 upon the understanding between them as to the obligations thereby assumed by her, and used the money, and invested the proceeds as stated in the finding; second, the subsequent conveyance of the land. As we read the finding, the first transaction is in substance this: In 1896 Mrs. Black obtained from Mr. Black \$3,500 upon the understanding that she should use the money in her business until she had made sufficient to build a house, and that, when the house was built, she should turn it over to Mr. Black as his property, and that the proceeds of the business not required for this purpose should belong to Mrs. Black. In accordance with this understanding Mrs. Black used the \$3,500 in her business, and at the end of 10 years was able to, and did build, the house, as contemplated by them. In 1896-97 she purchased the land in question, built upon it a house, and told Mr. Black she would convey it to him. We think that upon the completion of this transaction the relation of creditor and debtor existed between Mr. and Mrs. Black, and that Mr. Black was entitled to a conveyance of the

house or to damages in case of Mrs. Black's refusal to convey. The fact that Mrs. Black gave no note or written obligation at the time she obtained Mr. Black's money, and that there was no agreement made with reference to the repayment of said money and no interest was paid or calculated thereon is immaterial. The transaction was not a loan of money upon interest. Mr. Black's property rights resulted from the acceptance and use of his money by Mrs. Black upon the understanding between them, her purchase of the land, and building of the house with the proceeds and accretions of that money, and her promise to convey the land to him. The fact that Mr. and Mrs. Black were husband and wife is immaterial, except as explaining a transaction which might otherwise seem an improvident one on the part of Mr. Black. No rights of third parties are involved in the transaction, and it is not affected by the question of creditors of either Mr. or Mrs. Black. In a case such as this, the relation of husband and wife operates rather to emphasize the good faith and honesty of the transaction. *Gilligan v. Lord*, 51 Conn. 567. No claim is made that Mr. and Mrs. Black could not contract with each other in the manner detailed, and such a claim, if made, could not be maintained. *Spitz's Appeal*, 56 Conn. 186, 14 Atl. 776, 7 Am. St. Rep. 303; *Haussman v. Burnham*, 59 Conn. 132, 22 Atl. 1065, 21 Am. St. Rep. 74; *Corr's Appeal from Com'rs*, 62 Conn. 409, 26 Atl. 478. The plaintiff cites several decisions where it is held, as it was held in *Paulk v. Cooke*, 39 Conn. 570, that the use by a husband of money which came to his wife, and which, under the law, he is entitled to reduce to possession and use as his own property, does not constitute a valuable consideration for a subsequent transfer to his wife of large amounts of his own property for the purpose of placing it beyond the reach of creditors; it is evident that such decisions have no application to the facts in this case.

It thus appears that in 1897 the relation of debtor and creditor existed between Mr. and Mrs. Black, and that she was then bound to satisfy the claim of Mr. Black. The second transaction, namely, the conveyance to Mr. Black, took place some three years later on September 28, 1900. There is no significance in the delay in making the conveyance as the court finds that the matter was put off without any special reason and that the transfer from Mrs. Black to the defendant was made in good faith, and for the purposes aforesaid; that is, of satisfying her obligation to Mr. Black arising from the transaction above stated. The satisfaction of that obligation was the consideration of the transfer, and such a consideration is, in law, a valuable one. There can be no question of adequacy of consideration. Land worth about \$6,000 is a reasonable compensation for the loss of \$3,500, and its use and

profits for 10 years. Such a transfer, in good faith, upon valuable and adequate consideration might lawfully be made, although the parties knew of the Roger's claim, and that the transfer might operate as a preference, and would be valid as against Rogers, unless opportune proceedings in insolvency were commenced. That the parties supposed and understood that the intervening attachment of Rogers would, in fact, hold the land to the extent of any judgment Rogers might recover, and so to that extent affect the value of the property received by Mr. Black in satisfaction of his claim only serves to illustrate the absolute good faith of the transaction which the court so unequivocally finds. That the transfer of the land in question to Mr. Black was not fraudulent is the necessary legal conclusion from the facts found.

There is error. The judgment of the superior court is reversed, and the cause remanded, with instruction to render judgment for the defendants.

PIERCE v. STAUB.

(Supreme Court of Errors of Connecticut.
Jan. 4, 1906.)

SALES—RESCISSION OF CONTRACT—REMEDIES OF BUYER—RECOVERY OF PURCHASE MONEY.

Where a contract of sale provided for the payment of the price in installments, and that the seller should have the exclusive possession of the property until full payment was made, and contained no stipulation for a forfeiture on default, and the buyer, although he faithfully tried to perform his obligations under the contract, was unable to complete the stipulated payments, and defaulted, whereupon the seller, after various extensions of time, refused to recognize any rights of the buyer to the property, and disabled himself from performing the contract by transferring the property to other parties, and both parties treated the contract as at an end, there was in effect a mutual rescission of the contract of sale, and the buyer was entitled to recover back the money paid by him under the contract.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 258, 260.]

Appeal from Superior Court, Hartford County; John M. Thayer, Judge.

* Action by Noble E. Pierce, as ancillary administrator of the estate of James M. Crosby, deceased, against Nicholas Staub. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank L. Hungerford and Frank W. Marsh, for appellant. Marcus H. Holcomb and Noble E. Pierce, for appellee.

TORRANCE, C. J. The plaintiff is the ancillary administrator, in this state, upon the estate of James M. Crosby, who died domiciled in Massachusetts in June, 1900. In May, 1897, the defendant and Crosby entered into a written contract for the sale to Crosby of certain property belonging to the defendant. The property consisted of certain shares of the capital stock of the

Falls Village Water Company, of this state, of the charter and franchises of the New Milford Water Power Company, of this state, and of certain rights in real estate, and in water rights, fully described in said contract. That contract provided in substance as follows: In consideration of certain payments made to him by Crosby, at and before the execution of the contract, and of the promises of Crosby contained in the contract, the defendant agreed to sell and convey to Crosby on or before the 1st of December, 1897, all the property aforesaid, "upon the faithful performance by Crosby" of his part of said contract. The purchase price of the property was \$150,000. Of this price Crosby paid \$3,000 before the contract was executed and in the contract he agreed to pay \$10,000 upon its execution, \$10,000 on or before July 1, 1897, and the balance on or before December 1, 1897. Mr. Crosby, not having made all the payments required by said contract, the parties on the 23d of February, 1899, entered into a supplemental contract in which it was agreed, among other things, as follows: (1) That the amount due and unpaid by Crosby under the first contract was \$97,217; (2) that said amount should bear interest at the rate of 6 per cent. per annum from April 1, 1898; (3) that Crosby should pay said sum with interest as aforesaid in one year from February 23, 1899, or sooner in whole or in part at his option; (4) that upon such payment being made in full within such time, the defendant would sell and convey to Crosby all the property agreed to be sold and conveyed in and by both contracts; and (5) that the defendant should have the exclusive use and possession of all said property until it should be so conveyed. It was also agreed that these two contracts should evidence the entire understanding of the parties as to said property with one exception which need not here be noted. Neither of the contracts contained any forfeiture clauses of any kind, nor did they in terms give any power of rescission to either of the parties.

Crosby paid under both contracts the sum of \$60,000 and no more. On February 27, 1900, while Crosby was confined to his bed by a serious illness, the defendant called upon him, and informed him that he (the defendant) was then ready to carry out said agreement. Crosby said he was then unable to perform his part of the agreement, and asked for an extension of time. Upon Crosby's promising to pay a certain note of his made to the defendant and then in the hands of a third party, the defendant agreed to extend the time for performance of the contracts for a period of 30 days from February 23, 1900. Crosby never paid that note nor any part of it, nor did he carry out his part of the contract, nor tender performance thereof within the extended time so given him by the defendant. On March 20, 1900, the defendant sent to Crosby a written notice of which the following is a copy: "My Dear

Sir: I beg to say that I am ready to perform on my part our agreements of May 8, 1897, and February 23, 1899, by conveying, transferring, and assigning to you all the property therein mentioned, in accordance with the terms of said agreements, and as you know, have been ready and willing to do so at all times since the dates thereof. Inasmuch as the extended time for carrying out said agreements on your part expired nearly a month ago (February 23, 1900), and I cannot compatibly with my own rights and my purposes with regard to said property allow the matter to remain open indefinitely, I hereby request that without further delay you make the payments agreed by you to be made as fixed and determined in said last-named contract, and you may consider this a demand therefor. Please take notice that unless said agreements are performed and said payments made on or before the 31st day of March, 1900, I shall regard and treat said property as divested of all interest which you may now have [if any] therein. If not convenient for you to come here, I will, on notice from you, meet you in New York any day this week or next week, for the purpose of mutually carrying out our engagements in said contracts made." Nothing further was heard by the defendant from Crosby, after giving said notice, and nothing was done by Crosby with reference to said contracts, except that he endeavored, until he became too ill to do business, to dispose of the property and to raise money upon the contracts to pay the balance due thereon. Nothing else save the giving of said notice was ever done by the defendant in the lifetime of Crosby to put him in default under said contracts or to terminate his rights of purchase thereunder. Crosby died in June, 1900. He never made demand upon the defendant for the payment of the whole or any part of the money paid under the contracts, nor did he, after March 31, 1900, make any claim to the defendant that he (Crosby) had any rights in the property described in the contracts; but he did make such claim to his wife and brother a few days before he died. Up to March 31, 1900, the defendant was ever ready and willing to carry out his part of said contracts, but no offer or tender of performance was ever made by Crosby or by any one in his behalf, or, since his death, on behalf of his estate. On the 27th of June, 1900, the widow of Crosby called upon the defendant to ascertain the amount due under the contracts, and whether she could have time in which to pay it. The defendant then informed her that as her husband's time for performance had expired, his heirs had no interest in the property; but said that if the amount due was paid within 30 days then next ensuing, he would, unless the property was sold within that time before the payment was made, convey the property to Mr. Crosby's heirs. He requested her to write him next day as to whether she could raise the

money. This she did not do, nor did she or any one else thereafter ever tender performance on behalf of the Crosby estate. After this, but exactly when did not appear, the defendant sold all of said property to a third party. Such sale appears to have been made some time in 1902. In September, 1900, the widow of Crosby was appointed and qualified as administratrix upon his estate, and in February, 1903, the plaintiff was in this state appointed and qualified as ancillary administrator of said estate. Demand upon the defendant, for the repayment of the money paid him by Crosby under the two contracts, was made by the administratrix in January, 1903, and by the plaintiff in February, 1903. The defendant refused to pay. The defendant until he sold said property was in the sole and exclusive use and occupation thereof. The defendant did not in this case, by his pleadings or otherwise make any claim for damages on account of the default of Crosby under said contracts.

Upon these facts the defendant made divers claims of law, which in substance and effect amounted to this: That the plaintiff was not entitled to recover back the money paid by Crosby either in whole or in part; in other words, that upon Crosby's default the defendant became entitled, at his option, to keep the property and the purchase money too. The court overruled this claim, and held that as the defendant had made no claim for damages on account of the default, the plaintiff was entitled to recover the amount of the money paid by Crosby, with interest from the date of the demand made upon the defendant by the plaintiff. In the case at bar the sale and conveyance to be made by the defendant were undoubtedly conditioned upon the payment of the price in full. If Crosby had paid 99 per cent. of the price in advance, he could not obtain the property without paying or tendering the remaining 1 per cent.; and if he, without legal excuse, failed to make such payment or tender, in the manner prescribed by the contract, he might lose his right to such sale and conveyance; and the defendant's claim is that he would, in such case, also lose the entire purchase money paid in advance, although the contract might contain no clause of forfeiture. The view of the law embodied in this last claim seems to put the vendee who pays a substantial part of the price in advance and then defaults, in a much worse position than the vendee who pays nothing in advance and ultimately refuses to go on with the contract. In the former case the vendor may get very much more than compensation for the loss caused by his breach; while in the latter case he gets only compensation for his actual loss, frequently measured by the difference between the contract price and the value of the property at the time of the breach, which may be merely a nominal amount. Founded upon the doctrine of the entirety of contracts, the general rule un-

doubtedly is that if a party, without legal excuse, fails to perform the conditions of a contract, he can recover no compensation for benefits conferred upon the other party by a part performance. Keener on Quasi Contracts, p. 215, and cases there cited.

To this general rule two exceptions, real or apparent, are not without authority for their support. One, in the case of contracts for personal services for a given time for a given sum; and the other, in case of contracts to do a specific work, as to build or repair a house, or a machine, and the like. In the former class of cases, it is held by many courts, that even a party who willfully breaks his contract may recover for the value of work done in excess of the damages caused by the breach. *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713; *Pixler v. Nichols*, 8 Iowa, 106, 74 Am. Dec. 298; *Wheatly v. Miscal*, 5 Ind. 142; *Fuller v. Rice*, 52 Mich. 435, 18 N. W. 204; *Chamblee v. Baker*, 95 N. C. 98; *Parcell v. McComber*, 11 Neb. 209, 7 N. W. 529, 38 Am. Rep. 366; *Duncan v. Baker*, 21 Kan. 107. In the latter class of cases it is held by many court that a party, who in good faith, attempts to perform his contract, and undesignedly deviates from it in some respects, may recover for benefits conferred, less damages caused by the breach. See *Pinches v. Swedish Lutheran Church*, 55 Conn. 183, 10 Atl. 264, and cases cited therein. Assuming, without deciding, that the principles applied in the above two classes of cases, if sound, are not applicable in the present case, does that case fall within the rule invoked by the defendant? We think not. That rule is based upon the proposition that a party who advances money in part performance of a contract, and then stops short and refuses to go on, while the other remains ready and willing to perform, cannot recover back the money advanced. This proposition is supported by the following cases, and by many others that might be cited: *Ketchum v. Evertson*, 13 Johns. 359, 7 Am. Dec. 384; *Lawrence v. Miller*, 86 N. Y. 131; *Rounds v. Baxter*, 4 Greenl. 454; *Plummer v. Buckman*, 55 Me. 105; *Hill v. Grosser*, 59 N. H. 513; *Steinbach v. Pettengill*, 67 N. J. Law, 36, 50 Atl. 443; *Downey v. Riggs*, 102 Iowa, 88, 70 N. W. 1091; *Hansbrough v. Peck*, 5 Wall. 147, 18 L. Ed. 520. The decisions in these cases all proceed upon the assumption that the special contract, though broken by one of the parties, remains open and unrescinded, and the defendant's claim in the present case proceeds upon such an assumption; but we think that in this case the fact thus assumed is not true.

We are of opinion that the parties in this case have, in effect, rescinded, and put an end to the contracts. It clearly appears that Crosby made default. In one sense it was not a willful default, for to the last he tried to fulfil his contract; nevertheless his failure was without legal excuse, and gave the defendant the right to put an end to the con-

tract if he chose to do so. By his written notice to Crosby the defendant said, in effect, that unless by a day certain the price was paid in full, the defendant would consider all the rights of Crosby and all the obligations of the defendant under the contracts as at an end, and all the rights of Crosby to the money paid or to the land as at an end. From the time of Crosby's default even until now the plaintiff has acted with respect to the property, the money, and the contracts, according to the tenor of his notice to Crosby. He has recognized no rights of Crosby, or of his estate, to the property covered by the contracts, or to the money paid by Crosby under the contracts, or any obligations of his own under the contracts. He has denied the existence of any such rights and obligations, has treated the property as his own, and has disabled himself from performing the contracts, by transferring the property to other parties. In short, since Crosby's default the defendant has treated the contracts as at an end. The position thus assumed by the defendant must be regarded, upon the facts found, as having been acquiesced in by Crosby in his lifetime, and by his representatives since his decease; for after his default he neither paid nor tendered any money in performance of the contracts; and since his decease his representatives have done nothing save to bring this action, and that is based upon the assumption that the contracts are at an end.

Under these circumstances both parties must be regarded as having treated the contracts as at an end, and such action is equivalent in equity to a formal and mutual rescission; and this being so, the defendant cannot be allowed to treat the contracts as dead to the prejudice of Crosby's estate, and yet alive to the advantage of himself. The contracts being thus at an end, the defendant claims, by right of forfeiture, the \$60,000 paid by Crosby, although the contracts contained no clause of forfeiture. If this claim is sustained, Crosby pays, and the defendant receives that sum of money for nothing save the promise of the defendant from which he now claims to be freed; and, save this promise, the defendant parted with nothing, not even the possession and use of the property agreed to be conveyed; and it nowhere appears that he lost \$1 by reason of his promise or by reason of Crosby's default. In cases like the present, it has been said by high authority that the better remedy of the vendor, and in some instances his only safe remedy, is to institute proceedings in the proper court to foreclose the equity of the purchaser where partial payments or valuable improvements have been made. *Hansbrough v. Peck*, 72 U. S. 497, 18 L. Ed. 520. Upon Crosby's default, the defendant, instead of bringing him into court to have their respective rights as against each other adjusted and determined, decided for himself that the money advanced was forfeited, and that Crosby had no rights whatever as against the defendant; and he is now in court asking it, in effect, to aid him in en-

forcing that forfeiture. Equity abhors, and the law does not favor, a forfeiture; and, if there by any difference between the defendant's position as determined by the rules of law and his position as determined by the rules of equity, it must be judged by the latter. Gen. St. 1902, § 532.

In view of the conclusion reached, that the contracts were in effect rescinded, the right of the defendant to retain the money advanced cannot be sustained; and, as he made no claim whatever for damages suffered by the default, the plaintiff, if entitled to recover anything, was entitled to recover all. Money paid upon a contract which is subsequently rescinded is never forfeited unless there is an express or implied contract to that effect (*Hickock v. Hoyt*, 33 Conn. 553-559); and, upon such rescission, it must be returned to him who has advanced it (*Gay v. Adler*, 102 U. S. 79, 26 L. Ed. 48; *Frink v. Thomas*, 20 Or. 265, 25 Pac. 717, 12 L. R. A. 239; *Wheeler v. Mather*, 56 Ill. 241, 8 Am. Rep. 683; *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. 749, 22 Am. St. Rep. 257; *Merrill v. Merrill*, 103 Cal. 287, 35 Pac. 768, 37 Pac. 392; *Gilbreth v. Grewell*, 13 Ind. 484, 74 Am. Dec. 266; *Glock v. Howard & Wilson Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17). Whether the defendant, upon proper pleadings and proof in this case, might have recovered the damages, if any, caused to him by Crosby's default, is a question that does not arise in this case, and therefore need not be considered nor decided.

There is no error.

PLUM v. SMITH et al.

(Court of Chancery of New Jersey. Jan. 19, 1906.)

1. WILLS — LEGACIES — ABATEMENT — LEGACY IN LIEU OF DOWER.

As a general rule a legacy given in lieu of dower cannot abate, if at the time of the making of the will the wife had an inchoate right to any dower out of the testator's estate.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 2105.]

2. SAME—LEGACIES CHARGED ON LAND—NECESSITY OF MORTGAGE.

A will giving testator's wife the interest on a sum of money, so long as she lives and remains unmarried, "to be left secured on my real estate," does not require the legacy to the wife to be secured by a mortgage on testator's real estate, but creates a charge on such real estate without the aid of a mortgage.

3. SAME—ABATEMENT OF LEGACIES.

Testator bequeathed to his wife in lieu of dower the interest on \$2,000 so long as she should live and remain unmarried, to be left secured on testator's real estate, and on the decease or marriage of the widow to be equally divided among testator's children. The sum specified was invested in a mortgage which covered all the land of which testator died seised. Default was made in the payment of interest for the last two years prior to the widow's death, and the mortgage was foreclosed, and the property sold for a sum insufficient to pay the principal and interest. *Held*, that the legacy to the widow would not

abate so long as any portion of testator's real estate or of the proceeds thereof remained, and consequently the widow's administrator was entitled to be paid, in preference to the other legatees, the interest which was not paid during the widow's lifetime.

Bill for the distribution of an estate by Joseph S. Plum, executor of Joseph Plum, deceased, against John B. Smith and others. Decree advised.

Oliver I. Blackwell, for complainant. John B. Hoffman, for defendants.

BERGEN, V. C. Joseph Plum died leaving a last will and testament in which the only provision he made for his widow is expressed in the second and third items thereof as follows:

"Second. I give and bequeath to my beloved wife, Hannah, the interest on two thousand dollars as long as she lives and remains unmarried and my widow, to be left secured on my real estate, but on her decease or marriage to be equally divided among my children.

"Third. I also give, devise, and bequeath to my beloved wife, Hannah, all my household furniture, except wardrobe," etc.

The executors named, and who qualified, were the widow and Joseph S. Plum, a son, who invested the sum of \$2,000 in a mortgage on lands, of which the testator died seised, and the interest on this mortgage was paid to the widow until April 1, 1893, between which date and the date of her death, July 20, 1895, the interest remains unpaid. The mortgage has been foreclosed, the property sold, and the amount realized not sufficient to pay the principal and interest in full, and the question presented is whether the administrator of the widow is entitled to priority in payment to the extent of the unpaid interest. The claim of the administrator is that the widow, having accepted the bequest in her favor in lieu of her dower in land, is entitled to be paid the compensation which it was agreed she should have when she accepted the provision made for her in the will, rather than that conferred upon by her by the law. While this will does not in terms declare that the legacy was intended to be in lieu of dower, it is quite manifest that the provision made by this testator had that object in view, and that the widow did elect to accept the testamentary gift in satisfaction of her claim for dower. It is a general rule that a legacy given in lieu of dower shall not abate, if at the time of the making of the will the wife had an inchoate right to any dower out of the testator's estate; for in that case the widow, if she do not dissent to the bequest, is accepting a compensation for the dower which ought to be paid at the price fixed. It is not a voluntary bounty or favor, but a meritorious consideration. Per-

rine v. Perrine et al., 6 N. J. Law, 133-138, 10 Am. Dec. 392.

The testator here gives to his wife the interest on \$2,000 as long as she lives and remains unmarried, "to be left secured on my real estate," and on the argument it was insisted that these words should be interpreted to mean secured by a mortgage, but it can hardly be doubted that this language will charge the payment of this interest on testator's land without the help of a mortgage. The land upon which this mortgage was an incumbrance was all the real property of which the testator died seised, and consequently constituted all of the real estate charged with the payment of the widow's legacy. If at any time during her life it became necessary to enforce the payment of her legacy, she could have, by proper proceedings, obtained a decree for the sale of so much of the land as might be necessary to raise and pay the share of her legacy which had matured, and such payment would have been at the expense of the corpus of the fund, and if necessity required, might, by repeated sales, have ultimately exhausted the principal. That the land which was charged with the payment of this legacy has been sold by other proceedings, and thereby reduced to money, does not, in my judgment, relieve the fund from the obligation which the testator imposed upon the land.

My conclusion is that the widow was entitled to be paid the interest on \$2,000 as long as she lived unmarried; that this bequest in lieu of dower is charged upon the lands of the testator, and that the widow cannot be called upon to abate her legacy so long as any portion of the real estate of the testator, or the proceeds thereof out of which payment can be made, remains. It is the surrender of existing rights which gives the preference to a legatee of this character, and as was declared by Lord Hardwicke (1 Roper on Legacies, 297): "The wife's abandonment of her legal rights would entitle her to payment of the whole of the benefits which were given to her under the will, in preference to the other legatees." The contest here is between the general legatees of the testator and the representative of a widow, who surrendered her dower right for a consideration which the law says she is entitled to have paid without abatement. While this cause originated in foreclosure proceedings, it has been before the chancellor on a motion to strike out part of the pleadings, and in passing upon that question, the parties were allowed to amend the pleadings so as to present the issue now considered.

The result which I have reached is, that the administrator of the widow is entitled to be paid, in preference to the other legatees, the residue of the compensation promised the widow as a consideration for her dower.

**MAYOR, ETC., OF JERSEY CITY v. TOWN OF HARRISON et al.
MATTHEWS v. SAME.**

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1905.)

1. FRAUDS, STATUTE OF—CONTRACTS.

A contract between two municipalities for a supply of water for public and private use is within the provisions of the statute of frauds.

2. MUNICIPAL CORPORATIONS — CONTRACTS — WHAT CONSTITUTES — PROPOSAL—ACCEPTANCE.

A resolution of the town council of Harrison directed the president and clerk to execute a contract with Jersey City for a supply of water on certain terms. Jersey City, learning of the resolution, caused to be drawn and executed by its officials and tendered to the town council of Harrison, a paper which was claimed to accord with the terms of the resolution. *Held*, that no contract was thus created (a) because the paper thus executed and tendered to Harrison did not conform to the terms of the resolution, and (b) because the resolution, never having been communicated by Harrison to Jersey City, did not constitute a proposal which Jersey City might accept and thereby bind Harrison.

[Ed. Note.—For cases in point, see vol. 86, Cent. Dig. Municipal Corporations, §§ 675-679.]

Dixon and Gray, JJ., dissenting.

(Syllabus by the Court.)

Error to Supreme Court.

Action by the mayor and aldermen of Jersey City against the town of Harrison and others, and by Martin V. Matthews against the town of Harrison and others. Judgments for defendants, and plaintiffs bring error. **Affirmed.**

George L. Record and Robert Carey, for plaintiffs in error. Collins & Corbin and Richard B. Lindabury, for defendants in error.

MAGIE, Ch. Four writs of error have brought to this court for review of four judgments of the Supreme Court. Two of the judgments were entered upon certiorari (one allowed upon the prosecution of the mayor and aldermen of Jersey City, and the other allowed upon the prosecution of Martin V. Matthews) which brought into review in that court a resolution of the town council of the town of Harrison, adopted September 15, 1903, and rescinding a resolution of that body adopted July 7, 1903. The other two judgments were entered upon certiorari (one allowed upon the prosecution of the mayor and aldermen of Jersey City, and the other allowed upon the prosecution of Martin V. Matthews) to review a resolution adopted by the town council of Harrison on September 15, 1903, for a contract between the town of Harrison and the New Jersey Suburban Water Company for a water supply, and the contract executed thereunder. The writs of certiorari in the two cases first named were dismissed by the Supreme Court, and in the other two cases the resolution for a contract and the contract itself were adjudged to be valid and legal, and were affirmed.

All these cases have been argued together, and present but a single question, which is raised by the contention of plaintiffs in error that the resolution of the town council of the town of Harrison, adopted July 7, 1903, and the acts of Jersey City thereon, disclosed by the affidavits, constituted a contract between the town of Harrison and Jersey City, and that in consequence thereof the town of Harrison possessed no power to pass the rescinding resolution of September 15, 1903, and their action in the passage of that resolution should have been adjudged null and void. This also involves the contention that if the resolution of rescission is void, the resolution of the town council, passed at the same meeting, for the execution of a contract with the New Jersey Suburban Water Company, and the contract executed in pursuance thereof, were ultra vires, and should have been avoided and set aside for that reason.

The resolution of July 7, 1903, is in the following words: "Resolved, that the president of the common council and the town clerk of the said town be, and they are hereby, authorized to execute on behalf of the said town, and in common with the municipal authorities of Jersey City, for a new water supply for the said town to be furnished by the said Jersey City on the same terms and conditions and for a similar period of time as are contained in a certain contract made on the 31st day of July, 1885, between the mayor and aldermen of Jersey City and the said town of Harrison, with the following exceptions: First. That the price for the water to be supplied under the contract hereby authorized shall be at the rate of the sum of \$84 per million gallons per day for that quantity of water shown to be consumed on the date of contract, and at the rate of \$83 per million gallons when such consumption shall have increased to an average of 500,000 gallons daily above that consumption indicated on the day of the date of contract, and at the rate of \$78 per million gallons when the consumption shall have indicated a daily average increase of a second additional 500,000 gallons, and at the rate of \$75 per million gallons for all water consumed in excess of 3,000,000 gallons daily."

From the return to the writs of certiorari which called for the resolution of July 7, 1903, it appears that it was adopted by a unanimous vote of the members of the town council of Harrison. But there is nothing in the return to show that the town council directed that the resolution should be transmitted to Jersey City, or gave any one authority to present the resolution to Jersey City for its action thereon. It is, however, made to appear by the affidavits that the authorities of Jersey City did, in some way not explained, procure a certified copy of the resolution, and thereupon caused to be prepared and executed, by such of its officials as might bind the city, a paper purporting and claimed to be such a contract as was

called for by the resolution. The paper thus executed was afterward presented to the town council of Harrison, and a demand was made on behalf of Jersey City that it should be executed by the officials of the town of Harrison who were named in the resolution. It had not been so executed when the rescinding resolution was adopted. The claim on the part of Jersey City is that when the paper drawn as claimed, in accordance with the terms of the resolution, and executed so as to bind Jersey City, was tendered to the town of Harrison, then, although it was not executed by the officials named in the resolution, or by any one on the part of that town, a contract thereby came into existence, obligatory upon the town, which it could not avoid by repealing or rescinding the resolution giving authority to execute it. Upon its examination of the alleged contract, the Supreme Court reached the conclusion that such a contract between two municipalities for the sale and purchase of water, involving such amounts, was one within the provisions of the statute of frauds, and to be binding must be in writing and signed by the party to be charged or his agent lawfully authorized. With the view thus expressed we are in entire accord, and it has not been made matter of contest in the argument before us.

The insistent is that such a contract in writing is disclosed. The appeal is to the well-settled doctrine, illustrated by a long line of cases, which holds that a written proposition for a contract on specified terms and a written acceptance on those terms constitute a contract in writing within the statute. The contention is that the resolution was a proposition for a contract, and that the paper executed by Jersey City and tendered for execution to the town of Harrison made up a complete contract in writing. The contention we find to be ineffective. The argument ignores two facts. The resolution of the legislative board of the town is not signed by the town, and this resolution contemplated a contract to be made and executed by certain persons expressly authorized to sign for the town. *Donnelly v. Currie Hardware Co.*, 66 N. J. Law, 388, 49 Atl. 428. In the next place the proposition had not been communicated by Harrison to Jersey City. A proposition for a contract, to be competent to be accepted, must be communicated to the party with whom the contract is proposed. It will not be sufficient that the latter acquire knowledge of it, unless the knowledge is acquired with the express or implied intention of the proposing party. An owner of land, contemplating a sale thereof, might direct his stenographer or other agent to draft a contract for sale to a particular person on specified terms. If the owner has not communicated, or intended to communicate, the proposed contract to that person, the latter, having acquired knowledge thereof, could not, by acceptance, bring the owner into a contractual relation of sale. The owner might leave his uncommunicated draft in his agent's

hands without liability, and retract his agency and abandon his plan at any time. Until communication, there is no efficacious proposal which could be accepted. *Potter v. Hollister*, 45 N. J. Eq. 509, 18 Atl. 204; *a. c.*, 46 N. J. Eq. 609, 22 Atl. 56. In like manner, the resolution, never having been communicated to Jersey City by any act of the town of Harrison, did not constitute a proposal, and could not be raised to a binding contract by any acceptance.

As it is found that no contract between the two municipalities came into existence upon the resolution of July 7, 1903, it of course follows that Jersey City had no interest which required the town of Harrison to give any notice of its intent to rescind that resolution. If it should be admitted that the execution by Jersey City of the paper presented by its officials to the town of Harrison, with a demand that the town of Harrison should execute the same, could operate to create an actual contract, obviously it can only be given that effect if the paper so executed and tendered conformed to the terms of the resolution of July 7, 1903. That resolution expressly called for a new water supply. It appears by the affidavits that by the former and expired contract water had been for many years supplied to the town of Harrison from the reservoir and waterworks of Jersey City. The supply thus furnished had become polluted to such a degree that Jersey City had sought for a purer supply, which was being furnished temporarily by other parties, and out of that the supply to Harrison had lately been furnished by Jersey City. As the resolution called for a new supply, it is obvious that its demand could only be met by the tender of a contract for a supply that could be thus characterized. But the paper executed by the Jersey City officials and offered to Harrison simply required Jersey City to furnish water "from the reservoir and waterworks" of the city. It is obvious that, under those terms, the city could have resorted to pumping water from the Passaic river into its reservoir as it had formerly done, and so distributing it to the town of Harrison. In my judgment, the town of Harrison was entitled to a specific contract for water from a new source, and the tender of a contract which did not include the required terms was unavailing. Nothing, therefore, is found to justify us in declaring that the town of Harrison was unable to rescind its resolution of July 7, 1903. The resolution of September 15, 1903, to that effect, was therefore properly upheld by the Supreme Court, and its judgment thereon must be affirmed. It necessarily follows that the town council of Harrison, after the passage of the rescinding resolution, had power to proceed to make a contract for a supply of water from any person or corporation having water to furnish and having power to contract with the town.

The contention that the action of the town in determining to contract for water to be supplied by the New Jersey Suburban Water Company was invalid, because no notice of its intended action was given to Jersey City, and that the city was given no opportunity to be heard thereon, cannot be yielded to. As stated, Jersey City had no rights under the resolution of July 7, 1903. By the contract dated July 31, 1885, Jersey City had supplied water to the town of Harrison for a period of 10 years. After the expiration of that contract, it had never been renewed, nor any new contract made. Water had been supplied by Jersey City, which Harrison had received and paid for at the rates fixed in the expired contract. This course of conduct created no obligation, unless it raised an implied contract to pay for such water as was in fact received. But Harrison was not bound to continue to receive it for any period of time, and might cease to receive it whenever it deemed the public interest required. Moreover, before the resolution to contract with the New Jersey Suburban Water Company, notice had been given by that company to the town of Harrison that the water which it was receiving belonged, not to Jersey City, but to that company. It has been determined, on other cases now decided, that the property in the water was then in the New Jersey Suburban Water Company. Under those circumstances, Jersey City had no interest which required the town of Harrison to give it notice of its intent to contract with the New Jersey Suburban Water Company. The case is not like that considered in *Taylor v. Lambertville*, 43 N. J. Eq. 107, 10 Atl. 809, and the doctrine therein stated, if capable of being supported, is not applicable here. The resolution of September 15, 1903, for a contract with the New Jersey Suburban Water Company, and the contract made with that company, were within the power of the town. Whether the contract was a judicious one is not a subject of judicial review. No reason is presented which justifies us in declaring that the contract was lacking in validity.

The judgment of the Supreme Court in affirming it will therefore be affirmed.

DIXON and GRAY, JJ., dissent.

NEW JERSEY SUBURBAN WATER CO. v. TOWN OF HARRISON.

(Court of Errors and Appeals of New Jersey. Nov. 20, 1906.)

WATERS—TRANSMISSION—PROPERTY RIGHTS.

The New Jersey Suburban Water Company with another company, acquired by contract with the East Jersey Water Company the right to water transmitted by the latter company through its mains and pipes from its source of supply, and delivered at a specified place on the line of the pipes. The New Jersey Suburban Water Company contracted to supply therefrom the town of Harrison, and in performing its contract, made use of a line of

pipes, laid by Jersey City in the township of Kearney many years before, to transmit the water to the water system of Harrison. *Held*, that the property which the New Jersey Suburban Water Company acquired in the water was not divested by its delivery to, or transmission through, such pipes.

(Syllabus by the Court.)

Error to Supreme Court.

Action by the New Jersey Suburban Water Company against the town of Harrison. Judgment for plaintiff, and defendant brings error. Affirmed.

Edward Kenny, Michael T. Barrett, and George L. Record, for plaintiff in error. Collins & Corbin, for defendant in error.

MAGIE, Ch. The judgment of the Supreme Court brought up by this writ of error was entered upon a finding of a justice of the Supreme Court, trying the issue in the cause, without a jury, by consent. The issue was made up by a declaration containing a special count grounded upon a contract between the plaintiff and the defendant municipality for a supply of water at special rates, the common counts and a plea of the general issue. The only exception in the record is to the finding of the trial judge, and on this exception the sole assignment of error is founded. The contract on which the first count is founded has been attacked for invalidity by parties deeming themselves injured thereby. At the time of the trial of this cause, the Supreme Court had affirmed the validity of the contract, but a writ of error had been sued out, and the review thereon was then pending. By the decision of this court, just announced, the judgment of the Supreme Court has been affirmed. *Jersey City v. Harrison*, 62 Atl. 765. There is, therefore, no legal objection to the finding of the trial judge upon the contract, if there were facts before him upon which he might reach his conclusion. There was evidence from which it might be inferred that a specified quantity of water had been furnished by the water company to the municipality under the contract, during the period covered by the suit, and that the water furnished was the property of the water company. It is suggested that the fact that the water in question was delivered to the company through a pipe which had been laid by the city of Jersey City within the township of Kearney, the ownership of which pipe was claimed by Jersey City, required a finding that the water was not the property of the water company, but was the property of Jersey City. When a case is tried by a judge without a jury, the weight and sufficiency of the evidence to support his finding cannot be reviewed. *Weger v. Delran*, 61 N. J. Law, 224, 39 Atl. 730; *Wannamassa Park v. Clark*, 61 N. J. Law, 611, 41 Atl. 153. There was evidence that the water in question had become a commodity, and had been bought and paid for by the water company. The property therein would not be lost by making use of

the pipe of another person to transmit the water to its customers. The company may be liable to Jersey City for such use of the pipe in question, or might possibly have been prevented from making use of the pipe, but such use neither divested the company's property in the water, nor vested any property therein in Jersey City.

The judgment on the finding must be affirmed.

DIXON, J. This suit was brought to recover the stipulated price of water upon a sealed contract entered into on September 15, 1903, by the plaintiff and defendant. The contract bound the plaintiff to furnish to the defendant a water supply, delivered at a designated place, and bound the defendant to receive and pay for the water so delivered. The water was thus furnished and received, and, under the circumstances developed in this case, I think the defendant is estopped at law from denying the claim of the plaintiff for the price. The theory that the plaintiff had delivered the water to Jersey City at another place, and Jersey City had conveyed the water to the place designated in the contract and there delivered it to the defendant, and would demand compensation therefore, was one which, in the face of the contract, could not avail the defendant at law, and would be pertinent, if at all, only on an equitable bill of interpleader.

I concur in affirming the judgment.

WOOD & NATHAN CO. et al. v. AMERICAN MACH. & MFG. CO. et al.

(Court of Chancery of New Jersey. Jan. 16, 1906.)

1. CORPORATIONS — STOCKHOLDERS — RIGHTS — STATUS AS CREDITORS.

Where complainants financed a corporation under an agreement that they should have the practical control of the corporation, although not a majority of the stock, and afterwards became liable as indorsers on notes of the corporation, and the holder of the majority of the stock subsequently repudiated their rights and asserted a right in himself to the assets of the corporation, complainants were entitled to also repudiate the transaction on their side, and to stand as creditors of the corporation to the extent of the amount paid by them on the notes which they indorsed, and to enforce an equitable lien on the proceeds of such notes which stood to the credit of the company in the bank.

2. SAME—RECEIVERS—GROUNDS—INSOLVENCY.

Evidence held to show that a corporation was in a condition of insolvency such as to justify the appointment of a receiver.

3. SAME.

It is not necessary to show that a corporation is absolutely insolvent, in order to throw it into insolvency and authorize the appointment of a receiver; but it is sufficient if it appears that it cannot continue in business.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2201-2203.]

4. SAME—PROCEEDINGS—RIGHT TO MAINTAIN — STOCKHOLDERS AND CREDITORS.

Persons who were both creditors of and minority stockholders in a corporation and who

financed the corporation under an agreement that they should have practical control of its business, and whose rights were repudiated by the owner of the majority of the stock, had a sufficient standing to enable them to maintain receivership proceedings against the corporation.

Bill by the Wood & Nathan Company and others against the American Machine & Manufacturing Company and another. On motion for a receiver. Granted.

William H. Corbin, for complainants.
Spencer Simpson, for defendants.

PITNEY, V. C. (orally). I will dispose of this motion now for present purposes. This is a bill filed by a company—Wood & Nathan company—which is composed of two gentlemen, Mr. Wood and Mr. Nathan, against the American Machine & Manufacturing Company, asking for a declaration of insolvency and the appointment of a receiver. The application is contested.

The circumstances developed are these: A Mr. Kavenaugh, who also is a defendant, was in 1904 the owner of some patents for making small printing machines for printing handbills and labels and things of that kind, and to be run by power with great rapidity. He had organized the defendant company, the American Machine & Manufacturing Company, and had put these patents all in as of a certain value, and issued to himself I don't know how much stock—\$75,000—which was a patent fraud on the act of the Legislature. He had no money with which to run the company. He was not getting on either with manufacturing or selling. As it was a new thing, it required, confessedly, first, to have the machines manufactured, and have them manufactured under the superintendence, as he had no factory of his own—manufactured under the supervision—of a skilled mechanic; then to have them marketed by selling single ones, by personal application to the parties who would be likely to use them, engaged in printing that sort of thing; then they were to be set up on trial for 30 days to see whether the purchaser liked them. In the meantime they were to be watched by a skilled mechanic to see how they worked. Then, in order to promote the sales, further time was to be given to the party to try them for a while in addition to the 30 days—take them not only on trial, but to pay for them by installments. Now this was a slow business. It required capital. And it is not at all similar to manufacturing an article that sells by the dozen or the hundred, that has an established market; but every single machine has to be sold by personal application in each particular case, and then on the terms I have spoken of.

In this situation of affairs Mr. Kavenaugh fell in with the complainants, men engaged in the business of selling that sort of thing, and incidentally, as it appears, and manifestly as a part of this business, advancing

of money for the manufacture and attending to the whole thing on a good commission. The result was that they made a contract, or a series of contracts. In the first place complainant advanced \$25,000 hard cash for a little less than half the stock, leaving Mr. Kavanaugh still in control of the stock. Now, I believe there is no doubt they advanced that \$25,000 cash. Then they met in New York City and elected officers. Mr. Wood was elected president at large. Mr. Nathan, Mr. Kavanaugh, and a Mr.—somebody, a mere dummy—were elected directors, making the requisite number of three. Then Mr. Nathan was elected treasurer and general manager. An office was opened at No. 1 Madison avenue, New York City. Then they agreed to pay Kavanaugh \$70 a week. I did not understand for what, but I think he said it was for looking after the machinery and for standing around and making himself generally useful; not for selling. He was not to do any selling, but he was—I have no doubt, if he had an interest in the thing—to look up purchasers; but the real selling was to be done by the complainants. And he was to have his expenses. They commenced business. They employed a firm in Newark, Richards & Co., to manufacture these machines, and they employed an expert, Mr. Morrison, who had invented part of the machine, to see that it was built rightly. And that was very proper, because, while Mr. Richards might be a first-rate machinist, these machines were of a delicate character and very rapid runners, as I understand. So that, when assembled, they must be adjusted with the greatest nicety, and so they had to have a man there to attend to it. So that the payment to Mr. Richards of the contract price, \$400 or \$500, whatever it was, was not the whole consideration, by a considerable. Then they commenced to sell, and they sold on the terms above stated one after the other, and in almost every instance there was fault found. This machine did not work in this way and that one did not work in that way. In fact, it was a delicate machine, a rapid-running machine, and I have no doubt that Mr. Nathan (I think it was) told the exact truth when he said that they had to be run by a practical man, a man who was himself something of a machinist. They were liable to get out of order. Complainant had trouble in collecting from the persons to whom they sold the payments as they came due. They found fault; and Mr. Morrison had to run after them and keep the machines going. I state this to show the character of the business. They are not salable at all, in the sense that ordinary merchandise is, at the very best.

Well, the business went on, and the \$25,000 is gone. As I understand, Mr. Kavanaugh got about \$9,000, something like that, for his \$70 a week and expenses, and the concern was out of money. The corporation had given two notes, both payable on the

same day and at the same time on their New York bank, for \$3,700 each to Messrs. Richards & Co. for work done, as I understand, on goods taken away—because naturally Messrs. Richards, though there was nothing proven about it, would hold their lien on the machines before they were taken away—and the complainants were obliged to indorse those notes because Messrs. Richards would not take them without. Wood and Nathan, the complainants, indorsed those two notes. They were given on September 2, 1905, and they were for \$3,712.80, including interest, each, and they came due in New York on the 2d day of January at the complainants' bank. Now there they were liable for \$7,400. Then the corporation needed more ready money, and on the 16th of November the complainants indorsed the note of the company for \$10,000 at four months, payable at their own bank, and got it discounted at their bank, and Mr. Paul Nathan himself individually indorsed it, as well as Mr. Kavanaugh; and that was put to the credit of the corporation at the bank.

In the meantime some disputes arose between them, and Mr. Kavanaugh was asked to transfer to complainants the half of certain patents which by his contract he had agreed that he would transfer to the company, or that the company held at the date of the contract, and the complainants found that the company did not own them, and they further found they were chargeable with interference by a company that did own a patent of that kind, something about the delivery of the printed sheet after it had passed through and been printed. And that that is so is pretty clear—not only not denied by Mr. Kavanaugh, but Mr. Morrison swears that he went to Boston and prepared changes in the machinery for delivery to attach to the machines—the one they had sold there—to prevent an interference with this very patent. That is what I understood him. At any rate, they had a dispute because Mr. Kavanaugh did not deliver this particular patent which he had made a sworn statement belonged to the company. And by and by Mr. Kavanaugh blurts out "You are not officers, anyhow." Now it was a part of the contract that those gentlemen, the complainants, should have control. Perfectly plain. They were not disposed to put their money into that concern and take the responsibility of running it and selling the machinery, unless they had control, and although Mr. Kavanaugh retained a majority of the stock, yet at the election of the directors these two gentlemen were put in substantial control of the company, handled its money, and so protected themselves against a variety of disasters which are liable to overcome one of those companies.

Now, I say that in the month of December last disputes arose, and some hard feeling arose between Kavanaugh and the complainants. The result was that Mr. Kave-

naugh told them, declared verbally that they had not any rights, they were not officers, that the election in New York was void, and that he was the master of the whole concern. And that was, according to the evidence of Mr. Wood, after this \$10,000 note was signed and indorsed. Well, there is their position. They were indorsers for \$10,000 on paper of this company in their bank for cash lent, and they were indorsers on \$7,400 more of paper that had been given to the Richards Company, the manufacturers. That makes \$17,400 of liabilities, and they are coolly told by this Mr. Kavanaugh, who is, as far as appears, practically impecunious, that he is the master of the corporation, and they have no standing. Now, the letter to that effect was written by Kavanaugh December 30th, but before that date Mr. Wood swears—and I do not recollect, but think that Mr. Nathan swore to the same thing—Kavanaugh had spoken of it personally. Now, let us see what that letter is, dated December 30, 1905, which I think the evidence warrants me in holding to be an echo, a reiteration in writing, of what he had previously stated orally. Now, the company had been writing letters, I think, and all that sort of thing, dated at the office. Yes, they had their shingle out, and all that, at No. 1 Madison avenue, New York City; but here is a letter which says: "Principal Office, 825 Federal Street, Camden, New Jersey." That shows that the office of the company had been changed from No. 1 Madison avenue, New York City. But it also says: "New York, December 30, 1905. H. A. Wise Wood and Paul Nathan, 1 Madison Ave., New York—Sirs: As president of the American Machine and Manufacturing Company"—now, mind you, Mr. Wood was the president of the company—"I hereby notify you that the meeting of the stockholders which you pretended to hold in New York City November 20, 1904, was illegal and not in accordance with the laws of New Jersey, as all stockholders' meetings must be held in the state of New Jersey, and that your pretended appointment as president, treasurer, and general manager"—there is an admission that they had been appointed president, treasurer, and general manager—"is null and void; and therefore as president of such company I give you notice that I demand possession of all property, contracts, papers, and effects of said company, and hereby warn you not to interfere in the management or business of said company, either as president, treasurer, or general manager, or otherwise. And I further give notice that we shall hold you amenable to the law by any acts done by you to the affairs of the company and its capital. Joseph T. Kavanaugh, president."

Now, I repeat, I shall consider that as a simple reiteration of what he had said to them verbally before that. Now, with that kind of talk—no matter that that election in New York City was good as to strangers and would bind that company in giving all

these notes in the bank, and giving the notes to the manufacturers; grant that they could not repudiate these notes—yet as between these people who were parties to the transaction a different question arises, and that was a very disagreeable and inequitable threat to make to complainants. And the question was, what were they to do then? Why, one of the statements of complainants' counsel—I do not know that it was supported by proof—was that before this letter was written they had gone to the company office and demanded to see books, etc., and they would not show them to them. That was the statement made here yesterday when a motion was made. I think it is in the petition on file here. I think that states that on a particular day, some time before December 30—

Mr. Simpson: "We went to inspect the books."

"The Court: Yes. That shows what the situation was. They were being threatened by holders of a majority of the stock with entire repudiation of their rights. Now, what was their situation? Why, I say they were on the paper of the corporation for \$17,500. Of the proceeds of that note which had been discounted, put to their credit, there still remained in the treasury of the company to their credit in the bank \$7,500. Now, clearly, complainants had a lien on that money in equity, in my judgment. Under that threat it did not lie in the mouth of Mr. Kavanaugh to say: "I have got the advantage of you. You have, with my knowledge and consent, indorsed the paper of that corporation for \$10,000, and have put the proceeds in the treasury, and you cannot draw it out because you are not treasurer, and you cannot help yourself. We have got \$10,000 out of you. We stuck you as an indorser for \$10,000, and we have got you stuck as indorser for \$7,500 on the company paper; and according to my view I have a right to draw that money. I have a right to take that \$7,500 out of the bank and put it in my pocket and leave you to pay the other \$10,000 and \$7,500 that you are indorsers on to the bank and the manufacturers of Newark." Now, a gentleman that would take that ground was not too good. If he could do it, to get that \$7,500 out of the bank and put it in his own pocket and leave the complainants to pay the whole \$17,400. Now, in my judgment, they were perfectly justified in equity, while the money was under their control, in taking it and satisfying the debts of the company as far as they could. And it makes not a particle of difference how they did it; for if they had held that \$7,500 and applied it to the payment of those two notes that matured January 2, 1906, they would still have been liable on the \$10,000, and so it is only a question of time.

Counsel says: "Why, that \$10,000 is not due until March 16th," and by their own act

their debt is not due. But it is a debt in present solvendum in futuro. And there are other debts. There are debts that are past due to the manufacturing company, and I think there are other debts sworn to by the complainants. They are small, to be sure. But in my judgment the complainants had a right to change that transaction, and go right back to November 16th, and put the affairs right back to their original position, and repudiate the whole thing. If Mr. Kavanaugh proposed to repudiate their rights, they had a right to repudiate, on their side, what they had done. Therefore, in my judgment, they are entitled to stand here as creditors for the \$7,400 which they had paid on the Richards note, and for \$2,500 on the \$10,000 which they were obliged to pay out of their own pocket in order to take up the note. That makes \$10,000. Now, I forget how much the other little debts amounted to—\$1,000 or \$2,000 I believe. If the only debt was that \$1,000 or \$2,000, probably this court would not grant the motion. But, on the other side, what are the assets? Not a dollar in money, or not a dollar that is available. I cannot treat these two or three dozen machines here as available, for the reasons I have already stated. But, in addition to that, they are acknowledging the defects of those machines by inventing improvements to put on them, and they are held now from sale for the purpose of adding \$100 or \$200 or \$300 to each one by some new attachment in order to make them more salable and more desirable, more liable to be kept and used after they are put up for trial. The trouble with them is that people who take them for trial are not satisfied with them and do not keep them. I am satisfied the evidence on that subject of Mr. Nathan is reliable—borne out somewhat by proofs. The result is that they are not available assets. They may become available by somebody coming in, who is willing to put in \$10,000 or \$15,000. They may be made security for that. But in order to accomplish that you must get somebody that has faith in them. It is an individual transaction, and I do not see that Kavanaugh has turned his hand over one particle to try and raise the money since the break with the complainants.

I therefore adjudge—though I will not sign my name to anything at present—that this company is in a condition of insolvency, which justifies the appointment of a receiver. Now, right there, it is not necessary that it should be absolutely insolvent in order to throw it into insolvency. It is sufficient if it cannot go on. Now in its present condition I am satisfied it cannot, and that these complainants have a proper standing in court. I have spoken of them as creditors, but they are also stockholders. They have a right to intervene as such, and their standing as stockholders under the circumstances of this case is much higher than it is as credit-

ors. I will not enlarge on that, because I think the other is sufficient; but their standing as stockholders is much higher than that of creditors. They are entitled to the greatest consideration as stockholders, because they put all there is of value in the enterprise. They put in \$25,000 in cash, besides the \$10,000 that they have also advanced as creditors. In effect that makes \$35,000. They say the present is a situation which ought not to go on any further. The two positions support each other. I will, though, postpone the appointment of a receiver, continuing the injunction for one week, or rather until next Tuesday, and if in the meantime Mr. Kavanaugh has shown that he is taking sensible—not flighty, but real sensible—means of raising this money, indemnifying these gentlemen, and will get somebody to give them a bond—I do not suppose they want the money, and I would not make them; I would not countenance them in demanding the money if a good bond was offered, or something of that kind—why, I will consider whether I will give them any more time, but I will not make any promise beyond next Tuesday. In the meantime the injunction stands. I say this: I will not go beyond next Tuesday. The proposition is not stated in the presence of Mr. Corbin, who has left the court, and I do not wish to do anything to affect the case without having the benefit of his argument.

Whatever settlement takes place will be done by approval of the court. The court will let up the injunction far enough to allow you to carry it through.

LLOYD v. TURNER et al.

(Court of Chancery of New Jersey. Jan. 12, 1906.)

1. HOMESTEAD — RIGHTS OF WIDOW — LIABILITY FOR RENT.

Under the statute giving to a widow the right to enjoy "the homestead" during her life, where dower was never admeasured to a widow, she during her life was entitled either to occupy or rent it at her election, without any obligation on her part to pay rent.

2. TENANCY IN COMMON—OCCUPATION—RENTS — LIABILITY TO ACCOUNT.

Where the use of a dwelling house by a tenant in common did not amount to a denial of the rights of her tenants in common, and she did nothing to prevent them from equally enjoying the property, she was not bound to pay rent for the part occupied by her, in the absence of an express agreement.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy in Common, §§ 76, 78.]

3. SAME—RENTS AND PROFITS—ACCOUNTING.

Where one tenant in common collected the rents from a portion of the property which was rented by her, she was bound to account to her co-tenants for the amount so received, less reasonable expenditures for repairs, restorations, taxes, interest on mortgages, if any, insurances, etc.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy in Common, §§ 76, 79, 95-98.]

Suit between Elizabeth Lloyd against Helen Turner and others for partition. Decree for complainant.

Howard Carrow, for complainant. J. S. Westcott, for defendant.

GREY, V. C. (orally). The bill in this case is filed for the partition of a house and lot at Fourth and Berkley streets, Camden, N. J. The property was derived from one Edward Augustus, who, at the time of his death, was seized of it in fee. He left a widow and four children him surviving, to whom, at the time of his death intestate, the fee simple of the property descended, subject to the dower right of the widow, Mrs. Edward Augustus. At the time of the death of Mr. Augustus, it is undisputed that the property consisted of a dwelling, part of which was used separately as a store and rented out by Mr. Augustus; and of a small shop in the rear of the lot, the lower story of which he rented out, and the upper story of which he used for his own convenience and business. Mrs. Edward Augustus survived her husband, and with the family then occupied the dwelling house as their home. The law is that the homestead property of the intestate husband, in which the husband and wife resided at the time of the husband's death, may be thereafter occupied by the widow without any obligation on her part to pay rent. It has been further held in exposition of the status of the widow in the privilege of her quarantine, that the statute which gives her the right to enjoy "the homestead," gives her the right either to rent it to others, or to occupy it for her own use as she may choose. I think, therefore, that, as her dower estate was never admeasured to her, there should be no accounting for any portion of the home property at Fourth and Berkley streets for any occupation or renting of that property by Mrs. Augustus, the widow of the ancestor, during her life, which lasted up to January, 1900. It is quite plain that what her daughter, Mrs. Lloyd, did during that period was really done in behalf of Mrs. Edward Augustus, the widow of the decedent owner, for which, having received the authority and approval of Mrs. Edward Augustus, widow, enjoying her quarantine in the property, Mrs. Lloyd cannot be called upon to answer to anybody else.

This is not the only ground upon which the cross-bill rests, for the cross-bill complainant insists that Mrs. Lloyd, the complainant in the original bill, should, since the time of the death of the widow, account for the use and occupation of the dwelling house during the period that she has occupied it for her own use. It is not shown that Mrs. Lloyd has, in occupying the dwelling house, done anything which was in the nature of a denial of the rights of her co-tenants in common, or that she did anything that amounted to an exclusion of the other tenants from enjoying

the property with her, according to their several rights, nor has there been any sufficient showing that she obligated herself, by express agreement, to pay rent for the portion of the property which she occupied. There has been some mention made here that she did agree to pay rent to the other tenants for her occupation of the premises. She says she did not. The testimony that she did is not sufficient to justify any decree that Mrs. Lloyd shall pay rent for the dwelling portion which she occupied. A claim is made that Mrs. Lloyd did not object, or that she was at least willing to make the payment of \$15 a month for rent. Testimony on this point was given by Mr. Turner. The alleged leasing was wholly by parol, and was in its essential incidents, quite uncertain. Mr. Turner, in narrating the conversation, did not say that Mrs. Lloyd agreed that she would rent the property, and would pay \$15 as rent, but only that she agreed that \$15 per month was not an unreasonable rent. The alleged agreement did not specify the term for which Mrs. Lloyd was to occupy the premises, nor as stated does it show that there was, in fact, any demise thereof. The testimony does not satisfy me that there was any agreement which either at law or in equity charged Mrs. Lloyd with an obligation to pay rent, since her mother's death in January, 1900, for that portion of the premises which she occupied as a dwelling house, by herself and her family.

It is quite evident to me that the use made of the other portions of the premises stands on an entirely different basis. Mrs. Lloyd ought to account for those rents and profits which she collected after her mother's death in January, 1900, for the occupation by various lessees of the store part of the dwelling house, and also for the rents and profits which she received and collected for the use of the shop in the rear of the lot. The rentals thus collected by Mrs. Lloyd should constitute the left side of the account, showing what should be charged against her. On the other hand, she is entitled to be credited for any expenditures by her made for repairs and restorations, or for the payment of taxes, interest on any mortgages, if any there were, insurances, and such other lawful expenditures as she may have made in the care of any of the property. These should make up the right side of the account, and constitute the credits to which she is entitled. It is quite possible that, as I have settled the basis upon which Mrs. Lloyd must account, the parties may come to an agreement on that branch of the case. If they can, it would be a happy thing. If the clients will let counsel alone, it is probable that they will arrange this accounting without further contest or expense.

I will hold the matter for a week. If the parties are unable to agree, I will refer it to a master to state an account in accordance with the conclusions above expressed.

**ISLAND HEIGHTS ASS'N v. ISLAND
HEIGHTS WATER POWER, GAS
& SEWER CO.**

(Court of Chancery of New Jersey. Jan. 12, 1906.)

1. COVENANTS — USE OF REAL PROPERTY — PERSONS ENTITLED TO PROTECTION.

An owner divided a tract into lots, and conveyed the same by deeds binding the purchasers not to use the premises for any purpose except as a residence or summer resort, without the consent of the owner or his successors. *Held*, that the purchasers took the lots under the protection of the restriction, so long as the owner and his successors saw fit to hold it in force.

2. INJUNCTION—LACHES.

A party beneficially interested in the enforcement of a restrictive covenant in a deed conveying land for specified purposes only must come into court promptly in order to obtain equitable relief.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 199.]

3. SAME.

A bill by a land company, dividing its land into lots and conveying the same by deeds binding the purchasers not to use the same for any purpose save as a residence or summer resort without its or its successors' consent, alleged that it had conveyed more than 95 per cent. of the tract; that a purchaser erected waterworks on its lots and supplied water to the inhabitants of the tract; that the secretary of the land company protested against the location of the waterworks, and suggested other locations equally desirable. The bill did not show that any lot owners whose property could possibly be affected injuriously made any objection to the continuance of the works, nor did it show that the land company held any lots injuriously affected thereby. The land company waited for more than three years, while the purchaser was expending large sums of money and establishing a valuable public improvement. *Held*, that it was barred by laches from maintaining the bill praying for a mandatory injunction, and should be left to its remedy at law.

Suit by the Island Heights Association against the Island Heights Water Power, Gas & Sewer Company. Demurrer to bill sustained.

E. B. Leaming, for complainant. H. H. Van Voorhees and Norman Grey, for defendant.

STEVENSON, V. C. The demurrer will be sustained.

1. The covenant which the complainant invokes to sustain its bill provides that the grantee, his heirs and assigns, should not "at any time hereafter without the written consent" of the complainant, the grantor, "and their successors," use or occupy the land conveyed, or suffer or permit the same to be occupied, "as a boarding house, store, or for any mercantile or mechanical trade or purpose whatsoever, or for any other purpose except as a residence or summer resort." The case differs in what seems to be a very important respect from the class to which *De Gray v. Monmouth Beach Co.* (1892) 50 N. J. Eq. 329, 24 Atl. 388, belongs.

Whether the large number of different purchasers, who have acquired portions of the tract, which the complainant laid out, by deeds containing this covenant, acquire a right to have the covenant enforced for their benefit to the same extent that such right would exist if the restrictive covenant were not by its terms made subject to discharge by the written consent of the covenantee, is a question which has not been raised in this case, and need not be considered. There are no grantees before the court except the defendant. The original covenantee is the sole complainant, and although the bill endeavors to show that the complainant is moving in part, at least, at the instance of "various of the property owners on said tract," the interest of these other property owners in the enforcement of the covenant—the injury, if there be any, to these other property owners caused by the alleged violation of the covenant by the defendant—is not disclosed. Inasmuch as we are dealing in this case with the right of the complainant on its own behalf to enforce this covenant, perhaps the peculiar feature of the covenant above mentioned, which may distinguish the case from those which have been cited on the argument, may be disregarded. All the purchasers of lots on this tract took their property, not, as in the other reported cases, under the protection of an apparently perpetual covenant restricting the use of each lot for the benefit of all, but protected in that way only so long as the grantor and its successors should see fit to hold the restriction in force. It has not been insisted, however, on behalf of the defendant, that the reserved power of the complainant at any time to discharge lot owners from this restrictive covenant makes the covenant purely a personal one, and therefore, without any consideration of that question, I shall apply to the decision of this case the principles which have been laid down in the reported cases, where the restrictive covenant has been absolute and not expressly made inapplicable whenever the covenantee sees fit to give a written consent to the doing of what without that consent would be a breach of the covenant. Whether the covenantee in a case like this holds the covenant in trust for all the lot owners, and must exercise his power to give written consents in good faith, impartially, and with the greatest good to the greatest number of lot owners constantly in view, is another question, which has not been and need not be considered. It may be noted that in another part of this covenant restrictions are imposed perpetual in form and not subject to discharge by the written consent of the covenantee.

2. The bill charges that the defendant erected its works "with a preconceived determination * * * to violate said covenant and in defiance" of the complainant's

rights, and with the further determination "to erect the same at the risk of subsequently being compelled to comply with the terms of said covenants." Notwithstanding this allegation, an argument of considerable force has been submitted on behalf of the defendants to sustain the proposition that the actual conduct of the defendant alleged in the bill is not violative of the terms of the covenant. No doubt the defendant, having established its works on its property with full knowledge of this covenant, must be deemed to have intended the natural consequences of its acts. If what the defendant has knowingly and intentionally done constitutes a violation of the covenant, it follows that the defendant must be held to have determined and intended so to violate the covenant according to the allegations of the bill. I do not mean, however, to construe the covenant in its relation to the conduct of the defendant complained of in the bill, and therein alleged to be violative of such covenant, further than to point out that there appears to be some room for argument in defense of the charge that the covenant in fact has been violated. In such cases, where there is room for doubt, I think far greater effect may be given to the complainant's laches than in cases where it is perfectly clear that the defendant, with or without the aid of counsel, could not in good faith have supposed that his proposed operations were not within the prohibition of the covenant which he or his grantor had made in relation to his land.

3. The defendant erected its waterworks "in the winter of 1901 or spring of 1902" on lots which had originally been purchased by deeds containing the restrictive covenant, and proceeded to engage in the business of supplying the inhabitants of the Island Heights summer resort with water. The inference from the allegations of the bill is that the defendant, for over three years prior to the commencement of this suit, maintained its plant upon the lots in question, and carried on the business continuously of supplying this summer resort with water through pipes in the streets leading from their standpipe to the houses of the inhabitants of the place. The bill denies that the complainant has ever given its written consent to the erection of these waterworks, and denies that it has waived the covenant or in any way acquiesced in or assented to the maintenance of said works. The only allegation in the bill, however, which in any way explains the delay of the complainant in bringing this suit while it stood by and permitted the defendant to construct its plant and prosecute its business of supplying water to this community of summer residents, is as follows: "When it was proposed to erect the storage tank, water tower, or standpipe in lots 31 and 32, block 25, William T. McKaig, then secretary of the Island Heights Association, learning of said contemplated action by

Charles Beck (promoter of said company, then being and still remaining its president and chief stockholder), did remonstrate with the said Charles Beck, and protested against said location upon the lots aforesaid as obnoxious to the surrounding community and detrimental to the value of properties in that vicinity, and suggested other locations equally desirable for the purpose and free from the objections thereto." It does not appear with distinctness that the protest of Mr. McKaig was made in his official capacity on behalf of the Island Heights Association, or that such protest was based upon the assertion of any right on behalf of the association under this covenant. The gist of the protest seems to be that the establishment of the waterworks upon the lots selected for them would be injurious to property and property owners in the immediate vicinity, and the suggestion which accompanied the protest might perhaps be deemed to carry the implication that the waterworks would be permitted upon other lots of the association, notwithstanding the restrictive covenant. If, however, upon general demurrer a construction is to be placed upon the bill more advantageous to the complainant, it still remains true that it does not appear that Mr. McKaig had any authority from the corporation of which the bill alleges he was secretary to make this protest on its behalf, or that the corporation ever ratified or learned of this protest until immediately before the commencement of this suit. The secretary of this water company certainly had no power *ex officio* to make such a protest. For all that appears the president of the corporation may have taken an entirely different view of the operations in which the defendant proposed to engage. It is true the defendant had full notice of this restriction, but it also knew that the entire force of it at any time might be removed by the consent of the land company. The land company was thus absolute master of the situation and deliberately elected to do nothing, to wait for more than three years while the defendant was necessarily expending large sums of money and apparently establishing a valuable public improvement.

In determining the effect of the complainant's laches, the beneficial effect of the covenant should be borne in mind. It has been held in cases of this kind, but where the covenant was on its face apparently intended to be perpetual, that the grantor holds the covenant, not only for his own benefit, but also as trustee for all the purchasers of lots and their grantees. *Peck v. Matthews*, L. R. 8 Eq. 518 (1867); *Trout v. Lucas*, 54 N. J. Eq. 361, 368, 35 Atl. 153 (1896). After all, or even a portion, of the lots, have passed from the original owner, the projector of the scheme, he (the covenantor) may have no interest whatever in the enforcement of the covenant, and its whole binding operation practically may be among the grantees of the covenantor and their successors in title. If

the covenant in this case is held by the complainant in trust, such trust, as we have seen, is coupled with a discretionary power to discharge grantees from the operation thereof. The bill alleges that in a few cases lots had been wholly released from this covenant, where "for the benefit of the public" the complainant deemed such release expedient. The bill does not show that any lot owners whose property can possibly be affected injuriously by the maintenance of the defendant's waterworks make any objection to their continuance. The action of the lot owners who have petitioned the complainant to compel the defendant to remove its waterworks, the location of whose lots in relation to the waterworks is not set forth, may have been dictated by an arbitrary or malicious desire to injure the defendant. For all that appears the property of these objecting parties may be so remote from the waterworks that they are in no way affected by them. On the other hand, it appears distinctly that certain of the lot owners occupying their property as residences are receiving water from the defendant's works. The relief which the complainant prays for necessarily involves the cutting off of this public water supply, and it is fair to presume from all the allegations of the bill that such a result would be a very great injury to many of these lot owners, in whose interest to a large extent this covenant was inserted in the original conveyances, and in whose interest, also, provision was made practically for a release from the covenant where "the benefit of the public" called for such release. If this covenant is held in trust by the original covenantee, it would be quite unsafe to permit him to enforce it against the defendant in this case by a mandatory injunction. However, I am not dealing with any question of nonjoinder of necessary parties, but merely pointing out that the complainant in this case must, I think, be limited strictly to the enforcement of its own rights which it holds on its own behalf. Whether, in case this covenant must be deemed to be held by the complainant not only for its own benefit but also in trust for the lot owners, these lot owners, or any of them, after this long delay, can enforce the covenant against the defendant by a mandatory injunction, or in case the waterworks are a great benefit to them and not injurious to any of them, they can practically compel the complainant to consent to their continuance, are questions suggested in this case which need not be considered. Confining the scope of this inquiry to the grievance which the complainant sets forth on its own behalf, it is important to note that the bill alleges that "a large percentage of lots comprising" the tract laid out by the complainant has been conveyed by the complainant to various parties, and that at present "more than 95 per cent. of the said tract of land is held by persons under deeds of conveyance made by the

complainant containing the covenant." It does not appear that the complainant, who remains the owner of less than one-twentieth of the tract, now holds a single lot which is injuriously affected by the maintenance and operation of the defendant's works. The complainant may not be able to recover at law more than nominal damages.

The complainant, by its long delay, has indicated that it has no personal interest in the enforcement of the covenant. There is nothing to show that there are any other lot owners whose property is injuriously affected by the waterworks, or, assuming that there are such lot owners, that any one of them desires specifically to enforce the covenant or is now in a position to procure from a court of equity a decree for such specific performance. But, however this may be—assuming that this covenant is enforceable in equity at the instance of the lot owners other than the covenantee—the grievance of such lot owners cannot be redressed upon this bill. They are not before the court. The rule in cases of this kind is that the complainant, the party beneficially interested in the enforcement of the restrictive covenant, must come promptly into court if he is to have the aid of an injunction. *Trout v. Lucas*, supra. The complainant cannot repose upon any notice which he may give or the defendant otherwise may have received of the existence of the restriction. *Ocean City Association v. Hadley*, 62 N. J. Eq. 322, 338, 50 Atl. 78 (1901); *Roper v. Williams*, Turn. & R. 18 (1822).

Under the circumstances of this case, with no complaining party before the court who is shown to have a beneficial interest in enforcing this covenant against the defendant, and in view of the peculiar nature and function of the covenant itself, the laches of this complainant, the original covenantee, is a bar to the drastic remedy prayed for in its bill. The complainant should be left to prosecute its remedy at law. Whether, apart from the objection of laches, the bill presents a case for an injunction, is a question which need not be determined.

FORRESTER et al. v. ISLAND HEIGHTS ASS'N et al.

(Court of Chancery of New Jersey. Jan. 12, 1906.)

1. EASEMENTS—THREATENED INJURY—PROOF—SUFFICIENCY.

To prove that a corporation purchasing land threatened to use it for hotel purposes in violation of easements granted by the vendor to third persons, it was shown that one of the original stockholders of the corporation drafted a resolution for submission to the borough council indicating a purpose on the part of the corporation to use the premises for hotel purposes. It was not shown that his act was the act of the corporation, nor that it proposed to proceed to use the land for hotel purposes until all private interests had been adjusted. Held insufficient to show a threatened violation of the easements of the third persons.

2. SAME—PROTECTION—AID OF EQUITY.

An owner of an easement cannot ask the aid of equity to protect the easement against the acts of the owner of the fee until the latter threatens to interfere therewith.

3. SAME — DISTURBANCE — CONVEYANCE OF FEE.

A transfer of the fee in land is not an interference with an easement therein, and the owner of the easement cannot require the owner of the fee to continue to hold it.

Suit by James Forrester and others against the Island Heights Association and others. Demurrer to bill sustained.

Norman Grey, for complainants. E. B. Leaming, for defendants.

STEVENSON, V. C. I shall advise an order sustaining the demurrer.

1. Conceding all claims on behalf of the complainants which have any basis whatever, the defendant the Island Heights Association, after the dedication of the "camp ground," retained the fee of all the land so dedicated. The property so retained by this land company appears to have been valuable. At any rate it is not alleged in the bill that the defendant's title, even when subjected to all possible public and private easements and restrictions set up or suggested in the bill, had not a substantial money value. These restrictions all appear to have been and to be now susceptible of extinguishment. A speculative purchaser might pay even a large price for 20 acres of land on the seashore, embracing a lofty bluff and a grove, even though subject to all the public and private rights set forth in the bill.

2. The Island Heights Association in July, 1893, conveyed a part of the "camp ground"—apparently a small part—to one Angeline D. Brinley, who in 1896 conveyed the same parcel to the defendant James Bryant. In March, 1901, the association conveyed the remainder of the "camp ground" to one Ralph B. Gowdey for the sum of \$5,000, and took back a mortgage to secure that sum. In November, 1903, Gowdey, together with one Louis F. Bodine, to whom Gowdey had conveyed an undivided half of the land which he had purchased, conveyed the property to a corporation named the Island Heights Hotel & Improvement Company, one of the numerous objects of which was to acquire, own, improve, and sell real estate. The bill insists that all the conveyances by which the legal title to the "camp ground" passed from the Island Heights Association to the Island Heights Hotel & Improvement Company and James Bryant should be declared void, and prays that the land may be conveyed back to the association, and that the mortgage for \$5,000 may be surrendered and canceled, and that the defendants may be perpetually enjoined from making any further transfers. The only parties brought in as defendants are the two corporations and James Bryant. It is not necessary, however, to notice the questions which have been raised, or the

questions which might have been raised, as to the misjoinder or the nonjoinder of parties.

3. The fatal defect in the case presented by the bill consists in the failure to allege that the defendant the Island Heights Hotel & Improvement Company or the defendant James Bryant has threatened to put the land to any use which will be violative of any of the alleged public or private easements or other rights in which the complainants or any of them are interested. The sole suggestion of any such purpose is found in the draft of resolution submitted to the borough council in August, 1904, by the said Louis F. Bodine, who appears in October, 1903, to have been one of the incorporators and original stockholders of the Island Heights Hotel & Improvement Company when that corporation was created. This act of Bodine is not alleged to have been the act of the corporation, and, if it was, it is not alleged that the corporation is proposing to proceed with the use of the "camp ground" for hotel purposes until all private interests have been adjusted and harmonized. If the present owners of the "camp ground" desire to free it from all public or private claims arising from the dedication and other transactions set forth in the bill, it is manifest that they must begin at some point with some party, public or private, who claims to hold an adverse interest. In regard to the small portion held by the defendant Bryant, for all that appears the title to this small part of the "camp ground" had been reposing in Bryant or his grantor for 12 years without any effort being made on the part of either of them to use the land in violation of the restrictive covenant.

4. The interests, and especially the private interests, existing in a "camp ground" laid out, mapped, and dedicated in the manner set forth in the complainant's bill, have been the subject of judicial investigation in this state in several recent cases. *Lennig v. Ocean City Association*, 41 N. J. Eq. 603, 7 Atl. 491, 56 Am. Rep. 16 (1886); *Bridgewater v. Ocean City R. R. Co.*, 62 N. J. Eq. 276, 49 Atl. 801 (1901). It is altogether unnecessary to define the nature and extent of the interest which the complainants have in the "camp ground" described in their bill. My present conclusion merely is that; whatever rights may be held adversely to the defendants as owners of the fee, the complainants must wait until the defendants threaten to interfere with those rights before they can ask the aid of this court. A mere transfer of the fee is not an invasion of any of these rights. In the case of *Lennig v. Ocean City Association*, supra, which is cited on behalf of the complainants to sustain their bill, the land company which laid out the "camp ground" formed a scheme for dividing it up into lots and leasing the lots for the erection of permanent cottages. The court found, not that the land company was merely trans-

ferring its fee, but that it was promoting a scheme for the occupation of the land by permanent structures in direct violation of the rights of the prior grantees. The complainants have no right to compel the original dedicator to continue to hold the fee. No authority is cited to sustain the contradictory of this proposition, which seems to be a fundamental premise of the bill of complaint. There is certainly strong ground for claiming that, admitting the widest possible definition of the public and private rights set up by the complainants, the owners of the fee in this land nevertheless can occupy it or use it for many purposes with substantial pecuniary advantage to themselves, without in the slightest degree affecting these outstanding public or private rights. But, however this may be, the fee at all times presumably is of some value because of the possibility that it may be discharged from some or all of these outstanding rights.

It may also be observed that there is nothing in the bill to raise the implication that the conveyance of the fee should be restrained in order to prevent the creation of new rights vested in bona fide purchasers. The maps upon which the "camp ground" is laid out have been recorded, and all the facts connected with the dedication of the "camp ground" and the creation of all public and private rights therein appear to be matters of public notoriety and largely matters of record. The bill does not allege that there is any danger that rights may be created in bona fide purchasers unless the transfer of the fee shall be restrained, nor are there any facts alleged from which such a result could be inferred.

HOWE v. CITY OF ORANGE.

(Court of Chancery of New Jersey. Jan. 12, 1906.)

WATERS AND WATER COURSES—MUNICIPAL SUPPLY—DUTY TO FURNISH—WATER RENTS—PAYMENT.

P. L. 1876, p. 371, § 10 (Gen. St. p. 649), provides that in case of nonpayment of water rents the water shall be shut off from the building, place, or premises, and shall not again be supplied to said building, etc., unless such arrears, with interest thereon, shall be fully paid, and Act 1885, § 1 (P. L. 1885, p. 66; Gen. St. p. 655), declares that any city wherein waterworks are owned by the city shall have full power, in case of neglect or refusal of any person to promptly pay for the use or rents of water furnished, to shut off the supply, and that the city shall not be compelled again to supply the building until the arrears, with interest and penalty, shall be fully paid. *Held* that, where a city had a claim for water rents in arrear against complainant's grantor of the property in question at the time she purchased, she was not entitled to compel the city to furnish her with water until such arrearages were paid.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 295.]

Bill by Annie H. B. Howe against the city of Orange. On demurrer to bill. Sustained.

William Read Howe, for complainant.
William A. Lord, for defendant.

GARRISON, V. C. This is a bill filed by Annie H. B. Howe, charging that she is the owner of a house in the city of Orange; that the city of Orange owns and maintains a system of public water supply for the benefit of the inhabitants; that on Saturday, May 6, 1905, the complainant was notified by the clerk of the water department of the city of Orange that water would not be supplied to the premises until a bill of \$201.39 for water previously supplied thereto had been paid; that subsequently the water was turned on, but she was again notified that the supply would be discontinued and the water shut off unless the said arrears were paid. She charges that irreparable damage will come to her if the water is shut off from her premises. To this bill a demurrer is interposed by the defendant.

The sole question, as I view it, is whether the city, under the legislation in existence in this state, has the authority to shut off the water from these premises, and whether a court of equity should restrain it from so doing. Under section 10 of the act of 1876 (P. L. 1876, p. 371; Gen. St. p. 649) it is provided that, "in case prompt payment of any water rent or rents shall not be made when the same become due, the water shall be shut off from such building, place or premises, and shall not be again supplied to said building, place or premises until such arrears with interest thereon shall be fully paid. * * *" By section 1 of the act of 1885 (P. L. 1885, p. 66; Gen. St. p. 655) it is provided that "in any city of this state wherein waterworks are owned by the city and controlled by the city authorities, the municipal department of the city government having charge of such waterworks * * * shall have full power and authority, in case of the neglect or refusal of any person or corporation to promptly pay for the use or rents of water heretofore or hereafter furnished by such city or any municipal department thereof, in or upon any building, place or premises, to shut off the supply of water from such building, place or premises * * * and in case the supply of water shall be shut off from any building, place or premises for nonpayment of water rent or water rents, the said city or such municipal department aforesaid, shall not be compelled again to supply said building, place or premises * * * until said arrears, with interest and penalties, if required, shall be fully paid and satisfied. * * *"

Counsel for the complainant does not in any way attack the constitutionality of the legislative provisions relating to this subject. The act of 1876, above referred to (Gen. St. p. 649, § 10), makes the water rents a lien upon the premises until the same shall be paid and satisfied. The bill in this case does not in any way dispute the claim, which it

sets out, of the city for the arrears of rent. The gravamen of the bill is that because the water, for which these water rents are in arrears, was furnished to the building while it belonged to a previous owner, the city has not the right to shut off the water from the premises because of the nonpayment of the arrears. I am unable to perceive any reason why this should be held to be the law. If the legislation be constitutional, and it is not suggested that it is not so, it undoubtedly vests in the municipal authorities the right to shut off the water from premises when the water rents for water furnished to such premises are in arrears. Under the pleadings in this suit there are arrears against these premises for water previously furnished. There would seem to be no reason why the city should not be permitted to pursue the statutory procedure with respect thereto. It cannot be said that irreparable injury will ensue to the complainant if the city is permitted to shut off the water, because, by paying the water rents in arrears, the water will be furnished. If this complainant wants the water, and is compelled to pay the back rents to obtain it, and should not in law have been compelled so to do, the cases hold that she may recover back from the city the amounts of money thus wrongfully extorted from her. *Westlake v. St. Louis*, 77 Mo. 47, 46 Am. Rep. 4; *St. Louis Brewing Ass'n v. St. Louis*, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911; *Panton v. Duluth G. & W. Co.*, 50 Minn. 175, 52 N. W. 527, 86 Am. St. Rep. 635; *Penna. Iron Co. v. Lancaster*, 17 Lanc. Law Rev. 161, affirmed 15 Pa. Super. Ct. 556.

The only case cited by counsel for the complainant is *Hudson Savings Institution v. Carr-Curran Paper Mills Co.*, 58 N. J. Eq. 59, 48 Atl. 418 (Pitney, V. C.; 1899). In that case the Vice Chancellor held that the lien of the city, under the act of 1876, for water rents, was not prior to the lien of a mortgage previously given. I do not find in that case any decision militating against the right of the city to shut off the water from the premises where arrears for water previously furnished are existing. In other jurisdictions similar legislation to that in this state upon this subject has received consideration, and the courts have held that the city or the water company has the power to shut off the water, and will not be restrained with respect thereto.

It is held that the premises to which the water is furnished are liable, that indulgence with respect to the time of shutting the water off will not be held to operate against the right to do so, and that the fact that the title has changed hands since the furnishing of the water is immaterial. *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. 893; *Appeal of Brumm (Pa.)* 12 Atl. 855; *Atlanta v. Burton*, 90 Ga. 486, 16 S. E. 214.

I will advise a decree sustaining the demurrer in this cause, with costs.

GARVEY v. HARBISON-WALKER RE- FRACTORIES CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. DEDICATION — STREETS — SALE ACCORDING TO PLAT.

Where an owner of lots sells them according to a plan which shows them to be on a street, it is a dedication of the street to a public use, and implies a covenant to the purchaser that such street shall be forever open.

2. SAME.

Where lots are sold by the owner according to a certain plan showing streets, the fact that the plan does not appear on the maps of the municipality is immaterial as between the parties to the sale.

3. HIGHWAYS—OBSTRUCTION—REMOVAL.

An owner of lots sold the same according to a certain plan. A corporation purchasing some of the lots encroached with its building on one of the streets shown in the plan, and its successor, another corporation, purchased all the lots on the plan, except lots owned by one person. *Held*, that the latter could, by bill in equity, compel the corporation to remove the encroachments from the street.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, §§ 430, 432.]

4. ESTOPPEL—SILENCE.

Where a purchaser of lots according to a plan has not acquiesced in the placing of an obstruction on the street by the purchaser of other lots, his mere silence will not prevent him from demanding the removal of the obstruction.

5. HIGHWAYS — OBSTRUCTION — RELIEF IN EQUITY.

Where a purchaser of a lot according to a plan obstructs a street shown on the plan, another purchaser can maintain a bill in equity to remove such obstruction; the remedy at law being inadequate.

Appeal from Court of Common Pleas, Cambria County.

Action by Bernard Garvey against the Harbison-Walker Refractories Company. Decree for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Roberts S. Murphy, Thomas E. Murphy, and James E. McCloskey, for appellant. William Williams and Harry Doerr, for appellee.

MESTREZAT, J. It is settled by numerous decisions of this court that a sale of lots according to a plan which shows them to be on a street implies a grant or covenant to the purchaser that the street shall be forever open to the use of the public, and operates as a dedication of it to public use. *Transue v. Sell*, 105 Pa. 604; *Quicksall v. Philadelphia*, 177 Pa. 301, 35 Atl. 609. The proprietor cannot revoke the dedication, and the purchaser of a lot abutting on one of the streets, as well as all other persons owning lots in the general plan, may assert the public character of the street and the right of the public to use it. In re Opening of Pearl Street, 111 Pa. 565, 5 Atl. 430. "Where one owns property by a title sufficient to give him entire dominion over it," says

Thompson, C. J., in *Davis v. Sabita*, 68 Pa. 90, "he can grant it all, or reserve portions of it, as he pleases. So may he dedicate it to uses not contrary to law, either public or private, and it is only by lawful process, or the assent of those for whose use the dedication was made, that any change can be made. It is not for one citizen to disregard the lawful exercise of rights by another." The fact that the plan of lots does not appear on the maps of the municipality is immaterial as between parties claiming under the original owner and affected with knowledge of his plan. *Transue v. Sell*, 105 Pa. 604.

Both parties to this litigation claim under Mrs. Tibbott, the common grantor. She was the owner in fee of a tract of land in Lower Yoder township, now situate in the city of Johnstown, Cambria county, and laid out into building lots. In 1893 she began to sell the lots, and in the conveyances they were described as adjoining and bounded by the streets and alleys designated on the plan. One of the streets named on this plan is Tibbott street. The lots on the south side of this street extended to an alley running parallel with the street, and were sold to persons who improved them by the erection of buildings with reference to the street and alley. Three of the lots, at the intersection of Tibbott and River streets, are now owned by the plaintiff, and were conveyed by Mrs. Tibbott and her husband to the plaintiff's predecessor in title in 1893 and 1894. Tenement houses and a stable were erected on these lots. In 1894 the Basic Brick Company, the defendant's grantor, purchased some lots in the Tibbott plan, and erected thereon a plant for the manufacture of brick. In extending the plant Tibbott street and the two alleys mentioned in the plaintiff's bill were encroached upon and obstructed. Subsequently the company acquired title to all the other lots in the plan, except those owned by the plaintiff, and on July 1, 1902, conveyed by deed its entire plant to the defendant company. This deed calls for Tibbott street. The trial judge found, on sufficient evidence, that "neither party has acquired any title to Tibbott street or the lots in question, except that acquired in the conveyance of lots by deeds calling for streets or alleys upon a plot or plan."

It is apparent from a statement of the undisputed facts that the defendant company and its predecessor in title had no authority, against the objection of an owner of another lot in the plan, to place obstructions on Tibbott street or any other street or alley designated on the plan of lots of which its real estate formed a part. By its deed the Basic Brick Company took the lots conveyed to it, subject to an easement by the public in the streets and alleys on which the land abutted. It held its lots subject to the same easement and with the same rights on the streets and alleys designated in the plan as the owners of the other lots had. It is

claimed, however, as a defense to this proceeding that equity has no jurisdiction, and that the plaintiff has no right to the relief he seeks, because of the acquiescence of himself and of his predecessor in title in the encroachments complained of, that the relief sought would be disproportionate to the alleged injury, that the damage to the defendant company by granting the relief asked would be irreparable, and that the buildings and encroachments were built on the streets and alleys with the belief that no public or private right was invaded. We do not regard either of these positions as tenable. That equity has jurisdiction to give the plaintiff relief for the injury he has sustained we have no doubt. His right to have the streets and alleys kept clear of obstructions must be conceded under all our decisions. It is conferred by the grant contained in his deed, the validity of which is not questioned. Mrs. Tibbott was the owner of the land at the time it was subdivided into lots and is, as we have seen, the common grantor of both parties to this litigation. Hence the defendant company is not in a position to deny the existence of the ways designated in the plan of lots laid out by her and sold with reference to the plan. *Hacke's Appeal*, 101 Pa. 245; *Ferguson's Appeal*, 117 Pa. 426, 11 Atl. 885; *Manbeck v. Jones*, 180 Pa. 171, 42 Atl. 536. In *Hacke's Appeal*, Mr. Justice Trunkley, speaking for the court, says (page 249): "It has long been settled that nuisances to rights of way are one of the classes of cases in which the equitable remedy by injunction may be sought. This was established in England and accepted as a rule in this country. No case has been cited where it was denied or doubted in this state. Its existence has been recognized. * * * This right of way is founded upon contract; the grant being shown by the respective deeds under which Brown and Hacke hold their lots. The owner has a right to its enjoyment in the mode and form stipulated for in the deed. The mere fact that the appellants prevent such enjoyment is a sufficient ground for interference of the court by injunction."

Nor will the alleged acquiescence or laches of the plaintiff and his predecessors in title avail the defendant company in this proceeding, and estop the plaintiff from asserting his right to have the obstructions removed from the street and alleys designated on the Tibbott plan of lots. The plaintiff contends that neither he nor those through whom he claims title consented to or acquiesced in placing the obstructions on the street and alleys, and the court found, in support of this contention, that from 1897 until the plaintiff became the purchaser of the property he was the agent of the owners, and as such protested from time to time against the encroachments. But, aside from any objections which may have been made against the

obstructions being placed upon the highways, the silence of the owners of the lots would not, under the facts of the case, prevent them now from demanding the removal of the obstructions. The defendant admits that its title papers call for Tibbott street and the alleys, and refer to the plan, and the learned trial judge found as a fact, on sufficient evidence, that the defendant's grantor, the Basic Brick Company, "knew that it was encroaching upon and obstructing this street and the alleyways, though it continued to encroach upon and obstruct Tibbott street by building a brickkiln thereon in 1890, and a machine shop in 1900." The Basic Brick Company therefore knew of the streets and alleys and of their location when it placed the obstructions upon them, and hence had knowledge that its act was unlawful and to the prejudice of the other owners of lots in the Tibbott plan. The deeds in its chain of title gave it notice of the streets and of their location, and there was nothing to justify the belief that in obstructing the streets and alleys it was not invading a public or private right. The silence of the plaintiff or of his predecessors in title, therefore, under the record facts in this case, will not work an estoppel. *Hill v. Epley*, 31 Pa. 331; *Ormsby v. Ihmsen*, 34 Pa. 462; *Woods v. Wilson*, 37 Pa. 379. "If the truth be known to both parties, or if they have equal means of knowledge," says Strong, J., in *Hill v. Epley*, "there can be no estoppel." And in *Ormsby v. Ihmsen*, the same justice, delivering the opinion, says: "If the truth was known to both parties, there can be no estoppel, for it is essential to such an estoppel that the party who asserts it has been misled, and he cannot be misled by a statement, the falsity of which he knows." In *Woods v. Wilson* it is said that silence will not postpone a title when a party who is himself aware of the title seeks to postpone it on the ground of silence, and that, when both parties are aware of their respective rights, it (the doctrine of estoppel) has no place in law or equity.

It has been distinctly ruled that in cases of this character the question of irreparable damages does not enter, and that the law does not afford an adequate remedy. Hacke's Appeal, 101 Pa. 245. In that case it is said (page 249): "It is not necessary that the owner should prove damage to entitle him to his property. * * * The court will not, unless under very exceptional circumstances, take into consideration the comparative injury to the parties from granting or withholding the injunction. The obstruction of a way by the owner of the land differs widely from the maintaining of a mill or factory which is in itself lawful, but by its noise, fumes, or odors becomes a private nuisance to a person in the vicinity. Here the question of irreparable damage enters. * * * But not where a man buys land subject to

an easement, or grants an easement. He cannot appropriate such property against the owner's will, and say, 'I will compensate him in damages.' * * * The law does not offer an adequate remedy. He is entitled to a remedy that will restore him to enjoyment, and is not confined to actions at law for damages resulting from obstructions."

We find no substantial error in this record, and the decree of the court below is affirmed.

In re McCausland's Estate.

Appeal of STUART.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. MARRIAGE—COMMON-LAW MARRIAGE.

Where a father and mother of a child lived together in Colorado as husband and wife after the birth, holding themselves out to the world as such, the contract of marriage was valid, not only in Colorado, but also in Pennsylvania, and legitimized the child.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Marriage, §§ 4, 16.]

2. SAME—VALIDITY—PRESUMPTIONS.

Where a married man disappeared and was not heard from for seven years, the presumption is that he is dead; but there is no presumption as to the actual time within the seven years when his death occurred, and where his wife married within the seven years, and there is no proof of the actual date of his death, the presumption is in favor of the validity of the second marriage, as not having occurred before the death of the absent husband.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 1-3; vol. 34, Cent. Dig. Marriage, §§ 58, 63, 67.]

Appeal from Orphans' Court, Westmoreland County.

In the matter of the estate of Anna McCausland. From a decree of distribution, Jane B. Stuart appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

V. E. Williams, A. M. Sloan, and W. F. Wegley, for appellant. W. S. Byers and J. A. C. Ruffner, for appellee.

BROWN, J. This is an appeal from the decree of distribution in the estate of Anna McCausland, deceased. By the seventh clause of her will she devised to her daughter, Jane B. Stuart, the appellant, and to her son, Jacob W. McCausland, the rents, issues, and profits issuing from her real estate in Greensburg, and provided that "if either one survive the other then during the lifetime of the one surviving one half to him or her and the other half to the child or children of the one deceased." Jacob W. McCausland, the son, died on January 18, 1903, and one-half of the fund in the hands of the accountant is now claimed by the Safe Deposit and Trust Company of Greensburg, Pa., guardian of Jacob Welty McCausland, found by the court below to have been

the legitimate son of Jacob W. McCausland, the son of the testatrix. The legitimacy of the ward of the appellee is the single question before us.

The court below, having found the boy to be the legitimate son and only child of Jacob W. McCausland, deceased, awarded his guardian one-half of the fund brought before it for distribution. We are not asked by any of the assignments to say that error was committed in receiving the testimony of witnesses, upon which the court's findings were based, but it is urged that from this testimony there ought to have been a finding that the ward of the appellee was not the legitimate child of the son of the testatrix, and therefore not entitled to a portion of her estate under the seventh clause of her will. Elizabeth McCausland, the mother of Jacob Welty McCausland, found by the court below to have been the lawful wife of Jacob W. McCausland, the son of testatrix, was the daughter of John and Sarah M. Evans, and prior to March 26, 1882, had lived with her mother at Hannibal, Mo. On that day, when she was about 25 years of age, she was married to one John E. Rodgers, and lived with him until some time in the year 1884. The findings of the court below are that during this period Rodgers frequently told her she was not his wife, as they had not been legally married, because the man who performed the ceremony was not an alderman or justice of the peace; that on August 3, 1885, she saw him at the Union Depot, in the city of Denver, for the last time, since which date he has never been heard of by any one connected with or interested in this case; that she then went to Hannibal, Mo., on a visit to her mother, and, returning in about a month, took up her residence, in September, 1885, with Jacob W. McCausland, the deceased son of the testatrix; that she and he lived together continuously until his death, January 18, 1903; that she gave birth to a son, the ward of the appellee, on March 4, 1887; that this child was called Jacob Welty McCausland, and was recognized by Jacob W. McCausland, deceased, as his son; that about six weeks after the birth of the child she and the said Jacob W. McCausland agreed with each other to become husband and wife and to live together in that relation until parted by death; that they did continue to live together as husband and wife, she performing all the duties of a wife to him and of a mother to the boy; that Jacob W. McCausland introduced her as his wife; that telegrams, by his direction, were addressed to her as Mrs. Jacob McCausland; that he had himself registered as a married man in the city of Denver, Colo., and they were known and recognized in the community where they lived as husband and wife; that the boy was always recognized by him as his son, and at his death, by his will, he named and acknowledged Elizabeth McCausland as his

wife and Jacob Welty McCausland as his son, and gave all of his property to them as such.

It is conceded, first, that by the laws of Colorado the common-law marriage prevails there just as it does in this state; second, that there is a presumption there, as well as here, of the death of a person who has been absent and unheard of for seven years; and, third, that the subsequent marriage of the parents of children legitimatizes those born prior to the marriage. The seventh section of chapter 28 of the General Statutes of 1883 of the state of Colorado provides that "illegitimate children shall inherit the same as those born in wedlock, if the parents subsequently intermarry, and such children be recognized after such intermarriage by the father to be his." Our act of May 14, 1837 (P. L. 507), is of similar import. It is: "In any and every case where the father and mother of an illegitimate child or children shall enter into the bonds of lawful wedlock and cohabit, such child or children shall thereby become legitimated, and enjoy all the rights and privileges as if they had been born during the wedlock of their parents." That the marriage of Jacob W. McCausland to Elizabeth Rodgers was valid, if she were not under a disability existing from her marriage to John E. Rodgers, who might still have been alive, cannot be questioned. It was not only valid in Colorado, where they agreed to become husband and wife, but it would have been valid if entered into here as it was there, and the law of neither state puts the brand of bastardy upon their issue. When their babe was six weeks old, they agreed to become husband and wife, and to live together in that relation until death should part them. From that moment, if they were competent to make the solemn compact, their babe was no longer the son of no one, but the child of parents wedded as lawfully as if their marriage had been solemnized by pomp and religious ceremony; and their simple vows, made over a cradle, were kept to the end. The father, on January 10, 1903—but eight days before his death—declared in his will that Elizabeth McCausland was his beloved wife and that Jacob W. McCausland was his son. When Jacob Welty McCausland was born, on March 4, 1887, John E. Rodgers had not been seen or heard from for a period of 19 months. He was last seen on August 3, 1885, so that on August 3, 1892, seven years afterwards, he was presumed to be dead. For nearly 11 years after that date the woman he had married continued to live as the wife of Jacob W. McCausland, without hearing anything from him or about him, and up to the day of the audit in the court below nothing had been heard from him. By the laws of Colorado and this state he was presumed to be dead on August 3, 1892. Even if Elizabeth McCausland had been under disability before that day to enter into a lawful marriage

contract with Jacob W. McCausland, it then presumptively disappeared, and thereafter, in the absence of proof that her former husband was living, she could become the lawful wife of Jacob W. McCausland. Though seven years must elapse before the presumption of death arises, when this period does elapse, there is no presumption as to the time when, during the seven years, the death of the absent party actually occurred, and therefore, to help the presumption of innocence or legitimacy, there is no presumption that it occurred after the second marriage, but rather that it occurred before. "*Semper præsuntur pro matrimonio.*" This is, of course, but a presumption to be rebutted by proof of the actual date of the death, but, in the absence of such proof, with the presumption in favor of legitimacy, the presumption is in favor of the validity of the second marriage, as not having occurred prior to the death of the absent husband. 1 Greenleaf on Evidence, § 41; 1 Bishop on Marriage and Divorce, §§ 949-953; *Senser et al. v. Bower et ux.*, 1 Pen. & W. 450; *Pickens' Estate*, 163 Pa. 14, 29 Atl. 875, 25 L. R. A. 477.

Under the facts found, the only conclusion that could be arrived at was reached by the learned judge of the court below; and his decree is affirmed, and the appeal dismissed, at the cost of the appellant.

ELK BREWING CO. v. NEUBERT.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. CORPORATIONS—OFFICERS—DIFFERENT CORPORATIONS.

Where the treasurer of a trust company is also the treasurer of a brewing company, and as such opens an account with the trust company and appropriates the moneys of the brewing company, the trust company, in the absence of fraud on its part, is not liable for the moneys misappropriated.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1383.]

2. SAME.

Where the treasurer of a brewing company deposits its moneys with a trust company, of which he is also treasurer, and misappropriates the same, that the president of the brewing company is also a director of the trust company does not render the trust company liable, where there is no evidence of fraud or collusion for a loss resulting to the brewing company from the misfeasance of its president.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1383.]

8. EQUITY—MISJOINDER OF DEFENDANTS.

A bill in equity is defective for misjoinder of parties defendant, where such parties act in different capacities and are not chargeable with any joint liability in the relief sought.

4. DISCOVERY—IN EQUITY—WHEN BILL LIES.

Where the bill seeks an accounting and merely incidental discovery, if there is no right to an accounting, it is demurrable.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Discovery, § 27.]

Appeal from Court of Common Pleas, Armstrong County.

Bill by the Elk Brewing Company against

Charles Neubert and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Each of the defendants filed a demurrer in substantially the same form, which was as follows: "(1) The bill is multifarious: (a) Because it joins three persons as defendants, against whom, if the plaintiff has any equitable right, its remedy would be against them as individuals, and not against them jointly or collectively. (b) Because the defendants are distinct and separate in business relations, and are not jointly liable (if liable at all) under the averments of the bill. There is no common liability of the defendants. (c) Because the bill avers and charges the defendants in separate relations and capacities. (d) Because a chancellor could not make a decree, if the facts were found to be true as averred, that would be just against said defendants jointly. (e) Because the bill prays for relief against three defendants, and with respect to at least two distinct matters, and against said defendants, who were, either as individuals or officially, in distinct separate capacities or positions. (f) Because these defendants, under the averments of the bill, would have different defenses and different proofs, and a chancellor would be required to make different decrees. (g) Because the right of the decree prayed for, under the averments of the bill, must be established by evidence different from that introduced against other of the defendants, or upon a finding of facts in regard to which the other defendants are unconcerned and unadvised. (2) The bill does not disclose a case for equitable jurisdiction against Charles Neubert. (3) If any right exists against Charles Neubert, a proceeding at law is the proper remedy and not by equity." The court entered a decree dismissing the bill.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, PORTER, ELKIN, and STEWART, JJ.

O. E. Harrington and M. F. Leason, for appellant. Rush Fullerton, McCain & Christy, Ross Reynolds, and J. W. King, for appellee.

ELKIN, J. The bill avers substantially that Charles Neubert was the treasurer of the brewing company and also of the trust company; that as treasurer of the brewing company he kept its accounts in the trust company, and intermingled or mixed the funds of the brewing company with those of the trust company, so as to render complainant unable to determine how much money is in his hands as treasurer and deposited in the trust company; that Valentine Neubert was the president of the brewing company and a director of the trust company; that said Valentine Neubert was a cestui que trust in the Bernd mortgage, and that he has in his possession papers, agreements, records, and memoranda showing the transac-

tion concerning said mortgage, and refuses an inspection of the same; that said Valentine Neubert has failed, as president of the brewing company, to supervise and inspect the accounts of the treasurer thereof, and to ascertain the funds belonging to said company, and has knowingly permitted the corporate funds to be used improvidently; that on September 27, 1898, in pursuance of an agreement made prior to that date, Henry F. Bernd executed a mortgage to said trust company as trustee in the sum of \$11,000 to secure a loan of that amount made to him, and of this amount the brewing company advanced \$4,000, and that afterwards, to wit, on December 18, 1900, said trust company received the sum of \$4,500 on account of said mortgage for use of the appellant, and has not accounted for the same; that said trust company has refused to allow plaintiff to make an examination of its books, records, and accounts showing the status of the accounts of Charles Neubert as treasurer, and has failed to account for other moneys belonging to the appellant. Upon this allegation of facts the complainant relies to show such joint liability and interest between the respondents as will entitle it to the equitable relief prayed for.

Much of the confusion in this case has arisen because of a seeming misapprehension of the legal status of Charles Neubert, who acted as treasurer of both corporations. He had a right to act in this dual capacity, if the corporations chose to have him so act. In so doing, however, the relations, duties, and liabilities of the two corporations were in no way changed. Any act performed by him within his duties as treasurer of the brewing company was not his individual act, but the act of the company whose officer he was, just as his act as the treasurer of the trust company was the act of said company and not his individual act. The rights, duties, and liabilities of each company are just the same as if a different individual had acted as treasurer of the respective companies. If the trust company is indebted to the brewing company, the obligation arises, not because Charles Neubert was the treasurer of one or both companies, but on account of said trust company having received moneys belonging to the brewing company which it has not accounted for. In such event a bill in equity does not lie because there is an adequate remedy at law.

Again, if the treasurer of the brewing company has failed or refused to account for all the moneys which came into his hands as treasurer, or if he is guilty of any misfeasance or malfeasance in office, he is liable to his company entirely independent of the fact of where he deposited said moneys, or, indeed, whether he deposited them at all. Certainly the trust company, which received said deposits in its usual course of business, like all other deposits, in the absence of fraud or collusion, cannot be held liable for the

failure of the plaintiff's own treasurer to perform his duty. It would be a harsh rule to hold the trust company liable to the brewing company because of the alleged malfeasance of its own officer. Even if it be conceded, which it is not, that the treasurer of the brewing company failed to deposit or account for all moneys which came into his hands as such, the trust company cannot be held liable for such default or misappropriation merely because said treasurer happened to be an officer of the trust company at the time of the default or misappropriation.

And how does Valentine Neubert come into this equitable proceeding? He is charged with being president of the brewing company and a director of the trust company during the period covered by the bill. He is also charged with having failed in the performance of his duties as president of the brewing company, and with having permitted the corporate funds to be improvidently used. If these allegations be true, how do they affect the trust company? How can the trust company be made answerable for the alleged wrongful acts of the president of the brewing company? The only connection between them in this respect is that the same man happens to be president of one and director of the other corporation. This fact neither increases nor diminishes the liability of the respective companies. If Valentine Neubert has been derelict in his duty as president of the brewing company, that company must look to him in a proper proceeding, and cannot hold either the trust company or Charles Neubert answerable for such dereliction of duty, in the absence of fraud or collusion, and none such is charged.

What has already been said brings the case within the rule stated in *Artman v. Giles*, 155 Pa. 409, 28 Atl. 668, wherein it is held that a bill in equity which joins separate respondents, acting in different capacities, upon different rights, and not chargeable with any joint liability or interest in the relief sought, is defective.

As to the allegation that the trust company owes the brewing company \$4,500 on the Bernd mortgage, as well as other moneys, it is only necessary to say that an action at law provides a full, complete, and adequate remedy.

There only remains one question to be considered. It was contended in the court below, and it is argued here, that the bill should be sustained for discovery, and if good for discovery, equity jurisdiction having attached for this purpose, all other questions may be considered and disposed of in the same proceeding. It may be conceded that it is difficult, under the authorities, to draw the line between the cases where a bill for discovery, having also a prayer for relief, is entertained, and where refused. It is not open to doubt, however, that, if discovery is used as a mere pretense to give jurisdiction, it would be a gross abuse to entertain a suit in equity when

the whole foundation upon which it rests is either disproved or is shown to be a colorable disguise for the purpose of changing the forum of litigation. Story's Eq. p. 70 et seq. The question has been ruled in our own state in *Holland v. Hallahan*, 211 Pa. 223, 60 Atl. 735, wherein Mr. Justice Fell said: "Where there is no right to the main relief sought by a bill, and discovery is merely incidental to this relief, it will not be granted. In a bill seeking an account and discovery, the discovery is *prima facie* merely incidental to the account, and, if a right to an account is not disclosed, the bill will be held bad on demurrer."

We have already said that the plaintiff is not entitled to the equitable relief prayed for, and, since the discovery is only incidental to the relief, it necessarily follows, under the rule stated, that the bill must fail.

Decree affirmed, at the cost of the appellant.

CUNNINGHAM et al. v. WALLACE.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

APPEAL—REVIEW—DISCRETION OF COURT.

A decree fixing the fee of a master in partition will not be reversed, where no abuse of discretion is shown.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, §§ 3881, 3882.]

Appeal from Court of Common Pleas, Lawrence County.

Bill for partition by J. P. H. Cunningham and S. W. Cunningham against Caroline C. Wallace. From the decree, plaintiffs appeal. Affirmed.

Following is the opinion of Wallace, P. J., in the court below:

"This case came before me on exceptions to compensation of master. It was fixed by the court at \$4,500, when plaintiffs claimed it was excessive and fixed without notice to them. The matter was referred to the master, to be considered by him in his distribution of the fund. The master reported the same amount, whereupon exceptions were filed before him and are now renewed in court; the exceptants representing about one-half of the estate. The services in this case were of a very complicated nature, requiring, not only skill and ability as a member of the bar, but the exercise of more than ordinary care, and involving considerable labor and responsibility. The master performed all the duties imposed upon him faithfully and

well, and to the satisfaction of all the parties interested. Their own agreement says: 'The entire partition and all the various proceedings therein, and the execution by the master of the decree appointing him, are satisfactory, and are hereby duly approved.' The master awarded two purparts to two of the heirs at their bid of \$6,472, and advertised all the remaining purparts for sale at public outcry, as directed by law and order of court, and sold at public sale several of the purparts for \$125,910.50, and at the instance of the parties in interest adjourned the sale of the remainder from time to time, until the heirs entered into an agreement, by the terms of which each of the heirs agreed to take certain of the purparts at certain prices, and that the master should report as sold at public sale. This was in effect a private sale to the several parties for \$35,467. His service and responsibility extended to the entire property which was so sold by him. The total amount distributed by him, and for which he was responsible, was \$167,849.50. His fees were fixed a little more than 2% per cent. It was agreed for exceptants that he should only be allowed commission upon the property actually sold at public sale. This amounted to \$125,910.50, and if we should allow commissions on that alone, and in addition compensation for the labor, care, skill, and ability, outside of these public sales, it would aggregate more than the amount we have allowed him. Without going into details, however, our knowledge of this case, and of all the proceedings, satisfies me that the amount is not excessive, but, upon the contrary, is a reasonable compensation.

"Now, December 31, 1904, the exceptions are therefore dismissed, and the adjudication fixing the master's fees at \$4,500 is confirmed absolutely, and it is ordered, adjudged, and decreed that said amount be retained by him out of the moneys of the estate in his hands."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

S. W. Dana, Robert K. Alken, and C. H. Akens, for appellants. James A. Gardner, for appellee.

PER CURIAM. The services of the master were familiar to the court below, and he was in better position to judge as to the proper compensation than we can be. We have not been convinced that there was any abuse of his discretion, and the judgment is therefore affirmed on his opinion.

HANNA v. SWEENEY.

(Supreme Court of Errors of Connecticut.
Jan. 23, 1906.)

1. ASSAULT AND BATTERY—PUNITIVE DAMAGES.

In an action for a violent, unprovoked, and malicious assault, plaintiff is entitled to recover punitive damages.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, § 54.]

2. SAME—AMOUNT—LITIGATION EXPENSES.

In an action for assault, it was error for the court to permit the jury to assess punitive damages in favor of plaintiff according to their discretion; such damages being limited to the amount of plaintiff's expenses in the suit, less his taxable costs.

Appeal from Superior Court, Hartford County; Edwin B. Gager, Judge.

Action for assault and battery by William H. Hanna against John F. Sweeney. From a judgment for plaintiff, defendant appeals. Reversed.

William F. Henney, for appellant. John Walsh and James Roche, for appellee.

TORRANCE, C. J. In the trial court the evidence for the plaintiff tended to prove that the defendant committed upon him a violent, unprovoked, and malicious assault and battery, whereby the plaintiff was greatly injured in mind, body, and estate. Upon that evidence the plaintiff claimed to be entitled, if the jury found in his favor, not only to full compensation for all his actual injuries, but also to damages, in excess of such compensation, variously termed exemplary, punitive, or vindictive; and the court correctly charged the jury in accordance with the tenor of this claim. *St. Peter's Church v. Beach*, 26 Conn. 355; *Burr v. Plymouth*, 48 Conn. 460; *Mais-enbacker v. Society Concordia*, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213; *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55.

The court, however, further charged the jury with reference to such damages that, if they found in favor of the plaintiff, they might, "in addition to actual or compensatory damages, award punitive damages or 'smart money,' as it is sometimes called, proportionate to the degree of malice or wantonness evinced by the defendant." It is of this part of the charge that the defendant chiefly complains. He says that by it the amount of "exemplary" damages which the jury might award to the plaintiff was erroneously left entirely at large to the discretion of the jury, and we think he is right in this claim. At common law, in certain actions of tort, the jury were at liberty to award damages, "not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." *Pratt, L. C. J., in Wilkes v. Wood*, Lofft, 1, 18, 19; *Huckle v. Money*, 2 Wils. 205; *Lake Shore Railway v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37

L. Ed. 97; *Goddard v. Grand Trunk Railway*, 57 Me. 202, 2 Am. Rep. 39; *Day v. Woodworth*, 13 How. 363, 14 L. Ed. 181; *Dalton v. Beers*, 38 Conn. 529.

Moreover, at common law, the amount of punitive damages that might be awarded was left almost entirely to the discretion of the jury; for the courts generally refused to grant a new trial for excessive damages of this kind. In *Huckle v. Money*, supra, the actual damages appeared to be about £20 sterling, but the verdict was for £300; and the court, in refusing to grant a new trial, said: "It must be a glaring case, indeed, of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages." In *Day v. Woodworth*, 13 How. 363, 14 L. Ed. 181, in speaking of the discretion of the jury in such cases, Justice Grier says: "This (i. e., the amount of 'smart money') has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend upon the particular circumstances of each case. It must be evident, also, that, as it depends upon the degree of malice, wantonness, or oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages assessed by way of example may thus indirectly compensate the plaintiff for money expended in counsel fees, but the amount of those fees cannot be taken as the measure of punishment or a necessary element in its infliction." That the amount of punitive damages, in cases where such damages may be awarded, is generally left to the discretion of the jury, see, also, *Cyc.* vol. 13, p. 119, and cases there cited, and *Hale on Damages*, c. 7, par. 83, and *Sedgwick's Elements of Damages*, p. 85.

This power of a jury, at common law in certain actions of tort, to award damages beyond mere compensation, and practically of such an amount as they in their discretion may determine, has resulted in the doctrine of punitive damages, which has been called "a sort of hybrid between a display of righteous indignation and the imposition of a criminal fine." *Haines v. Schultz*, 50 N. J. Law, 481, 14 Atl. 488. This doctrine has been said to be exceptional, anomalous, logically wrong, and at variance with the general rule of compensation in civil cases; but, notwithstanding the objections urged against it, it prevails in many, if not in most, of the states. *Sedgwick's Elements of Damages*, pp. 86, 87. In this state the common-law doctrine of punitive damages, as above outlined, if it ever did prevail, prevails no longer. In certain actions of tort the jury here may award what are called punitive damages, because nominally not compensatory; but in fact and effect they are compensatory, and their amount cannot exceed the amount of the plaintiff's expenses of litigation in the

suit, less his taxable costs. "Such expenses in excess of taxable costs * * * limit the amount of punitive damages which can be awarded." *Malsenbacker v. Concordia Society*, 71 Conn. 369-378, 42 Atl. 67, 71 Am. St. Rep. 213, and cases there cited.

The court, it is true, told the jury that in estimating punitive damages they might consider counsel fees and other expenses of the plaintiff to which he had been put in attempting to get compensation; but, probably by an oversight, they were not told that the amount of the punitive damages which they might award was limited by the amount of those expenses less the taxable costs in the suit; and afterwards they were told in effect that the amount of punitive damages was a matter that rested in their discretion, dependent upon "the degree of malice or wantonness evinced by the defendant."

There is error, and a new trial is granted. The other judges concurred.

LAMPHIRE et al. v. STATE.

(Supreme Court of New Hampshire. Grafton. Jan. 2, 1906.)

1. BAIL—DISCHARGE OF SURETIES—GROUNDS.

Under Pub. St. 1901, c. 252, § 30, providing that, when the sureties in a recognizance are prevented without their fault from surrendering their principal by the act of the government of the state or of the United States, the Supreme Court may discharge them on such terms as may be just, it must be shown, to entitle sureties on a forfeited recognizance to a discharge, not only that they were prevented without their fault from surrendering their principal, but that such prevention was accomplished by the act of the government of the state or of the United States; and a showing that the principal voluntarily enlisted in the United States Navy without the knowledge of the sureties, and was thus enabled to depart from the state beyond the reach of the sureties, is insufficient.

2. SAME—ACTIONS—EXCEPTION BY STATE.

A proceeding by sureties on a forfeited recognizance for the appearance of one accused of crime to obtain their discharge is a civil proceeding, and the state is entitled to take an exception to an order of discharge.

Exceptions from Superior Court; Stone, Judge.

Petition by Henry A. Lamphire and Fred W. Towle for a discharge as sureties upon a recognizance. There was an order discharging the sureties, and the state excepted. Exception sustained.

The petitioners recognized as sureties for the appearance at the superior court of Daniel McIntyre, who was duly bound over for such appearance at the May term, 1904, by a justice of the peace upon a complaint charging him with breaking and entering a dwelling house and stealing therefrom. At the May term McIntyre was indicted for the crime charged before the justice, but did not appear, and the recognizance was defaulted. After entering into the recognizance, and before the May term, McIntyre, without the

knowledge of the sureties, enlisted in the United States Navy. He is now in the service of the United States, and has been ever since his enlistment. Upon these facts the court found that the sureties without their fault were prevented from surrendering the principal, and ordered their discharge, under section 30, c. 252, Pub. St. 1901. To this order the state excepted.

Scott Sloane, for petitioners. Marshall D. Cobleigh, for the State.

PARSONS, C. J. "When the sureties in a recognizance, without their fault, are prevented from surrendering their principal by the act of God, or of the government of the state or of the United States, or by sentence of law, the Supreme Court, on petition and notice thereof to the county commissioners and state's counsel, may discharge them on such terms as may be deemed just." Pub. St. 1901, c. 252, § 30. Upon petition under this section by the sureties in a recognizance, the superior court found that the sureties without their fault were prevented from surrendering their principal, and ordered their discharge. The order was not warranted by the facts found. To bring the case within the statute the sureties must have made it appear, not only that they were prevented from surrendering their principal without their fault, but also that they were prevented by the act of God, or of the government of the United States or of this state, or by sentence of law. Neither fact is found, or could be found, from the evidence. The principal was not impressed as a seaman or drafted by the government, but voluntarily enlisted. If, by such voluntary act, he has been enabled to depart from the state, so that the sureties cannot reach him, his absence is due to his voluntary act, and not, as far as appears, to any act of the government of the United States. His absence is purely voluntary, and affords the sureties no justification or excuse. "It was against that they guaranteed the government. To prevent that they became responsible." *State v. McAllister*, 54 N. H. 156, 158. The causes named in the act would be a good defense at common law to an action against the sureties. *Goodwin v. Smith*, 4 N. H. 29, 30; *Harrington v. Dennie*, 13 Mass. 93; *Belding v. State*, 25 Ark. 315, 4 Am. Rep. 26, 99 Am. Dec. 214, 216-218, note. The purpose of the statute does not appear to be to introduce a new ground for releasing the sureties, but merely to provide a convenient method of determining their liability. But, whatever its purpose, it does not make the voluntary absence of the principal, without fault of the sureties, alone sufficient ground for their discharge. The recognizance was a contract between the sureties and the state for the production of the principal at the required time. The sureties upon an action for breach of this contract are not accused of crime. The proceeding is civil, and the state

is entitled to its exception. *State v. Kinne*, 39 N. H. 129, 137; s. c., 41 N. H. 238. As no facts are found which, as matter of law, authorize the order of discharge, and no evidence was before the court upon which the facts necessary to authorize the order could be found, the order made was erroneous, and must be set aside.

Exception sustained. All concurred.

NOYES v. THORPE.

(Supreme Court of New Hampshire. Grafton. Jan. 2, 1906.)

1. DISCOVERY—BILL—NATURE OF ACTION.

Where a bill for discovery in aid of an action for libel stated the nature of the action, the names of the parties, the term of court at which it was entered, and where it was pending, it was not demurrable for failure to set out a legal cause of action in aid of which the discovery was sought.

2. LIBEL—OFFENSE—MISDEMEANORS.

The malicious publication of a libelous article is a common-law crime, punishable as a misdemeanor.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 405, 406.]

3. SAME—PERSONS LIABLE.

Every person who requests, procures, or asks another to publish a libel, is answerable as though he published it himself.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 414.]

4. DISCOVERY—LIBEL—PRIVILEGE.

A bill for discovery of an original libelous article alleged to have been published by defendant in a newspaper, and the names of the persons who dictated the article to defendant and procured him to publish it, in aid of an action at law for libel, was demurrable as calling on defendant to disclose matter which would tend to incriminate him.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Discovery, § 12.]

Exceptions from Superior Court; Wallace, Judge.

Bill by Walter S. Noyes against Charles A. Thorpe for discovery in aid of an action for libel. A demurrer to the bill was sustained, and plaintiff brings exceptions. Exceptions overruled.

Everett O. Howe and Smith & Smith, for plaintiff. Scott Sloane and Mitchell & Foster, for defendant.

BINGHAM, J. In the bill it is alleged that the plaintiff has brought an action at law against the defendant to recover damages for publishing in his newspaper a libelous article concerning the plaintiff; that the article was instigated and its publication brought about by persons unknown to the plaintiff, who either sent or dictated it to the defendant; that the plaintiff is not able to discover who the persons are; that the defendant knows who they are, but will not state; and that the plaintiff desires to know, so that he may join them in his action against the defendant. The prayer of the bill is (1) that the defendant be required to produce the

original writing containing the alleged libelous article, and (2) that he may be required to disclose who the persons were who dictated the article to him and procured him to publish it. The defendant demurs to the bill, and says his demurrer should be sustained (1) because the bill does not set out a legal cause of action, in aid of which the discovery is sought, and (2) because a disclosure of the matters prayed for would tend to incriminate him.

1. The bill states the nature of the action, the names of the parties to it, the term of court at which it was entered, and where it is pending. If this is not a sufficient reference to the action and the declaration contained therein, so as to incorporate into the bill the alleged slanderous words, the objection may be obviated by an amendment. As the bill may be amended to meet this objection, it is unnecessary to further consider the first reason assigned in support of the demurrer.

2. It is an established rule that a demurrer to a bill of discovery lies where the matter sought to be disclosed will convict or tend to convict the defendant of a crime; that he cannot be required to discover the principal fact, or any one of a series or chain of facts, which may contribute to establish a criminal charge against him. *Reynolds v. Fibre Co.*, 71 N. H. 332, 334, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535; *Adams v. Porter*, 1 Cush. 170; *Marsh v. Davison*, 9 Paige, 580; 6 Enc. Pl. & Pr. 743, 779. The malicious publication of a libelous article is a common-law crime, and punishable as a misdemeanor. *May, Cr. L. 148*. If, then, the production of the original article, taken in connection with other evidence, may tend to convict the defendant of a violation of the criminal law, he cannot be required to produce it. That the production of the article from the defendant's possession, unexplained, taken in connection with evidence of its publication, would tend to show that he was the person who published it, cannot be doubted. And if it appeared, on the production of the article, that it was in the handwriting of the defendant, the evidence would be of still greater weight in the establishment of his guilt. *Regina v. Lovett*, 9 O. & P. 462.

3. "Every one who requests, procures, or commands another to publish a libel is answerable as though he published it himself." *Odg. Lib. 119, 120*; *Cochran v. Butterfield*, 18 N. H. 115, 45 Am. Dec. 363. The allegations of the bill, read in the light of this principle, disclose that the publication relied upon to establish the guilt of the unknown persons is the same publication as that with which the plaintiff seeks to charge the defendant. This being so, it follows that an answer to the question, who communicated or dictated the article to the defendant and procured him to publish it? involves an admission that he himself was the agency through which the publication was effected. Such an admission

would tend to establish his guilt, and he cannot be required to make the disclosure.

It is unnecessary to consider whether, in the absence of the foregoing reasons, the plaintiff would (*Post & Co. v. Railroad*, 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86; *Hoppock's Ex'rs v. Railroad*, 27 N. J. Eq. 296; *Telephone Co. v. Mohler*, 51 W. Va. 1, 41 S. E. 421; *Heathcote v. Fleete*, 2 Vern. 442; *Morse v. Buckworth*, 2 Vern. 443; *Moodalay v. Morton*, 2 Dick. 652; *Orr v. Diaper*, L. R. 4 Ch. Div. 92) or would not (*Opdyke v. Marble*, 44 Barb. 64; *Twells v. Costen*, 1 Pars. Eq. Cas. 373; *Dineley v. Dineley*, 2 Atk. 394; *London v. Levy*, 8 Ves. 398) be entitled to have the defendant disclose the names of the unknown persons. The demurrer was properly sustained.

Exceptions overruled. All concurred.

FLINT v. UNION WATER POWER CO. (Supreme Court of New Hampshire. Coos. Jan. 2, 1906.)

1. TRIAL—VIEW BY JURY.

In an action for alleged illegal flowage of plaintiff's land, it was not error during a view to call the jury's attention to a newly dug hole in the ground near the stream and the height of the water therein, as compared with the height of the water in the river, as bearing on the extent of the flowage.

2. WATERS AND WATER COURSES—FLOWAGE—ACTION—EVIDENCE.

In an action for alleged illegal flowage, it was proper for the court to permit a civil engineer to testify that water would percolate through the soil, and that he dug a hole in the land and found that water in it stood on a level with the stream.

3. EVIDENCE—EXPERTS—FINDING.

The fact that a civil engineer was permitted to testify to the percolating character of the soil of plaintiff's land between a certain hole and a river implied a finding that he was qualified to testify on the subject.

4. WATERS AND WATER COURSES—FLOWAGE—INJURIES TO REAL ESTATE—EVIDENCE.

In an action for injuries to plaintiff's land by flowage, evidence that plaintiff relied on the lowlands, which could be cropped without fertilizing, to keep up his light upland, and that the damage to him from water held back by defendant's new dam more than by the old dam was \$1,000 for six years prior to the date of the writ, was admissible.

5. SAME—EASEMENTS—DEEDS—CONSTRUCTION.

A deed under which defendants claimed conveyed the land on which a dam stood and all rights of flowage of any lands belonging to the grantors, or either of them, on a lake and certain rivers and their tributaries, and all right "they had to flow the land of others by any of such dams," followed by a clause that the deed was intended to convey all rights of flowage of any lands in C. county, caused by any of such dams, wherever situated and however the right may have been acquired. *Held*, that such deed only conveyed the right to flow as it was exercised at the time the deed was executed.

Exceptions from Superior Court; Peaslee, Judge.

Action by Benjamin H. Flint against the Union Water Power Company. A verdict

was rendered in favor of plaintiff, and defendant brings exceptions. Overruled.

The plaintiff's evidence tended to prove a record title to the premises (located in Wentworth's location) from 1851, possession and use by the various holders of the title, a customary control of the water in the Magalloway river adjoining the premises by the dam at Errol, operated by the defendants and their predecessors in title down to 1887, the building of a new dam at that time, and an increased flowage thereafter. The defendants' evidence tended to prove that the plaintiff's title originated in a tax sale about 1850; that in 1877 Coe & Pingree held the record title to Wentworth's location and to the Errol dam, and then conveyed to the defendants' grantors the land on which the dam stood, and "all rights of flowage of any lands belonging to us [them], or either of us [them], upon Lake Umbagog, and also upon the Androscoggin and Magalloway rivers and their tributaries, including, also, all right which we [they] have to flow the land of others by any of said dams, intending hereby to convey all right of flowage of any lands in said county of Coos, caused by any of said dams, wherever situate, above or below said dams, and however the right may have been acquired, whether by purchase, grant, prescription, or otherwise, to the end that the grantees may have and enjoy the same rights of flowage, and to the same extent over all said premises, as we [the grantors] now have the right to enjoy." At a view of the premises by the jury, the plaintiff called attention to a newly dug hole some rods from the river, to the water in the hole, and to its height as compared with the level of the river. A civil engineer testified that water would percolate through that soil, and that he dug the hole and found that the water in it stood on a level with the stream. To all this the defendants excepted. Subject to exception, the plaintiff testified that he relied upon the lowlands, which could be cropped without fertilizing, to keep up his light upland, and that the damage to him from water held back by the new dam more than by the old dam was \$1,000 for the six years prior to the date of the writ.

The defendants excepted to the following instructions given to the jury: "The evidence apparently shows that the plaintiff's title is a prescriptive one; but this does not render it any the less valid. He has had such possession and color of title as give him a right to recover damages if the defendants have exceeded their legal rights in the premises. And so the practical question for you is whether the defendants have flowed beyond what they have a right to. The defendants say that they have title by deed, and also a prescriptive right to flow as much as they have flowed. The deed to them from Coe & Pingree conveys the right of flowage by Errol dam. This means the right to flow

as it was exercised at the time the deed was given in 1877; and that is the limit of the defendants' right as founded upon the deed." Instructions were also given as to what was necessary to enable the defendants to acquire flowage rights by prescription as against the plaintiff. The charge then proceeded as follows: "So whether this title is by deed or by prescription, it is measured by the extent of the use; and, as there is no dispute but that the use was substantially the same for more than 20 years, the practical question for you will be whether there has been a substantial increase of the flowage by the new dam. The question, as you will see, is purely one of fact for you to settle. Was the flowage for the 6 years just before March 11, 1908, substantially greater than that which the defendants had claimed and exercised the right to the enjoyment of for 20 years?" There was no exception to these instructions.

Edmund Sullivan and Goss & Tardivel, for plaintiff. Drew, Jordan, Buckley & Shurtleff and White & Carter, for defendants.

CHASE, J. There was no error in the calling of the attention of the jury at the view to the newly dug hole in the ground and the height of the water therein, as compared with the height of the water in the river, nor in the receipt of the civil engineer's testimony regarding the hole and the water. The height of the water in the plaintiff's land, as compared with its height in the river, was a physical fact relevant to the issue on trial, and it might be shown by direct observation and by the testimony of those who had observed it. *Concord, etc., Co. v. Clough*, 70 N. H. 627, 47 Atl. 704. The fact that the civil engineer was permitted to testify to the percolating character of the soil between the hole and the river implies that the court found that he was qualified to testify upon the subject. As there is nothing in the case tending to show that there was any error of law involved in this finding, the parties are bound by it, and his testimony was competent. *Jones v. Tucker*, 41 N. H. 546; *Dole v. Johnson*, 50 N. H. 452. Nor is the exception to the plaintiff's testimony concerning his damages tenable. *Carter v. Thurston*, 58 N. H. 104, 42 Am. Rep. 584; *Foster v. Foster*, 62 N. H. 532.

It would seem, from the manner in which the case was presented to the jury, that it was not denied that the plaintiff had acquired a title by prescription to the land flowed, subject to a flowage easement appurtenant to the defendants' land at Errol, on which their dam was located. The extent of this easement appears to have been the only question in dispute. The defendants asserted title to the easement by virtue of the deed of 1877 from Coe & Pingree to

their grantors, and also by prescription. The only exception to the charge related to the interpretation that was given therein to the Coe & Pingree deed. There were conveyed by this deed the land on which the dam stood and "all rights of flowage of any lands" belonging to Coe & Pingree, or either of them, upon Lake Umbagog, the Androscoggin and Magalloway rivers and their tributaries, and all right they had "to flow the land of others by any of said dams." Whether the phrase "by any of said dams" limits the right of flowing lands above the Errol dam, owned and retained by Coe & Pingree, as well as all rights acquired by them to flow lands of others, might be doubtful in the absence of further statement. But this description is immediately followed by the explanation: "Intending hereby to convey all rights of flowage of any lands in said county of Coos, caused by any of said dams, wherever situated, * * * and however the right may have been acquired," etc. Here, the right of flowing lands other than those conveyed is specifically limited to that "caused by any of said dams." The only flowage easement involved in the action is the one pertaining to the dam at Errol, which, according to the case, must be one of "said dams" mentioned in the deed. The right of flowage conveyed in connection with this dam or the land on which it stood, was not a right to flow Coe & Pingree's other lands to any extent and depth that it was possible to flow them by a dam at Errol, but only a right to flow such lands to the extent that they were customarily flowed by the existing dam. The further explanatory clause is added: "To the end that the grantees may have and enjoy the same rights of flowage, and to the same extent over all said premises, as we now have the right to enjoy." This does not modify the prior explanatory clause. "The same rights of flowage" are of the flowage "caused by any of said dams." These rights are to be enjoyed "to the same extent over all said premises as we [the grantors] now have the right to enjoy"; that is, by means of "any of said dams."

The rightful state of the property at the time of the execution of the deed is weighty evidence of the intention which the parties attempted to express by its terms. *Dunklee v. Railroad*, 24 N. H. 489; *Seavey v. Jones*, 43 N. H. 441; *Watson v. Bartlett*, 62 N. H. 447. Reading the deed in the light of this evidence, and giving its terms their ordinary meaning, it appears that there was no error in the court's instructions to the jury that the right of flowage conveyed by the Coe & Pingree deed was "the right to flow as it was exercised at the time the deed was given in 1877," and that "that is the limit of the defendants' right as founded upon the deed."

Exceptions overruled. All concurred.

STATE v. TRUITT.

(Court of General Sessions of Delaware. Kent.
Oct. 26, 1905.)

1. ASSAULT AND BATTERY—DEFINITION OF ASSAULT.

An assault is any unlawful and wrongful attempt by force and violence to do injury to the person of another.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, §§ 1, 68.]

2. RAPE—ASSAULT WITH INTENT TO RAPE—ELEMENTS OF OFFENSE.

In order to authorize a conviction of assault with intent to commit rape, the jury must be satisfied beyond a reasonable doubt that, if defendant had consummated his intent, he would have been guilty of rape.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, §§ 15, 79-81.]

3. SAME—DEFINITION.

Rape is the carnal knowledge of a woman above the age of 10 years against her will.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, §§ 1-19.]

4. CRIMINAL LAW—EVIDENCE—INTOXICATION.

Where a crime involves a specific intent and purpose as a constituent element of the offense, evidence of defendant's intoxication is competent on the question whether, by reason thereof, defendant was capable of forming and entertaining the intent requisite to constitute the crime.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 67, 761.]

5. SAME—EFFECT OF INTOXICATION.

An intoxicated person may be capable of premeditation and deliberation, and, if he commits a wrongful act willfully and premeditatedly while in his drunken condition, he is as guilty of crime as if he had been sober.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 67.]

6. SAME.

Where a person resolves to commit a crime, and then drinks to intoxication and commits the same, the fact of intoxication cannot lessen the degree of the offense.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 65, 67.]

7. SAME—CRIMINAL INTENT—PRESUMPTIONS.

Where a specific intent is a necessary ingredient of the crime, defendant, so long as he is capable of conceiving and entertaining such intent, must be presumed, in the absence of proof to the contrary, to have intended the natural and probable consequences of his act.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 26-28.]

8. SAME—DEFENSES—DRUNKENNESS—ASSAULT WITH INTENT TO RAPE.

Where defendant, at the time of the commission of an alleged assault with intent to commit rape, knew what he was doing, and was able to appreciate the character of his act, and knew that it was unlawful and wrongful, his drunkenness was no defense.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 65-70.]

9. SAME—ASSAULT AND BATTERY.

A person may be found guilty of a mere assault, no matter how drunk he was at the time of the commission of the offense.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 65-70.]

10. SAME—REASONABLE DOUBT—WHAT CONSTITUTES.

Reasonable doubt as to the guilt of one accused of crime must be such a real and substantial doubt as intelligent and impartial men might

reasonably entertain upon a careful consideration of all the evidence, and must not be a vague, fanciful, or merely possible doubt.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1267, 1906-1922.]

James Irvin Truitt was indicted for assault with intent to rape, and convicted of assault.

At the trial one Celestine Lito, the prosecuting witness, testified: That on the 5th day of July, 1905, between 8 and 9 o'clock in the evening, while she was driving from her home to the town of Marydel, she saw a person lying across the road, and stopped her horse, got out, and told the person (who proved to be the defendant, Truitt, whom she knew) to get over onto the side of the road, as he was in danger, if he remained where he was, of being run over. That after she had induced Truitt to move from his position to the side of the road she told him that, when she came back from Marydel, she would take him home in her dearborn. Shortly thereafter she came back and stopped, and Truitt got into the wagon and sat on the board, which formed the seat of the dearborn, beside Mrs. Lito, the prosecuting witness. That she talked with him and urged him to become a better man, as she had observed that he had been drunk on several occasions. That he spoke to her rather encouragingly along that line, telling her that he believed in God, etc., until they had passed by several houses along the road and were approaching a road, which crossed the one upon which they were traveling, near a woods, when he asked her if she was going to drive up this road to her son-in-law's house. She told him that she was not, but was going to drive on home. That he thereupon grabbed her around the waist with his arm and made an indecent proposal to her, which she refused and resented. That he then threw her down in the bottom of the dearborn, and in her efforts to free herself from him the seat was upset and was thrown across her, with the prisoner's weight resting upon the same. That she screamed, but, as nobody was apparently within hearing, she asked him to let her up from under the seat, as it was hurting her, and, when he did so, quick as a flash she jumped from the dearborn and started running down the road towards her home. That the prisoner jumped out and ran after her, and overtook her a short distance down the road, and threw her down in the grass alongside of the road, where she continued to struggle with him and screamed. That he put his hand over her mouth and told her that, 'f she did not keep still, he would kill her. That she told him, if he killed her, he would have to pay the penalty by being killed himself, and he said he did not care if he was, that he was going to have what he was after. That about that time she saw a man come along the road (whom she thought to be a Mr. Luff, but who proved to be a Mr. Betton, whom she did not know, but who lived near and had heard her

scream), and she called to him several times for help. That he did not heed her at first, but finally came to her assistance, when she jumped up and ran home, a distance of about two miles; her horse having in the meantime gone on ahead of her and being home when she arrived there.

The witness Betton testified: That, when he approached the prosecuting witness at the side of the road, the defendant, Truitt, ran at him, cursed him, and told him he would fix him. The witness thereupon struck the defendant, knocking him down, and then jumped upon him and struck him twice, when the defendant said: "Do not strike me any more. This is only poor Truitt." That he thereupon desisted and let Truitt go.

The husband of the prosecuting witness testified that, when she arrived at home, she was bruised on the arm and side of the neck; that her hair was down, and that she was very much excited; and that she related to him the facts of the assault made upon her by the defendant.

The defendant did not deny that he committed the assault, but stated that he had drunk a quart of apple brandy during the day of the alleged assault (July 5th) and was so drunk that evening that he did not know anything about the matter of the assault, or anything else that happened. Several other witnesses testified to the defendant's drunken condition during the day and evening of July 5th, and one witness testified that in his opinion the defendant was so drunk that he did not know what he was about. There was also testimony to the effect that the character of the defendant for peace and good order was good.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Robert H. Richards, Atty. Gen., and Daniel O. Hastings, Dep. Atty. Gen., for the State. Alexander M. Daly, for defendant.

PENNEWILL, J. (charging jury). The prisoner at the bar, Joseph Irvin Truitt, is charged in this indictment with having committed, on the 5th day of July of the present year, an assault upon one Celestine Lito, with intent her, the said Celestine Lito, to ravish and carnally know. This indictment is based upon a statute of this state, which provides "that if any person shall, with violence, assault any female with intent to commit rape, such person shall be deemed guilty of felony," etc. And the charge embraces, as you have doubtless observed, not only an assault, but also the intent to commit rape.

An assault is any unlawful and wrongful attempt by force and violence to do injury to the person of another, and you may find the prisoner at the bar guilty of an assault simply, if the evidence shall justify such a finding. In order to find the prisoner guilty in manner and form as he stands indicted (that is, guilty of an assault with intent to commit rape), you must be satisfied beyond

a reasonable doubt that if the prisoner had consummated his intent (that is, accomplished his purpose) he would have been guilty of rape. It is therefore necessary for us to tell you briefly what constitutes the crime of rape. It has been defined by this court to be the carnal knowledge of a woman, above the age of 10 years, against her will; and if you believe that the prisoner not only committed the assault alleged in the indictment, but that he intended at the time to commit the crime of rape, you should find him guilty in manner and form as he stands indicted.

We have been asked by the counsel for the defendant to instruct you as to the effect of drunkenness as a defense, where the charge embraces a specific intent; and we think the law upon this question has been very correctly and clearly stated by the court in the case of *State v. Di Guglielmo*, 4 Pennewill, 336, 55 Atl. 350. Judge Grubb, in charging the jury in that case, said: "Although voluntary intoxication constitutes neither excuse for nor palliation of crime, yet, in cases where a specific or particular intent and purpose is an essential or constituent element of the offense, intoxication, even though voluntary, becomes a matter for consideration, and is competent evidence on the question whether, by reason thereof, the defendant was capable of forming or entertaining such an intent or purpose at the time the act was perpetrated. Evidence of intoxication, however, should always be received with great caution, and carefully examined, in connection with the other proven circumstances. A person who is intoxicated may be capable of premeditation and deliberation, and a drunken man who commits a wrongful act willfully and premeditatedly is as guilty in the eyes of the law as if he had been sober. If a person resolves to commit a crime, and then drinks to intoxication and commits the act, the fact of intoxication cannot lessen the degree of the offense, because he specifically intended to commit it. When the specific intent is a necessary ingredient of the crime, so long as the defendant is capable of conceiving and entertaining the design, he must be presumed, in the absence of proof to the contrary, to have intended the natural and probable consequences of his act."

If you believe from the evidence that the prisoner, at the time of the commission of the alleged offense, knew what he was doing, and was able to appreciate the character of his act, and knew it was unlawful or wrongful, his drunkenness would be no defense. All we have said to you about intoxication or drunkenness has reference only to the intent to commit the rape, and does not apply in any manner to the charge of assault, because that does not embrace any specific intent. Therefore, no matter how drunk the person may have been at the time, you may find him guilty of assault only, provided the evidence in this case shall warrant you in so finding.

In this case you may find any one of three verdicts. If you should believe that the prisoner at the bar did not commit the assault at all, your verdict, of course, should be not guilty. If you believe that he did commit the assault alleged, but are not satisfied that he intended to ravish or rape the prosecuting witness, your verdict should be not guilty in manner and form as he stands indicted, but guilty of assault only; and if you should believe that he not only committed the assault, but that it was his intent at the time to ravish or rape the prosecuting witness, your verdict should be guilty in manner and form as he stands indicted. If, after carefully considering all the evidence in this case, you entertain a reasonable doubt of the guilt of the prisoner, that doubt should inure to his benefit, and your verdict should be not guilty. But we say to you that such a doubt must not be a vague, fanciful, or merely possible doubt, but such a real and substantial doubt as intelligent and impartial men may reasonably entertain upon a careful consideration of all the evidence in the case.

Verdict: Not guilty in manner and form as he stands indicted, but guilty of assault only.

GREEN v. COUNCIL OF NEWARK.

(Superior Court of Delaware. New Castle.
March 10, 1905.)

1. MUNICIPAL CORPORATIONS—TORTS—DEFECTIVE SIDEWALKS—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

In an action against a city for injuries to a pedestrian caused by falling on a defective footway or crossing, whether plaintiff was guilty of contributory negligence *held*, under the evidence, a question for the jury.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1754.]

2. SAME—DUTIES OF MUNICIPALITY.

It is the duty of municipal corporations to keep streets or highways in a reasonably safe condition for the use of travelers.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1612.]

3. SAME—PRESUMPTIONS BY TRAVELER.

In the absence of knowledge to the contrary, a traveler on a street may presume that it is in a safe condition, and need not look out or search for holes or obstructions.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1673, 1678.]

4. SAME—DUTY OF TRAVELER—AVOIDANCE OF INJURY.

Where a traveler on a street has knowledge of the existence, nature, and character of any obstruction or danger, he must look out for such obstruction, and take all such precautions to avoid injury as an ordinarily prudent person would take under such conditions, and if he carelessly incurs risk, and is injured thereby, he cannot recover against the city for his injuries, although the city authorities were also negligent.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1677.]

5. SAME—NEGLIGENCE OF DEFENDANT—BURDEN OF PROOF.

In an action against a city for injuries caused by a defective crossing or footway, the

burden is on plaintiff to prove defendant's negligence.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1725.]

6. EVIDENCE—WEIGHT OF CONFLICTING TESTIMONY.

Where testimony is conflicting, the jury should reconcile it, if they can, and, if not, they should give credit to those witnesses who, from their intelligence, truthfulness, impartiality, and opportunity of knowledge, are most entitled to credit under all the facts of the case.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2424, 2437.]

7. DAMAGES—PERSONAL INJURIES—AMOUNT.

The measure of damages for personal injuries is such an amount as will reasonably compensate plaintiff for expenses incurred in treating his injuries, for bodily pain and suffering, for loss of wages incurred in the past, and for such permanent disability to earn a living in the future as may be the result of the injuries complained of.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 222-259.]

Action by Joseph L. Green against the Council of Newark. The jury disagreed.

Action on the case to recover damages alleged to have been sustained by plaintiff on November 11, 1903, by being caught and thrown upon a footway or crossing on Chapel street, in the town of Newark. Plaintiff claimed that said defective footway was allowed to be and remain in such condition through the negligence of the defendant.

The plaintiff testified concerning the accident and his knowledge of the locality and condition of the stone, and also as to his injuries, as follows: "Q. What happened to you on the night of November 11, 1903, if anything? A. I fell on a loose flagstone on Chapel street, in Newark, in this county, and crippled my back. Q. Tell the court and the jury how this accident happened. A. Well, I was going up to my son's store—he had a little store on the corner—to my home, and was walking along with my little boy seven years old alongside of me, and I went across this street with my boy along close by me. I was walking along as I always do ordinarily, as any ordinary man would; and I stepped on the edge of this loose flagstone, and it tilted with me, and my foot went down between it, and it caught that foot, and I made the other step, and it went from under me and throwed me on my back. Q. Was this stone lighted by any street lamp? A. There was a street lamp right below it, but there was a tree that stood between the light and the stone, and it made a kind of shade over the stone—a shadow. Q. Tell the court and the jury, now, the condition of that stone at that time. A. Well, the stone appeared that it laid on a pivot. Sometimes that stone would be apparently placed so that it did not rock much, and other times it went that way. (Witness indicates a rocking motion.) Q. How long had you known of this stone being in that loose condition? A. For two years. Q. In what condition was that stone the last time you noticed it prior to the time

of the accident? A. Well, it appeared to be pretty solid. Q. Knowing this, will you explain to the jury just how you approached the stone to cross it that night? A. Well, I knew that the stone was a dangerous place at times, and I always looked for it, which any man would that knew the stone to be in that condition; and I came up there, walking slow, with my little boy alongside of me, and of course this shadow of the tree was there, and I stepped on this stone; and the last time I had noticed it, it was up close together, and this time it was far enough apart just to let my foot go between it. Did you look at the stone to see if it was flat or otherwise before you crossed it? Yes, sir; but I could not tell, for this shade that was over it, how it was laying. Q. What happened to you after this accident? A. I lay there and tried to get up, and could not do it until help came and gathered me up and taken me in the house. Q. Then what did you do? A. They sent for the doctor. Q. Did it cause you pain? A. Severe pain. Q. Explain to the court and the jury the character of the pain. A. It was right across the small of my back. Q. How long did that pain continue? A. Until the doctor came and injected something in my back that eased it at the present time, and then they carried me to bed. Then I suffered severe for weeks. Q. How long were you in bed? A. Between four and five weeks. Q. Then did you go about your work? A. No, sir; went around my room for quite awhile before I was able to go downstairs. Q. Then how soon did you return to your work? A. I did not return to my business until November, 1904. Q. What business is that? A. My business I am at now is frame making in the paper mill. Q. What wages do you get now? A. One dollar and twenty-five cents a day. Q. How long were you disabled from working at all? A. A year, all but about five weeks. Q. What wages did you make during those five weeks? A. Five dollars a week. Q. And that amounted to how much? A. Twenty-five dollars. Q. Why did you discontinue that work? A. It was climbing in and out the wagon, and I could not stand it. Q. What kind of work was it? A. Driving a huckster wagon, and getting in and out the wagon was too much for me. Q. Then you were idle until when? A. November 3d. Q. Was that because of disability or inability to work following this injury? A. There was nothing that I could do. Q. So that you were out of work from November 11, as I understand, 1903, until November 3, 1904? A. Yes, sir. Q. A year lacking one week? A. Yes, sir. Q. Excepting that week, what was the loss to you in wages as a blacksmith for the 51 weeks? A. That would be about \$510. Q. But during that time you say you received in wages \$25? A. Yes, sir. Q. And since November 3d you have been making, as I understand you, \$1.25 a day, making how much per week? A. Seven dollars

and fifty cents per week. Q. Which is a loss of \$2.50 per week from November 3d to this time? A. Yes, sir. Q. Do you know your expenses in the way of doctor's bill, medicine, etc., or nursing? A. Well, my wife she did the nursing, and as for the doctor's bill I cannot say. He did not send me my bill alone, as I owed him another bill for tending my wife. Q. Are you able to return to your business as a blacksmith? A. No, sir; and don't think I ever will be for the way I suffer with my back. Q. Did your trade as a blacksmith furnish you with steady work? A. Yes, sir. Q. Does your present occupation furnish you with the same probability of steady work and employment? A. I suppose so, if I am able to stand it. Q. How old are you? A. I was born in 1851. Q. That would make you 54 years old? A. Yes, sir. Q. In what month were you born in 1851? A. September 25th. Q. Do you know whether or not the council of Newark or any of its officers knew of the condition of this stone prior to your accident? A. No, sir; I don't know of my personal knowledge. Q. Is the stone in the same condition now that it was at the time of the accident? A. No, sir."

Other witnesses testified on behalf of plaintiff, corroborating his testimony as to the insecure condition of the footway or stone in question, and that it had continued in such condition for a year or more prior to the accident to the plaintiff; one witness testifying that by reason of the rocking motion of the stone she had slipped and come near falling. There was also testimony to the effect that the defendant town council had been notified of the defective condition of the crossing six months prior to the accident.

Argued before LORE, C. J., and PENNEWILL and BOYCE, JJ.

Josiah Marvel, for plaintiff. Chas. B. Evans and J. Harvey Whiteman, for defendant.

The defendant moved for a nonsuit on the ground that the plaintiff had actual and constructive knowledge of the defects alleged to have caused the injury, having crossed over the particular crossing three or four times daily for several years before the accident, knew where the stone was, knew of its defective condition, but nevertheless stepped upon it; that he was therefore guilty of contributory negligence, and could not recover.

LORE, C. J. For the purposes of this nonsuit, we are only to determine now whether there is any evidence to go to the jury to show that the plaintiff exercised reasonable care and caution with the knowledge with which he is affected. While we do not attempt to pass upon the merits of the case or upon plaintiff's right to recover, or anything of that kind—that being for the jury—yet it does occur to the court that there is some

evidence to go to the jury as to the degree of caution with which the plaintiff approached that stone, with the knowledge with which he was affected, and that therefore it is a question for the jury, and that we ought not to take it away from the jury. We therefore refuse to grant the nonsuit.

LORE, C. J. (charging the jury): Joseph L. Green, the plaintiff in this action, seeks to recover from the council of Newark, a municipal corporation of this state, the defendant, damages which he alleges he sustained on the 11th day of November, 1903, by being caught and thrown upon a footway or crossing on Chapel street, in the town of Newark, which he alleges was caused by the negligence of the defendant. The plaintiff claims that on the evening of the day named, while he and his little boy, in the exercise of due care, were walking upon the stone footway of the crossing on Chapel street, one of the stones of the footway which was unsafely bedded turned, threw the plaintiff down, and so injured him in his back and otherwise that for nearly a year he was unable to work, and that he still suffers therefrom; that the crossing was in a dangerous condition at the time of the accident, and had been so dangerous for a long time before; that the defendant knew of such condition and negligently permitted it to continue. The defendant, on the other hand, claims (1) that the footway, at the time of the accident, was in a reasonably safe condition; (2) that, even if it was in a dangerous condition, the plaintiff was fully acquainted therewith and negligently took the risk of using it as he did.

There are no difficult or contested questions of law in this case. It is our duty, however, under the prayers of the respective parties to the action, to instruct you as to certain principles of law that bear upon the case. We have been asked by the counsel for the defendant to instruct you to return a verdict for the defendant. This we decline to do. We consider that the case should be determined by the jury upon the evidence submitted, and under the charge of the court.

It is not denied that Newark is an incorporated town of this state, and that the council of Newark, the defendant, had full jurisdiction and control of the streets and crossings of the said town at the time of the accident, and that Chapel street was one of the said streets and a public highway of this county. Such streets or highways are for the use of the public, and for the public convenience. It is the duty of the persons having control of them to keep them in a reasonably safe condition, free from holes, pits, or other obstructions, so that they may be safe for the traveler, on foot or otherwise, who may use them in a lawful and careful manner. In the absence of any knowledge to the contrary, the traveler may presume that such streets or highways are in such safe condition,

and in such case he is not bound to look out or search for holes or other obstructions.

On the other hand, if the traveler has knowledge of existence, nature, and character of any obstruction or danger, he is put upon his guard, and must look out for such obstruction, and take all such precautions to avoid injury therefrom as an ordinarily prudent person would take under such conditions. His care and precaution should be in just proportion to the measure of his knowledge. If, knowing the danger, he carelessly incurs risk and is injured thereby, he may not hold others accountable for the results of his own negligence, even though such others may have been jointly negligent with him. The right of the plaintiff to recover in this action is founded upon the negligence of the defendant. If there was no negligence on the part of the defendant, there can be no recovery. The burden of proving such negligence rests upon the plaintiff.

In reaching your verdict you are to be governed by the law as we have stated it in this charge. If you should be satisfied from the evidence that at the time of the accident the footway or crossing in question was in a dangerous condition, although known by the plaintiff so to be, yet that the plaintiff was injured in crossing the footway while using such reasonable care as the conditions demanded (that is, without negligence on his part), your verdict should be for the plaintiff, provided the defendant had actual or constructive knowledge of such dangerous condition. Should the evidence, however, satisfy you that the footway was then in a dangerous condition, and known to the defendant to be so, but that the plaintiff was entirely familiar with such condition, and with such knowledge carelessly and negligently saw fit to use that crossing, and was thereby injured, your verdict should be for the defendant. In such case the plaintiff would be guilty of contributory negligence and may not recover, as the law will not attempt to measure the extent of each one's contribution to the accident. If you should find that at the time of the accident the footway was in a reasonably safe condition, your verdict should be for the defendant.

Where testimony is conflicting, as in this case, the jury should reconcile such testimony, if they can; but, if they cannot so reconcile it, they should give credit to those witnesses whose apparent intelligence, truthfulness, impartiality, and opportunity of knowing the facts about which they speak, most entitle them to credit, taking into consideration all the facts and surroundings of the case. Your verdict should be based upon a careful consideration of all the testimony, and for either the plaintiff or defendant, as you may deem just.

Should your verdict be for the plaintiff, it should be for such an amount as would reasonably compensate him for expenses incurred in treating his injuries, for his bodily pain

and suffering, for loss of wages incurred in the past, and for such permanent disability to earn a living in the future as may be the result of the injuries sustained by him in the accident set out in the declaration.

The jury disagreed.

STATE v. NILES.

(Supreme Court of Vermont. Franklin. Jan. 29, 1906.)

1. GAME—STATUTORY PROVISIONS.

Acts 1896, p. 74, No. 94, as amended by Acts 1898, p. 84, No. 108, prohibiting the killing or possession of deer during the closed season and the hunting or capturing of deer by certain methods during the open season, making the possession of deer during the closed season presumptive evidence of guilt, and further regulating the hunting and shipment of deer, is not wholly repealed as to nonresidents by Acts 1904, p. 167, No. 128, providing for the granting of hunting licenses to nonresidents, regulating in certain particulars the exercise by nonresidents of the privilege of hunting and shipping game, and repealing such acts and parts of acts as are inconsistent therewith, but is only repealed in so far as it is inconsistent with the later statute. In other respects, nonresidents must conform to its provisions, and are subject to the penalties and presumptions therein prescribed.

2. SAME—NATURE OF PROPERTY.

No one can acquire an absolute property in animals *feræ naturæ*, but the ownership of such animals is at most a qualified one, and belongs to all the people of the state in common.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, § 3.]

3. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—DISCRIMINATIONS—JUSTIFICATION.

Acts 1896, p. 74, No. 94, as amended by Acts 1898, p. 84, No. 108, prohibits any person, except in the open season, from killing a wild deer or having such a deer in his possession, imposes a fine of \$100 for killing more than one deer during the open season, and requires one transporting deer to have the carcass open to view, tagged, and plainly labeled with his name. Acts 1904, p. 167, No. 128, providing for the granting of hunting licenses to nonresidents on the payment of a fee, repeals the act of 1896 as to nonresidents, in so far as it is in conflict therewith, and permits a licensed nonresident to transport the carcass of a deer by merely having a coupon attached thereto, and authorizes the imposition of a lesser fine than \$100 on a nonresident for unlawfully having deer in his possession. A resident is not required to have a license in order to be entitled to hunt deer. *Held*, that the discriminations in favor of a nonresident are justified by the fact that the nonresident, having paid for and obtained a license, acquires a qualified property in the carcass of the animal, while the resident, who hunts without a license, acquires no such property, and consequently the legislation does not infringe the equality clause of Const. U. S. Amend. 14.

Exceptions from Franklin County Court.

Calvin B. Niles was informed against for having in his possession wild deer in the closed season. There was a judgment overruling a demurrer to the indictment, and respondent excepted. Judgment affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Lee S. Tillotson, for plaintiff. Warren R. Austin, State's Atty., for the State.

START, J. The respondent demurs to the information wherein he is charged with the offense of having in his possession two wild deer during the closed season for hunting, and with taking wild deer, contrary to the provisions of No. 94, p. 74, of the Acts of 1896, as amended by No. 108, p. 84, of the Acts of 1898, and insists that by No. 128, p. 167, of the Acts of 1904, nonresidents of this state are exempt from the penalties provided for by the act of 1896, and that he is thereby discriminated against in contravention of his rights under the fourteenth amendment to the Constitution of the United States. He claims that by No. 128, p. 167, of the Acts of 1904, a resident of this state is unlawfully discriminated against, in that he is by the act of 1896, as amended by No. 108, p. 84, of the Acts of 1898, prohibited from killing or having in his possession a deer during the closed season for hunting; that for killing or having in his possession, during the open season, more than one deer, he subjects himself to a fine of \$100; that he is prohibited from transporting a deer during the open season without its being open to view, tagged, and plainly labeled with the name of the owner thereof, and accompanied by him; that he is prohibited, during the open season, from hunting, destroying, or capturing deer with a dog or dog kind, by the aid or use of a jack or artificial light, by the method known as "crusting," while the deer are yarded, or by the use or assistance of any snare, trap, or salt lick; and that the possession of a deer, except in the open season, is presumptive evidence that he is guilty of a violation of the provisions of section 1 of the act of 1896; while a nonresident is, by No. 128, p. 167, of the Acts of 1904, exempt from all of these prohibitions and requirements. These claims, as a whole, are not sound.

Section 1 of the act of 1896 provides that no person, except in the open season, shall pursue, take, or kill a wild deer, or have in his possession a wild deer or part thereof, so taken or killed, and that the possession of a deer or any part thereof, except in the open season, shall be presumptive evidence that the person having it in his possession is guilty of a violation of the provisions of the section. The act of 1904 only repeals such acts and parts of acts as are inconsistent therewith. The act of 1896, as amended by the act of 1898, is still in force and binding upon a nonresident, as well as a resident, of this state, except as is otherwise provided by the act of 1904. There is nothing in the act of 1904 that is inconsistent with the act of 1896, except the provision relating to the transporting of deer, the penalty for killing more than one deer, and the provision requiring a nonresident to procure a license. That part of the act of 1896, as amended by the act of 1898, which prohibits the killing or possession of a deer during the closed season for hunting, or, at any time, the hunting

of deer with a dog or dog kind, by the aid or use of a jack or artificial light, by methods known as "crusting," while deer are yarded, or by the use or assistance of any snare, trap, or salt lick, remains in force; and for a violation of any of these provisions residents and nonresidents are alike punishable under the act of 1896. A nonresident's license to hunt in this state, except as is otherwise provided by the act of 1904, must be taken to be a license to do so in conformity to the general game laws of this state, and a nonresident who has in his possession, during the closed season, a deer, subjects himself to the penalty provided by the act of 1896. A nonresident, being punishable under the act of 1896 for having a deer in his possession during the closed season, is not exempt from the presumption therein provided for, which arises from such possession; and in prosecutions against him under the act of 1896 for having such possession he must overcome this presumption to the same extent that a resident is required to in a like case. The act of 1904 does not impose the same penalty on a nonresident for killing more than one deer during the open season that is by the act of 1896 imposed upon a resident for doing the same act; for that a nonresident may be fined not less than \$25 nor more than \$100, while a resident must pay a fine of \$100. Also, a nonresident may transport the carcass of one deer by having a coupon, furnished by the fish and game commissioners, attached thereto, while a resident to do so must have the carcass open to view, tagged, and plainly labeled with the name of the owner thereof, and accompanied by him. These regulations for admitting nonresidents, on payment of a license fee, to this state for the purpose of hunting, which differ from those regulating hunting by residents of this state, who are not required to procure a license, are within the police power of the state, and do not render either act nonenforceable.

A resident is not by the acts denied his constitutional right to hunt deer under legislative regulations as to the time for doing so and the number of deer that may be killed by one person; and we cannot say that the regulations are oppressive or unreasonable. These regulations apply to a nonresident, as well as to a resident, hunter. There is nothing in the act of 1904, which provides for licensing of a nonresident hunter, that takes away the right of a resident to hunt. The regulations respecting the licensing of a nonresident hunter, which differ from those provided for a resident, relate to the license fee, the punishment, and the transportation of deer. If these discriminate against a resident, they are discriminations, which are within the police power of the Legislature to make.*

No person can acquire an absolute property in animals *feræ naturæ*. The ownership of such animals is, at most, a qualified one. They belong to no persons in particular. As Blackstone says (2 Com. 394): "A man may, lastly, have a qualified property in animals *feræ naturæ* * * *; that is, he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty, and may restrain any stranger from taking them therein; but the instant they depart into any other liberty this qualified property ceases." It follows that this qualified property belongs to all the people of the state in common, and, as Blackstone further says, " * * * that this natural right * * * may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community." Mr. Justice White, in *Geer v. State of Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, remarks that "the right to preserve game flows from the undoubted existence in the state of a police power to that end, that in most of the states laws have been passed for the protection and preservation of game, and that the power of the state to so legislate has not been questioned." He further says " * * * that the power or control lodged in the state, resulting from this common ownership, is to be exercised like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good." He quotes from *Ex parte Maier*, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129, where it is held that the wild game in a state belongs to the people in their collective sovereign capacity. In *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098, the court said, in respect to the ownership of wild animals, that such ownership is in the state, not as proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common. This is the doctrine of *American Express Co. v. People*, 133 Ill. 649, 24 N. E. 758, 9 L. R. A. 138, 23 Am. St. Rep. 641, where it is held that the ownership of game is in the people of the state, and that the power to legislate on this subject is part of the police power, inherent in each state. See *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *Wheatley v. Harris*, 70 Am. Dec. 259. The law upon this subject is concisely stated in *Magner v. People*, 97 Ill. 333: "The ownership being in the people of the state, the repository of the sovereign authority, and no individual having any property rights to be affected, it necessarily results that the Legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as, in the opinion of its

*See note at end of case.

members, will best subserve the public welfare." This doctrine is fully stated in *Payne v. Sheets*, 75 Vt. 335, 55 Atl. 656. In *State v. Norton*, 45 Vt. 268, the court said: "The numerous statutes which have been passed for the protection of game and fish have been deemed necessary to the beneficial enjoyment of the constitutional right, and the court will not hold such laws unconstitutional until it is clearly shown that they are so prohibitory as to virtually deprive the inhabitants of the right secured to them by the Constitution." In *State v. Theriault*, 70 Vt. 617, 41 Atl. 1030, 43 L. R. A. 290, 67 Am. St. Rep. 695, a statute which authorized the fish and game commissioners, when they placed fish in a pond or stream, to prohibit fishing therein, or in specified portions thereof, for a term of years, and provided that waters when so stocked should be treated as public waters, etc., was held not unconstitutional, but as a reasonable exercise of the police power of the state.

The granting of licenses by the fish and game commissioners to nonresident hunters to kill deer within this state is within the proper exercise of the police power of the state, provided it does not discriminate in their favor and against resident hunters, without classification. Classification is essential to discrimination, and there can be no classification unless there is some difference between resident and nonresident hunters that bears a just relation to the classification. In this case a difference is found in the fact that the resident hunter has a qualified property in the deer, while the nonresident has no property whatever therein. There is a clear discrimination in the law, as has been shown, in favor of nonresidents in respect to having the carcass exposed to view, labeling, etc. But we think that a nonresident person, having paid for and obtained a license, and having killed a deer under his license, acquires such a property in the body of the animal that it may be removed from the state without its being open to view, tagged, labeled, etc. In this respect the act is not unconstitutional.

Judgment affirmed and cause remanded.

NOTE.—Judge START finished his work upon this opinion on the Saturday before his death, which occurred Tuesday, November 7, 1905. From the star the opinion is per curiam.—Reporter.

HILTON v. HANSON et al.

(Supreme Judicial Court of Maine. Dec. 27, 1905.)

1. CONTRACT—WAIVER—EVIDENCE.

A written contract may be waived either directly or inferentially, and such waiver may be proved by express direction, or by acts and directions manifesting an intent not to claim the supposed advantage, or by a course of acts and conduct, or by so neglecting and failing

to act, as to induce a belief that it was the intention and purpose to waive.

2. EVIDENCE—PAROL EVIDENCE—CONTRACT—WAIVER.

Parol evidence of a subsequent waiver of any of the stipulations in a written contract, or of a right under such contract, is admissible, even when such contract is under seal.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2146.]

3. WORK AND LABOR—QUANTUM MERUIT.

When a written contract has been waived, an action of quantum meruit will lie for work and labor done.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Work and Labor, §§ 27, 29.]

4. SAME—EXPRESS CONTRACT—WAIVER—EVIDENCE.

In the case at bar, the jury found, and it is held, that the written contract had been waived, and that the plaintiff's verdict must stand.

(Official.)

Action by Herbert M. Hilton against Charles E. Hanson and David M. Parks. Verdict for plaintiff for \$143.44. Motion for a new trial overruled.

Assumpsit on account annexed for services rendered in cutting, splitting, and piling wood, and for cutting and hauling logs, and for peeling hemlock bark, etc. The writ also contained an omnibus count of the common form. Tried at the December term, 1904, of the Supreme Judicial Court, Somerset county. Plea, the general issue, together with a brief statement alleging that there was a written contract duly executed between the plaintiff and the defendants upon which the plaintiff's action should have been brought, and that the action of assumpsit, as brought by the plaintiff, could not be maintained, and also alleging that the plaintiff had broken said contract, thereby damaging the defendants to the amount of \$500, which said sum the defendants asked to be allowed to them against the plaintiff by way of recoupment.

Argued before WHITEHOUSE, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Daniel Lewis, for plaintiff. Morse & Anderson, for defendants.

SPEAR, J. This is an action of assumpsit containing a count for quantum meruit, brought by the plaintiff to recover of defendants for the sum of \$168.94, and interest thereon amounting to \$15.20, for services rendered in cutting, splitting, and piling wood, and for cutting and hauling timber, etc. The defendants set up in defense a written contract duly executed between the plaintiff and defendants, upon which they say the plaintiff's action should have been based, and that his action of assumpsit cannot be maintained. The plaintiff admits the execution of the written contract, but says that it was waived and a new oral agreement substituted in its place, whereby he was thereafter to receive an agreed compensation as set forth in his account annexed for services rendered.

That a written contract may be waived either directly or inferentially is almost too

well settled to require citation. Waiver may be proved by express declaration, or acts and declarations manifesting an intent not to claim the supposed advantage, or by a course of acts and conduct, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive. *Peabody v. Maguire*, 79 Me. 586, 12 Atl. 630. Parol proof of the subsequent waiver of any of the stipulations in the written contract, or of any right under such contract, is admissible, even when such contract is under seal. *Adams v. Macfarlane*, 65 Me. 152. In *Blood v. Enos*, 12 Vt. 626, 36 Am. Dec. 363, the court say: "It is always competent for the parties to rescind a subsisting simple contract by a naked verbal agreement to that effect, whether this was the intention of the parties is to be determined by the jury from what passed between them." Waiver is also held to be a question of fact. See *Peabody v. Maguire*, *supra*, and cases cited.

It is also well settled, when a contract has been thus waived, an action of quantum meruit will lie for work and labor done. *Abbott's Trial Evidence* (2d Ed.) p. 446, § 8. It is held in *Greenleaf* (volume 2, § 104) that the plaintiff may resort to the common counts, where the contract, though partly performed, has been abandoned by mutual consent, or where it appears that what was done by the plaintiff was done under a special agreement, but not in a stipulated time or manner, and yet was beneficial to the defendant. See, also, *Munroe v. Perkins*, 9 Pick. (Mass.) 298, 20 Am. Dec. 475.

But the defendants reply further and assert that, even if this is so, the plaintiff's action cannot be sustained, inasmuch as he has brought suit against the defendants jointly, and the evidence in the case shows that the modified contract, if made at all, was made between the plaintiff and only one of the defendants to the original contract without any knowledge or consent on the part of the other, and that one joint contractor cannot thus waive the original contract and bind the other to a new or modified contract.

The defendants were owners in common of the land on which the wood and timber was to be cut by the plaintiff. The legal position of the defendants, with regard to the right of one joint contractor to waive or bind the other to a new and modified contract without his knowledge or consent, may be well taken, but the plaintiff avers that the defense set up by the defendants is not warranted by the facts, and that the defendant *Charles E. Hanson*, instead of being without knowledge of, and not consenting to, a modified contract, was cognizant throughout the whole transaction of what was going on, of what his co-contractor was doing; that he received his share of the benefit of all the services performed by the plaintiff; and that, under all the facts and circumstances in this case, the inference is fairly warranted that the defendant *Parks* acted as the agent of

Hanson in engaging in the new agreement with the plaintiff, and that *Hanson* understood and ratified all that was done in pursuance thereof. The jury found that the plaintiff was entitled to recover of the defendants for the services rendered the sum of \$143.44. No ground is found in the evidence, equitable or legal, for disturbing the amount of the verdict. The case finds that the plaintiff performed services for the defendants which were worth to them \$143.44 and received and appropriated the benefit of these services to their own account.

The only remaining question is whether the evidence warrants the other conclusion which the jury must have arrived at in order to find a verdict for the plaintiff, that the defendant *Hanson* was represented by his co-contractor *Parks* in negotiating the contract under which these services were rendered, or ratified the contract while they were being performed, or after they were completed. It would be practically impossible, in a case like this, to prove that one of the contractors was an agent for the other, in procuring the services of the plaintiff, by direct evidence of any specific agreement between them. It is not essential that the agency or the ratification claimed by the plaintiff should be so proved. These facts may be established by inference drawn from the other circumstances and facts connected with the case.

A ratification may be implied as from the principal's act. *A. & E. Ency. of Law*, vol. 1, p. 437. The acceptance of the moiety originally paid over to the co-tenant was held to be the ratification by him of the act in the other in making a shipment and consignment of goods for sale. *Rogers v. White*, 6 Me. 193. In this case the parties were tenants in common. A party cannot claim the property, and yet deny the agency of the purchaser. When they have claimed the property purchased, it is too late to deny the agency. *Newhall v. Dunlap*, 14 Me. 180, 31 Am. Dec. 45. If one joint debtor, not a co-partner, signs the name of another without authority to a promissory note, the promise of the latter to pay it with full knowledge of all the facts will amount to the ratification of an assumed authority, and the court will draw the inference that he must have known of the facts when he made the promise to pay. *Waite v. Foster et al.*, 33 Me. 424. When an agent, without the authority or knowledge of his principal, borrows money and applies it to the payment and discharge of the legal liabilities of his principal, and the principal knowingly retains the benefit of such payment, the lender may recover therefor in an action against the principal. The principal cannot retain the benefit of the money hired by his agent, and at the same time legally refuse to pay the lender, upon the ground that the agent had no authority to borrow the money. *Perkins v. Boothby et al.*, 71 Me. 91. It should not require a great quantity of evidence to warrant the

legal inference of a duty to do what is right. In this case the rule would seem to apply. The undisputed facts show that the defendants were owners in common of the property in which the plaintiff operated; that they were jointly interested in the result of the operation; that the defendant Hanson, as well as Parks, knew what the plaintiff was doing; that he saw the plaintiff, talked with him, and personally made a partial payment to him for work performed; that he received and appropriated to his own use his share of the services rendered by the plaintiff, and had repeatedly promised the plaintiff to pay him therefor. No intimation that Hanson repudiated the action of Parks or the services done by the plaintiff was ever made until after the trial of this case. It was only after a verdict against them that they raised the defense now offered.

From all the evidence in this case, we are not prepared to say that the verdict was so clearly wrong as to warrant us in setting it aside. The case was tried upon its merits. No exceptions were taken to the rules of law given by the court. The contention of both sides was therefore properly presented to the consideration of the jury. We do not think that the inference can be properly drawn that the jury acted under a mistake, disregarded their duty, or were influenced by improper motives.

Motion overruled.

**COMMONWEALTH BANK OF BALTIMORE,
to Use of PRESTON, v.
KIRKLAND.**

(Court of Appeals of Maryland. Jan. 10, 1906.)

**1. PLEADING — DECLARATION — INSTRUMENT
SUED ON.**

Baltimore City Charter, § 312, provides that, when a cause of action is a contract, plaintiff is entitled to judgment after 15 days from the return day, unless the plea filed contains a good defense, etc.; and section 313 declares that the plaintiff shall not be entitled to judgment under the preceding section, unless at the time of bringing an action he shall file with his declaration an affidavit stating the true amount the defendant is indebted to him, and shall also file the bond, bill of exchange, promissory note, or other writing or account by which the defendant is so indebted, etc. *Held*, that the proceeding contemplated by such sections was a special statutory one, and must be strictly complied with in order to entitle plaintiff to judgment thereunder.

2. SAME—WRITTEN CONTRACT—FILING.

In an action on an alleged guaranty, to recover a deficiency arising on a mortgage foreclosure sale, the declaration alleged that the mortgagor covenanted to pay the debt to H. or his assigns, and that by successive assignments the debt and mortgage were transferred to P., the use plaintiff; that the debt was due from the mortgagor to P.; and that defendant guaranteed the payment of the mortgage debt in consideration of the forbearance of plaintiff, who was not the equitable owner of the debt, to enforce a mortgage for a reasonable time. Plaintiff filed as the obligation of defendant, a receipt for certain interest due on the mortgage alleged to

have been signed by defendant, which recited that it was understood that he guaranteed the payment of the debt. *Held*, that such receipt, unexplained, did not constitute a contract by defendant to pay the mortgagor's debt, and that the filing thereof, in the absence of a denial of the signature, did not entitle plaintiff to judgment, as provided by Baltimore City Charter, §§ 312, 313.

3. FRAUDS, STATUTE OF—DEBT OF ANOTHER.

A contract by which defendant was alleged to have guaranteed the payment of a mortgage debt, in consideration that plaintiff, who was not the equitable owner of the debt, would forbear to enforce the same for a reasonable time, was a promise to answer for the debt of another, within the statute of frauds.

Appeal from Superior Court of Baltimore City; Danl. Girard Wright, Judge.

Action by the Commonwealth Bank of Baltimore, to use of James H. Preston, against Ogden A. Kirkland. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, SCHMUCKER, JONES, and BURKE, JJ.

S. S. Field, for appellant. Wm. S. Bryan, Jr., for appellee.

PAGE, J. It is alleged in the narr. that by mortgage a certain Edward O. Pritchett covenanted to pay to Joseph E. Hall the sum of \$3,750, three years after the 15th of April, 1890, with interest thereon at 5 per cent., payable annually, with power of sale to the mortgagee or his assigns, upon default being made in the payment of the principal or interest, at the time limited for the payment of the same or the interest thereon; that the said mortgage debt and mortgage were assigned by Hall to William T. Donaldson on the 2d of October, 1899, and by him, on the same day, to the Baltimore Building Association, and on the 12th of December, 1899, by the latter to the appellant; that afterwards, the appellant being still the holder of the mortgage and the debt secured thereby, and the appellee being the real owner of the equity of redemption, and the said mortgage being in default for the nonpayment of overdue interest, and the appellant being about to sell the mortgaged property, the appellant and appellees "in conversation" agreed together that the appellant would accept from the appellee the overdue interest and give up its right to proceed to enforce the said mortgage for a reasonable time and to demand the entire mortgage debt, and that the appellee, in consideration therefor, would guaranty the payment of the said debt, but said debt was never paid; that subsequently, the said mortgage being again in default, and the whole of the entire debt being due, the appellee having refused, after due notice and request, to pay the same, the appellant sold the property, and after applying the proceeds of sale to the said debt, there remained a balance of \$2,289 still unpaid; and that subsequently, for a valuable consideration, the said bank assigned the balance

of the mortgage debt and guaranty to James H. Preston, the equitable plaintiff, but the said appellee has refused to pay him the said sum due as aforesaid, though often requested so to do. Annexed to and filed with this declaration was the following paper, with an affidavit: "Office of O. A. Kirkland, Auctioneer, Rooms 104 and 105 Law Building, First Floor. C. & P. Telephone Call 960. Home Telephone Call 465-3. \$93.75. Baltimore. Received, Baltimore, Mch. 6, 1900, of Mr. Ogden Kirkland, the sum of ninety-three 75/100 dollars in payment of 6 months' interest due Oct. 15, 1889, on mtge. at Cedar Heights, being same mtge. given by Edw. C. Pritchett and wife to Joseph E. Hall, and recorded in Balto. County Liber N. B. M. No. 195, folio 260. It is also understood that this interest is accepted from Mr. Ogden Kirkland with the understanding that he guarantees the payment of the said mtge. debt of \$3,750. O. A. Kirkland [Seal], per J. M. Winkler." The court instructed the jury to render a verdict for the appellee, and after judgment this appeal was taken.

There were seven bills of exception, six to the rulings on the evidence, and one to the ruling of the court taking the case from the jury and refusing the prayer of the appellant. No evidence was offered to prove the execution of the alleged guaranty, filed with the narr. The important question in the case is whether the genuineness of the signature thereto is admitted by the pleadings, for the purposes of the cause. The charter of Baltimore (section 312) provides that in any suit, when the cause of action is a contract, etc., the plaintiff shall be entitled to judgment, after 15 days from the return day to which the defendant shall have been summoned, although the defendant may have pleaded, unless such plea contains a good defense, and unless the defendant, or some one in his behalf, under oath or affirmation shall state that every plea is true, and that the affiant believes the defendant will be able, at the trial, to produce sufficient evidence to support it, etc., "and if the copartnership or incorporation of any of the parties to the suit shall be alleged in the declaration and the affidavit to be filed thereto, as hereinafter provided, or if there shall be filed with the declaration in said cause any paper purporting to be signed by any defendant therein, the fact of such alleged copartnership and the genuineness of such signature, shall be deemed to be admitted for the purposes of said cause, unless the affiant knows or has good reason to believe such allegation of copartnership or incorporation to be untrue, or that such signature was not written by or by the authority of the person whose signature it purports to be." By section 313 it is further provided that the plaintiff shall not be entitled to judgment under the preceding section, unless at the time of bringing his action he shall file with his declaration an affidavit

stating the true amount the defendant is indebted to him, "and shall also file the bond, bill of exchange, promissory note, or other writing or account, by which the defendant is so indebted," etc. It is clear that the proceeding contemplated by these sections, being "a special statutory one," must be "strictly complied with." *Thillman v. Shadrick*, 69 Md. 523, 16 Atl. 138.

The objection made here is that the paper filed with the declaration does not comply with the provisions of the statute, which requires that there shall be filed the "writing or account by which the defendant is so indebted." It is certainly not necessary under this provision to file that which is evidence only. *Dawson v. Brown*, 12 Gill & J. 59. *Lee v. Tinges*, 7 Md. 229. But the writing should show on its face at least a prima facie case of indebtedness from the defendant to the plaintiff. Now, was the paper filed with the declaration the writing "by which the defendant is so indebted." It purports to be a sealed instrument, and is signed by "O. A. Kirkland, per J. M. Winkler." It acknowledges the receipt from Ogden Kirkland, of \$93.75 "in payment of six months interest due Oct. 15th, 1889, on mortgage at Cedar Heights, being same mortgage given by Edw. C. Pritchett and wife to Joseph E. Hall, recorded in Baltimore County, Liber N. B. M. No. 195, folio 260," and concludes with the following words: "It is also understood that this interest is accepted from Mr. Ogden Kirkland with the understanding that he guarantees the payment of the said mortgage debt of \$3,750." It is difficult to perceive how a receipt from O. A. Kirkland to Ogden Kirkland can in any manner unexplained constitute or be evidence of an indebtedness from O. A. Kirkland to the Commonwealth Bank of Baltimore. There is no stipulation on the part of Kirkland to become indebted to that institution, and no facts are stated from which that can be inferred. The most that can be stated about it is unexplained, that O. A. Kirkland accepts the interest with the understanding that Ogden Kirkland is to guaranty the payment of the mortgage debt; but there is nothing showing to whom the guaranty was made. If the mortgage and the assignments thereof had been filed with the declaration, there might have been a clearer statement of the cause of action. But, standing alone, it cannot be regarded as the paper upon which the defendant was indebted. Unexplained by other evidence, it is unintelligible, and imposes no obligation upon anyone. It cannot be regarded as containing a promise to pay the debt of another, for the reason that the contract to do so is not stated with such certainty as that it can be understood, without reference to parol proof. Such a paper could not of itself constitute a valid cause of action, for the additional reason that it does not comply, even when taken in connec-

tion with the averment of the narr., with the requirements of the statute of frauds. It is set out in the narr. that by the mortgage one Pritchett covenanted to pay the debt to Hall and his assigns, and that by successive assignments the debt and mortgage was transferred to Preston, the equitable plaintiff. The debt was therefore due from Pritchett to the assignee, Preston, and that the defendant Kirkland "guaranteed the payment of the mortgage debt" in consideration that the plaintiff (not the equitable plaintiff) would forbear for a reasonable time to enforce said mortgage and to demand the entire mortgage debt. Such a contract is within the statute of frauds, and must be by writing and not by parol. *Thomas v. Delphy*, 33 Md. 373. The contract "must be stated with reasonable certainty, so that it can be understood from the writing itself, without having recourse to parol proof." "It cannot be partly in writing and partly in parol." *Frank v. Miller*, 38 Md. 459. Nor could proof of the other writings set out in the narr. avail the appellant in this case. Here the mortgage, certainly the writing standing alone, without the aid of the assignments thereof, together with the paper filed with the narr., could show any legal obligation on the part of Kirkland to pay Pritchett's debt to the Bank or Preston.

The plaintiff in this case having failed to comply with the provisions of sections 312 and 313, in that it did not file with the declaration the writing by which the defendant was indebted, cannot claim the benefit of the special proceedings permitted by the statute. The case of *Thorne v. Fox*, 67 Md. 67, 8 Atl. 667, contains nothing in conflict with this view. There the plaintiff had fully complied with the statute, but pleas were interposed which permitted the defendant under the general issue to contest everything involved in the issues except the two facts which under the pleadings had been legally admitted. Here, not having complied with the statute, the appellant can claim nothing under it. Nor can the claim be successfully made that the paper can be regarded as admitted, under the provision of Code Pub. Gen. Laws, art. 75, § 24, subsec. 108, that provides: "Whenever the partnership of any parties, or the incorporation of any alleged corporation, or the execution of any written instrument filed in the case, is alleged in the pleadings in any action or matter at law, the same shall be taken as admitted for the purpose of said action or matter, unless the same shall be denied by the next succeeding pleading of the opposite party or parties." There is no allegation in the narr. of the execution of any instrument. The averment is that the defendant "guaranteed the payment of the mortgage debt," but refers in no manner to the writing. There being, therefore, no legal admission of the execution of the writing, and no proof thereof, the court committed no error in re-

jecting it, and, there being no evidence in the case tending to establish the alleged guaranty, it was correct in taking the case from the jury and directing a verdict for the defendant. It follows, also, that the appellant's prayer was properly rejected.

Judgment affirmed.

WESTERN UNION TELEGRAPH CO. et al. v. RING.

(Court of Appeals of Maryland. Jan. 10, 1906.)

1. TRESPASS—DAMAGES—EVIDENCE.

In an action for trespass on plaintiff's land, causing damage to his trees, evidence that plaintiff had an offer for a piece of the property on which some of the trees were cut, and that when the purchaser found the trees had been cut he refused to take the property for that reason, was inadmissible.

2. SAME—ELEMENTS OF DAMAGE—EVIDENCE—RELEVANCY.

Where, in an action for injuries to plaintiff's land by the cutting of certain of his trees, plaintiff testified on cross-examination that he had sued another two years previously for a similar injury and had settled the case for \$50, a question asked as to whether the trees then alleged to have been injured were of the value of \$2,000, as alleged in plaintiff's narr. in that suit, was inadmissible to show that the damages to the trees for which the suit at bar was brought had been occasioned by cutting done by another.

3. EVIDENCE—OPINIONS—DAMAGES—INJURIES TO TREES.

In an action for injuries to plaintiff's trees, evidence of a witness' estimate or judgment of the damage in exact figures was objectionable as invading the province of the jury.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2285.]

4. SAME—SPECIAL KNOWLEDGE.

In an action for injuries to plaintiff's trees, it was error for the court to permit a witness to testify to the value of a tree like those injured, for wood or timber, after merely answering that he knew something about the value of such trees, without a further showing as to his knowledge of the subject.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2217-2218.]

Appeal from Baltimore City Court; John J. Dobler, Judge.

Action by Robert H. Ring against the Western Union Telegraph Company and another. From a judgment for plaintiff, defendants appeal. Reversed.

Argued before MCSHERRY, C. J., and BOYD, SCHMUCKER, JONES, and BURKE, JJ.

Albert R. Stewart, for appellants. Howard Bryant, for appellee.

JONES, J. This was an action of trespass quare clausum fregit brought by the appellee against the appellants. The narr. contained two counts. The first charged that the appellant corporations by their servants and agents "broke and entered a parcel of land in the possession and ownership of the plaintiff (appellee) * * * and dug up the ground, injuring shrubbery by cutting and otherwise mutilating the same, which con-

sisted of ornamental shade and fruit trees," and the second that the appellee was possessed of a parcel of land on which "there was growing valuable ornamental shade and fruit trees," and that "the defendants (appellants) by its agents and servants cut, bruised, and injured said trees wrongfully and maliciously." The defendant pleaded the general issue pleas, and the case was tried before a jury. In the course of the trial, as appears from the record, 12 exceptions were reserved to the rulings of the trial court. Eleven of these relate to rulings upon questions raised as to admissibility of evidence, and the twelfth to the ruling upon the prayers. The fifth, sixth, and twelfth exceptions were abandoned. The others will be considered and disposed of in their order in the record.

There was error in the ruling in the first exception. The plaintiff, after proof of his ownership of the premises trespassed upon and the cutting of trees growing thereon, with a view to prove damages under the first count of his narr., "offered to prove that he had an offer for a piece of this property upon which some of the trees were cut, and that when the purchaser came to close the bargain and found the trees had been cut he refused to take the property on account of the damages to the trees. He did not want that lot because the trees were cut and mutilated in that way." And the court, against the objection of the defendant, allowed the proffered testimony to be given to the jury. The plaintiff, under this count, could only recover for damages resulting to his premises from the trespass, and as a measure of damage was entitled to show depreciation in value of the property by reason of the trespass, and as a basis for showing a depreciation he could, by competent testimony, prove the value of the property before the trespass; but it was not competent to prove value by an offer of purchase. This seems to be according to all of the authorities. In 2 Lewis on Eminent Domain (2d Ed.) § 446, it is said: "It is not competent for the owner to prove what he has been offered for his property, or what persons who have been looking for similar property were willing to give for it. * * *

As a general rule offers for property cannot be proven." The reason for this is succinctly stated in *Fowler v. Co. Com'rs of Middlesex*, 6 Allen (Mass.) 92-96, as follows: "The value of an offer depends on too many considerations to allow it to be used as a test of the worth of property." Among cases in point are *Whitney v. Thacher*, 117 Mass. 523; *Wood v. Firemen's Ins. Co.*, 126 Mass. 316; *Watson v. Milwaukee, etc., R. R. Co.*, 57 Wis. 332, 15 N. W. 468; *Minnesota Belt Line Ry. v. Gluck*, 45 Minn. 463, 464, 48 N. W. 194; *Louisville, etc., R. Co. v. Ryan*, 64 Miss. 399, 8 South. 173; *St. Joseph's, etc., R. R. Co. v. Orr*, 8 Kan. 419.

There was no error in the ruling in the second exception. The plaintiff as a witness upon cross-examination had testified that in

July, 1902, he brought a suit against the Chesapeake & Potomac Telephone Company for cutting trees on his property; that said company "claimed they had some sort of paper and that is why he settled it"; and that he settled for \$50. Counsel for defendants then read the declaration in said suit, which claimed \$2,000 damages, and proposed to ask the witness, "Were those trees which the Chesapeake and Potomac Telephone Company cut of the value of \$2,000?" Upon objection by plaintiff, the court refused to allow the question to be asked. The object of the defendant's counsel was to elicit testimony going to show that the damage to the trees for which the suit at bar was brought had been occasioned by the cutting of the trees by the Chesapeake & Potomac Telephone Company. The question asked would elicit nothing with respect to the fact of who had done the cutting of the trees involved in the present suit; and the damages laid in the declaration which was read to the witness was no fair test of his estimate of the damages sustained by him from the cutting involved in that suit. The amount was stated in the declaration without reference to its strict, or even approximate, accuracy, most probably; and it is hardly to be supposed the witness was responsible for the statement of the narr. in that regard; or that it had been inserted as an expression of his judgment of the real damage sustained.

As far as appears from the record, we can see no error in the rulings in the third and fourth exceptions. These exceptions were taken to the refusal of the court to permit the questions therein set out to be asked. The object of the evidence sought to be elicited by the questions was the same as that referred to in disposing of the second exception, and the questions were asked of a photographer who had gone upon the scene of the trespasses in October, 1904, to obtain for the defendants pictures of the same. These pictures were exhibited in connection with his testimony and he was asked, as indicated in the third exception, "Was there, or not, an extensive cutting of the cedars around the wires running between the larger poles of the Chesapeake & Potomac Telephone Company?" and, in the fourth exception, "State whether the wires running between the Chesapeake & Potomac poles did or did not run over the tops of the trees." The relevancy of the evidence here sought to be elicited to the situation existing in 1902, the time of the alleged trespass here sued for, is not perceived, in the absence of anything to show or an offer to show the connection or relation between that and the situation in 1904, when the observation of the witness was taken.

There was error in the seventh and eighth exceptions with respect to the rulings therein set out. In the seventh exception a witness had testified that he knew the plaintiff's premises and the trees to which the suit had

relation; that he had seen the trees had been cut—three walnuts and some cedars; and that the trees had been injured by the cutting. In the seventh exception, it appears he was then asked: "Give to the jury an estimate of the damage that was done to them. Whether they were your trees or the trees of anybody else, * * * what was the actual damage done to those trees by their being cut as you saw them?" Against the objection of the defendants, the witness was permitted to give in exact figures his estimate or judgment of the damage. It was the function of the jury to give this estimate or judgment. The witness could go no further than to give the facts within his knowledge that has caused injury, and the fact that damage had resulted. This was ruled in *Balto. Belt R. R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 854. The ruling there was made as to the evidence offered through a witness examined as an expert—a class of witnesses forming an exception to the rule excluding opinion evidence; and it was said in the course of the opinion: "Strictly speaking, perhaps, no witness, whether expert or not, should be allowed to draw from the facts the conclusion that the property is damaged, for the jury are quite as competent to do that as the witness. But we believe the practice in this state has been otherwise, and witnesses, who are acquainted with the property and have observed the effects of the alleged tort, have been generally allowed, after giving the facts to the jury, to testify to the fact of damage." Then, after saying that the object for which the jury is sworn, if they find there is damage, "is to find the extent of it measured in dollars and cents," it is said: "To allow the expert to give such testimony not only puts him in the place of the jury, but permits him to indulge in mere speculation. Witnesses who are competent for that purpose may testify to the value of the property before and after the alleged injury. But it by no means follows that the injury is the sole cause of the diminution, if any exists. Whether it is or not, or to what extent, is for the jury, and not the witnesses, to determine." The opinion concludes as follows: "It was error to have permitted experts to give their opinions as to the fact, as well as to the exact amount, of damage." If, therefore, the evidence set out in the exception now under consideration was intended to be offered as from an expert witness, nothing more needs to be said than that it is within the ruling of the case just cited. If the witness of whom the question objected to was asked was not intended to be qualified as an expert, then the evidence offered was not within the exception to the general rule which excludes opinion testimony—a rule the limits of which, it is intimated in the opinion just cited, ought not to be enlarged, and which we may here say is a most salutary one in its operation as a restraint upon testimony which otherwise too often would be the result more of bias, recklessness of statement, and mere

speculation than of judgment calmly and intelligently applied to relevant facts. In the eighth exception the witness, having given his estimate of damage as \$500 under the ruling last referred to, was asked to "tell the gentlemen of the jury how you [he] arrived at that," and proceeded, not using the facts in the case as a basis of judgment, or making reference to such facts at all, to give as a basis of the opinion expressed matters and considerations altogether speculative and hypothetical. The objection to this testimony should have been sustained.

The witness to whom the interrogatories embraced in the seventh and eighth exceptions were put was further asked, "Do you know anything about the value of the walnut tree as a tree for wood or timber?" and answered, "I do," and was then asked, "What is that?" and was permitted to state such value. This question was objected to, and forms the subject of the defendants' ninth exception. The witness should have been interrogated further, and required to show his knowledge of the subject of inquiry, before being allowed to give the values he was asked about.

The rulings in the tenth and eleventh exceptions are disposed of by what has been said in respect to that in the seventh exception. The question objected to and forming the subject of the tenth exception was: "Now tell the gentlemen of the jury what was the sound value—what was the amount of damage done to the trees in money." And that of the eleventh exception was: "Tell the gentlemen of the jury what was the actual damage they did in your opinion." Both of these questions were allowed, and in this there was error, for the reasons given in considering the seventh exception.

For the errors pointed out in the several exceptions, the judgment below must be reversed.

Judgment reversed, with costs to the appellants, and new trial awarded.

SCHAUMLOEFFEL v. STATE.

(Court of Appeals of Maryland. Jan. 10, 1906.)

1. CRIMINAL LAW—LIMITATION OF PROSECUTIONS—FALSE PRETENSES.

The offense of obtaining money by false pretenses, with intent to defraud, is a misdemeanor punishable, at the discretion of the court, by fine or imprisonment or by confinement in the penitentiary, and is not, therefore, within Code Pub. Gen. Laws, art. 57, § 11, providing that no prosecution or suit shall be commenced for any fine, penalty, or forfeiture, or any misdemeanor, except those punishable by confinement in the penitentiary, unless within one year from the time the offense was committed.

2. SAME—WITNESSES—DISCLOSURE.

Code Pub. Gen. Laws, art. 27, § 440, provides that in an indictment for false pretenses it shall not be necessary to state the particular false pretense intended to be relied on in proof of the same, but the defendant, on application before trial, shall be entitled to the names of the witnesses and a statement of the false pretenses to be given in evidence. *Held*, that

such section did not limit the state to the introduction only of such witnesses as were disclosed by the list furnished defendant.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1416, 1428.]

3. FALSE PRETENSES—VARIANCE.

Where defendant was charged with obtaining by false pretenses "\$1,800 current money," proof of obtaining the money by means of a check, which defendant deposited in the bank and drew the proceeds, was not a fatal variance.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. False Pretenses, § 53.]

Appeal from Criminal Court of Baltimore City; Pere L. Wickes, Judge.

T. Julius Schaumloeffel was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, SCHMUCKER, JONES, and BURKE, JJ.

Thomas C. Weeks, for appellant. George A. Solter and Attorney General Bryan, for the State.

BRISCOE, J. The appellant was indicted and convicted in the criminal court of Baltimore of obtaining money by false pretenses, and was sentenced to the Maryland penitentiary for the period of five years. From this judgment he has appealed.

The indictment was filed on the 20th of June, 1904, and contains three counts. A motion to quash the first and a demurrer to the second count were sustained at the trial of the case. There is no objection raised to the rulings of the court upon these pleadings, and they will not be considered by us.

The third count of the indictment, and the one upon which the appellant was tried, is as follows: "That T. Julius Schaumloeffel, late of the city of Baltimore, on the 30th day of July, 1901, by a certain false pretense by him then and there made to Otto Bregenzer, with intent then and there to defraud, he, the said T. Julius Schaumloeffel, then and there well knowing the said pretense to be then and there false (which said false pretense was not then and there a mere promise for future payment, and was not then and there a mere promise for future payment not intended to be performed), unlawfully, knowingly, and designedly did then and there obtain from Otto Bregenzer eighteen hundred dollars current money, of the value of eighteen hundred current money, of the goods and chattels, moneys, and property of Otto Bregenzer." To this count the appellant interposed the plea of limitations, that the alleged misdemeanor was not committed within one year next preceding the commencement of the prosecution. The state demurred to the plea, and the demurrer was sustained. There were eight exceptions taken during the trial to the rulings of the court upon the admissibility of evidence. There was no error, we think, in the ruling of the court in sustaining the demurrer of the state to the plea of limitations. The

offense of obtaining money by false pretense with intent to defraud is a misdemeanor, to be punished, at the discretion of the court, by fine and imprisonment or by confinement in the penitentiary for not less than two years nor more than ten years, as the court shall award. By article 57, § 11, of the Code of Public General Laws, it is provided that no prosecution or suit shall be commenced for any fine, penalty, or forfeiture, or any misdemeanor, except those punished by confinement in the penitentiary, unless within one year from the time of the offense committed. Misdemeanors punished by confinement in the penitentiary are excluded from the provisions of this section of the statute, and are placed along with felonies. They are not barred by limitations, if not prosecuted within one year from the time of the offense committed. The authorities hold that it is the liability to punishment, and not the punishment actually inflicted, which controls the jurisdiction of the court. In *re Mills*, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107; *People v. Murphy*, 185 Ill. 623, 57 N. E. 820.

The questions raised on the exceptions may be considered together and can be disposed of without discussing them seriatim. The fifth and sixth exceptions present the identical question, and that is whether the state, on a trial for false pretenses under the statute, can call other witnesses than those furnished in the list by the state's attorney to the defendant. The statute (section 440, art. 27, of the Code of Public General Laws) provides that in any indictment for false pretenses it shall not be necessary to state the particular false pretenses intended to be relied on in proof of same; but the defendant, on application to the state's attorney before the trial, shall be entitled to the names of the witnesses and a statement of the false pretenses to be given in evidence. And in *Jules v. State*, 85 Md. 305, 36 Atl. 1027, this court said: "The office of a bill of particulars like this is, first, to inform the defendant of the names of the witnesses the state expects to call; and, secondly, to furnish him with a statement of the false pretenses intended to be relied on and given in evidence. It is no part of the pleading, cannot be demurred to, but must be excepted to if insufficient." There can be no good reason for holding the rule here sought to be enforced to be mandatory and not directory. The statute requires the list to be furnished, but does not restrict the state's attorney to the list, nor does it control or affect the competency of the witness. In *Gardner v. People*, 3 Scam. 83, where a similar rule was under discussion, it was said: "If such a construction were placed upon this statute as would exclude all persons whose names were not indorsed on the indictment, many offenders would go unpunished, not on account of their own innocence, nor on the negligence of the state's attorney, but by a

defect in the law itself, or a narrow and illiberal construction of it not sanctioned by reason or justice. We think, therefore, that the prosecution is not confined to the list of witnesses indorsed on the indictment, but furnished previous to the arraignment; but the circuit court, in the exercise of a sound discretion, and having a strict and impartial regard to the rights of the community and prisoner, may permit such other witnesses to be examined as the justice of case may require."

There was no error in the rulings of the court in admitting the evidence set out in the second, third, and fourth exceptions. It was evidence tending to establish the theory of the state's case, and was admissible as part of the *res gestæ*.

The first, seventh, and eighth exceptions contain the rulings of the court in admitting in evidence the \$1,800 check given by Bregenzer to the appellant. The ground of the objection is that, as the indictment charged the obtaining "of eighteen hundred dollars current money," the check did not tend to prove the averment of the indictment. The statute (section 112, art. 27, of the Code of Public General Laws) under which the appellant was indicted provides that any person who shall by any false pretense obtain from any other person any chattel, money, or valuable security, with intent to defraud any person of the same, shall be guilty of a misdemeanor. The indictment, it will be seen, charges that the appellant obtained "eighteen hundred dollars current money." The bill of particulars alleges the false pretense to be "that on or about the 20th day of May, 1901, the appellant knowingly and falsely represented to Bregenzer that one Harris Flinder was the owner of certain property and that he desired to borrow the sum of \$1,800 and give as security therefor a mortgage on said property, that the appellant knew that Flinder was not the owner of the property, and that by virtue of the false representation Bregenzer was induced and did pay to the appellant the sum of \$1,800. The question, then, is whether a charge of obtaining by false pretense "eighteen hundred dollars current money" can be sustained and supported by proof of obtaining the money by the check for a like sum. It is well established that certainty to a reasonable extent is an essential requirement of criminal pleading, where conviction is to be followed by penal consequences. One of its objects is notice to the party of the nature of the charge, so as to enable him to defend against a second prosecution of the same crime by pleading a former acquittal or conviction. We do not see, under our statute (section 112, art. 27, of the Code of Public General Laws), how the admission of the check in evidence could be held a variance. The proof in the record shows that the check was given by Bregenzer to the appellant for \$1,800, was deposited in bank to the credit of his account, and the proceeds subsequently paid or check-

ed out by him. The check was, therefore, the means by which the money was procured, and was, within the meaning of the act, obtaining money under false pretenses.

We therefore find no error in the ruling of the court in admitting the evidence contained in the first and seventh exceptions, nor in its refusal to strike out the testimony as to the Bregenzer check, in the eighth bill of exceptions. For the reasons given the judgment will be affirmed.

Judgment affirmed, with costs.

STANDARD OIL CO. v. HARTMAN.

(Court of Appeals of Maryland. Jan. 10, 1903.)

1. HIGHWAYS—USE OF HIGHWAY—COLLISIONS BETWEEN TRAVELERS—NEGLIGENCE—QUESTION FOR JURY.

Evidence in an action for injuries received by a traveler on a highway in a collision with a vehicle of another traveler examined, and *held*, that the question of defendant's actionable negligence was for the jury.

2. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Evidence in an action for injuries received by a traveler on a highway in a collision with the vehicle of another traveler examined, and *held*, that the question of plaintiff's contributory negligence was for the jury.

3. SAME—CARE REQUIRED IN USE OF HIGHWAY.

The right of one driving on a highway to use any part of the highway must be exercised with reference to the rights of others, and one driving a heavy wagon, necessarily slow in being changed from its course in an emergency, ought to take such part of the highway as will afford to lighter vehicles the opportunity of passing it without colliding with it.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, §§ 459-465.]

4. SAME—ACTION FOR INJURIES IN COLLISION—RECOVERY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

A traveler on a highway, injured in a collision with the vehicle of another traveler, is entitled to recover for the injuries received, in case they resulted directly from the want of ordinary care on the part of the latter, and not from his own want of ordinary care directly contributing to the injury.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, § 470.]

5. SAME—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In an action for injuries received by a traveler on a highway in a collision with the vehicle of another, defendant has the burden of proving contributory negligence on plaintiff's part.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, §§ 472, 473.]

Appeal from Circuit Court, Queen Anne County; William R. Martin and Edwin H. Brown, Judges.

Action by Nancy G. W. Hartman against the Standard Oil Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Roger W. Cull and Phil. B. Hopper, for appellant. W. T. Warburton, for appellee.

JONES, J. This is an appeal from a judgment rendered in the court below against the appellant, at the suit of the appellee, for damages resulting to the appellee by reason of the alleged negligence of the appellant, which the narr. charges as follows: "That it [the appellant] is the owner of large wagons or oil tanks, used in the transportation and delivery of its oils and driven by its servants upon the public roads of the county in the prosecution of its business; that on the 21st day of December, 1903, the plaintiff, while driving on the Elkton and Chesapeake City public road to her home, exercising due care, the servant or servants of the defendant [appellant] having in charge one of its said teams, while acting within the scope of his employment, carelessly and negligently drove the same against and over the carriage in which the plaintiff [appellee] was riding," and caused her to be thrown out and injured. To this the defendant pleaded the general issue, and trial was had before a jury, during which no questions arose upon the evidence. Upon the proofs submitted in the cause the plaintiff (appellee) asked three instructions to the jury, and the defendant (appellant) four, and filed special exceptions to the plaintiff's first prayer, alleging absence of proof to support it. The court below granted all the prayers of the plaintiff, overruled the defendant's special exceptions to plaintiff's first prayer, rejected the defendant's first prayer, and granted its others. The defendant excepted to this action of the trial court in respect to the granting of the plaintiff's prayers and the overruling of its special exceptions and the rejection of its first prayer. This exception presents the questions to be determined here.

The defendant's first prayer, as it appears in the record, is too general, and was properly rejected on this ground, if no other. This we understand to be admitted. This is not material, however, because substantially the same question is raised by the special exceptions to the plaintiff's first prayer. If that was properly granted, then the defendant's first prayer, which affirmed the insufficiency of the plaintiff's evidence to support a recovery by the plaintiff, was necessarily to be rejected. The question thus raised will make necessary a reference to the evidence adduced by the plaintiff to sustain the action. As to some of the material parts of this there is no conflict with that of the defendant. Where such conflict occurs a question is presented falling exclusively within the province of the jury.

The plaintiff's first prayer in general terms affirms the right of the plaintiff to recover if the jury should find that the injury complained of was caused by the negligence of the defendant's servants while acting within the scope of their employment and driving its team upon the public highway, and "resulted directly from the want of ordinary care and prudence" on the part of such serv-

ants, "and not from the want of ordinary care and prudence on the part of the plaintiff directly contributing to the injury." The second prayer put upon the defendant the burden of proof to show contributory negligence on the part of the plaintiff directly contributing to produce the injury complained of, to disentitle the plaintiff to recover on the ground of such negligence; and the third instructed as to the measure of damages in the case of a finding for the plaintiff. There is evidence in the record going to show the following facts: About 6 o'clock in the evening of December 21, 1903, the appellant's (defendant below) servant, in the prosecution of its business as a manufacturer and vender of oil, was driving a wagon belonging to the appellant on the public road in Cecil county running between the town of Elkton and Chesapeake City. The wagon was large and heavy, weighing from 3,000 to 3,200 pounds when empty, and was drawn by three horses driven abreast. It was a 5-foot truck, with the singletrees projecting from 12 to 20 inches past the hub on either side, making it thus to require a space of about 7 feet in passing along the road. The outside horses traveled outside of the tracks of the wheels. The wagon was being driven from Chesapeake City to Elkton. Near the latter place and at the point of the accident there was a down-grade in the road, and the road was there 28 or 29 feet wide. All of it could be used at this point. There was so special traveled way. On the right-hand side of the road going from Elkton, and the left-hand side approaching Elkton from Chesapeake City—the direction in which the wagon was being driven—there was a whitewashed board fence. The wagon, at the point and the time of the accident, was being driven so far to what was the left side of the road, when going from Chesapeake City to Elkton, that it was not possible for a buggy to pass between the wagon and the board fence. There was no reason making it necessary for the wagon to be on that side of the road. It could have been driven in the middle of the road, when there would have been plenty of room for a buggy to have passed on either side. The road from Elkton out beyond the place of accident was much traveled. "It is the main road leading out of Elkton to all points in the lower part of the county. Teams are on it continually"—says one witness. There is more travel on it than on any road leading into Elkton, and this travel continues all day and the early hours of the evening. The servants of the defendant had used the road frequently and for a considerable time and were familiar with it and with the conditions. The night of the accident was unusually dark, and the darkness was increased at the place of the accident by conditions existing there. The wagon had displayed no lights, and no means were provided to give warning of its approach. On the day and at the hour mentioned the appellee (plaintiff below) was

driving to her home from Elkton on the road in question. She was in a buggy, and driving a horse that was old and safe to drive, and which could not be urged to much speed. In driving she kept to what was the right side of the road going out from Elkton, the direction she was traveling. At the place of the accident in question she met the wagon of the defendant coming in the opposite direction, and, as has been shown, being driven upon the same side of the road upon which the plaintiff was driving. She was prevented by the darkness from seeing it until too close to it to avoid colliding with it. Immediately upon becoming aware of the approach of the wagon she pulled her horse to the right; but at the same instant the two vehicles came into collision, and the plaintiff was thrown from her buggy and injured, and the buggy was broken and damaged. There was evidence that the plaintiff was familiar with the road from driving over it frequently, and some from which it could be inferred that she kept to the right side of the road in driving over it on the occasion in question because she thought that the safe and proper thing to do. In the foregoing summary of the evidence in the case there is enough appearing to be submitted to the jury on both branches of the inquiry involved in the plaintiff's narr.; that is, as to negligence vel non on the part of the defendant's servants, and as to the exercise of ordinary prudence and care on the part of the plaintiff in the circumstances leading up to and attending the accident in question.

In the briefs in the case and in the oral argument there has been a good deal of discussion as to the effect to be given, in determining the question of negligence, to what is affirmed to be the law of the road—that persons in using the public highways must observe the rule of keeping to the right, with a view to secure to all unobstructed and safe passage over the same; the theory of the plaintiff apparently being that the court can and ought to take judicial notice of such rule and apply the same to the conduct of parties in the given case, while it is contended on behalf of the defendant that the court cannot take notice of nor give effect to the rule, unless it be proved as a custom. It is further contended on behalf of the defendant that, though the rule is to be applied in determining the questions indicated, the road can be used indiscriminately by persons passing over it until confronted with and made aware of the necessity for a change of course or of their position thereon. In other words, it is only when persons proceeding along the road from opposite directions are meeting that it is necessary or required to observe the rule of going to the right, that each may have free passage. Consequently it is argued that it is not to be imputed to the defendant as negligence in

this case that its team, at the time of the accident in question, was being driven upon the left, instead of the right, side of the road. We do not deem it necessary in this case to pursue the inquiry thus raised. If it be admitted that the servants of the defendant had the general right, in driving upon the road, to be with its vehicle upon any part of the same that for the time might suit their convenience or pleasure, this right was not an absolute and unqualified one. All other persons having occasion to use the highway would be entitled to the same right, and such right must of necessity be exercised by each and every one with reference to and regard for the rights and safety of every other. It is not consistent with the rights and safety of others using a highway that a vehicle, such as is described as being in charge of the defendant's servants, should be driven over the same, in the conditions mentioned, without so regulating its position upon the road as to give such reasonably convenient opportunity as circumstances permitted for other vehicles to avoid collision therewith, or to have adopted and used some means of giving warning of its presence and approach. The wagon of the defendant was heavy and cumbersome, drawn by large and heavy horses, three abreast. It was necessarily slow in being changed from its course, and could not be so changed, in an emergency, readily and quickly. If it had been kept in the middle of the road, which there is evidence going to show could readily have been done, opportunity would have been afforded to lighter vehicles, susceptible of quick change and movement in their course, to have gone to either side of the road that the situation made most practicable to escape collision with it. It would have been but prudent, too, that a vehicle of that character, occupying the space that it did in proceeding along the highway in the darkness described, and where the frequency of travel was such as it is shown to have been, should have displayed some symbol or warning of its presence.

Our conclusion is that it was entirely proper that the case should be submitted to the jury and that the instructions for their guidance which were made the subject of exception were proper. It has not been thought necessary to extend this opinion by taking up for review the many authorities cited on both sides of the argument and briefs. An examination of them has not developed any peculiar features appropriate to be applied here. In each and all of them there seems to have been only the application of the familiar principles of the law of negligence to the facts of the particular case. The judgment below will be affirmed.

Judgment affirmed, with costs to the appellee.

ZELL v. BALTIMORE STOCK EXCH.
et al.

(Court of Appeals of Maryland. Jan. 10, 1906.)

EXCHANGES—SEATS OF MEMBERS—SALE—RESULTING TRUST.

The constitution of a stock exchange provided that every member on the day of his admission should sign the constitution of the exchange and pledge himself to abide by the same and all subsequent amendments on penalty of forfeiture of his seat, and also declared that the seat of a member might be sold by the exchange, and the proceeds applied to the member's contracts, debts, or obligations with or to other members of the exchange, to the exclusion of other creditors of the member. *Held* that, where complainant furnished the money with which to purchase a seat in the exchange in the name of his partner, complainant was not entitled to restrain a sale thereof, for the payment of his partner's individual debts to other members of the exchange in accordance with such provisions of the constitution, on the ground that his partner held the title to the seat in trust for complainant.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exchanges, §§ 8-10.]

Appeal from Circuit Court No. 2 of Baltimore City; J. Upshur Dennis, Judge.

Suit by Edwin S. Zell against the Baltimore Stock Exchange and others. From a decree dissolving an injunction restraining the sale of a seat of a member, complainant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, SCHMUCKER, PEARCE, JONES, and BURKE, JJ.

Frank Gosnell, for appellant. W. Burns Trundle, for appellees.

JONES, J. This case originated in a bill of complaint filed by the appellant here in circuit court No. 2 of Baltimore city, in which he alleged that on or about the 1st day of June, 1899, he purchased from Owen Daly, one of the appellees here and one of the defendants below, a seat or membership in the Baltimore Stock Exchange, and paid therefor the sum of \$4,250; that for the sake of convenience the said membership or seat was placed in the name of Frank J. Merceret, with whom, about the time of said purchase, he had formed a partnership for the purpose of carrying on a general brokerage business in stocks and bonds, it being understood and agreed that the said Frank J. Merceret should transact the business of the firm on the Baltimore Stock Exchange; that without the knowledge or consent of the appellant said Merceret speculated in stocks and bonds upon his own account with the other individuals who are named as appellees, and in consequence became indebted to them in the sums specified in the bill; that in January, 1905, the said Merceret received from the said appellees notification by letter that they could no longer carry for him said indebtedness. Payment thereof was requested, and proceedings threatened in case of his failure to make such payment; that at the time the debts mentioned were contracted by Merceret the said

appellees and each of them knew that the transactions giving rise to them were had solely on the individual account of the said Merceret and without the knowledge or consent of the appellant; that the said appellees knew that the seat or membership in the said stock exchange was not the property of Merceret, though standing in his name, but was the property of the appellant, and that any dealings that the said appellees or any of them had with Merceret were on his individual credit, and the said debts were not contracted with reference to the said seat or membership; that the appellant had addressed to the said appellees a letter to that effect in which he referred to the letter of the said appellees to said Merceret and called their attention to his claim that, though the seat in question was "colorably" in the name of Merceret, it was the appellant's individual property, having been paid for by him, which he averred had all along been well known to each and all of the said appellees and informing them that he would claim and maintain his rights in the premises; that according to the constitution and by-laws of the Baltimore Stock Exchange, which was made defendant below and is one of the appellees here, "a seat or membership owned, belonging to, and the property of, a member thereof, may be sold by" it, "and the proceeds of said sale applied to the contracts, debts or obligations with or to other members of the exchange to the entire exclusion of the other creditors of such member"; and a copy of the said constitution and by-laws is filed as an exhibit with appellant's bill. The bill then charges that it is the intention of the appellees, who are the creditors of Merceret, to apply to the Baltimore Stock Exchange to make sale of the seat or membership of the same, belonging to the appellant, as he claims, but standing in the name of Merceret, and apply the proceeds thereof to the payment of the debts due to such creditor appellees unless they be restrained, etc. The bill then prays an injunction to so restrain them and the stock exchange from such action. A preliminary injunction was granted. The appellees, except Merceret, promptly filed answers to the bill and moved for a dissolution of the injunction. The appellees, who were creditors of Merceret, as well as the Baltimore Stock Exchange, each and all denied in their answers that they had any personal knowledge of the partnership between the appellant and Merceret or the terms thereof; or that, at the time the debts referred to in the bill of complaint were contracted, they knew that they were so contracted by Merceret without the knowledge and consent of the appellant; and denied that the seat or membership of the said stock exchange referred to in the bill was not the property of Merceret. On the contrary, they averred "that all the right, title, and interest therein, under the constitution and by-laws whereby membership was created, was and could only be in the

said" Merceret. Testimony was taken upon the motion to dissolve the injunction, and the testimony of each of the said appellees was practically to the same effect as their answers in respect to their said respective denials. Upon the hearing of the motion, the preliminary injunction was dissolved. The appeal is from the order dissolving the same.

Prior to the dissolution of the injunction, the appellee Merceret had answered the bill under leave of court, but it is not material to refer particularly to such answer. The appellant himself testified as a witness, as follows: "I told Mr. Daly I was going to purchase a seat on the Baltimore Stock Exchange. Had he one for sale? I was so informed by Merceret. He said he had. I asked the price—\$4,250. He said it would cost \$50 to have the seat transferred. I wanted to pay for that seat then and there, and he said he could not accept the money until Merceret was elected a member; that the seats were sold subject to admission." And again he said in his testimony: "I told Mr. Daly I wanted the seat to be known as my property; that I was buying it. Mr. Daly told me it could not be arranged to be known as my property, that they recognized the board member, the man in whose name the seat was. Mr. Badart was present when I told Mr. Daly, and Mr. Orrick was present." It would seem to be obvious, upon this state of allegation and proof, that the rights of the parties before the court must depend upon the effect to be given to the constitution, by-laws, rules, and regulations of the stock exchange adopted for the government of its membership and defining and fixing the rights, privileges, and obligations attaching to membership therein. The stock exchange is a voluntary association governed by such constitution, by-laws, rules, and regulations as it may choose to adopt, and which, so far as not contrary to law or public policy, will secure to the members thereof exclusive rights and privileges which the courts have fully recognized. The constitution and by-laws of the Baltimore Stock Exchange are in evidence in this case. The one having more particular reference to the controversy here has been substantially set out in the appellant's bill, and is the one against the enforcement of which the injunction is here sought. Only one other will be specially referred to, which is as follows: "Every member shall, on the day of his admission and notification thereof by the secretary, sign the constitution of the exchange, and thereby pledge himself to abide by the same, and all subsequent amendments thereof under penalty of forfeiture of his seat." The conditions under which a seat or membership may be sold by the stock exchange in enforcement of the obligations of its members are provided for in its constitution; and there is no pretense here that the stock exchange is proceeding, or intends to proceed, in respect to enforcing the obligations incurred by Merceret, except in accordance with the

provisions of its constitution applicable to the case. Now will the court interfere?

A case very analogous to the case at bar is that of *Thompson v. Adams*, 93 Pa. 55, in which it appeared that the plaintiff gave to Samuel A. Richards, who was a partner with William E. Thompson in the business of stockbrokers, the sum of \$1,000 to purchase a seat in the board of brokers. The seat was purchased by Richards, and he continued to hold it by plaintiff's permission, without knowledge on part of the board of any other ownership or title, until his death in May, 1876. At that time he was indebted to various members of the board in the sum of \$5,477.17. Under a section of the constitution of the board of brokers, when a member died, his seat might be sold by the secretary; and, after satisfying the claims of the members of the board, the balance should be paid to the legal representatives. The seat was sold. The question was whether the plaintiff was entitled to the proceeds or any part either in full or *pari passu* with the creditors of Richards. The court below denied the right of the plaintiff to, or to participate in, the proceeds of the sale. On appeal the judgment below was affirmed, and the court said "The constitution and articles of a voluntary association, such as the Philadelphia Board of Brokers, are law as to the members. The plaintiff was not a member, but had furnished the money by which Richards obtained a seat. His contention is that he was the equitable owner of the seat, and had title to that which was received for it, and that the defendant had no right to apply the proceeds to debts due by Richards to other members in pursuance of the terms of the constitution of the club. But why not? Richards was the member of the board, the legal owner of the seat, and the plaintiff an entire stranger unknown to the association. The members gave credit to each other in part, no doubt, upon the faith of the liability of a member's seat to them for his debts. There is nothing unlawful or unreasonable in the regulation. The seat is not property in the eye of the law. It could not be seized on execution for the debts of the members. It is the mere creature of the board, and, of course, was to be held and enjoyed with all the limitations and regulations which the constitution of the board put upon it." It is sought to distinguish the case at bar from the one just referred to, in that the plaintiff there was a stranger to the exchange and not a partner with the member in whose name the seat stood. It is not perceived how the circumstance of a partnership of a member of the exchange with another who is not a member can make any difference in principle as to his relations to the exchange. Being a partner with an outside party is nothing more than having a contract with such party subsisting at the same time with his contract with the exchange. He is under an obligation to observe his contracts and engagements with each party; and there

can be no reason why his contract or obligations with the exchange and its members are to be subordinated to those he may have with others, whether they pertain to a partnership or otherwise. It would be impossible for a voluntary association to maintain its organization and enforce, on behalf of its members, rights pertaining to membership if this were to be so.

It is further argued that there was not, in the case cited, any evidence to show that the other members of the exchange had any knowledge of the plaintiff's equity. It has already been seen what the state of the testimony here is as to the facts upon which the appellant rests his equity; but, be that as it may, it is the exchange—the whole body of the membership—that has control, and the right of enforcement, of its laws and rules in the interest of each and all of its members; and such organization would be shorn of its function if the exercise of such right and control was to be affected by particular equities that might be made to appear in the relations of individual members, as individuals and not as members of the association, with outside parties.

There seems to be no want of harmony in the authorities as to the validity and contractual effect of the rules and regulations of a voluntary association of the character of the one here in question. In another case, very much in point (*Hyde v. Woods*, 94 U. S. 523, 24 L. Ed. 264), the Supreme Court of the United States had under consideration a rule of a stock exchange which read as follows: "In sales of seats for account of delinquent members, the proceeds shall be applied to the benefit of the members of the board exclusive of outside creditors, unless there shall be a balance after payment of the claims of members in full." And the court, in giving effect to such rule in the particular case, said, speaking through Mr. Justice Miller: "That rule entered into and became an incident of the property when it was created, and remains a part of it, into whose hands soever it may come. As the creators of this right—this property—took nothing from any man's creditors when they created it, no wrong was done to any creditor by the imposition of this condition." The same court, in a later case (*Page v. Edmunds*, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 818) having before it more particularly the question of how far a seat in a brokers' exchange was to be treated as property, while holding in apparent disagreement with the dictum in the Pennsylvania case, to which it referred that the seat was property, said undoubtedly it "was to be held and enjoyed with all the limitations and restrictions which the constitution of the board chooses to put upon it." In the recent case in this court of *Baltimore City v. Johnson*, 96 Md. 737-744, 54 Atl. 646, 61 L. R. A. 568, a similar view was expressed of the tenure of a seat in a stock exchange, after a review of many authorities—

reference being had there more particularly to the taxable quality of such seat—where this court said, through Judge Boyd: "It is thus apparent that, while a membership in the exchange is in a sense property, it is qualified and limited and lacks one of the most valuable and usual characteristics of property—the right of disposing of it as the owner deems proper, so long as he violates no law."

In view of the doctrine and principles thus enunciated and defining the nature of the holding of a seat in a stock exchange, it cannot avail the appellant to say, nor for the court to hold, in the circumstances of this case, that a resulting trust accrued to him, as he claims by the payment of the money which purchased the seat or membership here in question, for, giving him the benefit of the theory which he sets up, what was purchased was not a clear, unfettered title to the seat, but one burdened with the obligations that membership in the exchange put upon the member holding it and subject "to be held and enjoyed with all the limitations and restrictions which the constitution of the board chooses to put upon it." The bill in the case does not allege, nor does he attempt to show, that he will not get this. As in no view can he get any more, there was no error in refusing the relief asked, and the order of the lower court dissolving the injunction will be affirmed.

Order affirmed, with costs to the appellees.

GOTTSCHALK v. MERCANTILE TRUST & DEPOSIT CO.

(Court of Appeals of Maryland. Jan. 10, 1906.)

1. APPEAL—MATTERS REVIEWABLE—DISCRETIONARY ACTION.

While an appeal will not lie from an order or decree passed in the exercise of the discretion of the lower court, yet the question whether the subject-matter of the order or decree is within such discretion is open to examination upon an appeal in the suit in which the decree is passed.

2. TRUSTS—ADMINISTRATION—SUPERVISION BY COURT.

Where trustees administer their trust without seeking the aid and protection of the court, they may exercise the discretion and execute the powers conferred on them without interference from the courts, so long as they act in good faith and with fair discretion; but, if a court of equity by an appropriate decree assumes jurisdiction of the trust and directs the execution thereof under its direction, the trustees must secure the sanction or ratification of the court for the successive steps taken in their administration of the trust.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 230-232.]

3. SAME—DEPOSIT OF FUNDS.

Where a will creating a trust authorized the designated trustees, or whoever might be a trustee under the will, to sell, lease, exchange, or otherwise dispose of any part of the trust property, and to make any investments and reinvestments of such property that they might think proper, and jurisdiction over the trust was duly assumed by a court of equity, it was

within the power of the court to select a depository for the current balance of cash funds.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 230-232.]

4. SAME—REVIEW.

An order of a court of equity, passed in the exercise of its jurisdiction in supervising the administration of a trust fund, selecting a depository for current cash funds, was discretionary in its nature, and not subject to appellate review.

Appeal from Circuit Court of Baltimore City; Henry D. Harlan, Judge.

Suit by the Mercantile Trust & Deposit Company against Joseph Gottschalk. From an order selecting a depository for trust funds, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, SCHMUCKER, and BURKE, JJ.

Wm. Pinkney Whyte, for appellant. Edwin G. Baetjer, for appellee.

SCHMUCKER, J. This is an appeal from an order of the circuit court of Baltimore City designating the banks in which the appellant and appellee, as joint trustees under the will of the late Albert Gottschalk, should deposit the cash funds of the trust estate from time to time in their hands. The appellee insisted that the order of the circuit court is not reviewable on appeal, because it was an interlocutory and discretionary one. It is not necessary at this late day to cite authorities in support of the well-settled doctrine that an appeal will not lie from an order or decree passed in the exercise of an undoubted discretion of the lower court. But the question whether the subject-matter of the order or decree was within the area of the discretion of the court which passed it is open to examination upon an appeal in the same case, for a court cannot improvidently extend the exercise of its discretion to matters which lie beyond its legitimate reach. In *re Farmers' Loan Co.*, Petitioner, 129 U. S. 206, 215, 9 Sup. Ct. 263, 32 L. Ed. 656; *Cecil v. Negro Rose*, 14 Md. 68, 69.

The appellant does not deny the soundness of these propositions, but contends that the will of Mr. Gottschalk conferred upon the trustees of his own selection the discretionary power of selecting a depository for the trust funds, and that this discretion did not pass from them to the circuit court as an incident of its supervisory jurisdiction over the administration of the trusts in this case. The fundamental question, therefore, presented by the record, is whether the order appealed from was passed in the exercise of an undoubted discretion of the circuit court. Albert Gottschalk, by his last will and codicils, admitted to probate on October 18, 1898, gave the bulk of his estate, valued at more than \$1,000,000, to his son Joseph and the Mercantile Trust & Deposit Company of Baltimore, in trust for the benefit of his wife and children, as therein set forth. During the continuance

of the trusts thus created the trustees were directed to collect the income arising from the trust property, and make disposition thereof in accordance with the terms of the will. One of the codicils to the will provided that in the event of the death of the testator's son Joseph his other son, Levi, should be substituted in Joseph's place as trustee, and in the event of the death of both of them a majority of the devisees and legatees of the will, counting them per stirpes, should have the power to appoint a successor to act with the trust company, and should also have the power from time to time to fill in like manner any vacancy occurring in the trusteeship. By the eighteenth clause of the will the testator conferred upon the trustees powers of management of the estates committed to their charge, as follows: "I further provide that the said trustees or whoever may be trustee or trustees hereunder shall have and they are hereby invested with full powers and authority during the continuance of any of the trusts under this will to sell absolutely and in fee simple on such terms as they may see fit, to demise and lease for ninety-nine years renewable forever or for any other term, to exchange, transfer, convey, assign and dispose of all or any part of the property hereinbefore described and of the property which by increase, substitution or reinvestment, may at any time be held by such trustees so long as the same may be held by them under the provisions of this will, and also to make any investments and reinvestments of said trust property which they may think proper, and also to make, execute and acknowledge any deeds, leases or instruments of writing whatever which may be necessary or proper for the execution of the powers hereby granted." By the same clause of the will the investments and reinvestments of trust funds were required to be made and held under the trusts of the will, and purchasers and other persons are relieved from obligation to see to the application of purchase money or other money that may be paid to the trustees.

While the personal estate of the deceased was in process of administration in the orphans' court the testator's son Levi Gottschalk filed a bill of complaint in the circuit court of Baltimore City against the trustees under the will, and the parties interested in the trust estate as beneficiaries, praying that the court assume jurisdiction of the trusts of the will, and that they be administered under its direction and supervision. Both the trustees and the cestuis que trust acquiesced in the prayer of the bill, and a decree was passed by consent by which the court assumed jurisdiction of the trusts and directed them to be executed under its supervision. Some time thereafter, on the 18th of July, 1894, the Mercantile Trust Company, one of the trustees under the will, filed a petition in the case in which the trusts were being administered, asking the court to designate some depository or depositories for the

uninvested current funds of the estate. The trust company, in this petition, after referring to the creation of the trust and the assumption of jurisdiction of its execution by the court, stated that its co-trustee, Joseph Gottschalk, had been depositing to the joint credit of the trustees the cash trust funds from time to time coming to his hands, consisting of principal awaiting investment and income awaiting distribution, and at times amounting to from \$50,000 to \$100,000, in the Fidelity & Deposit Company of Maryland, which allowed 3 per cent. interest on the balance of the account; that the petitioner, believing that so large a current deposit ought not to be maintained except with the authority and under the direction of the court, had applied to its co-trustee to unite with it in a report of such deposit to the court, and an application to it for instructions in reference to the deposit, but he had declined to unite in such an application, saying that there was no occasion to make it. The petition also alleged that the petitioner had deposited to the joint credit of the trustees the cash trust funds, from time to time coming to its hands, in the National Bank of Baltimore, which allowed 2 per cent. interest on the balance of the account, which the petition averred was a fair current rate of interest for such deposits. It further alleged that Joseph Gottschalk, its co-trustee, objected to the deposit in the said National Bank on account of the low rate of interest allowed by it, and had always suggested the deposit of the entire fund in the Fidelity & Deposit Company, and for the purpose of enforcing his objections had recently refused to sign a check on the account in said bank to be used in payment of the distribution of certain income which had been deposited therein. The prayer of the petition was for an order of court (1) instructing the trustees with reference to their deposit in the Fidelity & Deposit Company, and designating some depository or depositories for the funds of the estate, and (2) approving the deposits of trust funds made by the petitioner in the National Bank of Baltimore. Joseph Gottschalk the other trustee, who is the present appellant, answered the petition, admitting the deposit by him, as alleged, of the current funds of the trust estate in the Fidelity & Deposit Company, and his refusal to recognize the deposit of any of the trust estate funds in any National Bank, and asserting, in justification of his action, that the testator in his lifetime had kept his account in the Fidelity & Deposit Company, and that the estate would suffer serious loss by accepting a lower rate than 3 per cent. interest on the large sum which, from the size of the estate and the nature of the trusts, would currently be on hand in cash. He also insisted in his answer that the Fidelity & Deposit Company was a thoroughly reliable corporation, and that by the terms of its char-

ter, guardians, receivers, and others having the custody of bonds, securities, or money were authorized to deposit the same with it for safe-keeping. He further answered that all of the beneficiaries of the estate, save one, who was in Europe, had united in a letter to his co-trustee, protesting against accepting less than 3 per cent. interest on the trust funds while a responsible company was willing to allow that rate for them. The issue made by the petition and answer having come to a hearing, and the parties having failed to act upon a suggestion from the court that they try to agree, subject to its approval, upon depositories for the trust funds, the order appealed from was passed on August 4, 1905, approving the deposits which had been made *pendente lite* in the National Bank of Baltimore, but directing the trustees to deposit all trust funds, then in, or thereafter to come in, their possession or control, in one or two of the three prominent national banks which were named in the order, but did not include the National Bank of Baltimore.

We think the circuit court, in passing this order, acted within its jurisdiction, and in the exercise of well-recognized discretionary power. If trustees undertake to administer their trust without seeking the aid and protection of any court, they may exercise the discretion and execute the powers conferred on them by the instrument creating the trust, and equity will not generally interfere with them, so long as they act in good faith and with fair discretion. But if, upon their application, or that of their cestuis que trust with their assent, a court of equity, by an appropriate decree, assumes jurisdiction of the trusts, and directs them to be executed under its direction and supervision, the authorities agree that the situation of the trustees is thereby in so far changed that they must thereafter secure the sanction or ratification of the supervising court for the successive steps of their administration of the trusts. *Perry on Trusts*, § 474; *Lewin on Trusts* (11th Ed.) p. 753. This court recently had occasion to consider the effect, upon the extensive and important powers conferred by the will of the late Arunah S. Abell on his sons as trustees, of the assumption by a court of equity of jurisdiction of the trusts of that will. It was said in that case: "All apprehension, if any exist, as to the arbitrary exercise of the very large discretionary powers given to the trustees, may now be dismissed. For the trustees themselves, recognizing the great difficulty and delicacy in performing some of the duties imposed upon them, have voluntarily subjected themselves to the jurisdiction of a court of equity. And whatever their powers may be under the will, if the trusts created thereby are before such a court, and a decree has been made, the powers of the trustees are thenceforth so far changed that

they must have the sanction of the court for all of their acts.' 2 Perry on Trusts, § 474 and authorities there cited."

The precise area and limits of the jurisdiction acquired by a court of equity over the administration of a trust thus subjected to its supervision have never been fixed, but must necessarily depend to some extent upon the nature of the trusts and the character of the powers conferred upon the trustee. It may, for instance, be doubted if a court of equity would, except under very special circumstances, compel a trustee to execute a power which the instrument conferring it declared should be exercised by him or not, according to his own volition, or at his own discretion. Thus, in *Tempest v. Lord Camoys*, 21 Ch. Div. 571, the will gave to two trustees power, "in the exercise of their absolute discretion," of selling real estate and investing proceeds in other real estate. It also gave them power, "at their absolute discretion," to raise money by mortgage for the purchase of real estate. The trust being in process of administration, under the supervision of equity, the court refused to compel one of the trustees, against his own judgment, to unite with the other trustee in mortgaging the real estate, and with the proceeds of the mortgage and other trust funds making a proposed purchase of other real estate. Nor does a court of equity ordinarily, in any form of proceeding, control the exercise by a trustee or other fiduciary of a special power strictly personal in its nature, such as the power sometimes given to a parent, who is a life tenant or a trustee for his children, to determine the proportions in which the trust fund is to be divided between them, or at what age they shall receive their respective shares of the estate absolutely, or whether the income shall be paid over to them or expended by their trustee for their support and maintenance. Thus, in *Addison v. Bowle*, 2 Bl. Ch. 618, the will gave to the testator's son-in-law, William Bowle, an estate for his life, with power to designate in his discretion any one or more of his children by the testator's daughter to take the remainder in fee, stating that this uncertainty of designation among the children was intended as a motive of good conduct in them all. Chancellor Bland held that the discretion was to be exercised arbitrarily by the father because of the nature of the power.

The present case is, however, not, strictly speaking, one of the control by the court of the exercise of a power conferred by the will upon the trustees. The will, although conferring on the trustees general powers of disposition of trust property, contains no express power touching the selection of a place of custody or deposit for funds temporarily in their hands. Fur-

thermore the powers which are granted by the will for the management of the trust are in no sense personal to the trustees named in that instrument, for they are conferred in terms upon "the said trustees or whoever may be trustee or trustees hereunder." The real question in this case is whether the trustees, while administering their trust under the supervision of a court of equity, should procure its sanction or ratification for so material and important a step of that administration as the selection of a depository for their large current balance of cash trust funds. The selection here was not about to be made under any express or personal power vested in the trustees, but it was an act incidental to the administration of the trust, and discretionary in its nature. The theory of the judicial supervision of the administration of trusts certainly contemplates securing the authority or approval of the court for all important transactions requisite to the proper management and custody of the funds of the estate. We are of opinion that the subject-matter covered by the order appealed from was within the jurisdiction of the circuit court.

We also think the order was discretionary in its nature, and it is therefore not subject to be reviewed by us on appeal. It is essential to the successful supervision by courts of equity of the administration of trusts that matters of detail, incident to the administration, which must be regulated by the exigencies of the situation out of which they arise and the circumstances of the particular case, rather than by propositions of law, should be under the discretionary control of the supervising court. The selection of a depository for the trust funds, although an important matter in the present case by reason of the large amount of current funds, is after all a detail of the administration of the estate. It might, for a variety of reasons, be found desirable to promptly make a change in the depository from time to time, and in selecting one the highest rate of interest allowed on deposits should not be the only, nor necessarily the best, criterion by which to make the choice. There was an especial propriety in the passage of the order appealed from, because of the positive conflict of views and action between the two trustees who failed, when afforded an opportunity to do so, to unite in the recommendation of one or more depositories for approval by the court. It is proper to say that there is nothing in the record or the briefs in this case in any manner reflecting on the integrity or financial soundness of any of the institutions mentioned in the proceedings. The order appealed from will be affirmed, and the case remanded.

Order affirmed, with costs, and case remanded.

SHIPLEY v. MERCANTILE TRUST & DEPOSIT CO. et al.

(Court of Appeals of Maryland. Jan. 10, 1906.)

1. WILLS—CONSTRUCTION—RULES.

In construing a will, words and expressions used therein are to be taken in their ordinary grammatical sense, unless, upon so reading them in connection with the entire will or upon applying them to the facts, an ambiguity arises, in which case the primary meaning of the words may be modified, extended, or abridged, and the intention of the testator, as collected from the entire will, with the aid of proper extrinsic evidence, will be effected, even against the literal sense of particular words and expressions.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 974.]

2. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEDENTS.

Under Code Pub. Gen. Laws, art. 85, § 2 as amended by Laws 1904, p. 1168, c. 661, providing that in actions by or against executors, heirs, or devisees of a decedent, in which judgments or decrees may be rendered for or against them, no party shall be allowed to testify as to any transaction with or statement made by the decedent, a wife cannot testify in a suit involving the construction of the will of her deceased husband to conversations with her husband in which he stated what her interest under the will would be.

[Ed. Note.—For cases in point see vol. 50, Cent. Dig. Witnesses, § 664.]

3. WILLS—CONSTRUCTION—EVIDENCE—DECLARATIONS OF TESTATOR.

Declarations of testator as to the meaning of the words used in his will are inadmissible on the issue of the proper construction of the will.

[Ed. Note.—For cases in point see vol. 49, Cent. Dig. Wills, § 1027.]

4. SAME—EXTRINSIC EVIDENCE—WHEN ADMISSIBLE.

Extrinsic evidence cannot be resorted to in construing a will, in the absence of some ambiguity or difficulty of construction.

[Ed. Note.—For cases in point see vol. 49, Cent. Dig. Wills, § 1022.]

5. SAME—CONSTRUCTION OF PARTICULAR WORDS—DOWER AND THIRDS.

A will creating a trust provided for the division of the trust estate into shares and the conveyance of the shares to the beneficiaries "free and discharged from the trust, but subject to the dower and thirds of my said wife." A subsequent clause devised a certain share of the trust fund to a trustee, "subject to the dower and thirds aforesaid of my said wife." A codicil provided for the capitalization of the widow's dower and thirds by an agreement between her and the trustee according to the standards and valuations recognized by courts of equity, and a later codicil, in repeating the provision for the widow, stated that the trust fund should be subject to the widow's dower and thirds during her lifetime. *Held*, that by the widow's dower and thirds was meant a third interest for life in the real property and an absolute third interest in the personal property, and the will could not be so construed as to entitle the widow to an absolute third interest in both real and personal property.

6. DOWER—ASSIGNMENT—RIGHTS OF WIDOW.

Where a husband devises his estates to others subject to his widow's dower, the widow cannot be deprived, by any provision of the husband's will or by any decree of court, of the right to have her dower assigned, if she elects to exercise that right.

7. SAME—WAIVER OF RIGHT.

Where a will devised testator's estates to a trustee subject to the widow's dower, and provided for the disbursement of the trust estate from dower by an agreement between the widow and the trustee, neither the widow's consent to the assumption of jurisdiction by the court over the administration of the trust, nor her declaration in her answer filed in proceedings relating to the trust of a willingness to free the estate from dower, could be regarded as a waiver of her right to have her dower assigned in case no agreement as provided for in the will was arrived at between her and the trustee.

8. SAME—COMPULSORY ASSIGNMENT—PERSONS ENTITLED—TRUSTEES.

Where a will devised an estate in trust subject to the widow's dower, and provided for the disbursement of the trust estate from dower by an agreement between the widow and the trustee, the trustee had the right, in the event of the failure to come to an agreement with the widow, to pray for an assignment of dower.

9. TRUSTS—ADMINISTRATION—DISCRETION OF TRUSTEE.

A will devising an estate in trust, subject to the widow's dower, authorized the trustee to agree with the widow for the capitalization of dower and to set apart property equal to the dower as capitalized, and to assign the same to the widow as her absolute property, or to sell any part of the trust property and pay the widow the capitalized value of her dower, or to average with her by payment of part in money or part by conveyance of property or both as should be deemed advisable. *Held*, that the disbursement of the estate from the widow's dower in the mode provided by the will was left to the discretion of the trustee, to be exercised to the best interests of the cestui que trust.

Appeal from Circuit Court of Baltimore City; Henry D. Harlan, Judge.

Suit by the Mercantile Trust & Deposit Company, as trustee under the will of Charles S. Shipley, deceased, and another, against Ida R. Shipley, individually and as executrix of Charles S. Shipley, deceased, and others. From the decree rendered, defendant Ida R. Shipley appeals. Affirmed.

Argued before McSHERRY, C. J., and BOYD, PEARCE, SCHMUCKER, and BURKE, JJ.

Wm. Pinkney Whyte, for appellant. D. K. Este Fisher and Thomas G. Hayes, for appellees.

PEARCE, J. The record in this case is accompanied by numerous and elaborate briefs in behalf of the various parties in interest, but the principal question presented is a narrow one. The case originated in a bill filed in the circuit court of Baltimore city by the Mercantile Trust & Deposit Company, as trustee under the last will and testament of Charles Shipley, deceased, and by Stephen George Shipley, one of the beneficiaries under said will, against Ida R. Shipley, widow of Charles S. Shipley, in her individual capacity and as executrix of the said Charles Shipley, and also against numerous other parties, beneficiaries under said will, praying the court to assume jurisdiction over the administration of the trusts created by the will and over the exercise of the powers conferred thereby upon the Mercantile Trust & Deposit Company.

of Baltimore, as trustee under said will, and particularly over the division of the rest and residue of the estate of said Charles Shipley, and to direct said trustee in the execution of said trusts and powers. The will and the three codicils thereto are very voluminous, covering 14 pages of the printed record, and disposing of a large estate; but it will be sufficient for the purposes of this case to say that after making certain bequests and devises which are not drawn in question here the testator devised and bequeathed all the rest, residue, and remainder of his estate to the said Mercantile Trust & Deposit Company, in trust to divide the same equally into as many shares as he should have children living at his death, and children deceased leaving issue at his death; such issue to represent per stirpes the shares of their deceased parents, and, to facilitate such division, authorized said trustee to sell such parts of said rest, residue, and remainder as it should deem necessary to effect such division. He further directed that one of these equal shares should be conveyed and transferred by said trustee, "free and discharged from the trust (but subject to the dower and thirds of my said wife in said rest, residue and remainder which said dower and thirds, as also like dower and thirds in all the other shares I hereby give, devise and bequeath unto her) unto each of my children living at my death, other than to my daughter, Mary A. Shiebler, my son, Stephen George Shipley, my daughter Sarah N. Dulaney and my daughter Ruth Peregooy Hood." The testator left surviving him the above-named four children, and also three other children, J. Lester Shipley, Mary A. Choate, and Joseph D. Shipley, but no issue of deceased children, and the three last-named children are provided for in the clause above quoted. By subsequent clauses in said will one other equal share of said rest and residue was devised and bequeathed "subject to the dower and thirds aforesaid of my said wife" to the said Mercantile Trust & Deposit Company, in trust for each of the children first above named. In the first codicil to said will he made the following provision: Whereas the Mercantile Trust & Deposit Company of Baltimore, will, as trustee, take the several parts of the residue of my estate, subject to the dower and thirds of my wife; if it shall so happen that she is willing to capitalize and convert her dower and thirds, and receive the value thereof according to the standards and valuations recognized by the courts of equity in Maryland, either before or after the trustee makes the division of the residue of my estate. I authorize the Mercantile Trust & Deposit Company of Baltimore, as trustee, to make the division, or as trustee under said several trusts, to agree with her for such capitalization, and to set apart property real or personal, or both, equal at a valuation to be fixed by said company, with her consent, to her capitalized dower and thirds in such

portion and to assign, convey and deliver the same to her as her absolute property, or I authorize said company to sell any parts of the trust property, and provide money to pay her the said capitalized value of her dower and thirds, or to average with her by payment of part in money and part by conveyance of real or personal property, or both, as may be deemed advisable." The bill alleged that no agreement had been effected between the trustee and the widow for the capitalization of her dower and thirds as authorized by said codicil, and "that, in order to make any of the rest and residue of the testator's estate marketable, it was necessary to relieve said rest and residue from her claim for dower and thirds by the exercise of said power, or by having the same set off to her in the manner provided by law, which the plaintiffs are advised can be done in these proceedings." The bill then specifically prayed "that the rest and residue of the estate of the testator may be disencumbered of the dower and thirds of his widow, the said Ida R. Shipley, either by the exercise of the power conferred upon the Mercantile Trust & Deposit Company of Baltimore for that purpose, or by setting off the same to her as provided by law."

The material part of the answer of Ida R. Shipley to the plaintiffs' bill will appear from the following extracts from said answer: "And in further answer to the said fourth paragraph she says: That it is plain that each share of the rest, residue, and remainder of his estate, when divided, shall be conveyed and transferred by the trustee, free, clear, and discharged of her dower and thirds unto certain of the children in the said will mentioned; but that he gives, devises, and bequeaths by his said will in each and every one of the shares of the rest, residue, and remainder, the dower and thirds of this respondent Ida R. Shipley, wife of the testator. That she claims it is the duty of the trustee, and all interested in the said estate, to have a true construction of the said will, as to the meaning of the words 'dower and thirds' of his estate, which words this respondent affirms are often explained to her by her late husband as meaning one-third of the whole rest, residue, and remainder of his estate, and she invokes the action of this court most respectfully in that regard. Moreover, she insists, before any other administration of the estate, it is the duty of the trustee to value the said several parts of the residue of the testator's estate and to capitalize and convey to her said 'dower and thirds' and to agree with her for such capitalization and to set apart property, real, personal, or both, equal, to a valuation to be fixed by said company and with her consent, to her capitalized 'dower and thirds' in said portion, and to assign, convey, and deliver the same to her, as her absolute property, or to make an agreement with her for such capitalized value of her 'dower and thirds' upon the terms set forth

in said will. (5) That in answer to the fifth paragraph no effort has been made to enter into an agreement to pay or satisfy this respondent in regard to the dower and thirds' claimed under the will of her late husband, for the reason that there has been no offer of an agreement between the trustee and herself in regard to the meaning of words 'dower and thirds' in the will, as she understands them. * * * (7) That this respondent believes that the statement of paragraph 7 in regard to persons interested under said will is truly stated in the said bill of complaint. That she assents to the assumption by this court of jurisdiction over the administration of the trust by the said Mercantile Trust & Deposit Company of Baltimore. That she is ready and willing, when a proper construction is made by this court of the words in the will of 'dower and thirds' to this respondent in the rest and residue of his estate, to consent to the disbursement of the rest and residue of the estate of the said testator of the said 'dower and thirds' of this respondent. That she denies the right of the trustee to petition for a sale, free of her dower, of the said lots described in the bill of complaint, because she claims a 'dower and thirds' in the whole rest and residue, meaning one absolute of the whole of said property. And, now, having answered all the allegations in the bill, she prays to be hence dismissed with her reasonable costs, etc. Ida R. Shipley, Defendant."

The court assumed jurisdiction over the administration of the trusts by decree reserving for further consideration all other relief sought by the bill. A subsequent decree was also passed, under an agreement of the parties for the sale of certain portions of the property, and this also reserved for future determination all questions concerning the manner of relieving the testator's estate from the widow's dower and thirds, and all questions raised by her concerning the true interpretation of the expression, 'dower and thirds,' employed in the will and codicils. Testimony was taken in behalf of the widow's contention, and after hearing Judge Harlan passed the following decree, from which this appeal is taken: "Decree, filed 27th September, 1905: This cause, coming on for a further hearing, was argued by counsel for the respective parties, and the pleadings and evidence and the exceptions filed thereto having been read and considered by this court. It is thereupon adjudged, ordered, and decreed by the circuit court of Baltimore city this 27th day of September, 1905, that all the exceptions filed to the admission in evidence of the testimony of Mary O. Burwell and Ida R. Shipley, filed in this cause, be, and the same are hereby, sustained. And it is further adjudged, ordered, and decreed that by the true construction of the said last will and testament and codicils the said testator employed the expression 'dower and thirds' in its ordinary technical sense, and that by

virtue thereof the said Ida R. Shipley is entitled to an estate for her life, and not absolutely in one-third of all the real estates of inheritance of the testator embraced in the rest and residue of his estate, excepting that described and devised in and by the second item of the third codicil, and the ground, rents, and reversions mentioned and devised in and by the third item of said third codicil to the said trustee, in trust for her for her life; and that she is entitled absolutely to one-third in value of all the personal estate of the testator embraced in the rest and residue of his estate, which shall remain after the payment of his just claims against him, excepting the subversions, stocks, and bonds, bequeathed by the third item of the third codicil to the trustee, in trust for her for her life. And it is further adjudged, ordered, and decreed that by the said provision for capitalizing and converting said dower and thirds with the consent of the said Ida R. Shipley it was the intention of the testator if she should consent to the capitalization and conversion thereof, either before or after the division of the rest and residue of the testator's estate (and if the trustee should determine to exercise the powers conferred upon it in connection therewith), that the real and personal estate, respectively, in which she would be entitled to the dower and thirds, to be capitalized and converted, should be valued separately by the said trustee, with her consent, and that she should be entitled to receive as her absolute estate, in lieu of dower in said real estate, not more than one-seventh nor less than one-tenth of the said value of said real estate, according to her age, health, and condition; and that the said trustee should have power to pay to her the capitalized value of her dower, so ascertained, in money or in property, real or personal, or partly in money and partly in property, and, if paid to her in whole or in part in property, that said property should be taken by her at a valuation to be agreed upon between her and said trustee, and that she should be entitled to receive, as her absolute property, in satisfaction of her thirds in said personal estate, one-third in value of said personal property, to be paid to her in like manner, in money or in property, real or personal, or partly in money and partly in property, and that for the purpose of effecting said capitalization and conversion and payment the said trustee should have the power to sell and convey free of dower and thirds any of the real and personal estate of the testator in which the said Ida R. Shipley should be entitled to dower and thirds. Henry D. Harlan."

The cardinal question in the case is the meaning of the words "dower and thirds" as used by the testator in the second clause of the seventh item of the will, and in the first and third codicils; the appellees claiming that they were employed in their ordinary techni-

cal sense, and that Mrs. Shipley was entitled under the terms of the will and codicils to a life estate in one-third of the residuary real estate, and to one-third of the residuary personal estate absolutely, excepting the residuary real and personal estate mentioned in the second and third items of the third codicil; while she claims to be entitled to the one-third of each the shares of the residuary estate for division among the seven children. The rule which governs the construction of wills has been well stated as follows in *Beach on Wills*, § 300: "In construing a will, the words and expressions used are to be taken in their ordinary, proper, and grammatical sense, unless upon so reading them in connection with the entire will, or upon applying them to the facts of the case, an ambiguity or difficulty of construction, in the opinion of the court, arises, in which case the primary meaning of the words may be modified, extended, or abridged. Notwithstanding the foregoing rule, the intention of the testator, which can be collected with reasonable certainty from the entire will, with the aid of extrinsic evidence, of a kind properly admissible, must have effect given it, beyond and even against the literal sense of particular words and expressions." We regard this rule as stating the legal principles applicable to the construction of will as favorably to the agreement of the appellant as any law-writer or judge has done, and she has accordingly sought to introduce evidence to sustain her contention as to the meaning of the words in question as used in this will. Miss Burwell, an intimate friend of Mr. and Mrs. Shipley for many years, testified to conversations with the testator, in which he told her how he had provided by his will for his wife, and that he said "she was to have one-third of everything he possessed, and that he had fixed it so; and, so that I could understand him, he said, 'If my estate was \$9,000 she is to get \$3,000 in cash, and if it was \$30,000 she would get \$10,000'—that it was all to be capitalized, and she was to have one-third of everything, and have it in money." Mrs. Shipley also testified that her husband told her: "'One-third of everything I have is yours. I have made my will to that effect. The whole estate is to be capitalized and you are to get one-third of the whole estate.' And he used this illustration to me to explain how I got my one-third of the whole estate: that if it yielded \$9,000 when capitalized, I was to get \$3,000 in money." Objection was made to the competency of Mrs. Shipley as a witness, and exceptions were filed to the whole of the testimony thus offered from these two witnesses, and these objections were sustained in the decree.

It cannot be doubted since Acts 1904, p. 1168, c. 661, amending section 2 of article 35 of the Code of Public General Laws, that Mrs. Shipley was not a competent witness; the proceeding being one against devisees and distributees of a decedent in which judgment or decree must be

rendered for or against them, and she being a party to the cause not called to testify by any party in the opposing interest. Nor do we think the evidence of either of these witnesses, consisting, as it does, solely of the declarations of the testator as to the meaning of the words used in the will, is of a kind properly admissible in any event. In *Redfield on Wills*, vol. 1, p. 540, it is said: "The declarations of the testator, whether made before, contemporaneously with, or subsequent to the making of the will, cannot be received to affect its construction. This has been repeatedly decided by the American courts. The declarations of the testator after making his will of his purpose and intention therein are not admissible in evidence to control or explain it." In *Weston v. Foster* (Mass.) 7 Metc. 297, the court said: "This principle is of such universal application and lies so much at the foundation of all rights of property depending upon written evidence that it scarcely seems requisite to multiply cases here." In *Shreve v. Shreve*, 43 Md. 398, extrinsic testimony had been taken under a commission, and was not excepted to in the court below. This court said: "That testimony consists of parol declarations by the testatrix after she had made the will, as to its effect and her intentions in executing it, and like proof as to what interpretation had been placed upon it by the devisees, the court in the partition case, and the commissioners who divided the estate." It was contended that, as it was not excepted to, it must be allowed its full force as held in respect to evidence not objected to in *Gibbs v. Gale*, 7 Md. 76. But the court said, through Judge Miller: "All this testimony was clearly inadmissible to affect the construction of the will or the rights of the infant defendants. * * * and, as these do not appear to have been represented by counsel at the taking of the testimony or the hearing of the case when exceptions should have been filed, it would be an unreasonable extension of the doctrine in *Gibbs v. Gale* to apply it to this case, and we must therefore construe this will by the light afforded by the paper itself." In adhering to this rule, we have no reference to that class of cases described in the *Walston's Lessee v. White*, 5 Md. 305, in which it was said extrinsic evidence may be resorted to for the purpose of determining the object of a testator's bounty, or the subject of disposition, or the physical quantity of interest intended to be given by the will.

But it must be remembered that in no event can extrinsic evidence be resorted to in construing a will, except where upon reading the words questioned in connection with the entire will, or upon applying them to the facts in the case, there arises in the opinion of the court an ambiguity or difficulty of construction, and we cannot perceive that any such exists here. The words "dower and thirds" in themselves have each a uniform, established meaning, both in law and in com-

mon usage; the former meaning a widow's life estate in one-third of the inheritable real estate of which the husband was seised during coverture, and the latter meaning her absolute estate in one-third of her husband's personal property remaining after payment of his debts. It is needless to cite authorities for these definitions. In Underhill & Strahan on Interpretation of Wills, p. 5, it is laid down "that a testator who uses words which have an intelligible, conventional meaning is not to be held as having used the words with any other meaning, unless the context of the instrument shows that he intended to do so." We have carefully examined this entire will with a view to discovering any provision or expression sustaining Mrs. Shipley's contention that the testator used these words as convertible terms, and meant thereby one-third absolutely of all the residuary real and personal estate, but we can discover nothing. On the contrary, the natural and ordinary meaning of these words appears to harmonize with the whole context. In disposing of the rest and residue of his estate, he was disposing of both real and personal estate, in the former of which she was entitled to dower, and in the latter to thirds. He devises and bequeaths equal shares of this residue to his seven children, to some directly, and to trustees for others, but in all cases subject to the dower and thirds of his wife; that is, subject to her dower in the real estate, and to her thirds in the personal estate. If he had designed to give her one-third absolutely of all his real and personal estate, would he not naturally and inevitably have devised and bequeathed to her one-third of his whole estate, and then have devised and bequeathed the remaining two-thirds to his children? Would any lawyer, or would any layman even, with such a design, have resorted to such a circuitous and clumsy device for effecting so simple and plain a purpose? Looking to the will alone, we think there can be no doubt that he used the words "dower and thirds" in their ordinary technical sense. Coming to the provision made in the first codicil for the capitalizing and converting of her dower and thirds so as to receive the value thereof according to the standards recognized by courts of equity in Maryland, the view which we have expressed is strengthened and confirmed. If she was to have one-third absolutely of both real and personal, there would be nothing to capitalize or convert, nothing to which the standards of valuation recognized by courts of equity could be applied, or upon which any agreement as to valuation, between herself and the trustee, could operate. But, if she was to have the technical dower and thirds, the will and codicil are in harmony in these provisions; and there is opportunity for capitalizing, for the application of equity standards of valuation of dower, and for the conversion of a larger limited, into a smaller, absolute estate. Finally, in the third codicil, in repeating the provision for

his wife, the testator says: "The shares of the said residue to be divided after my death, during the life time of my wife shall all be subject to her dower and thirds as stated in said will." This is the last declaration of the testator upon that subject, and there can be no mistake as to its import. We therefore fully agree with the lower court as to the meaning of the words "dower and thirds" and as to the estate taken by Mrs. Shipley under the will.

There remains for consideration that part of the decree which directs "that for the purpose of effecting said capitalization and conversion and payment, the said trustee should have the power to sell and convey free of dower and thirds any of the real and personal estate of the testator in which Mrs. Shipley should be entitled to dower and thirds." In her answer to the bill she assents to assumption by the court of jurisdiction over the administration of the trusts by the Mercantile Trust & Deposit Company. She also declares her readiness and willingness, when a proper construction is made by the court of the words "dower and thirds," to consent to the disembarassment of the residue of the estate from her dower and thirds, though she alleges no effort has been made to enter into any agreement to pay or satisfy her in regard thereto, and she expressly denies the right of the trustee to petition for a sale free of her dower in the lots described in the bill of complaint.

The argument for the appellant upon this branch of the case we think is founded upon the assumption that the bill prays for a sale free of dower, without her consent, and that the decree authorizes such a sale; but this we think is not the true construction of the bill or of the decree. If it were, we could not hesitate to hold that a widow cannot be deprived, by any direction of the testator who has devised his estates to others, subject to her dower, nor by any decree of court, of the right to have her dower assigned, if she elects to exercise her right. Neither her consent to the assumption of jurisdiction over the administration of the trusts, nor her declaration of her willingness to free the residue from her dower after the construction of the words "dower and thirds," can be regarded as a waiver of her right to have her dower assigned, if no agreement is in fact made so to free said residue from her dower. She must be presumed to have referred to the mode provided by the testator for so doing, which requires an agreement by her with the trustee for the valuation of said residue as a basis for capitalization of her dower. If no such valuation is agreed upon, there can be no capitalization. A compulsory sale clear of dower might determine the actual market value at the time of sale of the property sold, but that would not be the equivalent of a valuation by her agreement with the trustee. But it will be seen that the bill does not pray for a sale clear of dower with her consent.

The prayer is "that the rest and residue of the estate of the said testator may be disencumbered of the dower and thirds of his widow, the said Ida R. Shipley, either by the exercise of the power conferred upon your orator, the Mercantile Trust & Deposit Company of Baltimore for that purpose, or by setting off the same to her as provided by law."

We think the trustee had a right, in event of a failure to free the residue from dower by agreement in the mode provided in the will, to pray that it be done by the assignment of dower. It is stated in Park on Dower, 265, that the propositions are indeed convertible that against whomsoever a writ of dower will lie that person is competent to make a valid assignment, or, in other words, whoever is compellable by writ to assign dower may do it without writ." We are also of the opinion that the testator left the disencumbrance of the estate from his widow's dower in the mode provided by his will to the discretion of the trustee as to the best interests of its cestui que trust, and that there was no error in that portion of the decree which refers to its discretion to exercise the powers conferred upon it in that connection. Finding no error in any part of the decree it will be affirmed.

Decree affirmed; costs to be paid out of the trust estate.

SAFE DEPOSIT & TRUST CO. v. CAHN et al.

SAME v. ROBERTS et al. (two cases).

(Court of Appeals of Maryland. Jan. 10, 1906.)

1. TRUSTS — MISAPPROPRIATION OF TRUST FUNDS—ACTIONS—JURISDICTION.

Defendant sold corporate stock, which showed on its face that the same was the corpus of a trust estate, for the individual benefit of the trustee, and paid the proceeds by check to the trustee individually. Defendant also knew from information received from the trustee that the stock belonged to a trust estate. The trustee converted the proceeds to his own use. *Held*, that equity, in a suit by a substituted trustee, clothed with the powers conferred on the original trustee and in equity as the assignee of rights of action of the beneficiaries, had power to compel defendant to make restoration to the trust estate.

2. SAME.

The fact that the substituted trustee holds the legal title to the trust estate and that he seeks to recover money due to the trust estate does not deprive equity of jurisdiction to compel restoration, for the primary interest to be maintained is essentially equitable.

3. SAME.

A person abetting a defaulting trustee becomes, by participation in the breach of trust, a trustee and amenable to the jurisdiction of a court of equity in a suit by a substituted trustee.

4. DISMISSAL—GROUNDS—ERROR AS TO FORM OF ACTION—TRANSFER TO PROPER COURT.

Where it is apparent that plaintiff is entitled to some relief, the mere fact that he has invoked the aid of the wrong tribunal is not a sufficient cause for the dismissal of the suit; but the court, in obedience to the express provisions of Code Pub. Gen. Laws, art. 26, § 44, and article 75, § 113, should remove the cause to the proper court.

5. PARTNERSHIP — LIMITED PARTNERSHIP — STATUTES—BUSINESS AUTHORIZED.

The business of a stockbroker may be carried on by a limited partnership, within Code Pub. Gen. Laws, art. 73, § 1, authorizing the formation of limited partnerships for the transaction of any "mercantile, mechanical, manufacturing or banking business," and declaring that the provision shall not authorize any such partnership for the purpose of making insurance; for sales and purchases of bonds, stocks, and other securities are mercantile transactions.

6. SAME—CONVERSION INTO GENERAL PARTNERSHIP.

Code Gen. Pub. Laws, art. 73, § 4, requires that the certificate of a limited partnership shall be recorded in the county in which the principal place of business shall be. The certificate of a limited partnership declared that its principal place of business was in a city in the state. The bill in a suit against the partners alleged that the principal place of business of the concern was outside of the state. *Held*, that the limited partnership could not be deemed converted into a general one.

7. SAME—LIABILITY OF SPECIAL PARTNER.

Where all the requirements of the statutes relating to limited partnerships have been complied with, no personal liability attaches to the special partner, except as expressly declared by Code Pub. Gen. Laws, art. 73, § 2, to the extent of the fund contributed by him, for the object of the provision declaring that the special partner's contribution shall be made in actual cash is to provide a fund subject to firm losses.

8. SAME—SUITS AGAINST PARTNERS IN LIMITED PARTNERSHIP — JOINDER OF SPECIAL PARTNER.

Code Pub. Gen. Laws, art. 73, § 19, declaring that suits respecting the business of a limited partnership shall be against the general partners only, except as otherwise provided, applies to suits respecting the business of the partnership while the firm is a going concern and to suits after its dissolution while the special partner's cash contribution forms a part of the assets or has been absorbed in liquidating debts, but does not apply to a case where the partnership has been dissolved and the special partner has been repaid his cash contribution, leaving firm debts unpaid.

9. SAME.

Code Pub. Gen. Laws, art. 73, § 13, declares that no part of the sum contributed by a special partner shall be withdrawn during the continuance of the limited partnership. Section 19 provides that suits against limited partnerships shall be against the general partners only, except as otherwise provided. Section 20 enacts that, if in any suit against general and special partners it shall appear that the special partners are not liable, the court may proceed to judgment against the partners liable. A partnership aided a trustee in converting corporate stock belonging to the trust estate by selling the same for the trustee and paying the proceeds by check to the trustee individually. Subsequently a limited partnership was formed, which took over the assets and assumed the liabilities of the partnership. The limited partnership aided the trustee in converting stock of the trust estate in the same manner. The limited partnership was dissolved, though formed to continue longer, and the cash paid by the special partner was returned to him, with the liabilities resulting from the transactions remaining unpaid. *Held*, that the substituted trustee, in a suit to compel restitution, properly made the general and special partners parties defendant.

10. SAME—ASSUMPTION BY FIRM OF FORMER FIRM LIABILITIES—LIABILITIES INCLUDED.

A general partnership wrongfully aided a trustee in misappropriating trust funds. It was then dissolved, and a limited partnership took its assets and assumed its liabilities. *Held*,

that the liability of the general partnership to make restitution to the trust estate was included in the liability assumed by the limited partnership.

11. SAME — MISAPPROPRIATION OF TRUST FUNDS—RECOVERY—ACTIONS—PARTIES.

The limited partnership was dissolved, leaving the liability outstanding. The members of the general partnership were the members of the limited partnership. The substituted trustee, in a suit to compel restitution to the trust estate, filed a bill against the individual members of the two partnerships. *Held*, that the individuals were liable, whether as members of the first or second firm.

12. TRUSTS — CONSTRUCTIVE TRUSTS—WRONGFUL PURCHASE OF TRUST PROPERTY.

A purchaser at a private sale of corporate stock belonging to a trust estate, with knowledge of the order of the court directing the sale of the stock at the highest market price obtainable on a public stock board, holds the stock subject to the trust to which it was subject in the hands of the original trustee.

Appeals from Circuit Court of Baltimore City.

Consolidated suits—one by the Safe Deposit & Trust Company against Frank B. Cahn and others and two by the same plaintiff against William C. Roberts and others. From a decree dismissing the bills, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, SCHMUCKER, JONES, and BURKE, JJ.

Frank Gossnell and Bernard Carter, for appellant. Edgar H. Gans and Robert W. Honeyman, for appellees.

McSHERRY, C. J. There are three appeals in this record. Two of the questions brought up for decision are involved in all of the cases, whilst there are separate, subordinate inquiries which are confined to the first and third appeals, respectively. Before stating any of the questions which are to be considered, a brief narration of the facts must be given, in so far as they affect the first contention which is common to all the cases; and subsequently the facts bearing on the other general question will be stated, and when the subsidiary inquiries are later on dealt with the facts pertaining to them will be mentioned, if not incidentally alluded to earlier.

Three bills in equity were filed in the circuit court of Baltimore City by the appellant, the Safe Deposit & Trust Company of Baltimore City, against the several appellees. To each bill demurrers were interposed, the demurrers were sustained, and the bills were dismissed upon the sole ground that a court of equity was without jurisdiction to grant the relief prayed. It appears from the face of the bills and exhibits: That in the year 1895 a certain Wesley A. Tucker departed this life, leaving a last will and testament in and by which his widow, Rebecca J. Tucker, and his son, William Trump Tucker, were appointed executrix and executor, and were named and constituted trustees of the prop-

erty therein disposed of on the trusts and conditions therein mentioned and set forth. That the executrix and executor after administering on the estate of the decedent, conveyed and transferred that portion thereof falling within and covered by the trusts created by the will, to themselves as trustees. That the circuit court, upon appropriate proceedings taken, assumed jurisdiction over the administration of the trusts named and described in the will, and over the trust property and estate subject thereto. That a portion of the trust estate was invested in 328 shares of the capital stock of the Merchants' & Miners' Transportation Company, and in 211 shares of the capital stock of the Northern Central Railway Company; and that the certificates representing all of those shares stood in the names of Rebecca J. Tucker and William Trump Tucker, trustees of Wesley A. Tucker, deceased. That by certain orders passed at different times by the circuit court in the trust estate proceedings the trustees were authorized to sell the above-named shares of stock with a view to the reinvestment of the proceeds in other securities. That as to 100 shares of the Merchants' & Miners' Transportation Company's stock, the sale was directed by the court to be made at the Public Stock Board of Baltimore City, and as to the entire 211 shares of the Northern Central Railway Company's stock, the sales were directed by the court's orders to be made at the highest market price obtainable on the Public Stock Board of Baltimore City; and as to the remaining 228 shares of the Merchants' & Miners' Transportation Company's stock the order instructed the trustees to sell at the highest market price obtainable at the Public Stock Board of Baltimore City, "or otherwise, provided the same shall not be sold at less than one hundred and seventy (170) dollars per share"; and as to the remaining 128 shares of the same stock the court's order permitted the sale to be made at the "market price upon the Public Stock Board of Baltimore City, or at private sale at not less than \$175 per share." That all of the above-mentioned certificates, thus plainly earmarked and distinctly identified as forming parts of the corpus of the trust estate of Wesley A. Tucker, deceased, and clearly showing that they did not belong to Rebecca J. Tucker or William Trump Tucker individually, were sold by the appellees, who are bankers and stockbrokers, under circumstances, some of which need not be mentioned just here because having no relation to the branch of the case now being considered, but which will be stated later on when the liability of the several firms separately proceeded against comes to be discussed. That the appellees sold all the shares for the individual benefit and account of William Trump Tucker, and credited the proceeds of the sales to the individual account of William Trump Tucker, and paid the proceeds by check to him individually,

without indicating in any way on the face of the checks that they represented the proceeds of the sale of stock belonging to a trust estate, and without naming Rebecca J. Tucker as trustee or payee, and without describing William Trump Tucker, the person named as payee therein, as trustee, although the appellee firms knew full well, both from information gathered from previous dealings with William Trump Tucker and from the fact that the certificates all showed on their face that they represented stock standing on the books of the two corporations above mentioned in the names of Rebecca J. Tucker and William Trump Tucker, trustees of Wesley A. Tucker, deceased, that said stock in fact belonged to and formed part of the trust estate of the decedent. That William Trump Tucker took the proceeds of said sales, thus paid to him individually, and converted them to his own private use without accounting to his co-trustee or to the trust estate therefor. That after wasting and despoiling the trust estate to a large amount he departed to, and is now residing in, some place unknown, and that he is utterly insolvent. That both Rebecca J. Tucker and William Trump Tucker were subsequently removed from the trusteeship, and that the Safe Deposit & Trust Company was duly appointed in their stead. The three bills contained in the record were filed by the Safe Deposit & Trust Company, the substituted trustee. In the first, certain individuals who formerly traded as Frank B. Cahn & Co. and later in conjunction with a special partner as Roberts, Cahn & Co., were proceeded against to recover from them the sum of about \$17,000, representing the proceeds of the sale of 100 shares of the capital stock of the Merchants' & Miners' Transportation Company; in the second, certain individuals constituting the same firm of Roberts, Cahn & Co. were proceeded against to recover from them the sum of \$42,138.39, being the amount of the proceeds of the sale of the remaining 228 shares of the Merchants' & Miners' Transportation Company's stock; and in the third, certain individuals constituting a still later firm of Roberts, Cahn & Co. were proceeded against to recover from them something more than \$20,000, being the amount of the proceeds of the sales of the 211 shares of the capital stock, of the Northern Central Railway Company. The liability of all the appellees is based upon their participation in Tucker's breach of trust.

Upon the facts admitted by the demurrers, the first question presented is this: Has a court of equity jurisdiction to decree that the defendants—the appellees here—shall restore to the trust estate the amounts which by their participation in Tucker's malversations they enabled him to abstract therefrom and to convert to his own use? Or must the substituted trustee proceed by an action at law against these participants in Tucker's con-

ceded breach of trust to recover the amounts lost by his defalcations?

It cannot be doubted at this day that on the facts alleged in the bills of complaint the appellees are answerable in some forum, either in a court of equity or in a court of law, for their participation in the defaulting trustee's breach of trust. It is a general principle that all persons who knowingly take part or aid in committing a breach of trust are responsible for the money thus withdrawn from the trust estate, and they may be compelled to replace the fund which they have been instrumental in diverting. Every violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust. There is in such instances no primary or secondary liability as respects the parties guilty of or participating in the breach of trust, because all are equally amenable. That a breach of trust was committed by William Trump Tucker does not admit of a doubt. He and his co-trustee were removed because he was a defaulter. He received the proceeds of the sales of all of the shares of stock which have been hereinbefore mentioned, and those proceeds formed part of the corpus of the trust estate which it was his imperative duty to preserve intact. Instead of performing that duty, he spent the funds or appropriated them to his own use. Whoever knowingly aided him, or knowingly participated with him, in misapplying those funds, became, by reason of so aiding and so participating, equally liable with him to make the fund good by restoring the proceeds of the sales or an equivalent in cash to the trust estate. If the appellees aided and participated in Tucker's breach of trust in the manner and to the extent alleged in the pleadings as hereinbefore stated, then they are, beyond dispute, as responsible and answerable to the substituted trustee as is the defaulting trustee himself.

But in what tribunal must that responsibility of the appellees be enforced? The appellant says in a court of equity; the appellees assert in a court of law, because an adequate remedy exists there. If this were a proceeding against the defaulting trustee alone, can it be questioned that a court of equity would have ample jurisdiction to require the spoliator to make good to the trust estate the funds belonging thereto which he had unlawfully converted to his own use? A court of equity which has assumed charge of the administration of a trust estate has jurisdiction over the trust property and over the trustee; and if the trustee misappropriates the trust funds, and squanders and misapplies them, whilst a court of equity has supervision over them and him, that court would be lame and impotent indeed if it were powerless to compel, by its own process, the delinquent trustee to restore the abstracted funds, and if it were, in consequence of its

own want of jurisdiction, driven to seek the aid of a court of law to accomplish that result. "The trustee's personal liability to make compensation for the loss occasioned by a breach of trust is a simple contract equitable debt. It may be enforced by a suit in equity against the trustee himself, or against his estate after his death, and the statute of limitations will not be admitted as a defense, unless the statutory language is express and mandatory upon the court." 2 Pom. Eq. § 1080. If the jurisdiction of a court of equity is broad enough to enable that court to decree that a defaulting trustee shall make compensation to the extent which he has wrongfully depleted a trust estate, upon what principle can it be maintained that the same jurisdiction will not extend to and bring within its scope the individuals who may knowingly aid and assist the trustee in his spoliation of the fund? If the one is answerable in a court of equity, why should not the other be also? Both the defaulting trustee and his confederates, those who aided and abetted him, occupy precisely the same relation to the trust estate. Each is primarily liable. Why, then, cannot the same tribunal be invoked to enforce against both an identical liability? The participants in the defalcation—the persons who aid, and by their conduct knowingly assist, the trustee to squander the trust funds—are chargeable with the loss, because, as stated by Sir John Leach, Master of the Rolls, "in the consideration of a court of equity, they, by being parties to a breach of trust, have themselves become trustees for the purposes of the testator's will." *Wilson v. Moore*, 1 Myl. & Keene, 126. By their own wrongful act they have, in the consideration of a court of equity, constituted themselves trustees of the fund they have aided the trustee in misapplying, and they may be treated as trustees of the misapplied fund for the purposes of the testator's will. As the original trustee is answerable in a court of equity to the trust estate for his diversion of its funds, because that court has jurisdiction over the estate and over him it must of necessity follow that those who aid the trustee in his misappropriations of the funds, and who, by so aiding him, become themselves trustees of the diverted assets, are also liable in a court of equity, because by becoming trustees *ex delicto* they have brought themselves within the jurisdiction to which the testamentary trustee is amenable. The forms and varieties of the trusts which are termed *ex maleficio* or *ex delicto* are practically without limit. "The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer." 2 Pom. Eq. § 1053.

The jurisdiction of a court of equity to grant the relief prayed for in these proceedings has been distinctly and unequivocally upheld by this court. The substituted trustee

clearly became in equity the assignee of any rights of action possessed by the cestui que trust for injuries done to the trust property before the substituted trustee's appointment, and it was clothed by the order appointing it with all the powers conferred by the will of Wesley A. Tucker upon the original trustees. This court had before it a precisely similar situation in *Stewart & Duffy, Trustees, v. Firemen's Ins. Co.*, 53 Md. 564. It appeared in that case that a testator bequeathed the residuum of his estate to two trustees upon certain trusts which need not be stated here. The circuit court of Baltimore City assumed jurisdiction over the administration of the trusts, and thereafter the trustees, with the consent and permission of the Firemen's Insurance Company, transferred a portion of that company's stock, which belonged to the trust estate, and appropriated the proceeds to their own use. Subsequently the trustees were removed, and Messrs. Stewart and Duffy were appointed trustees in their stead. The decree which effected this removal and appointment clothed the new trustees "with all the power and authority conferred upon or vested in" the removed trustees. The substituted trustees then filed a bill in equity against the insurance company to recover the stock thus lost to the trust estate, or its value; and the insurance company specially denied the right of the complainants to institute the suit, and also denied that the circuit court had any jurisdiction to confer such a right. It was held, in a carefully considered judgment delivered by the late Judge Miller, that a court of equity has jurisdiction to enforce the liability incurred by a participant in a breach of trust by a trustee, and it was said: "In case of a trust like the one before us we cannot doubt the power of a court of equity, at the instance of the cestui que trust, to supervise the trustees in its management, to remove them for misconduct and appoint others in their place, clothed with all the power and authority over the trust estate which the original trustees had under the instrument creating the trust. Why, then, is it not competent for the complainants to maintain this bill to recover the portion of the trust property which they aver has been lost through the misconduct of their predecessors and the negligence of the defendant corporation? It is true the question has never been expressly decided in this state, but in *Thruston v. Blackiston*, 36 Md. 501, a similar bill was sustained without any such objection being interposed." After citing with approval the case of *Loring v. Salisbury Mills*, 125 Mass. 138, this court proceeded to say: "But apart from authority, and assuming the question is one of first impression, we have no difficulty in sustaining the right of the trustees appointed, as in the present case, to maintain suits against the proper parties for breaches of trust committed by, or injuries done to, the trust property while in the hands and under the management of their predecessors." The

insurance company was accordingly held responsible in equity at the suit of the substituted trustees for the loss sustained by the trust estate as the result of a breach of trust committed by the former trustees with the aid and co-operation of the company. Precisely the same relief was granted upon analogous facts in *Swift v. Williams & Moore, Trustees*, 68 Md. 286, 11 Atl. 835. In *Duckett v. National Bank of Baltimore*, 88 Md. 8, 41 Atl. 161, 1002, the jurisdiction of a court of equity to compel a participant in a breach of trust to make compensation at the suit of a substituted trustee was distinctly challenged, and was in express terms upheld. In *Duckett v. National Mechanics' Bank*, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513, the jurisdiction was not questioned or doubted. The allusion in the last-named case to *Third Nat. Bk. v. Lange*, 51 Md. 138, 34 Am. Rep. 304, *Marbury v. Ehlen*, 72 Md. 206, 19 Atl. 648, 20 Am. St. Rep. 467, and *Stewart v. Fire Ins. Co.*, 53 Md. 564, was to distinguish them from the situation presented by the check which was payable to Scott, cashier, for deposit to the credit of Clagett personally, as the context plainly shows.

It has been vigorously and ingeniously contended in behalf of the appellees that none of the cases above cited is applicable here, because the proceedings now before us are in reality suits in equity for the recovery of damages, and should have, therefore, been instituted in a court of law. The fundamental proposition upon which the contention is based is that the substituted trustee is the holder of a legal title; that as such holder it is not seeking to have the stock itself restored, because the shares were rightfully sold under an order of court, and it is not endeavoring to have restored the proceeds of the stock in their identity as trust funds, because those proceeds, according to the averments of the bills, are no longer in the hands of the appellees, having been paid over to William Trump Tucker; but as the holder of the legal title the substituted trustee is attempting to recover from the appellees damages for the negligence of which they were guilty in the method of payment pursued by them, whereby they made it possible for William Trump Tucker to appropriate the proceeds to his own use. There are several fallacies lurking in this contention. It does not follow, because the substituted trustee holds a legal title to the trust estate, that therefore the trustee cannot, in the circumstances of these cases, invoke the remedial aid of a court of equity to compel a deposed trustee or his confederates to reimburse the depleted trust estate. Conceding that the trustee does hold the legal title, yet "the primary right, estate, or interest to be maintained, or the violation of which furnishes the cause of action" (1 Pom. Eq. § 130), is essentially equitable. "In all cases of equitable estates * * * they are in equity what legal estates are in law.

The ownership of the equitable estate is regarded by equity as the real ownership, and the legal estate is * * * no more than the shadow, always following the equitable estate, which is the substance, except where there is a purchaser for value and without notice who has acquired the legal estate." 1 Pom. Eq. § 147. But equity jurisdiction embraces not only cases for the maintenance or protection of primary rights, estates, and interests purely equitable, "but cases for the maintenance and protection of primary rights, estates, and interests purely legal; and in the latter class of cases the remedies granted may be of a kind which are peculiar to equity courts, * * * or may be of a kind which are administered by courts of law, as the recovery of money, or of the possession of specific things." 1 Pom. Eq. § 136. Hence it is obvious that the mere circumstances that the trustee is clothed with a legal title and seeks to recover money due to the trust estate are not sufficient to indicate that equity has no jurisdiction to grant relief. Again, the implied assumption that there is no fiduciary relation between the substituted trustee and the appellees is equally fallacious. It directly conflicts with the doctrine laid down by the Master of the Rolls in *Wilson v. Moore*, supra, pursuant to which the abettor of a defaulting trustee becomes, by participating in a breach of trust, a trustee for the purposes of the testator's will, and therefore amenable to the jurisdiction of a court of equity.

The case of *White v. White*, 1 Md. Ch. 53, has been strongly pressed upon us as flatly deciding that a court of equity is without jurisdiction in such cases as these. In that case the bill of complaint averred that 46 shares of the stock of the Manhattan Company of New York were transferred to the defendant Joseph White, in trust for the complainants, and that Joseph White, by letter of attorney, empowered Campbell P. White to sell and transfer the shares to the defendant John C. White, which was accordingly done; that said defendant John C. White knew the stock was trust property, but made no returns of the proceeds to the complainant, though payment was duly demanded. The bill then prayed that John C. White account for the sale of the stock, and pay over the proceeds thereof. The defendants relied by way of defense (1) upon a want of jurisdiction in a court of equity over the case made by the bill, and (2) on limitations. The chancellor decided that he had no jurisdiction in the premises and he observed: "The bill presents the case of a single transaction of the sale of stock, the particulars of which seem to have been known to the complainants or of which the proof was entirely within their reach, without having recourse to the conscience of the defendant. As between him and them there was unquestionably no such trust as would bring the case within the

exclusive jurisdiction of a court of equity." This dictum of the chancellor has never been followed in Maryland, and though the case of *White v. White*, supra, has been referred to in three later cases, viz., *Abbott v. Balto.*, etc., *Packet Co.*, 4 Md. Ch. 313; *Nelson v. Bank*, etc., 27 Md. 75, and *Mason v. Union Mills Co.*, 81 Md. 452, 32 Atl. 813, 29 L. R. A. 273, 48 Am. St. Rep. 524, it never has been followed or even alluded to on the question of jurisdiction. As it is flatly at variance with all the later decisions of this court on this subject, it must be regarded as overruled in this particular. We hold, for the reasons we have given, that the demurrers raising the question of jurisdiction should have been overruled.

There is one other suggestion to be made before leaving this branch of the case. The bills of complaint were all dismissed, as we have already observed, on the sole ground that a court of equity had no jurisdiction over the cases stated therein. Acts 1896, c. 229, now section 44, art. 26, and section 113, art. 75, of the Code of Public General Laws of 1904, provides that in every case at law or in equity in which it shall appear that the plaintiff is entitled to some relief or to some remedy, but not in the particular court in which the relief is prayed, "the plaintiff shall not on that account be nonsuited or the case dismissed"; but the case may, in the discretion of the judge, be removed to the proper court. Whilst a failure to remove the case from one court to another is not a ground for appeal, being a matter within the discretion of the judge in the court below (*Summerston v. Schilling*, 94 Md. 607, 51 Atl. 612), yet the statute shows it is the declared policy of the law that where it is apparent the plaintiff is entitled to some remedy, the mere fact that he has invoked the aid of the wrong tribunal shall not be a sufficient cause for the dismissal of his bill of complaint.

We come next to the second general question, which relates to all three of the cases. The facts which need to be stated in considering this question are as follows: Prior to the month of August, 1902, Frank B. Cahn, Henry L. Straus, and Henry Landon Davies composed the firm of Frank B. Cahn & Co., which carried on a general banking and stock brokerage business in the city of Baltimore. That firm sold, on August 11, 1902, the 100 shares of the capital stock of the Merchants' & Miners' Transportation Company mentioned in the first of the three bills of complaint, and carried the proceeds to the individual credit of William Trump Tucker, as has been stated in an earlier part of this judgment. On September 9, 1902, the firm was dissolved by mutual consent, and on the same day a new firm, known as Roberts, Cahn & Co., was formed, wherein William C. Roberts, Frank B. Cahn, and Henry F. Straus were named as general partners, and Bernard Cahn as a special partner who had contributed \$150,000 as capital to the

common stock of the concern. This latter was a limited partnership. Two days later an amended certificate, bringing in Henry Landon Davies as a general partner, was filed. These certificates were framed under article 73 of the Code of Public General Laws, relating to limited partnerships. In the bill of complaint in the first case, it is alleged that the firm of Roberts, Cahn & Co. took over all the assets and assumed all the liabilities of the firm of Frank B. Cahn & Co. As the liability incurred by Frank B. Cahn & Co. in August, 1902, by their participation in Tucker's breach of trust was an outstanding liability at the time Roberts, Cahn & Co. took over the former's assets and assumed all of its liabilities, the contention is that Roberts, Cahn & Co. are accountable to the substituted trustee and answerable for that liability. Whether the members of these two firms, both of which have been dissolved, can be held liable for the same claim is the subordinate inquiry confined to the first case. It will be considered later on. The two sales of stock which are described in the second bill of complaint were made by the firm of Roberts, Cahn & Co., of which Bernard Cahn was a special partner; and the firm was dissolved thereafter by mutual consent on February 10, 1903, and thereupon the special partner received from the general partners, in either cash or securities, the amount of the capital contributed by him, and now has the same in his possession. On February 2, 1903, a new firm composed of William C. Roberts, Frank B. Cahn, and Henry Landon Davies, general partners, and Bernard Cahn, special partner, was formed under the name and style of Roberts, Cahn & Co. To the common capital of this firm Bernard Cahn contributed \$150,000 in cash. On May 19, 1903, this firm sold the 211 shares of Northern Central Railway stock to themselves, notwithstanding the order of the circuit court directed the shares to be sold at the highest market price obtainable on the Public Stock Board of Baltimore City, and the proceeds were disposed of in the manner hereinbefore mentioned. On January 18, 1904, the firm was dissolved by mutual consent, and Bernard Cahn received from Roberts, Cahn & Co. in either cash or securities, the amount of the capital contributed by him as special partner, and now has the same in his possession. Bernard Cahn demurred to the three bills, and one ground assigned was that, being a special partner, he cannot be made liable in personam. The questions which these facts raise are: (1) Is Bernard Cahn liable to be treated as a general partner? (2) Can he, if he was a special partner, be joined as a codefendant with general partners? And the subordinate inquiry which arises under the first bill as previously indicated is: Can the firm of Frank B. Cahn & Co., and the firm of Roberts, Cahn & Co. be sued jointly on account of the transaction concerning the

100 shares of stock named in the first bill of complaint? And the subordinate inquiry which arises under the third bill of complaint grows out of the circumstance that the firm of Roberts, Cahn & Co. themselves purchased the shares of Northern Central Railway stock.

It is insisted that Bernard Cahn is not a special partner because (1) the business of a stockbroker is not within the terms of the statute permitting limited partnerships to be formed; and because (2) the firm is alleged in the bill to have had its general or principal office in the city of New York. Under section 1, art. 73, of the Code of Public General Laws of 1904, limited partnerships may be formed for the transaction of any mercantile, mechanical, manufacturing, or banking business within this state. The certificates of limited partnership executed by the appellees all declared that "the general nature of the business intended to be transacted is a general banking, commission and brokerage business in stocks, bonds and other securities." Section 1 of article 73 expressly declares that the provisions of that article shall not be construed to authorize any such partnership for the purpose of making insurance. The certificates, in so far as they refer to the business of banking, bring the partnership within the express words of the Code; and the prohibition against construing the other terms employed in the section so as to include under them the business of making insurance, plainly indicates that those terms are to have a liberal and not a narrow meaning ascribed to them. Upon that principle the Court of Queen's Bench in *Bowers v. Holland*, 14 U. C. Q. B. 322, held that the buying and building of steamboats and employing them to carry on the business of transportation of passengers and freight was a mercantile business within the meaning of the limited partnership statute. Sales and purchases of bonds, stocks, and other securities are equally mercantile transactions; and hence the objects for which the limited partnerships now before us were formed are, in our judgment, such as the Code has designated and allowed. Next, as to whether the special partner is to be treated as a general partner merely because the bills aver that the firms did not have their "general or principal office" in the city of Baltimore. Section 4 of article 73 requires the certificate, when acknowledged, to be recorded in the office of the clerk of the superior court, if the principal place of business of the partnership be in that city. We cannot put upon that section a construction which would convert a limited partnership into a general one, merely because the principal office of the concern is alleged to be out of the state, though its duly executed certificate declares that its principal place of business, within the state of Maryland, is located in Baltimore City.

This brings us to the question respecting the right of the substituted trustee to join the special partner as a codefendant in these proceedings. Limited partnerships were wholly unknown to the common law, and as they exist in the United States they are entirely statutory. "No such thing as a limited partnership can exist unless authorized by statute." 19 Am. & Eng. Ency. L. (2d Ed.) 337. Limited partnership statutes must be construed with reference to the common law, and, except as otherwise provided by the statute, the rights and liabilities of the partners and their creditors are governed by the rules of the common law applicable to ordinary partnerships. *Id.* 341. The fundamental difference between the liability of the general and the special partners is to be found in the fact that the former are responsible in *solido* for the debts and obligations of the firm, as in the case of ordinary partnerships, without regard to the amounts contributed by them to the social capital, whilst the latter is not personally liable if the statute has been complied with, because his cash contribution is substituted for a personal liability. In the language of section 2, art. 73, of the Code of Public General Laws, the special partner "shall not be liable for the debts of the partnership beyond the fund so contributed by him * * * to the capital." Obviously, then, when all the requirements of the statute have been complied with no personal liability attaches to the special partner, but the cash contribution made by him does become liable for the debts of the partnership. The object of the provision which declares that the special partner's contribution to the capital shall be made "in actual cash" is "to provide a fund on the day the company is formed, to be thereafter subject to no contingencies or losses, except those which come from the proper business of the partnership." *Line-weaver v. Slagle*, 64 Md. 483, 2 Atl. 693, 54 Am. Rep. 775. Whilst, therefore, the limited partnership is a going concern, in which the cash contributed by the special partner stands for and takes the place of a personal liability on his part, it is entirely appropriate that section 19 of article 73 should enact that "all suits respecting the business of the partnership shall be brought by and against the general partners only," except in cases mentioned in the section. And even after the dissolution, whilst the cash contribution still forms part of the social assets, it is also proper that the liabilities due by the firm should be enforced by suits against only the general partners; because in both instances there is no individual liability attaching to the special partner, since his cash contribution itself measures the limit of his responsibility. Looking to the object which the Legislature had in view when it required the special partner to contribute his proportion of the capital in actual cash, and bearing in mind the principle

that except as otherwise provided by the statute, the rights and liabilities of the partners and the creditors are governed by the rules of the common law applicable to ordinary partnerships, the provision of section 19 requiring all suits respecting the business of the partnership to be brought against the general partners only must be construed to apply to suits brought whilst the firm is a going concern, and to suits brought after its dissolution, but whilst the special partner's cash contribution still forms part of the assets, or has been wholly absorbed in the liquidation of debts due by the firm. His cash contribution to the capital must make good or be answerable for precisely the same debts and obligations for which, to the extent of that contribution, but no farther, he would have been personally responsible except for the restriction of that responsibility and the imposition of it on the cash contribution, by the limited partnership statute. If this were not so, the simple process of dissolving the firm by mutual agreement in anticipation of the date fixed in its certificate and the repayment to the special partner of his contributed cash capital, would relieve him and his cash capital from any liability for debts due by the firm at the time of its accelerated dissolution, though the cash capital was designed by the statute to be answerable for those debts, and was intended to be "subject to no contingencies or losses, except those which come from the proper business of the partnership." The withdrawal of the cash capital by the special partner, and his subsequent release from all responsibility, in such circumstances, whilst there are outstanding debts due by the firm, is not a contingency contemplated by, or provided for in, the statute, and, if permitted, would subvert the whole intent of the legislation on this subject.

Upon turning to the record it will be found, as already stated, that the first sale of the trust estate stock was made by the firm of Frank B. Cahn & Co. on August 11, 1902; that on September 10th following the limited partnership was formed, which took over the assets and assumed the liabilities of the former concern. Then on November 2, 1902, and on January 6, 1903, the limited partnership made the next sales. If the limited partnership is liable at all, it was liable to the trust estate on account of its participation in diverting from that estate the proceeds of the two last named sales, when the diversions actually occurred—that is, not later than January 6, 1903—and for its assumption of the prior firm's liability on account of the first sale. Now, on the 10th day of February, 1903, the limited partnership was dissolved by mutual consent, though it had been formed to continue until December 31, 1904, and upon its dissolution, the cash capital paid in by Bernard Cahn was returned to him in full, notwithstanding the above-mentioned lia-

bilities to the trust estate were then outstanding and still are unpaid. The second limited partnership was formed February 2, 1903. On May 19, 1903, the transaction in regard to the Northern Central Railway stock took place. The liability of the second limited partnership then accrued. On January 18, 1904, that firm was dissolved by mutual consent, though it had been formed to continue until February, 1905, and upon its dissolution the cash capital paid in by Bernard Cahn was returned to him in full, notwithstanding the liability growing out of the railway stock sale was then outstanding and still is unpaid. Here, then, we have the admitted fact that liabilities existed against the two limited partnerships; that each of those partnerships was dissolved before the times fixed in their certificates and after the liabilities had been incurred, and the further fact that the special partner has withdrawn his entire contributed capital, though under the Code that capital stood in the place of, and as a substitute for, his personal liability; and yet it is insisted that only the general partners can be sued, and that the special partner, who has in his pocket the fund which the law declares shall be responsible, cannot be sued at all, whereby he will escape a personal liability altogether and will, in addition, retain his returned cash capital unimpaired. A court of equity can scarcely be expected to place upon article 73 of the Code a construction which will, in such circumstances as we have in this record, work out a result so wholly at variance with the spirit and design of the statute. Section 13 of article 73 declares that "no part of the sum which any special partner shall have contributed to the capital stock shall be withdrawn by him * * * during the continuance of the partnership." What becomes of the security which this provision was intended to afford, if, before the expiration of the period during which the partnership was formed to continue, the firm can be dissolved by mutual consent, and if the special partner can then with immunity withdraw his capital? A succession of dissolutions and withdrawals of capital would be quite a simple and effective expedient to shield the special partner from any liability whatever, if the theory of the appellees were sanctioned. But section 20 of article 73 expressly makes provision for a suit against both general and special partners, and thereby indicates that section 19 ought to be so limited in its application as to include and refer to only such suits as are instituted during the existence of the co-partnership or during the time, after its dissolution, that the special partner's cash capital still forms part of the firm's assets in the hands of the general partners. Section 20 enacts: "If in any case a suit shall be brought against general and special partners and at the trial of the cause it shall appear that the special partners or any of them are not liable to the suit of the plaintiff the court

may proceed to judgment or decree against the partners who may appear to be liable, in the same manner as if such partners were the only parties-defendants to the writ, excepting that the partners who may be deemed not liable shall recover their legal costs against the plaintiff and such additional costs as the court may deem reasonable." The situation disclosed by the record does not bring article 78 into force, and as to the withdrawn cash capital, the rules of the common law must prevail. We hold, then, upon this branch of the case, that the demurrer filed by Bernard Cahn, and which is founded on the assumption that because he was a special partner he cannot be in any event sued conjointly with the general partners, should have been overruled in view of the facts alleged in the bills of complaint.

We now come to the subordinate inquiries, and but a few words will be needed to dispose of them. It is objected that the two firms should not have been sued jointly in the first case, because (1) the liability incurred by Frank B. Cahn & Co. in the transaction connected with the first sale of the trust estate stock is not such a liability as the second firm assumed, and because (2) both firms cannot be held. The liability of the first firm was a liability to restore a certain sum of money to the trust estate, it was an obligation which it owed, and we can see no reason why it should not be included in the liabilities assumed by the second firm, inasmuch as the latter assumed all the liabilities of the former. But, apart from this, both firms have been dissolved, and the bill in the first case was filed against the individual members of the two firms, and as all the members of the firm of Frank B. Cahn & Co. were also members of the firm of Roberts, Cahn & Co., they are responsible to the substituted trustee, whether as members of the first or the second firm. The exact nature of their liability will in the end depend on the evidence.

Finally, it will be remembered that the appellees purchased the railway company's stock themselves at private sale, in spite of the court's order that the shares should be sold "at the highest market price obtainable on the Public Stock Board of Baltimore City." In addition to the reasons hereinbefore given in support of the liability of the appellees, the fact that they themselves bought the shares at private sale with a full knowledge that they were shares belonging to the trust estate impresses upon the shares in their hands the same trusts to which the shares were subject in the hands of the trustee (*Abell v. Brown*, 55 Md. 221; *Wormley v. Wormley*, 8 Wheat. 419, 5 L. Ed. 651), in view of the fact that the appellees aided and assisted the defaulting trustee to deplete the trust estate.

Upon a review of the whole case we are of the opinion that there was an error com-

mitted in sustaining the demurrers and in dismissing the bills. The decree of the circuit court will therefore be reversed, and the causes will be remanded.

Decree reversed, with costs above and below, and causes remanded.

BOND et al. v. GRAY IMP. CO. et al.
(Court of Appeals of Maryland. Jan. 9, 1906.)
CORPORATIONS—FORECLOSURE SALE—RIGHTS OF MINORITY STOCKHOLDERS.

Minority stockholders of a corporation, the property of which has been sold in a suit to foreclose its mortgage thereon, may not intervene to maintain exceptions to ratification of the sale, where the other stockholders are satisfied that everything was done to realize the best price, and refuse to oppose the sale; no act which is ultra vires, fraudulent, or illegal being shown.

Appeal from Circuit Court of Baltimore City; Henry D. Harlan, Judge.

Suit by Letitia E. Hanna and others against the Gray Improvement Company to foreclose a mortgage. Petition of G. Morris Bond and another to be allowed to intervene to maintain exceptions to ratification of the sale was denied, and they appeal. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Morris A. Soper, for appellants. Richard Bernard, for appellees.

BRISCOE, J. The questions in this case arise upon exceptions to the sale of certain mortgaged premises situate in Baltimore City, under a decree of court. The appellee the Gray Improvement Company of Baltimore City is a corporation, duly incorporated under the laws of the state and on the 8th of April, 1897, executed a mortgage upon 10 acres of unimproved land, situate near Druid Hill Park, Baltimore, to secure the payment of the sum of \$54,000, authorized by a resolution of its board of directors to be borrowed from Letitia E. Hanna and others, mortgagees. This mortgage being in default, a decree for the sale of the property, was passed on the 23d of May, 1904, by the circuit court of Baltimore City, and Mr. Richard Bernard, a member of the Baltimore bar, was appointed trustee to make the sale. The property was advertised for sale in accordance with the terms of the decree, and was sold on the 20th day of June, 1904, to John Waters of Baltimore county, for the sum of \$76,500. It appears from the report of the trustee, that "the lot of ground is composed of parts of three tracts, which are together embraced in one description," and contains 10 acres of land more or less. The trustee first offered the property in four separate parcels, but the amount aggregating only \$24,500 from a sale in that manner, it was afterwards offered as an entirety,

and thus sold to the purchaser. Subsequently, on the 16th of July, 1904, the appellants, who are minority stockholders of the mortgagor corporation filed exceptions to the ratification of the sale, asking that the sale as thus made, be vacated and set aside.

The grounds relied upon and briefly stated, are substantially these: (1) That the property was insufficiently advertised; (2) that the trustee improperly advertised the property to be sold "as an entirety"; (3) that the price was grossly inadequate; (4) that the property should have been sold as building lots; (5) that the trustee sold more of said property than was absolutely necessary for the satisfaction of the mortgage debt and proper expenses of the sale. On the 27th of January, 1905, the appellees, the mortgagees, filed a motion to overrule and dismiss the exceptions to the sale, because the exceptants are minority stockholders, owning only one-eighth of the capital stock of the corporation, and have no standing to attack the sale as made by the trustee. It further appears that on the 28th of January the appellants, two of the stockholders of the mortgagor company, petitioned the court to intervene as party defendants and maintain their exceptions, averring that the president of the company had refused to take such action as would protect the interests of the stockholders. The appellees, mortgagees, demurred to this petition, and the mortgagor company filed an answer thereto. The answer states "that all the stockholders except the appellants believe that the trustee, who, besides representing the mortgagee, represents about three-eighths of the capital stock of the company, did all in his power to realize the best price, and that his conduct met the approval of seven-eighths of the stockholders of the company; that the petitioners are the holders of the remaining one-eighth, and are largely interested in the contiguous vacant land, which has been for some time on the market; that their effort to control the management of the company is unjust, inequitable, and vexatious, and the majority of the stockholders are acting for the interest of the company. The case was heard on the petition, answer, and the demurrer, and from a decree sustaining the demurrer, refusing the application to be made parties, overruling the exceptions and ratifying the sale, an appeal has been taken.

The principal question in dispute, and the one upon which the decision of the case must turn, is whether the appellants, who are minority stockholders of the mortgagor corporation, have presented such a case as gives them a standing in court, to defend apart from the corporation itself, a contest or litigation involving the corporate rights and duties of the company. The law involving the rights of individual or minority stockholders to sue or defend independent of the corporation itself, has been firmly established by adjudications of both the federal and

state courts. In *Shaw v. Davis et al.*, 78 Md. 316, 28 Atl. 619, 23 L. R. A. 294, Judge McSherry, in speaking for this court, said: "It may be stated, as the result of all the authorities, that whenever any action of either directors or stockholders is relied on in a suit by a minority stockholder for the purpose of invoking the interposition of a court of equity, if the act complained of be neither ultra vires, fraudulent nor illegal, the court will refuse its intervention, because powerless to grant it, and will leave all such matters to be disposed of by the majority of the stockholders in such manner as their interest may dictate, and their action will be binding on all, whether approved of by the minority or not." And Mr. Justice Miller, in *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, said: "While the cases admit the right of a stockholder to sue in cases where the corporation is the proper party to bring the suit, they limit this right to cases where the directors are guilty of a fraud or a breach of trust, or are proceeding ultra vires." And it will be found that the English cases are to the same effect.

It is needless, then, for us to prolong this opinion by a further citation from decided cases, or to enlarge upon the obvious and manifest reason for the rule. The case at bar presents no fact that would invoke the jurisdiction of the court, under the well-settled rule of law above stated. According to the record, the appellants who own one-eighth of the capital stock of the company are the only stockholders who desire the sale vacated. It is further shown that all of the stockholders of the company were present, or were represented at the sale made by the trustee, and are satisfied with the mode and manner of the sale. In the answer of the company, it is stated "that all the stockholders except the appellants believe that the trustee who, besides representing the mortgagee, represents about three-eighths of the capital stock of the company, did all in his power to realize the best price possible, and his conduct met the approval of the company backed up by seven-eighths of its stockholders."

We find nothing under the facts of the case that would justify a reversal of the order appealed from, and it will be affirmed.

Order affirmed, with costs.

BRYAN et al. v. DOUDS et al.
(Supreme Court of Pennsylvania. Jan. 2, 1906.)
FRAUDS, STATUTE OF — AGREEMENT AS TO LAND.

A parol agreement to buy lands at execution sale and resell them, and, after deducting the purchase price and expenses, pay over the balance to defendant in execution, is not enforceable, because within the statute of frauds.

Appeal from Orphans' Court, Beaver County.

Bill by Henry A. Bryan and Aaron Boone Bryan against Oliver A. Douds and others. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

The following is the opinion of the court below:

"The bill alleged that the defendant entered into an agreement with the plaintiffs to purchase the lands of plaintiffs at sheriff's sale, and pay off certain judgments and mortgages against the same, and hold the said lands for the plaintiffs until the same could be sold, at which time he was to pay himself whatever moneys he had advanced for the purpose aforesaid, and to pay the balance to the plaintiffs. The plaintiffs further alleged that the lands were sold by the defendant for \$22,000; that this is very largely in excess of the amount advanced by him in the purchase of the judgments and mortgages against the same, and the costs incurred by sheriff's sale thereof; that the mortgage of \$10,000, payable July 1, 1905, with 5 per cent., from William J. Mellon and others, is part of the purchase money of a part of the lands. The plaintiffs pray that a preliminary injunction be issued against Oliver A. Douds to restrain him from in any way assigning or transferring the said mortgage to any one else than the said plaintiffs, and restraining the defendants from paying the said mortgage or any sum becoming due thereon to Oliver A. Douds, until this matter is finally adjusted and an accounting by Oliver A. Douds to plaintiffs for such sums of money as he has received from the sales of said real estate over and above his advancements and expenses therein; and that he be required to assign to plaintiffs so much of said mortgage as shall be found upon hearing is due under the terms of the agreement aforesaid. To this bill the defendants demurred, and alleged that the contract mentioned in the bill was void, for the reason that the bill does not show that the same was manifested by writing, and signed by the defendant Oliver A. Douds; and that the bill does not allege such facts as show a resulting trust in favor of the plaintiffs, for the reason that no fraud in obtaining the title is shown, or that the plaintiffs paid or furnished any part of the purchase money or the consideration of the lands, or any of them mentioned in the bill of complaint when the title thereto was acquired by the said Oliver A. Douds.

"The substance of plaintiff's bill is found in the fourth paragraph, in this language: 'The said Oliver A. Douds undertook and agreed, being a cousin of your orators, to buy in said lands at a sheriff's sale which would be made thereof, and hold the said lands for your orators until the same could be sold, at which time he would pay to himself whatever moneys he had advanced for the purpose aforesaid, and to pay the balance to your orators.' It is not alleged in the bill that the contract was reduced to

writing and signed by Oliver A. Douds. The Supreme Court, in interpreting the act of 1858 in *Barnet v. Dougherty*, 32 Pa. 371, said: 'The plain meaning of this enactment is that a trust in land can now be proved in no other way than by writing. The proviso, indeed, excepts from its operation resulting trusts, such as the law implies. A resulting trust, however, is raised only from fraud in obtaining the title, or from payment of the purchase money when the title is acquired. Payment of the purchase money subsequently is not sufficient to raise a legal implication of a trust, as all the authorities show.' In *Kellum v. Smith*, 83 Pa. 158, the Supreme Court said: 'When the purchaser at a sheriff's sale promises to hold for the debtor, and afterwards refuses to comply with his engagement, the fraud, if any, is not at the sale, not in the promise, but in its subsequent breach. That is too late. It is abundantly settled that equity will not decree such a purchaser to be a trustee, unless there is something more in the transaction than the mere violation of a parol agreement.' In unmistakable language, in the case of *Phillips v. Hull*, 101 Pa. 567, the Supreme Court says: 'The plaintiff owned and was interested in judgments against the defendant in error aggregating about \$11,000. The latter seeks to recover on a parol agreement made with the plaintiff in error, by which he was to sell the land at sheriff's sale, buy it, and hold it until a private sale thereof could be made, and after the amount due to him was paid, the defendant in error was to have the residue. The latter was to advance nothing, to pay nothing. Without his assent the plaintiff could have sold. The defendant made no agreement that he would afterwards purchase the land at any price. If this were the whole case, it is very clear the defendant in error could not recover. As the purchase was made and the money paid by the same person, a refusal to fulfill the agreement is no more than the violation of a parol agreement, and equity will not decree the purchaser to be a trustee.' In the case of *Dollar Savings Bank v. Bennett*, 76 Pa. 402, the Supreme Court also said: 'It is essential to maintain this action that the promise or undertaking of the defendant should be founded upon a sufficient legal consideration—either some benefit to the promisor or some injury to the promisee. Nothing is clearer in principle or better settled by authority than that a mere naked verbal agreement by a purchaser at a sheriff's sale, with his own money, that he will hold the premises in trust for the defendant, neither vests any equitable estate in the defendant under the statute which prohibits parol declarations of trust, so that no claim to the money could exist to him under the common count, nor does it give any ground for an action, being a mere nudum pactum. The mortgagees had a legal right to proceed on their judgment bond and to become the

purchasers at the sale, if they were the highest and the best bidders.'

"There is no allegation in this bill that there was any fraud practiced by the defendant at any time, except in withholding the residue after payment of the amount advanced by him and his expenses. He being the owner of the judgment of Margaret A. Holt, and also the Gally mortgage, purchased the property at sheriff's sale, the plaintiffs allege, under this agreement to hold it for them; and, there being no fraud at the time the purchase was made by the defendant of the properties in question at sheriff's sale, his agreement to hold the same for them until it was sold, and give them the residue, was clearly a nudum pactum, and the plaintiffs have no ground of action. In the case of McCloskey v. McCloskey, 205 Pa. 491, 55 Atl. 180, the Supreme Court has further said: 'Though the trust is set forth as an express one, created by parol, the applicants seek to avoid the act of 1856, on the ground that a trust has resulted to them from the fraud of the appellees, and is therefore within the exception of the act. But the only misconduct charged is that the appellees now refuse to recognize the trust, and that, notwithstanding their promise to be bound by it, they now declare they will not regard it. This is not enough to take the case out of the plain words of the statute. If no valid trust was created in the first instance by William McCloskey, because he did not declare it in writing, there are no trustees to be bound by their promises, nor any cestuis que trustent to be protected. The statute of frauds would soon become a dead letter, if the mere broken promises of a trustee under a trust created by parol, who had agreed to carry it out, should, without more, be held sufficient to create a trust by implication within the exception of the act. It is only when a trustee refuses to perform or recognize a trust that courts are asked to declare its existence as against him, and, if a trust, which has no legal existence under the statute, can be brought into being as within the exception simply because a trustee breaks his promise to perform, no case will be without the exception. The statute of frauds would be worse than waste paper, if a breach of the promise created a trust in the promisor, which the contract itself was insufficient to raise.' And now, December 5, 1904, the demurrer is sustained, and the bill dismissed at the costs of the plaintiffs."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William A. McConnell, for appellants. Robert Ritchie, R. S. Holt, and David K. Cooper, for appellees.

PER CURIAM. Decree affirmed, on the opinion of the court below.

T. W. PHILLIPS GAS & OIL CO. v. PITTSBURG PLATE GLASS CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. EVIDENCE—PAROL EVIDENCE—CONTEMPORANEOUS AGREEMENT.

Where a lessee attempts to use an oil and gas lease in direct violation of a contemporaneous parol agreement, parol evidence is admissible to establish the agreement.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2037.]

2. WITNESSES—CORROBORATION—EVIDENCE—COMPETENCY.

Where testimony is introduced to show a contemporaneous parol agreement made at the time of the execution of a lease, evidence of prior conversations and transactions is admissible in corroboration.

Appeal from Court of Common Pleas, Armstrong County.

Action by the T. W. Phillips Gas & Oil Company against the Pittsburgh Plate Glass Company. From a judgment for defendant, plaintiff appeals. Affirmed.

At the trial the evidence of J. B. Barker was, *inter alia*, as follows: "Q. When did Mr. Woll first come to your house? A. He came there the evening of March 15, 1904. Q. Who were present? A. Why, my family. Q. What did Mr. Woll say? Give us the total conversation there as it took place. (Plaintiff's counsel objects to the question because it is not set up in the pleadings. The Court: We will hear the testimony and decide it afterwards. The objection is overruled, and a bill of exceptions is sealed to the plaintiff.)"

Defendant offered the following: "Know all men by these presents, that I, Joseph B. Barker, grantor and lessor in a certain article of agreement entered into with Samuel Runyon of the second part, dated January 19, 1900, covering all oil and gas rights in a certain tract of land in Valley township, Armstrong county, Pa., bounded on the north by James Schaeffer, on the east by D. J. Zimmerman, on the south by Charles Colwell and R. Adams, and on the west by W. W. Egley, containing sixty-three acres, more or less, which agreement has since been assigned to the Pittsburgh Plate Glass Company, and the term of which lease as provided herein, to wit: Three years and as much longer as oil and gas is found in paying quantities or the rental is paid thereon, do hereby agree to and with the said Pittsburgh Plate Glass Company, assignee as aforesaid, who have heretofore and at the present time are paying the said rental, that the term of said lease shall be fixed as of twenty years from the date of said lease, and shall not exceed said twenty years, all provisions, stipulations, rights to surrender, rentals, royalties and times of payments to continue as fixed in said lease. The purpose of this agreement is to fix a definite term to said lease and to provide for the time of the expiration of said lease or agreement, sub-

ject to all rights of said lessee to surrender as aforesaid. Witness my hand and seal this 8th day of April, A. D. 1904. J. B. Barker. [Seal.] J. G. Shearer." (Plaintiff's counsel object; it purporting to be an extension of the lease dated April 18, 1904, when plaintiff's lease is dated March 16, 1904. The Court: We will receive it for the present. The objection is overruled, and a bill of exceptions is sealed to plaintiff.)

The testimony of B. J. Barker was, *inter alia*, as follows: "Q. You are a son of J. B. Barker? A. Yes, sir. Q. Were you at home this night Mr. Woll called there? A. Yes, sir. Q. Give the jury the conversation that occurred there. Begin with what Mr. Woll said; give the full conversation. (Plaintiff's counsel objects to this as something which took place, not at the making of the lease, but before the making of the lease. The Court: We will hear that conversation. For the present the objection is overruled, and a bill of exceptions is sealed to plaintiff.) A. Mr. Woll came there on the evening of March 15, 1904, and he wanted to get a lease for that 15 acres. My father told him that he could not lease it, that the Pittsburg Plate Glass Company had a lease on it. He asked him then to see the lease with the Pittsburg Plate Glass Company. I went and got a copy of that lease, and I showed it to him and he read it."

The court charged in part as follows: "But if you believe that in obtaining that written lease Mr. Woll perpetrated a fraud on Mr. Barker—that is, if he made a contemporaneous parol agreement, and on the faith of such agreement Mr. Barker acted, and would not have acted unless it had been made, if by that kind of a declaration on the part of Mr. Woll, and the agreement of Mr. Woll, that if the Pittsburg Plate Glass Company would go into possession of this property that then he would return the lease, Mr. Barker was induced to sign this lease—then Mr. Woll had no right to put that lease on record."

Plaintiff presented these points: "(2) That the pleadings in this case on the part of the defendants are not such as would authorize them to offer proof of a contemporaneous parol contract, changing and varying the written contract, under which plaintiff claims title, nor is the proof in the case such as would justify a chancellor, or justify a jury, in setting aside or varying or changing the written contract. Answer: Refused. The facts are for the jury. (3) Under all the pleadings and evidence in this case the verdict of the jury should be for the plaintiff. Answer: Refused, with leave to renew this question under Act No. 198, p. 286, of 1905."

Defendant presented this point: "(2) If the jury find that the plaintiff procured the lease offered by them under a parol contemporaneous agreement that it would be re-

turned to Barker in case the defendant claimed the premises in suit under its lease, and that the defendant claimed the premises, then the refusal of the plaintiff to return the lease and the attempt to use it for the purpose of maintaining title is a fraud upon the defendant, and the plaintiff would not be entitled to recover. Answer: Affirmed."

Verdict and judgment for defendant. Plaintiff appealed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Clarence Walker, J. W. Lee, Eugene Mackey, and Ross Reynolds, for appellant. Orr Buffington, S. F. Bowser, O. W. Gilpin, and Rush Fullerton, for appellees.

MESTREZAT, J. This is an action of ejectment to recover possession of a tract of land in Armstrong county for oil and gas purposes. Both defendants filed an answer and abstract of title under the act of May 8, 1901 (P. L. 142). The answer of the defendant company, and in this respect the answer of the defendant Barker, is substantially the same, *avers*, *inter alia*, as follows: "That contemporaneously with the execution and delivery of the alleged lease of Barker to plaintiff's alleged assignor and as part of the alleged contract T. W. Phillips Sons & Co. entered into a parol contract with said Barker, whereby said partnership accepted the said alleged lease, subject to the existence and continuance of respondent's lease, and whereby said partnership agreed to at once return said alleged lease to Barker and cancel the same, and that the same should thereupon and *ipso facto* be and become null and void in the event of the respondent claiming or continuing to claim title under its said lease or upon its proceeding to operate the same. Respondent avers that immediately thereafter it claimed exclusive title to the premises for oil and gas purposes and immediately proceeded to and did drill a well producing natural gas in paying quantities, and that the said firm thereupon violated said parol contract, refused to return said alleged lease, refused to cancel the same and treat it as null and void as they had obligated themselves so to do." The correctness of this averment was the issue in the case.

If it was true, and the jury so found, the plaintiff company's lease had no validity and the company was not entitled to the possession of the premises in controversy. Whether the plate glass company's lease, assigned to it by Runyon, was still legally in force and effective against Barker, was immaterial in this issue. It would be important in a contest between that company and Barker for the possession of the premises, but not here, where the plaintiff company relies upon a lease from Barker to sustain its right to drill and operate for oil and gas on the land. If Barker chose to continue the Run-

yon lease, as his receipts of the rentals conclusively show he did, although it may, by its terms, have expired, he could do so, and, if the Phillips Company took a subsequent lease, which was, by a contemporaneous agreement, to be null and void in the event of the plate glass company "claiming or continuing to claim title under its said lease or upon its proceeding to operate the same," then the attempt of the Phillips Company to assert the validity of its lease in direct opposition to this agreement is a fraud upon Barker which he and those claiming under him with his consent may successfully resist.

That the defendants could set up as a defense to this action the parol agreement made contemporaneously with the plaintiff's written lease of March 16, 1904, is clear under all our cases. If the plaintiff company refused to surrender the lease for cancellation, in violation of its parol agreement, and asserted its right to the possession of the premises by virtue of the instrument, it was a fraud upon Barker, the lessor, and an attempt to make a fraudulent use of the lease. Parol evidence will be received in such cases to defeat the fraud. In *Rearich v. Swinehart*, 11 Pa. 233, 51 Am. Dec. 540, it was held that when an attempt is made to use a written instrument in violation of an agreement accompanying its execution, to which attempt no moral guilt can be imputed, a legal delinquency attaches to the attempted abuse of the writing, sufficient to subject it to the influence of oral evidence. The case of *Davidson v. Young*, 167 Pa. 265, 31 Atl. 557, was an issue between the obligee and obligor of a bond in which a contemporaneous parol agreement was set up as a defense. It was there held that the trial court committed no error in charging the jury that if the parties entered into that arrangement, although there was no fraud, accident, or mistake, and the obligee afterwards undertook to use the bond for a purpose that was not contemplated, and contrary to the agreement of the parties at the time the bond was executed, the obligor would be entitled to recover, for such use of the bond would be a fraud. In *Honesdale Glass Co. v. Storms*, 125 Pa. 268, 17 Atl. 347, Mr. Justice Green, delivering the opinion of the court, says (page 278 of 125 Pa., page 348 of 17 Atl.): "In that aspect of the case [setting up a written contract in violation of a parol promise] it comes within the very numerous decisions of this court which hold substantially that when the execution of an instrument has been obtained by means of a fraud, or where there has been an attempt to make a fraudulent use of the instrument, in violation of a promise or agreement made at the time the instrument was signed and without which it would not have been executed, parol evidence may be given to prove the fraud, though it contradicts the written instrument." Many decisions of this court are cited in the opinion to sustain the principle.

The assignments alleging error in admitting the testimony of certain witnesses cannot be sustained. The testimony was not received for the purpose of establishing an agreement prior to the date of the execution of the Phillips lease, but as corroborative of the testimony adduced to show the parol agreement between the parties made contemporaneously with the written lease. For this purpose it was competent. *Rinesmith v. Peoples' Freight Railway Company*, 90 Pa. 262; *Pyroleum Appliance Co. v. Williamsport Hardware, etc., Co.*, 169 Pa. 440, 32 Atl. 458; *Hinchcliffe v. Koontz* (Ind.) 23 N. E. 271, 16 Am. St. Rep. 403.

The judgment is affirmed.

SILVER et al. v. BUSH et al.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)
MINES AND MINERALS—CONVEYANCES—RESERVATION OF MINERALS.

A deed granted certain parcels of land, together with all the hereditaments and appurtenances thereunto belonging and all the interest of the parties of the first part. The habendum clause stated that said land was conveyed to the second parties, "except the mineral underlying the same and a right of way to and from said mineral, which the first parties reserved." Held, that the mineral in the deed did not include natural gas, and that the grantee under the deed took the same.

Appeal from Court of Common Pleas, Armstrong County.

Action by Mary Silver and others against U. G. Bush and the Pittsburgh Plate Glass Company. From an order refusing to take off the nonsuit, plaintiffs appeal. Affirmed.

At the trial it appeared that Stephen A. Forrester conveyed to Ulysses G. Bush a certain tract of land in South Buffalo township, Armstrong county, containing 45 acres and 17 perches, to have and to hold the same, "except the mineral underlying the same and the right of way to and from said mineral, which the said parties reserve." The plaintiffs are the successors in title to Stephen A. Forrester, and under the above-quoted reservation claimed the right to take the natural gas from under the land of the defendants. The defendants are the grantee in said deed and those claiming under him, and deny that under the above reservation natural gas is excepted. The court refused plaintiffs' offer to prove that natural gas was being drilled for in the surrounding territory at and prior to the date of the deed. The court entered a compulsory nonsuit, which it subsequently refused to take off.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. J. Christy and James H. McCain, for appellants. Orr Buffington, O. W. Gilpin, and Rush Fullerton, for appellees.

MITCHELL, C. J. The conveyances to the defendants were of certain "pieces or parcels

of land, * * * together with all and singular the improvements, ways, waters, water courses, rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belonging, or in any wise appertaining, and the reversions and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, claim and demand whatsoever, of the said parties of the first part," and the habendum in each deed is "to have and to hold the said piece or parcel of land except the mineral underlying the same, and the right of way to and from said mineral, which the first parties reserve." It is argued that the grantees took only an estate in the surface for agricultural and other strictly surface purposes, and that all minerals of every kind underlying the surface were excepted from the grant. But it is manifest that no such narrow construction can be sustained. The grant is of the land, and the additional words used are of the most comprehensive character, including all estates, interests, and rights in the land. Nothing whatever would have been left in the grantors, were it not for the reservation in the habendum, and that is of "the minerals underlying the same, and the right of way to and from" the same. The reservation must be read in its connection, and cannot be given a construction as extensive as the grant, for then it would be void for repugnancy. Even in a case where the grant was in terms only of the surface of the land, reserving "all coal and other minerals," it was held that the grantee took the entire fee to use for all purposes except mining, or taking the excepted minerals, or interfering with the grantor's reserved right to do so. *Hendler v. Lehigh Valley R. R. Co.*, 209 Pa. 256, 58 Atl. 486, 103 Am. St. Rep. 1005. This court has had rather frequent occasion to consider the word "mineral," and to define its meaning in different connections. A number of cases are cited by appellant in which it has been decided that petroleum and natural gas are minerals. Of the fact that, under the broad division of all matter into the three classes of animal, vegetable, and mineral, petroleum and gas are minerals, there has never been any room for question, and even under some more restricted classifications the same result may be reached. But, on the other hand, it has also been held that in other connections they are not included under that term. There is no discrepancy in the cases. The variations in the scope of the word arise from the connection and application in which it is used.

The crucial question here, as in all contracts, is, what was the sense in which the parties used the word? Mineral is not per se a term of art or of trade, but of general language, and presumably is intended in the ordinary popular sense which it bears among English speaking people. It may in any particular case have a different meaning,

more extensive or more restricted, but such different meaning should clearly appear as intended by the parties. A very recent discussion of the subject was had in *Hendler v. Lehigh Valley R. R. Co.*, 209 Pa. 256, 58 Atl. 486, 103 Am. St. Rep. 1005, where it was shown that while the word "mineral" has a very broad meaning, already alluded to, and also a more restricted scientific use, it has also a commercial sense, in which it is most commonly used in conveyances and leases of land, and in which it may be presumed to be used in such instruments. In that sense it may include any inorganic substance found in nature having sufficient value separated from its situs as part of the earth to be mined, quarried, or dug for its own sake or its own specific uses. But, though it may include all such substances, it does not necessarily do so. Appellant cites the case as authority for the view that whatever comes within the terms of that description must necessarily be included under the word "mineral." But this is an untenable inference. That decision announced no new principle, nor any departure from the line of previous decisions. As already said, there is no discrepancy in the cases. The cardinal test of the meaning of any word in any particular case is the intent of the parties using it, and all that *Hendler v. R. R. Co.* did was to apply that test to the word "mineral" in the deeds on which the case turned. The substance there in question was sand, and it was shown that it might or might not be within the definition of mineral in the commercial sense, according to the circumstances and the intent of the parties.

In the present case the question arises in respect to natural gas; the plaintiff claiming that it was included in the reservation of "the mineral underlying" the land conveyed. Certainly such gas is a mineral in the broadest sense of the term, but no evidence was given or offered to show that the parties so understood or intended the word "mineral," or even that it had acquired a usage in conveyancing which would include gas. In *Dunham v. Kirkpatrick*, 101 Pa. 36, 47 Am. Rep. 696, it was expressly held that petroleum was not included in a reservation of "all minerals"; the court saying: "In popular estimation petroleum is not regarded as a mineral substance, and can only be so classified in the most general or scientific sense. How, then, did the parties to the contract think and write? As scientists, or as business men, using the language and governed by the ideas of everyday life?" It was held, therefore, that petroleum was not within the intent of the parties in reserving the minerals. And, a fortiori, natural gas would not be so included. This decision was part of the law of the state when the deeds in question were made, and to some extent at least, as was said by the learned judge below, it had become a rule of property on which many titles in Western Penn-

sylvania rested. To take any case out of its operation the evidence should be clear and convincing that the parties used the words in a different sense. The only effort of the appellants in that direction was apparently based on the view of *Hendler v. R. R. Co.*, already referred to, that any substance mined or extracted from the land for its own sake is necessarily included in the word "mineral." Under this view offers were made to show that at the date of the deeds the land in that vicinity was already being developed for natural gas, which was known as a marketable commodity. These offers, however, even if proved, were not evidence that the parties used the term "mineral" in the sense contended for. They could only be ground for inference that the parties might have so intended, while, on the other hand, the offers themselves implied that the including of gas under the term "mineral" would be a new use of the term, and the inference would be strong that, if the parties intended to include gas, they would have said so expressly. The offers, therefore, were properly excluded.

Judgment affirmed.

SMITH v. HIBBS et al.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

QUIETING TITLE—RIGHT TO SUE—JUDGMENT.

Where, under a contract based on a valuable consideration passing to the owner of land, a person enters into possession thereof, the contract providing that the owner shall will it to the occupant, and the owner conveys the land to another for life, with remainder over to other parties on his death, the occupant may bring proceedings to quiet title under Act June 10, 1893 (P. L. 415), and may obtain judgment against both the life tenant and the remainderman, if they are made parties to the proceeding, which judgment will bar both parties and vest a good title in the occupant.

Appeal from Court of Common Pleas, Greene County.

Action by William D. Smith against George L. Hibbs and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas S. Crago, for appellants. J. B. Donley and D. S. Walton, for appellee.

STEWART, J. This is an action for the purchase money of real estate. The defense set up is that the title tendered is not marketable. The following facts appear in the case stated, and they are all that need be repeated here: The appellee, William D. Smith, being in possession, and claiming to be the owner, of the tract of land which is the subject of the contract of purchase. In September, 1903, began a proceeding under the act of June 10, 1893 (P. L. 415), to quiet his title to this land, in which proceeding the grantees, in a recorded deed of conveyance for the same

premises from David Shoyer, under date of November 4, 1897, were made respondents. Smith's claim of ownership of the land was as follows: David Shoyer, Smith's grandfather, in 1884 had agreed with Smith that, if the latter would abandon his trade and live with and care for Shoyer and his wife, he (Shoyer) would buy a farm on which they would live together, and, "when Shoyer and his wife were gone or deceased," the farm should belong to Smith, Shoyer to make a will devising said farm to Smith in fulfillment of the contract. Pursuant to this agreement Shoyer bought this tract of land, the parties named moved thereon, and continued to reside there together until the death of Shoyer's wife in September, 1897. Shoyer, according to his agreement, on March 16, 1897, executed a will devising the farm to Smith. Shortly after he went to reside with his son, George, and, while there, on November 4, 1897, he executed and delivered a conveyance of this same land "to his son, George B. Shoyer, for life, and at his death to his wife, Elizabeth Shoyer, if she survive him, and remain his widow, to her for life, and at her death or upon remarriage, then the reversion and remainder to the use of Edward C. Shoyer and John Shoyer, children of the said George B. Shoyer and Elizabeth Shoyer, in equal shares, in fee simple, to them, their heirs and assigns forever," which conveyance was recorded on November 26, 1897, in the recorder's office of Greene county. Pursuant to the prayer in Smith's petition a rule was granted on the grantees under said conveyance to answer said petition within 20 days from service of the rule; and said parties, to wit, George B. Shoyer, Elizabeth Shoyer, Edward C. Shoyer, and John Shoyer, were duly served with said rule, and with notice to appear and answer at a day named in the notice. There was no appearance to this rule, and Smith, on April 18, 1904, prayed the court to award an issue to determine the title to said tract of land, and on the same day an issue was awarded as prayed for, the said George B. Shoyer, Elizabeth Shoyer, Edward C. Shoyer and John Shoyer being made the plaintiffs, and William D. Smith defendant, in the action, which was the same day entered as an action of ejectment in the court of common pleas of Greene county to No. 134, May term, 1904. The plaintiffs entered no appearance in said action, and no answer was filed by them or either of them. On November 22, 1904, the case was called, the jury sworn, and verdict rendered for the defendant for the premises described. Judgment was duly entered on the verdict on December 6, 1904, and no appeal has been taken therefrom. Title to the land in question is admitted in David Shoyer, subject to the equities of the said William D. Smith; and it is admitted that William D. Smith fully complied with all the terms of his contract with the said David Shoyer.

The question here presented, and the only one, is, does the verdict obtained by William

D. Smith, in the issue to No. 134, May term, 1904, in common pleas of Greene county, conclude the plaintiffs therein, the grantees named in the deed from David Shoyer, under date of November 4, 1897, from asserting their title to the land under said deed? No reason is suggested, and none is apparent, why it should not have this effect. We do not understand that its conclusiveness upon George Shoyer, the present life tenant, is questioned, since, were his title good, his right of possession would follow, and he could maintain ejectment to enforce it. The suggestion is made that inasmuch as the other parties defendant in the issue were remaindermen, and not in position to assert their title as against the party in possession, the case might be different as to them. This suggestion springs from the supposed analogy between the proceedings contemplated by the act of June 10, 1893 (P. L. 415), and an equitable ejectment action. True, in *Ullom v. Hughes*, 204 Pa. 305, 54 Atl. 23, it is said, referring to this act to quiet title, that the act expressly assimilates the proceeding to an equitable ejectment; but it does not result from this, that the scope and purposes of the act are to be narrowed by the application of the principles and rules which govern in ejectments. Indeed, in the case just cited it is expressly said that the act does not give a new right enforceable only in the prescribed way, but merely a new remedy for a right always existing, to defend title and possession. It is further held that the old remedies were not done away with by the act, but that the remedy provided was added for still greater convenience in certain cases to which it could be applied. The purpose of the act, as expressed in the enactment, is to quiet title. Before its passage the remedy, in such cases, was by bill in equity, and that a court of equity had jurisdiction to give the same relief that is contemplated by the act cannot be questioned. In *Stewart's Appeal*, 78 Pa. 88, discussing the rule in equity in such matters, Chief Justice Sharswood says: "The best expression of the rule, it seems to me, is to be found in the opinion of the Supreme Court of Massachusetts, in *Martin v. Graves*, 5 Allen, (Mass.) 601, by Merrick, J.: 'Whenever a deed or other instrument exists, which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and canceled, or by making any other decree which justice or the rights of the parties may require.' The equitable proceeding was available, not to quiet possession, but title; and it was never suggested

that such remedy could be employed only as against those having a right of entry. It was directed against the adverse title by whomsoever asserted, and its object was to remove such title in some manner appropriate to the end sought.

While, as remarked in *Ullom v. Hughes*, 204 Pa. 305, 54 Atl. 23, equity thus came to the aid of the party in possession, who was threatened by an adverse title, the assistance was limited and not always adequate. Here we find as well the occasion for, and purpose of, the act of 1893. In *Delaware & Hudson Canal Company v. Genet*, 160 Pa. 343, 32 Atl. 559, both were considered, and it is there said of the act: "It was intended to give a party in possession the right and opportunity to institute a proceeding to test his title as against an adverse claimant. At common law the adversary might lie by concealed or quiet, and choose his own time for the contest, subject only to the risk that the statute of limitations might shut him out. The party in possession could do nothing but await the attack. Equity came to his aid by "bills to perpetuate testimony, to quiet title, etc., but this assistance was limited and not always adequate. In this state the act of May 21, 1881 (P. L. 24), gave the party in possession the further right, as against an adversary who had once asserted his claim in an ejectment, to rule him to bring his further action or be barred. The party in possession is no longer bound to await the attack, but may act on the offensive and bring on the battle at once." The general words employed in the act indicate a purpose to provide a remedy for the speedy settlement and determination of all cases where the right of any person in possession of lands "shall be disputed or denied by any person or persons aforesaid." Just what restriction, if any, can be derived from the use of the word "aforesaid," is not apparent; but it is very certain that nothing that precedes it in the text gives any warrant for the restriction here suggested. Accepting the purpose of the act to be what this court, in every case in which it has been considered, has held it to be, the word "aforesaid" as it occurs, can only be considered surplusage, and nothing more. If, then, in the issue tried, the court had jurisdiction of the parties—and upon the facts, as they appear in the case stated, we are of opinion that it had—it necessarily results that the parties who were plaintiffs therein and defeated are concluded with respect to the claim in that issue adjudicated, since the act provides that "the verdict of the jury in such issue shall have the same force and effect upon the right and title, and right of possession of the respective parties in and to the said land as a verdict in ejectment upon an equitable title."

Judgment affirmed.

COVER v. HOFFMAN.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. TRIAL—RESERVED QUESTIONS.

In order that a question of law may be reserved at the trial, the question reserved must be one of law purely, unmingled with any question of fact, it must be one that rules the case so completely that its decision will warrant a binding instruction, and it must be clearly stated, and the facts under which it arises must be admitted by the record or found by the jury; otherwise, the reservation will be incurably bad.

2. APPEAL—RESERVED QUESTION—NECESSITY OF EXCEPTIONS.

A judgment entered in pursuance of a question of law improperly reserved will be reversed, whether an exception was taken thereto or not.

3. TRIAL—RESERVED POINTS.

A reserved question, presented by points for a charge asking for binding instructions because plaintiff was not entitled to a verdict, and because a particular fact had not been established by a preponderance of the testimony, fails to present a pure question of law controlling the decision of the case, and is incurably bad.

4. CONTRACTS—BREACH—EFFECT—REMEDY.

Plaintiff sold defendant the real estate and stock of goods of a store, receiving a judgment note in part payment. At the time of the sale he agreed in writing that at the end of three years he would purchase the real estate and stock of goods then on hand on the same terms and conditions as those on which he had sold the same in case defendant then desired to sell. Defendant at the proper time gave due notice of his desire to sell and tendered a deed for the real estate which plaintiff refused to accept. *Held* that, notwithstanding his noncompliance with the agreement, plaintiff was entitled to recover on the judgment note; defendant being entitled merely to set off the damages which he had sustained by reason of plaintiff's breach of agreement.

Appeal from Court of Common Pleas, Somerset County.

Action by J. M. Cover, to the use of B. S. Fleck, against Sarah J. Hoffman, administratrix of Jacob Hoffman, deceased. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. H. Koontz and J. G. Ogle, for appellant. W. H. Ruppel and A. H. Coffroth, for appellee.

FELL, J. The rules relating to the reservation of questions of law at the trial have been so fully considered in the recent cases of *Fisher v. Scharadin*, 186 Pa. 565, 40 Atl. 1091, and *Casey v. Paving Co.*, 198 Pa. 848, 47 Atl. 1128, that a discussion of them is needless. They are: (1) The question reserved must be one of law purely, unmingled with any question of fact. (2) It must be one that rules the case so completely that its decision will warrant a binding instruction. (3) The question must be clearly stated and the facts upon which it arises must be admitted on the record or found by the jury. A reservation that

violates any of these rules is incurably bad, and a judgment entered in pursuance of it will be reversed, whether an exception has been taken or not. The question reserved at the trial in this case was raised by points for charge presented by the defendant, one of which asked for binding instructions because on all the evidence the plaintiff was not entitled to a verdict, and another because a particular fact had not been established by a preponderance of the testimony. No one of these points presented a pure question of law, arising from undisputed or admitted facts and controlling the decision of the case. The reservation was bad and the judgment must be reversed.

Since the case goes back for trial, we now express our opinion on the main question involved, whether the failure of the plaintiff to comply with his agreement to purchase the real estate sold to the defendant and the stock of goods in his possession would preclude him from recovering any part of the consideration named in the note. The issue was to determine what was due on a confessed judgment which had been opened without terms. The plaintiff owned and conducted a country store. He was elected to a county office for the term of three years, and sold the defendant the real estate for \$3,000 and the stock of goods and fixtures at a price to be determined by an appraisal, and he received a judgment note in part payment. At the same time he agreed in writing that at the end of three years, if the defendant at that time desired to sell, he would purchase the real estate and the stock of goods the defendant then might have in hand on the same terms and conditions on which he had sold. The defendant agreed that he would keep up the stock of goods, and, in the event of a sale to the plaintiff, that he would pay a reasonable rental for the real estate for the time he had occupied it. The defendant gave due notice of his desire to sell, as provided by the agreement, and tendered a deed for the real estate. The plaintiff failed to purchase, and the defendant's heirs afterwards sold the real estate at private sale for \$1,500. If it should be established to the satisfaction of a jury that the plaintiff's failure to comply with his agreement was without adequate reason, he is not thereby precluded from recovering anything on the judgment. The defendant's obligation was, not to pay the purchase money if he elected to retain the store, but to pay in any event and at fixed times. The plaintiff's obligation was, not to take back what he had sold at the option of the defendant and in discharge of his debt, but to repurchase the real estate and to purchase a stock of goods which was not then in existence, but might be on hand at the end of three years. If by reason of the plaintiff's breach of the agreement the defendant has sustained damages, he may set

off his loss against any balance due on the judgment. The case is one in which it will be difficult to work out the equities of the parties by a jury trial, and it will be well if they act on the suggestion of the learned trial judge and agree upon a form of reference by which their respective rights can be better determined.

The judgment is reversed, with a venire facias de novo.

EICHBAUM v. SAMPLE.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. CORPORATIONS — STOCK — SALE — PLEDGE — REDEMPTION.

Where plaintiff assigns certain bank stock on an agreement that the stock should be transferred back to him on payment of certain money advanced, with a right to redeem the stock at any time by such payment, the owner, whether such transaction was considered as a pledge or as a sale with an option, had a right to redeem on proper tender.

2. SPECIFIC PERFORMANCE—CONTRACT AS TO PERSONALTY.

Where the owner of stock sells it with an option to repurchase it, or pledges it, he may sue for a retransfer to himself, where the stock was not purchasable in the market, had no ascertainable market value, and it had a peculiar value to plaintiff, greater than the market price at the time of transfer.

Appeal from Court of Common Pleas, Lawrence County.

Bill by William W. Eichbaum against Luther H. Sample. Decree for complainant, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Aaron L. Hazen and Richard F. Dana, for appellant. James A. Gardner and John M. Gardner, for appellee.

PER CURIAM. The court below found as a fact that "about March 7, 1898, the plaintiff obtained from the defendant the sum of \$6,390, being the then book value of the stock, which money was paid over to the Citizens' National Bank to apply on its indebtedness, and thereupon the said stock certificates were released by said bank and were by the plaintiff transferred, assigned, and set over in blank to the defendant, upon an agreement then and there made, as a consideration for said transfer, that the said stock certificates should and would be retransferred back and returned to the plaintiff upon payment by the latter of the said \$6,390 with 6 per cent. interest thereon, less the dividends received by the said defendant on said stock during the time he held the same, with right in the plaintiff to redeem the said stock at any time he could raise moneys sufficient to pay the loan."

The court regarded the transaction as a pledge of the stock for a loan by defendant to plaintiff, and this is probably the correct view of what the parties intended, though no

agreement of plaintiff to pay is specifically found, and some doubt therefore might have arisen as to his obligation for the balance of the debt, had the stock been sold without bringing enough to pay the advance in full. But this question is not material, as the transaction, if not a pledge of collateral for a debt, was clearly a conditional sale of the stock, i. e., a sale with an option in the vendor to repurchase on specified terms. The fact that the time was left indefinite was not fatal. In either view of the transaction, the defendant, whether pledgee or vendee, could bring it to a close by notice to pay or redeem in a reasonable time or be barred. *Sitgreaves v. Farmers', etc., Bank*, 49 Pa. 359, quoting 2 Kent's Com. *582.

The court also found as facts that the stock of the Citizens' National Bank is limited in amount; that 50 shares, or any part thereof, are not purchasable in the market; that they have no quoted or ascertainable market value; and that plaintiff held them as an investment having a peculiar value to him, greater than the market price at the time of the transfer. Under these circumstances the jurisdiction of equity to enforce a retransfer is well settled. *Goodwin Co.'s Appeal*, 117 Pa. 514, 534, 535, 12 Atl. 736, 2 Am. St. Rep. 696; *Northern Central Ry. Co. v. Walworth*, 193 Pa. 207, 44 Atl. 253, 74 Am. St. Rep. 683.

Decree affirmed.

In re MATTHEW.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. INTOXICATING LIQUORS — LICENSE BOND — SUFFICIENCY.

Where a petition is filed for a liquor license and a bond regular in all respects, except that the space left for the names of the proposed sureties is not filled in, is attached, the defect is not substantial, and will not defeat the application.

2. SAME—PETITION—AMENDMENT.

Where an application is filed for a liquor license, and the bond is defective, in that the space for the names of the proposed sureties is not filled in, an amendment allowing their insertion is improper, as it would introduce into the petition facts other than those stated therein when the petition was verified.

Mestrezat and Potter, JJ., dissenting.

Appeal from Superior Court.

In re Benjamin H. Matthew's license. From a judgment reversing an order refusing a liquor license on the application of Benjamin H. Matthew, an appeal is taken. Affirmed.

The petition, certificate, and bond filed in the court of quarter sessions were as follows:

"This petition respectfully represents that your petitioner is a citizen of the United States, of good moral character and temperate habits, and desires to keep a hotel, inn, or tavern, and prays your honorable court to grant him a license under the laws of this commonwealth, to sell liquors in quantities not exceeding one quart. Your petitioner further

represents: (1) That his name is Benjamin H. Matthew, and that his present residence is Rockwood borough, Somerset county, Pennsylvania, and that he has resided there for more than one year last past. (2) The particular place for which license is desired is the 'Haines House' situate on the southeast corner at the intersection of Main and Market streets, Rockwood borough, Somerset county, Pennsylvania. (3) That your petitioner was born in Hazleton, Preston county, West Virginia, A. D. 1881. (4) The names of the owners of the premises where said business is to be conducted are Fred W. Biesecker and J. A. Berkey. (5) That the place to be licensed is necessary for the accommodation of the public, and is suitable, as well as necessary, for the entertainment of strangers and travelers. That he has for their exclusive use at least twenty-three bedrooms and twenty-three beds. (6) That your petitioner is not in any manner interested in the profits of the business conducted at any other place in said county, where any of said liquors are sold or kept for sale. (7) That your petitioner is the only person in any manner peculiarly interested in the business so asked to be licensed, and that no other person shall be in any manner peculiarly interested therein during the continuance of said license. (8) Your petitioner has not had a license for the sale of liquor in this commonwealth revoked during any portion of the year preceding this application. (9) The names of the persons who will be his sureties on the bond which is by law required are (1) ———, (2) ———, who are reputable freeholders of Somerset county, Pennsylvania, where the said liquors are to be sold; and your applicant further sets forth that each of the said sureties is a bona fide owner of real estate in the said county, worth over and above all encumbrances, the sum of \$2,000, and that it would sell for that much at public sale, and that neither of said sureties is engaged in the manufacture of vinous, spirituous, malt, or brewed liquors.

"Benjamin H. Matthew, Petitioner.

"State of Pennsylvania, County of Somerset—ss.:

"Before me, a justice of the peace, personally came Benjamin H. Matthew, aforesaid, and being duly ——— according to law, saith that the statements in the foregoing petition are true. B. H. Matthew.

"Affirmed and subscribed before me, this 16th day of January, A. D. 1905.

"David Gildner, J. P."

"My commission expires first Monday of May, 1905."

Certificate in support of petition:

"We, the undersigned, reputable qualified electors of the borough of Rockwood, county of Somerset, State of Penn'a, hereby certify that we have been acquainted with the foregoing petitioner for license, viz.: Benjamin H. Matthew, that we have good reason to believe

that each and all statements in the foregoing petition are true, and therefore pray that the prayer of said petitioner may be granted and that the license prayed for may issue."

Signed by 12 citizens.

Bond:

"Know all men by these presents, that we, Benjamin H. Matthew, principal, and (1) H. S. Swarner, (2) A. C. Sterner, sureties, are held and firmly bound unto the commonwealth of Pennsylvania, in the penal sum of two thousand dollars, lawful money of the United States of America, to be paid to the said commonwealth, her certain attorney or assigns, to which payment well and truly to be made, we and each of us, do bind ourselves. and each of us, our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated the 14th day of January, in the year of our Lord one thousand nine hundred and five. Now the condition of this obligation is such that if the above bounden Benjamin H. Matthew, principal, and (1) ——— (2) ——— shall faithfully observe all the laws of the commonwealth of Pennsylvania relating to the selling or furnishing of vinous, spirituous, malt, or brewed liquors, or any admixture thereof, and shall pay all damages which may be recovered in any action which may be instituted against us under the provisions of any act of assembly, and shall pay all costs, fines and penalties which may be imposed upon us under any indictment for violating the act of May 18, 1887, and supplements, entitled 'An act to restrain and regulate the sale of vinous, and spirituous, malt or brewed liquors, or any admixture thereof,' or any other act of assembly relating to selling or furnishing liquors as aforesaid, then this obligation shall be void and of no effect, or else shall be and remain in full force and virtue. And further, we do by these presents empower the district attorney of Somerset county or any other attorney of any court of record of the commonwealth of Pennsylvania, to appear for us therein and confess judgment against us for the said penal sum, with costs of suit and release of all errors, and do hereby waive the right of inquisition on real estate, and all laws exempting real or personal property from levy and sale on execution.

"B. H. Matthew. [Seal.]

"H. S. Swarner. [Seal.]

"A. C. Sterner. [Seal.]

"Sealed and delivered in the presence of David Gildner."

"State of Pennsylvania, County of Somerset—ss.:

"Before me, a justice of the peace, personally came H. S. Swarner, one of the sureties on the foregoing bond, who being duly qualified according to law, deposes and says that he is the bona fide owner of real estate in the said county, worth over and above all encumbrances the sum of two thousand dollars

and that it would sell for that amount at public sale. H. S. Swarner.

"Affirmed and subscribed before me this 14th day of January, 1905.

"David Gildner, J. P.

"State of Pennsylvania, County of Somerset—ss.:

"Before me, a justice of the peace, personally came A. C. Sterner, one of the sureties on the foregoing bond, who, being duly qualified according to law, deposes and says that he is the bona fide owner of real estate in the said county, worth over and above all encumbrances the sum of two thousand dollars, and that it would sell for that amount at public sale. A. C. Sterner.

"Affirmed and subscribed before me this 14th day of January, 1905.

"David Gildner, J. P."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. H. Ruppel, A. H. Coffroth, and J. C. Lowry, for appellant. J. A. Berkey, for appellee.

STEWART, J. In refusing the amendment asked for, the court below was entirely right, but for another and quite different reason than that given in the opinion filed by the presiding judge. Conceding the power of the court to allow a proper and adequate amendment, under the facts presented, the amendment proposed fell short of these conditions. What was asked for was leave to amend by inserting in the original petition the names of the sureties who were expected to join in the required bond. The inadequacy of the offer is apparent, when it is considered that, being made, the averment that each of the sureties "is a bona fide owner of real estate in said county, worth over and above all incumbrances the sum of \$2,000, that it would sell for that much at public sale, and that the applicant is not engaged in the manufacture of vinous, spirituous, malt or brewed liquors," would stand unverified by the affidavit of petitioner, since, while this statement appeared in the original petition, the names of the sureties not being given, it was without meaning and had no place in the jurat of the applicant. Not only so, but, for like reason, the certificate of the 12 reputable, qualified electors "that they have reason to believe that each and all the statements contained in the petition are true," would be lacking as well; no such statement of fact appearing in the petition when they certified thereto. The effect of the proposed amendment being to introduce in the petition other facts than those stated therein, when the jurat and certificate were made, the impropriety of allowing such change need not be discussed.

The case turns on whether any amendment was necessary; or, in other words, whether the application as made was sufficient. In

his opinion filed the learned judge says: "We would permit this amendment and grant the license, if we believed we had the power to do so." His conclusion that he had not the power rests entirely upon the omission of the names of the sureties from the petition, notwithstanding the fact that the applicant, in the judgment of the court, had complied with every requirement of the law, with the single exception referred to. The language of the court admits of no other meaning. The applicant then had satisfied the court, and in the way pointed out by the statute, that he was free from all legal disability in this connection, that the place to be licensed was necessary for the accommodation of the public, and that the sureties on his bond were sufficient. The inquiry here is, did the omission of the names of the sureties from the petition in any way defeat or interfere with the purpose of the statute? If it did, such omission would necessarily be fatal to the proceeding. The purpose of the several requirements as to what shall appear in the petition for a license to sell intoxicating liquors is not the same as to each. Some are manifestly intended to acquaint the public with certain facts with respect to the pending application in advance of the hearing. The publication of these is required to be made in two newspapers, to be designated by the court. The fact that publication of the names of the sureties is not required suggests that the chief, if not the only, purpose in requiring the names of the sureties to appear in the petition, was to aid the court in finally passing upon the adequacy of the bond that is necessary in all cases, since it is expressly provided that the license shall not issue until the applicant shall have executed a bond in the penal sum of \$2,000, with two sufficient sureties to be approved by the court. With the names of the sureties appearing, and their sufficiency attested by the oath of the applicant, and the certificate of the required number of reputable electors, in the absence of anything to excite doubt or suspicion or contest, the court ordinarily can feel satisfied in approving the bond without inquiring further. The importance of such requirement, in aid of the court, will be readily understood by those whose duty it is to pass upon such questions. If it be said that the sufficiency of the bond being proper matter for exception, as much as any other fact set out in the petition, that the requirement in this particular can be none the less for public information, the answer is, it may be, but that information was not to be gained by publication, but by inspection of the papers filed. The law must so contemplate, otherwise, it would have required publication of the names of the sureties. Now, an inspection of the papers filed in this case could not have failed to disclose the names of the sureties. The bond was filed with the application, perfected by

the signatures of the sureties. Under such circumstances, how can it be said that any essential requirement of the statute was omitted? It results that the omission of the names of the sureties from the petition, under the peculiar facts in this case, was not a substantial defect, and therefore ought not to have defeated the application.

The appeal is therefore dismissed, and for the reasons above stated the order of the Superior Court is affirmed.

MESTREZAT, J. (dissenting). It will be observed that the majority of the court agrees with the court of quarter sessions in refusing the application for an amendment of the petition for the license, and thereby reverses the judgment of the Superior Court on that question. This result accords with all the prior decisions of this court, and of the well-considered cases of the quarter sessions throughout the state. This court, however affirms the judgment of the Superior Court on the ground that no amendment of the petition was necessary, and that the application in its incomplete form was sufficient to warrant the quarter sessions in granting the license. In other words, the majority of the court holds that a license may be granted on a petition which omits the averment of some of the facts which the statute declares it "shall contain." This position of the court, in my judgment, cannot be sustained, either on principle or by precedent. It is at variance with the settled practice of every license court of the state. It also violates that provision of section 13 of the act of March 21, 1806 (4 Smith's Laws, p. 332; 1 Purd. Dig. 77), which provides that "in all cases where * * * anything is directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued."

The act of May 13, 1887 (P. L. 108; 1 Purd. Dig. 1226), requires the applicant to file a petition and the facts which it shall contain are required by section 5 (page 109) to be set out in 10 separate and distinct paragraphs. The section provides in its ninth paragraph, *inter alia*, as follows: "Said petition shall contain * * *. Ninth. The names of no less than two reputable freeholders of the county where the liquor is to be sold, who will be his, her or their sureties on the bond which is required, and a statement that each of said sureties is a bona fide owner of real estate in said county worth, over and above all incumbrances, the sum of two thousand dollars, and that it would sell for that much at public sale, and that he is not engaged in the manufacture of spirituous, vinous, malt or brewed liquors." The petition presented to the quarter sessions to obtain this license omitted to state the names of two reputable freeholders of the county who would become sureties on the bond which the licensee is required to give. The effect of this omission, as correctly held

by the majority of the court, was to leave out of the petition all the facts which the ninth paragraph of section 5 declares it shall contain. Ten days after the day fixed by rule of court for the hearing of the application the applicant asked leave to amend his petition "by writing therein in paragraph 9, the names of his sureties, to wit, H. S. Swarner and A. C. Sterner." This was refused by the quarter sessions, and its action is approved by this court. But this court holds that the license should have been granted on the petition as it was filed, notwithstanding it failed to set forth the facts required by the ninth paragraph of section 5 of the act of 1887. It will be observed that it is the positive mandate of the statute that the names of the bondsmen and the other facts stated in paragraph 9 shall be set forth in the petition. These are facts which the statute imperatively requires the applicant to include in his petition. They are, therefore, jurisdictional facts, and their omission from the petition is fatal to the application. If an applicant may neglect or refuse to include in his petition the facts required by the ninth paragraph of the fifth section of the act, he may omit any other facts which the statute requires he shall state in order to confer authority on the quarter sessions to grant the license. So far as it affects the question here involved, it is wholly immaterial what purpose actuated the Legislature in requiring the names of the bondsmen and the other facts mentioned in the paragraph to be inserted in the petition. It would not be difficult to show, if necessary, that it is a wise provision, and that there are abundant reasons why they should be included in the petition. But it is sufficient to say that the law which authorizes the court to grant the license—and in the absence of a statutory provision no license can be granted in this state—requires the applicant to file a petition, and positively and unequivocally says that "said petition shall contain" the facts set out in paragraph 9 of section 5 of the act of 1887.

I regard this decision of the court as most unfortunate. It strikes down the plain requirements of the statute which the Legislature, in obedience to the sentiment of the state, enacted, as its title shows, "to restrain and regulate the sale" of intoxicating liquors. Step by step the people of the commonwealth, through their representatives, have imposed greater restrictions upon the sale of liquors, and the settled policy of the state, as shown by the legislative enactments upon the subject, has ever been "to restrain" the liquor traffic. The present law is the most stringent legislation enacted since we became a commonwealth. Recognizing the unquestioned evils of intemperance, and desiring to abate them as far as possible, the act provides certain specific and stringent regulations, deemed necessary to carry out the purpose in view, with which the applicant must comply before he can be authorized by the court to

engage in the traffic. It also imposes severe penalties upon those who sell or furnish liquors contrary to its provisions. In the face of this legislation and its obvious purpose, this court by its decision annuls the imperative command of the statute and thereby defeats the clearly expressed will of the people of the commonwealth. This is not judicial interpretation. It is the assumption by the court of legislative authority which has been conferred by the Constitution solely upon another and co-ordinate branch of the government. It in effect repeals one of the most wholesome provisions of a statute ordained for the purpose of regulating a traffic which, uncontrolled, is subversive of the morals of the people and endangers the peace and good order of the commonwealth.

I would reverse the judgment of the Superior Court, and affirm the order of the court of quarter sessions refusing to grant the license.

POTTER, J. I join in this dissent.

In re REGAN. In re McINTYRE. In re TRESSLER. In re KYLE. In re STRAUB. In re FALKNOR. In re BLOOM.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

Appeal from Superior Court.

In the matter of the applications of Regan, McIntyre, Tressler, Kyle, Straub, Falknor, and Bloom for liquor licenses. From a judgment of the Superior Court reversing an order refusing a liquor license, appeals were taken. Affirmed.

STEWART, J. In the appeal to the Superior Court it was argued by counsel that the same judgment should be here entered as in Re Application of Benjamin H. Matthew, entered in that court to No. 262, of April term, 1905. The Superior Court passed upon no questions not presented in the former case; nor do we. For reasons stated in opinion this day filed in appeal of Benjamin H. Matthew (No. 143; Oct. term, 1905) 213 Pa. 269, 62 Atl. 837, the order of the Superior Court is affirmed.

DUPLEX PRINTING PRESS CO. v. CLIPPER PUB. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. REPLEVIN — TRIAL — RESERVED POINTS — FORM OF RESERVATION.

Where, in an action of replevin, the real issue is one of title, the reservation of a point whether there is any evidence on which plaintiff can recover is improper in form, but is not fatally bad, where the court treats the reservation as if it were based on a request to direct a verdict for defendant, in which form the reservation should have been made.

2. EXECUTION—PROPERTY SUBJECT TO LEVY —PROPERTY SOLD CONDITIONALLY.

Goods in the hands of a vendee in a conditional sale are subject to levy by a creditor of the vendee, regardless of the rights reserved by the vendor as between himself and the vendee.

3. RECEIVERS — SALES — RIGHTS OF PURCHASER.

Where goods sold conditionally, with a reservation of title in the vendor, are taken into the possession of a receiver, appointed in a creditors' suit against the vendee who has become insolvent, the purchaser at a receiver's sale takes a good title, regardless of notice to him of the asserted rights of the vendor.

Appeal from Court of Common Pleas, Westmoreland County.

Action by the Duplex Printing Press Company against the Clipper Publishing Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Following is the finding of facts of the court below:

"The property involved in controversy in this case was delivered to the Clipper Publishing Company on the footing of a conditional sale. The plaintiff proposed to build for that company and have delivered in running order at Greensburg, Pa., November 18, 1901, a printing press of defined mechanism and construction for the price of \$8,500, \$500 of which was payable on acceptance of the proposal, and \$1,500 when the press was set up in good running order. It was further stipulated in the plaintiff's proposal that the Clipper Publishing Company 'shall give to us your notes for the balance of the purchase price, dated and drawing interest payable annually at six per cent. per annum from the date of the shipment of the press,' as therein set out in detail. The terms of the proposal were accepted and agreed to by the Clipper Publishing Company, and delivery was made on that basis. There was no attempt made to hire or lease the press on any defined terms. Only terms of barter and sale are employed by the parties. Nothing that could constitute the transaction a bailment, as distinguished from a conditional sale, appears in the contract, unless it is to be found in the following concluding paragraphs of the proposal, viz.:

"'You shall immediately, upon its receipt, insure and keep the press insured for our benefit, as our interest may appear, for \$8,500, and send the policy to us, and the right, title and ownership to and of this press does not, and shall not, pass from us until all of the above payments have been fully paid. If you shall fail or neglect to pay any of the foregoing payments or notes for the space of thirty days after any of the above payments, interest or notes become due, then we or our representative may enter the premises wheresoever the press may be, and take the same into our possession, and remove it therefrom, at our discretion, and all the payments that may have been made previous to the time of such default in payment shall be held by us, under the legal principles ap-

plicable thereto, as a just compensation for the use of said press to the time of such default in payment, and for our loss and trouble in the matter.

"The delivery by you to us of any collateral, promissory note or commercial paper, either your own or of any third person, shall not be deemed a payment of any of the aforesaid sum until such is paid, and shall not prevent us from enforcing the foregoing agreement. When all payments hereunder shall have been made, then we will execute and deliver a bill of sale of said press.

"It is to be understood that if this proposal be accepted both parties shall be governed solely by the terms and conditions herein expressed, and not by any verbal agreement."

"The defendant became insolvent, and a receiver was appointed. The receiver, under order of court, sold the press to James K. Clarke. In a replevin brought by the Duplex Printing Press Company against the Clipper Publishing Company, Clarke was allowed to intervene to protect his title."

At the trial the court reserved the point whether there was any evidence on which the plaintiff could recover. The court entered judgment for defendant non obstante veredicto.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

V. E. Williams, A. M. Sloan, and W. F. Wegley, for appellant. A. H. Bell, for appellee.

MITCHELL, C. J. This is an action of replevin to try the title to a perfecting press manufactured and delivered by plaintiff to defendant under agreement that the title should not pass until the press was fully paid for. The purchaser (defendant) became insolvent, but before plaintiff had retaken possession under its retained title a creditor of the purchaser filed a bill, under which a receiver was appointed, who, under direction of the court, sold the press to one Clarke. By leave of the court this suit was brought, and Clarke allowed to intervene for the protection of his title.

At the trial the judge reserved the point whether there was any evidence on which the plaintiff could recover. While this is a permissible form of reservation in appropriate cases, it was not a good or convenient one here. The real issue was whether the receiver's sale gave Clarke a better title than that of plaintiff under its agreement, and it would have been much better to have reserved the question explicitly in that form. The facts not being disputed, this was a question of law. Or the point could have been raised, though less explicitly, by a request to the court to direct a verdict for the defendant. This being reserved, and the verdict taken for plaintiff, the whole case would have been under control of the court on the exact issue. The learned judge, however, in his opinion

treated it on this basis; and, this being correct in substance, the error in form was not fatal. *Williams v. Crystal Lake Water Co.*, 191 Pa. 98, 43 Atl. 208.

The contract between the original parties here was clearly one of conditional sale, and not of bailment. *Ott v. Sweetman*, 166 Pa. 217, 31 Atl. 102. This, indeed, is practically conceded by the course of appellant's argument. The references to decisions in other states upon the rights of the vendor as against creditors of the conditional vendee are therefore irrelevant. The law of Pennsylvania is settled that whatever rights the vendee may reserve as between himself and the conditional vendee the goods in the hands of the latter are subject to levy by his creditors. *Brunswick, etc., Co. v. Hoover*, 95 Pa. 508, 40 Am. Rep. 674; *Forrest v. Nelson*, 108 Pa. 481. Nor is it material that Clarke, the intervening purchaser, had notice of the vendor's continuing title, which is the main ground of appellant's argument. Clarke's title does not depend on his status as a bona fide purchaser without notice, but on the powers of the receiver who made the sale.

We come, therefore, to the real point of the case, which is the title that passed to the purchaser by the sale. The authority of a receiver and the effect of his action depend almost entirely on the purpose of his appointment and the extent of his powers conferred by the decree appointing him. The paper book of the appellant is quite defective in failing to print the bill on which the receiver was appointed, the decree appointing him, or even the order of the court authorizing the sale, and, as the appellee furnished no paper book, we get no assistance from that quarter. The learned judge below, however, has stated the facts very clearly, that the proceeding in which the receiver was appointed was made part of the evidence in this case, and "the bill and answer show that complainants therein proceeded in behalf of themselves as creditors, and on behalf of the other creditors of the Clipper Publishing Company, on account of the alleged insolvency of the defendant, which allegation of insolvency was admitted by the defendant corporation. The appointment of a receiver was, therefore, professedly made for the protection of creditors of an insolvent corporation, and the order of sale by the receiver was made to subserve their rights. The authority conferred on the receiver came, not from the creditor or from the debtor, but from the law itself." From this it must be assumed that the receiver in this case represented the creditors in whose interest he was appointed, and was clothed with all the powers the creditors would have had in acting for themselves.

Tams v. Bullitt, 35 Pa. 308, was an action by trustees under the insolvent law to recover money received by a third party for the use of the insolvent. The trustees were apparently appointed under the insolvent act of June 16, 1836 (P. L. 731), though the act

is not mentioned in the report. By that act the insolvent, before his discharge, was obliged to make an assignment to trustees, and (section 34, p. 737) such trustees were thereupon deemed to be vested with all the estate, rights, etc., of the assignor, and capable of suing in their own names for all such estate, etc. In sustaining the action this court, per Strong, J., said: "The right of plaintiffs to recover might well depend upon the question whether the transactions between William Tams and John Tams were honest or in fraud of creditors. As between the two brothers, there may have been no right in John to recover money received by William, but, if the money came to William's hands in pursuance of a fraudulent arrangement, the plaintiffs who were clothed with the rights of creditors could disregard that arrangement and recover when John Tams himself could not." And again: "If, by virtue of a fraudulent arrangement between John Tams and William Tams, the money of the former came to the hands of the latter, assignees acting under a compulsory assignment could recover it."

A voluntary assignee for the benefit of creditors is a mere representative of the debtor, and is bound where he would be bound (Wright v. Wigton, 84 Pa. 163); but Tams v. Bullitt establishes the distinction that when the assignee, trustee, or whatever he may be called derives his authority, not from the mere voluntary act of the assignor, but from the mandate of the law, even when enforced in the language of that case, through a "compulsory assignment" from the debtor in the interest of the creditors, he represents the latter, and is vested with their powers. The same principle applies a fortiori to a receiver deriving his authority, not at all from the debtor, but altogether from the court acting in the interest and for the enforcement of the rights of creditors. When, therefore, on a creditors' bill, a receiver is appointed for an insolvent corporation, he is not limited, like an assignee for the benefit of creditors, by the rights of the debtor corporation as to property held by it under a conditional sale, but has the rights of a levying creditor, and a sale by him passes a good title against the vendor, irrespective of the purchaser's status as a creditor either with or without notice. Judgment affirmed.

IN RE LOGAN & MOULDS' ASSIGNED ESTATE.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. APPEAL—HARMLESS ERROR.

A departure of the court from the form of a rule is immaterial, where the matter is within the court's discretion.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3808.]

2. SAME—REVIEW—FINDINGS OF AUDITOR.

A finding by an auditor based on competent evidence and confirmed by the court below will

not be reversed, in the absence of manifest error.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4015-4018.]

Appeal from Court of Common Pleas, Beaver County.

In the matter of the estate of Logan & Moulds. From an order dismissing exceptions to auditor's report, Hannah I. Moulds appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. H. Cunningham, for appellant. W. A. McConnell, Alfred P. Marshall, David A. Nelson, and Winfield S. Moore, for appellee.

PER CURIAM. The appellant's claim was presented at the audit of the first account of the receiver, testimony taken in regard to it, and the auditor passed upon it adversely, but before his report was confirmed the claim and the evidence upon it were withdrawn by leave of the court. Upon the audit of the receiver's second account the claim was again presented, and after testimony had been taken in regard to it, the claimant demanded an issue. This the auditor refused, on the grounds that, all facts being before him, there was no occasion for an issue, and, further, that the demand was too late. This raises the first question in the case.

The rule of the court below on the subject of auditor's reports, provides for a hearing on exceptions to confirmation, etc., and that "if the court think that a question of fact ought to be tried by a jury, it may order an issue or issues for the purpose." It would have been more regular for the auditor to have followed the rule strictly and instead of refusing the issue himself, to have reported the demand and the evidence to the court. Whether or not the demand was too late was not clear, as it might depend largely on the court's view of its previous order allowing the withdrawal of the claim from the first audit. But this error of the auditor, whether material or not, was cured by the subsequent action of the court which reviewed the whole matter and confirmed the result arrived at by the auditor. Where a matter is within the discretion of the court, as this clearly was, and the substance of the rule is observed, a departure by the court from the form of the rule is immaterial.

The second question is upon the sufficiency of the evidence to sustain the claim. The only testimony was by the appellant herself, her husband and their son, who testified that the policy was taken out by the husband for the wife, in pursuance of a previous agreement between them; that when it was delivered to him he took it home and gave it to his wife saying it was hers; that she put it in a box they had "for keeping papers in," and she retained that possession until it matured; that she "looked after the payment of the premiums," though they were

paid with his money, because he "had the money lying with the firm, and drew on the firm and gave her the money"; and that he was not in debt at that time. Against this the evidence, as summed up by the auditor, was that the policy was taken out by the husband on his life, to mature in 15 years, payable in case of his death before maturity to his wife, and at maturity to himself. He lived until the policy matured. It was paid to him, in a check to his order, deposited in his name in the bank, though the deposit was claimed to have been actually made by the wife, and shortly thereafter a part of it checked out by him and given to the firm of which he was a member. Furthermore, part of the proceeds of the policy was given by Mr. Moulds to his son, a part used by him to pay a debt of his to the bank, and a part used for payment of the household expenses of the Moulds' home. The auditor therefore found that the title to the money had never passed out of the husband, and accordingly rejected the claim.

On exceptions, the court reviewed the whole case, and, though taking a somewhat more lenient view of the appellant's testimony, yet came to the same conclusion as the auditor. "The claim is contradicted," he said, "by every record in the case," and, conceding that every word of the appellant's testimony and her husband's might be true, yet as a whole it is not clear and convincing, and falls short of the standard required to establish such a claim against creditors. This conclusion was irresistible.

Decree affirmed.

BEAVER VALLEY WATER CO. v. CONWAY BOROUGH.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. WATERS — WATER COMPANIES — USE OF STREETS.

Where a water company is required to obtain a permit from the town council, under a borough ordinance, before laying its mains in the streets, the application must be made to the council, and not to the burgess.

2. SAME—REASONABLE REGULATIONS.

A borough ordinance, requiring a water company to apply for permission to lay mains in the streets to the town council, is a reasonable regulation.

Appeal from Court of Common Pleas, Beaver County.

Suit by the Beaver Valley Water Company against the borough of Conway. From a decree continuing preliminary injunction, defendant appeals. Reversed.

The court below (Wilson, P. J.) found the following facts:

"(1) The plaintiff, the Beaver Valley Water Company, is a corporation of the commonwealth of Pennsylvania, organized and existing under an act of assembly approved April 29, 1874 (P. L. 78), and the defendants are a municipal corporation in the county of Beaver.

"(2) The plaintiff company has a right to lay its water mains in the streets and alleys of the borough of Conway for the purpose of supplying water to the inhabitants, subject to only such regulations as may be lawfully imposed by the proper authorities of said borough.

"(3) On March 14, 1903, Ordinance No. 6, was approved by the burgess, after it was enacted by the town council and provides as follows:

"An ordinance regulating the opening of streets in the borough of Conway and providing a penalty for the violation thereof.

"Be it enacted and ordained by the town council of the borough of Conway, and it is hereby enacted and ordained by the authority of the same, that it shall be unlawful for any person or persons, corporation or corporations, to enter upon any of the streets and excavate same for the purpose of laying pipe or pipes for the transportation of gas or water or any other substance without first obtaining a permit from the town council of said borough granting them permission so to do.

"Any person or persons, corporation or corporations violating the provisions of the foregoing ordinance, shall upon conviction thereof before the burgess or any justice of the peace of said borough, forfeit and pay for the use of said borough a fine of not less than \$25.00 nor more than \$50.00, and in case of failure to pay said fine so imposed, shall be committed to the county jail for a period of not more than one day for each dollar of fine so imposed and not paid."

"(4) At No. 13, June term, 1903, in the matter of a bill in equity filed by the borough of Conway against the Beaver Valley Water Company, this court adjudicated and determined the rights of the plaintiff in the premises, and therein held and decreed that the plaintiff company had the right to enter upon the streets and alleys of the borough of Conway without the consent of the town council, subject only to such reasonable regulations as the proper authorities of said borough should impose.

"(5) On April 12, 1905, John T. Taylor, general manager of the plaintiff company, desiring to open certain streets in said borough for the purpose of laying water pipes to supply the inhabitants of said borough, at their request, with water, applied to the chief burgess for a permit, and was refused, being informed at that time that the town council had directed him (the burgess) not to grant the permit, and further stated that the plaintiff company had no rights upon the streets of the borough."

The court entered a decree continuing the preliminary injunction.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Forest G. Moorhead and Edwin S. Weyand, for appellant. William A. McConnell and Lyon, McKee & Mitchell, for appellee.

ELKIN, J. The only question arising on this appeal is whether the ordinance requiring the water company to obtain a permit from the town council before proceeding to lay its mains through the streets of the borough is a reasonable regulation within the meaning of the act of assembly. The defendant borough, through its town council, passed an ordinance which in substance provides that before any gas or water company shall enter upon the streets or alleys thereof, for the purpose of laying mains or pipes, a permit must be obtained from the town council. It is contended here, and the court below so held, that this is an unreasonable regulation, and therefore void and of no effect. The plaintiff averred in the bill filed that the ordinance in question was unreasonable and was passed with the expectation and intention of depriving plaintiff from exercising its right to enter upon the streets and alleys of the borough. The learned court below granted a preliminary injunction on the ground that the ordinance was unreasonable, because uncertain, and made the right of the plaintiff to enter upon the streets for the purpose of laying its water mains dependent upon the humor or caprice of the town council.

The facts do not justify the conclusions reached in these respects. The town council cannot act arbitrarily or capriciously in such matters, and, if any such attempt be made, the courts, if applied to, would promptly and effectively grant the necessary relief. In this case, however, defendant disavows any such intention, and there is nothing in the evidence to show that it is not acting in good faith. The borough has a right to know what streets are to be occupied, how long they are to be torn up while excavating and laying pipes, and at what place and in what manner the mains are to be laid. It is proper and reasonable that these things should be considered when a permit is granted. What more reasonable regulation could be made than that a water company, about to enjoy the privilege and exercise the franchise of laying its mains on the streets of a borough, should first apply to the town council for a permit, which must issue as of course upon compliance with such reasonable regulations as may be imposed by that official body.

It is argued that the provisions of the ordinance were complied with by making application for a permit to the burgess, which was refused. The answer to this contention is, an application to the burgess is not a compliance with the ordinance. The application should have been made to the town council, and this was not done. The ordinance was a reasonable regulation imposed by the proper authorities, and therefore valid. It

was not complied with in the matter of obtaining a permit from the town council, and the plaintiff is not entitled to the relief prayed for.

Order and decree of the court reversed, at the cost of the appellee.

BURNS v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. TRIAL—OBJECTIONS TO EVIDENCE—PURPOSE OF OFFER.

Where plaintiff offers evidence without showing the purpose, and defendant objects, assuming that it is inadmissible for a certain purpose, the court cannot assume that another and legitimate purpose was intended.

2. SAME.

In an action for an accident at a crossing, plaintiff offered evidence that no gates or watchmen were at the crossing, and defendant objected, on the ground that it was not required to erect gates or place watchmen at such crossing. *Held* error to overrule an objection on the ground that the evidence was admissible to show the speed reasonably consistent with public safety at the crossing, where plaintiff did not claim to introduce it for that purpose.

3. SAME—INSTRUCTIONS—IGNORING EVIDENCE.

Where, in an action by a wife to recover for the death of her husband, two witnesses testified as to the wages received by the decedent, and the timekeeper of the company in whose employ he was at the time of his death testified that he only received one-half of such amount, it was error in charge to refer only to the testimony of the two witnesses, without reference to the testimony of the timekeeper.

4. SAME—APPLICATION TO EVIDENCE.

Where the evidence shows that an accident was caused by a person getting into a position of danger, and not in attempting to get out of such position, it was error to instruct as to the law where one is lawfully in a position of danger and is injured in attempting to escape.

Appeal from Court of Common Pleas, Cambria County.

Action by Catherine Burns against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

At the trial plaintiff was asked this question: "Q. Please state whether there were any gates or watchmen stationed at that crossing. A. No, sir. (Objected to as being incompetent and immaterial and improper, because it is not required of the company that it shall erect safety gates or place watchmen at crossings of this character. The Court: The objection is overruled, exception noted, and bill sealed for the defendant company. We do not hold by this ruling of the court that the company is obliged to station watchmen or to erect gates at the crossings, but we believe it to be a fact which the plaintiff is permitted to prove in the case.)"

The court charged in part as follows:

"Mrs. Burns, his wife, has testified that his check amounted to from \$35.00 to \$40.00 every two weeks; and the evidence of Mr.

Theiss was that his wages averaged from \$75.00 to \$80.00 per month."

"In view of the arguments of counsel in the case and the suggestion of counsel for the plaintiff, without having submitted a special point, we instruct you that, where one is lawfully in a position of danger, he is not required to exercise the same cool, deliberate judgment that might be required of him under different circumstances; if in attempting to evade danger he makes a mistake and does not employ the best means of escape, he is not held responsible. As we suggested, we do not see how this question can be seriously considered in the case, but we may not view it as the counsel do, and we will let you pass upon it."

Verdict and judgment for plaintiff for \$12,537. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

H. W. Storey, for appellant. E. T. McNeelis, for appellee.

STEWART, J. This case was before us in 210 Pa. 90, 59 Atl. 687. It is unnecessary to repeat the facts here. Sufficient to say that it is an action brought by a wife to recover damages for the death of her husband, who was killed by a passing train while attempting to pass over the tracks of defendant company, at a public crossing in the suburbs of Johnstown, on the morning of January 9, 1903. In this second appeal we have 31 assignments of error. The number would not be nearly so great, had proper effort been made to avoid unnecessary duplication. It would have been lessened materially, had the distinction in function between court and jury been kept in mind; while several, not otherwise open to criticism, would have been omitted, if what was said by this court in 210 Pa., 59 Atl., *supra*, had been closely observed. It would, without serving any good purpose, extend this opinion to unreasonable limits, were we to discuss each separate assignment. All have been considered. Those to which we make no special reference may be regarded as dismissed, and the reasons may be gathered from the observation above.

We pass directly to the consideration of the ninth, which complains of error in the ruling that permitted plaintiff to show the absence of safety gates and watchmen at the crossing where the accident occurred. When the witness on the stand was interrogated as to this, nothing was said as to the purpose, nor was any demand made that it be expressed, but an objection was promptly made that indicated very clearly what the objecting counsel supposed the purpose to be; the ground stated in the objection being incompetency and immateriality, "because it is not required of the company that it shall erect safety gates, or place watchmen, at crossings of this character." If the purpose

was to ascribe negligence from failure to have gates and watchmen at the crossing—and that is what the objection as stated assumes—the objection should have been sustained, both in view of the law and the pleadings in the case, except as another and competent purpose had then been asserted. The plaintiff failing to disclose any purpose, and failing to disclaim that attributed in the objection, the court should, of its own motion, have required the purpose to be expressed, or have ruled the matter as though the purpose was what the objection said it was. The court adopted neither course, but overruled the objection, with the observation that "we do not hold by this ruling that the company is obliged to station watchmen or to erect gates at the crossing, but we believe it to be a fact which the plaintiff is permitted to prove in the case." This was begging the question. The plaintiff's right to prove the fact depended on the use it was proposed to make of it; and, in the absence of any disclaimer from plaintiff that the purpose was what was expressed in the objection, the court had no right to assume that another and legitimate purpose was intended. The language used by the learned judge shows clearly that he understood the objection to be directed to a particular purpose, which he admitted would make the evidence inadmissible. It was admissible for one purpose only. That flagmen are not stationed at the crossing, and that gates are not maintained there, are matters proper to be considered in connection with other facts in a given case, in determining the rate of speed which is reasonably consistent with public safety. *Lehigh Valley Railroad Co. v. Brandtmaier*, 118 Pa. 610, 6 Atl. 238. The negligence charged here was the excessive rate of speed, under the condition there existing. Failure to maintain gates or keep watchmen at the crossing was not charged in plaintiff's statement as negligence, except as connected with disregard of a borough ordinance, which we held, when the case was here before, imposed no duty or obligation on the defendant company. The only legitimate purpose for which the evidence could be used was to exhibit to the jury the situation and conditions where the accident occurred, so that they might the more intelligently pass upon the question in issue, *viz.*: Was the speed of the train reasonably consistent with public safety, or was it not?

We remark further that, while the evidence would have been admissible for the purpose above indicated, yet, because of the danger which must always attend the introduction of such a fact, in a case of this character, of its significance being misapprehended, its admission should always be followed by proper instructions from the court as to how it is to be considered and applied by the jury. Not only was there failure in the court to instruct the jury as

to the effect they were to give the evidence, but the observation of the court, "that it was a fact which the plaintiff is permitted to prove in the case," admitted it into the case with unbridled license, to serve any purpose the jury might ask of it. The preceding remark, that by the ruling "the court did not hold that the company was obliged to station watchmen or erect gates at the crossing," did not restrict it, since the inference that the average juror would be likely to derive from the observation would be that, being a question of fact, and not of law, it was for the jury to decide whether the company was guilty of negligence in this particular. They had the fact before them, to make some use of, and were left to guess in what way it should be applied. Apart from this consideration, however, we are of opinion that, as the matter stands on the record, having regard to the question asked, the want of an offer as to purpose, and the objection stated, the objection should have prevailed. In so holding we do not overlook the rule, so repeatedly recognized, that, where evidence is pertinent for any purpose, its admission is not error. This rule applies only where the objection made was general. Here it was specific.

The thirtieth assignment complains that the court's charge was inadequate and unfair on the question of damages, in that, while reference was made to the testimony of each of the plaintiff's witnesses in relation to the earning capacity of plaintiff's husband, no reference whatever was made to the testimony on this point by the defendant's witnesses. The examination of the court's charge shows this statement to be entirely correct. The deceased had been a puddler employed at the Cambria Steel Works, and his employment there had continued 13 or 14 years. The two witnesses called by the plaintiff, neither of whom can be supposed to have any more accurate knowledge on the subject than the witness for defendant, testified that he was accustomed to receive from \$70 to \$80 per month in wages. The witness called by the defendant was the time officer of the company that employed the deceased. He testified that for the year 1903, the year

immediately preceding the accident, the deceased had received in wages the sum of \$640.02, and for the year preceding that, the sum of \$663.94. Here was a marked difference, not attempted to be explained, yet no reference whatever to it in the charge, but specific reference to the evidence which fixed the yearly earnings at a sum in excess by \$300, or nearly so, of the amount testified to by defendant's witness. The general effect of the charge on this branch of the case, in wholly ignoring the testimony for the defendant, and calling attention to the testimony for the plaintiff, would most likely be to create the impression in the minds of the jury that the testimony referred to was conclusive on the subject. Their attention was called to no other. It was not simply an inadequate presentation of the evidence on an important feature of the case, but is fairly open to the criticism that it was one-sided as well. We express no opinion on the amount of the verdict; that was exclusively for the jury. What we do say is that we cannot be made certain that it would have been the same, had the evidence on this point been adequately and fairly commented upon and submitted by the court. This assignment is sustained.

There is nothing in the case that called for the instruction given by the court, as to the law governing cases where one lawfully in position of danger is injured in attempting to escape. Plaintiff's husband was killed in consequence of his getting on the tracks, not as a result of an effort to get off. There were enough questions in the case to engage the serious attention of the jury without importing others that were without relevancy. This of itself might not constitute reversible error; but, when followed by an express direction to the jury, as was the case here, to pass upon it, that is, upon a question of fact absolutely without support in the evidence, the error becomes of too serious import to pass by with simply a word of disapproval. The thirty-first assignment is sustained.

For reasons thus stated, the judgment is reversed, and a venire de novo awarded.

In re WILMINGTON AVE.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENT.

Where, in one proceeding, there were included the opening of a part of a street on a new location, the widening of the part that had been opened before, and the grading of the whole, an assessment of damages and costs was not illegal, where the whole improvement was provided for by one ordinance and done under one contract.

Appeal from Court of Common Pleas, Lawrence County.

In the matter of Wilmington avenue. From an order dismissing exceptions to report of viewers, Joseph S. White appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

S. W. Dana, Robert K. Aiken, W. H. Falls, and Richard F. Dana, for appellant. James A. Gardner, City Sol., for appellee.

FELL, J. This appeal is from an order confirming the report of viewers assessing the damages, costs, and expenses of a street improvement. The single question raised by the appeal is whether the assessment against the appellant's land is illegal because there were included in one proceeding the opening of a part of a street on a new location, the widening of the part that had been opened before, and the grading of the whole. Wilmington Road enters New Castle from the north, and formerly connected with Jefferson street at Wallace avenue. The line of the road was a few degrees west of the line of the street, and an obtuse angle was formed at the point of connection. Jefferson street was extended, of its full width of 80 feet, 850 feet north of Boyles avenue, and was opened and graded under a separate ordinance and contract, and the damages were assessed under a separate proceeding. At Boyles avenue the location of the road was changed for a distance of 500 feet, so as to meet Jefferson street as extended. The new part was laid out of the width of 60 feet, and it was provided that the old part should be widened to correspond with this width. The result of the change was that in place of the road 50 feet wide an avenue, partly on new land and partly on the old roadbed, was laid out of the width of 60 feet in a straight line from Jefferson street to the north limit of the city. The opening of the new part, the widening of the old part, and the grading of the whole were provided for by one ordinance and done under one contract.

The appellant's contention is that the extension of Jefferson street and the construction of the new part of Wilmington avenue constituted one improvement, and the widening and grading of the old part of the avenue another distinct improvement, and that

in a proceeding to assess costs and expenses there could not be included with the latter the opening and grading on the new location. To this contention it is sufficient answer that the appellant has no just ground of complaint, unless his property at the north end of the avenue was improperly assessed for damages for land taken at the south part, or for costs to which it should not have been subjected. No objection is based on this ground. There were no exceptions to the amount of the assessments made by the viewers, and it appears from their report that the properties at the north end of the avenue were not assessed to pay for the taking of land on which they did not abut. Presumably the costs of widening and grading were properly apportioned and assessed. But the improvement of Wilmington avenue north to the city line was a single improvement, which included the opening and widening to established lines, and the grading for the entire length, including the bed of the old road. It was so treated by the city authorities in directing the work to be done and in contracting for it as a whole.

The order dismissing exceptions and confirming the report is affirmed, at the cost of the appellant.

LITTLE v. CENTRAL DISTRICT & PRINTING TELEGRAPH CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. TELEGRAPHS AND TELEPHONES—USE OF HIGHWAY—STATUTORY LIMITATIONS.

The right of a telegraph and telephone company conferred by Act April 29, 1874, § 33 (P. L. 92), to place its poles on public highways, must be exercised within the statutory limitations.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 6.]

2. SAME.

Act April 29, 1874, § 33 (P. L. 92), conferring on telegraph and telephone companies the right to place their poles on public highways, does not deprive the public of the use of the highways for any proper and reasonable means of travel, and the companies must exercise the franchise granted to them in subordination to the rights of the public.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 6.]

3. SAME—INJURIES FROM CONSTRUCTION OF POLES.

A telephone company which places its poles so near the traveled portion of a highway that a person seated on a wagon, with his feet extending about one foot from the side of the wagon, is injured by coming in contact with the pole, is liable for such injury.

4. HIGHWAYS—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

Whether a person riding on a wagon was guilty of contributory negligence in permitting his feet to extend beyond the side of the wagon, so that they came in contact with a telephone pole standing near the traveled portion of the highway, was a question for the jury, where the danger was not so apparent that a reasonably prudent person would not have taken the risk.

5. NEGLIGENCE—VICARIOUS NEGLIGENCE.

Where the driver of a private conveyance is not employed by the person riding therein, the negligence of the driver cannot be imputed to such person.

Appeal from Court of Common Pleas, Butler County.

Trespass by Eleanor C. Little against the Central District & Printing Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

At the trial the court, after reading to the jury section 33 of the act of April 29, 1874, (P. L. 92), charged, *inter alia*, as follows:

"So, gentlemen, you will see under the law the defendant company had the right to place its poles along or upon the public highway, but in so doing it must not so place them as to incommode the public use of the highway. As you all know the public highways are created in the first instance and principally for the use of the travelers upon them, and that public use must not be rendered dangerous or inconvenient by telegraph companies in placing poles upon it. Now, gentlemen, the company had therefore the right to place its poles upon the public highway; it did not have the right and would not have the right to place the poles upon the traveled portion of the road. You understand what is meant by that, the part that customary travel occupies and takes on the public highway. It would not have the right to plant its poles on that portion of the highway, and I would say it would not have the right to place its poles in such near proximity to the traveled track of the highway as to render the highway unsafe or inconvenient. In placing its poles so as to not incommode the use of the highway, therefore, we think it should not place its poles in a position to render inconvenient and unsafe public travel along the highway. If in placing them, they are located upon the traveled portion of the public highway, the traveled track, that, gentlemen, it would go without saying, would be placing them where they would inconvenience, at least, the travel. If placed in such close proximity to the traveled or beaten track as to make probable or natural that a person driving along in the daytime or nighttime would meet with an accident, and receive an injury, such placing of it would be a placing so as to incommode the public use of the highway.

"Now, gentlemen, the company had therefore the right to place its poles upon the public highway; it did not have the right and would not have the right to place the poles upon the traveled portion of the road. You understand what is meant by that, the part that customary travel occupies and takes on the public highway. It would not have the right to plant its poles on that portion of the highway and I would say it would not have the right to place its poles in such near proximity to the traveled track

of the highway as to render the highway unsafe and inconvenient. In placing its poles so as to not incommode the use of the highway, therefore, we think it should not place its poles in a position to render inconvenient and unsafe public travel along the highway. If, in placing them, they are located upon the traveled portion of the public highway, the traveled track, that, gentlemen, it would go without saying, would be placing them where they would inconvenience, at least, the travel. If placed in such close proximity to the traveled or beaten track so as to make probable or natural that a person driving along in the daytime or nighttime would meet with an accident and receive an injury, such placing of it would be a placing so as to incommode the public use of the highway.

"The question as to where this pole was placed with reference to the traveled or beaten track of the highway is a matter somewhat in dispute. On part of the plaintiff it is alleged this was placed in 1896 in what was at that time a portion of the traveled track of the highway. You have heard the witnesses who testified to that effect, I believe Mr. Shannon, possibly Mr. Cashdollar and others. They say they have known the road for quite a number of years, and at the time when the pole was placed there it was placed on a portion of the public highway then used for the driving of vehicles over it. If that were true that would, we think, be an encroachment on the highway not authorized or intended by the act of assembly, or, if the company placed it in such near proximity to that traveled or beaten track as to naturally and probably lead to results such as complained of in this case, then we think that, gentlemen, would be placing it so as to incommode the public highway, and such as not warranted by the act of assembly.

"You remember also the testimony of the witnesses for the defendant as to where the pole was located with reference to the traveled track as now and formerly was. Some state there is grass growing on the location now. You will take that fact into consideration in connection with the other testimony, and the time that elapsed since the pole was placed there, and from all the testimony you will conclude whether or not that pole was placed upon the traveled track at that time, in which case we think it would be negligence on their part, or if not placed on was in such close proximity as to render probable such an injury as complained of in this case.

"On the part of the defendant it is argued and contended here that it was negligent of Miss Little to be riding in the nighttime in the manner in which she was. Now, gentlemen, we may say to you that public roads are made for all sorts of proper travel upon them and with all kinds of vehicles such as are usually used by persons travel-

ing upon the roads, and we may say to you that all have a right to travel upon the public highways in parties under conditions such as the parties were traveling under in this case, and have a right to travel if they wish to travel upon hay ladders with hay upon them and also in the nighttime.

"So that in the location of the pole on the highway the defendant may be charged with the knowledge that persons may travel with all manner of vehicles reasonable and proper, and may travel in the nighttime as well as in the daytime, and further charged with the knowledge and fact that the nights sometimes are dark. All those things enter into the question of the determination of the defendant's negligence, and also into the question of the determination of the plaintiff's contributory negligence.

"It has been argued, and the court has been asked to say, that it was negligence on the part of the plaintiff riding on hay ladders with her feet extending out for some little distance over the bow of the wagon. We feel that we could not say this as a matter of law. That is a matter of fact to be passed upon by the jury, and it is for you to say from your knowledge of affairs and your experience as men in the country and passing over the highways, as to whether or not this was a dangerous or negligent position for the plaintiff to assume in riding in that way at that time.

"And I may say to you just here that under the law as it stands in this state at this time it does not seem that the negligence of the driver of a private conveyance can be attributed to those with him. It seems to be settled in this state that the others cannot be held for the negligence of the driver. It was a matter of some controversy for a long time, but now the law seems to be settled in that way. So that even if the driver in this case was negligent that negligence could not be charged up to the plaintiff in this case as contributory negligence on her part because she would not be held for the negligence of the driver."

Verdict and judgment for plaintiff for \$4,250. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

S. F. Bowser and A. L. Bowser, for appellant. Lev. McQuiston and John H. Wilson, for appellee.

MESTREZAT, J. On the evening of July 17, 1903, a party of 27 young ladies and gentlemen drove from Callery to Harmony, a distance of about 8 or 9 miles, in Butler county, to attend a social function at the latter place. The vehicle was a farmer's ordinary hay wagon, and was drawn by two horses. The rack or ladders on the wagon were covered with hay and the members of the party were seated at different places on

the hay. Frank Kramer drove the team on this occasion. He was a window glass cutter by trade, but at this time was in the employ of the Ball & Cooper Coal Company, the owner of the horses and wagon which carried the party to Harmony. While he was the driver of the team, the evidence does not show that he was a member of the party, nor does it show all the persons who composed the party. Nor is it disclosed by the evidence whether the owner of the team furnished it gratuitously for the occasion or was compensated for its use, or whether Kramer was paid for his services as driver, or whether they were rendered without compensation. The party left Harmony about midnight to return home. As the wagon was passing along the public road it came in contact with one of the defendant's telephone poles—"slightly, just enough to allow it to slide past"—and Miss Little, the plaintiff, was struck by the pole, knocked from the wagon, and injured. The pole was on the west side of the highway, and she was seated on that side of the wagon with her feet extending about a foot out over the bow of the hayrack, which was over the rear wheel. Kramer sat in front, and was driving in a slow trot. The road where the accident occurred is a public highway and runs north and south along a hillside which descends from east to west. The width of the traveled part of the road east of the pole, exclusive of the gutter on the east side, is about 13 or 14 feet, and is practically level, except possibly a slight descent from the west to the east side with a slight rise in the middle. Brush grows on both sides of the road. The telephone line was constructed at this point in 1896. The plaintiff's statement avers that the road where the accident occurred "is a regularly ordained, laid out, opened, used, and traveled public highway," and that the defendant company negligently and unlawfully placed the pole "in and upon the said public road, and upon the usual traveled portion of the said road, and the said defendant company has negligently, wrongfully and unlawfully maintained the said telegraph or telephone pole in and upon the said public road and the traveled portion thereof for several years last past, and yet continues to so maintain the same." It is claimed that the alleged negligent action of the defendant company in placing its pole on the public highway caused the injury sustained by plaintiff for which this suit was brought.

On the trial of the cause, the court submitted to the jury, with very full instructions, the alleged negligence of the defendant company as well as that of the plaintiff. The result was a verdict for the plaintiff, and the defendant has appealed, claiming that the court erred in the admission of certain testimony, in the charge to the jury, and in the answers to its first, fourth, sixth, and eighth points; the last of which re-

quested binding instructions for the defendant company. We have read very carefully the testimony and cannot see how the case could have been withdrawn from the jury. The credibility of the witnesses was for the jury and there was sufficient testimony, if believed, to warrant the finding that the telephone company had placed its telephone pole on the traveled portion of the highway, or in such close proximity to it as to endanger the safety of persons using the road, or, in the language of the act of 1874, "as to incommode the public use of said road." Section 33 (P. L. 92). Without quoting the testimony it is sufficient to say that several of the witnesses testified to this fact. While these witnesses vary in their estimates of the distance from the west side at which the pole stands within the traveled part of the road, they all say it is on the traveled part of the highway and that it is an obstruction to the use of the road by the public. The question was, therefore, for the jury.

The right of the defendant company to place its poles on the public highways of the state is statutory, and while the act conferring the franchise must not be construed so as to defeat the grant, yet the company must exercise its franchise within the statutory limitations. The authority by which a telegraph or telephone company is empowered to construct its lines on the public highways of this state is conferred by the act of April 29, 1874 (P. L. 92; 2 *Purd. Dig.* 2001), the 83d section of which provides that "such corporation shall be authorized * * * to construct lines of telegraph along and upon any of the public roads, streets, lands, or highways * * * within the limits of this state, by the erection of the necessary fixtures, including posts * * * for sustaining the cords or wires of such lines, but the same shall not be so constructed as to incommode the public use of said roads, streets or highways." * * * There can be no doubt as to the proper interpretation and the meaning of this legislation. The language is explicit and the purpose of the statute is manifest. The power to construct its lines "along and upon" a public highway is granted to the corporation in plain terms. Such was the evident purpose of the act. But equally clear and explicit is the language employed by the Legislature in the enactment in prescribing a limitation upon the power of such corporation to enter and construct its lines upon the highways of the state. Its right to use the public highways in the construction and maintenance of its lines was qualified and prohibited to the extent that the public should not be inconvenienced in the proper use of the highways. Its line, says the act, "shall not be so constructed as to incommode the public use of said roads, streets or highways." This limitation made the use of highways by a telegraph company secondary and subordinate to that of

the public for which the roads of the state were primarily intended. The Legislature did not intend, by this legislation, to deprive the public of the use of the highways for any proper and reasonable means of travel, but intended that the franchise granted telegraph companies by the act should be exercised in subordination to the rights of the public on the roads of the state. Such, we think, was the manifest purpose of the act of 1874.

A like interpretation was put upon a similar statute of Ohio by the Supreme Court of that state in *Cincinnati Inclined Plane Railway Company v. Telegraph Association*, 27 N. E. 890, 12 L. R. A. 534, 29 Am. St. Rep. 559. In that case Mr. Justice Dickman, delivering the opinion of the court, says (page 896 of 27 N. E., page 567 of 29 Am. St. Rep. [12 L. R. A. 534]): "The authority given by statute to a telephone company to construct its lines from point to point, along and upon any public road, under the continuing prohibition that 'the same shall not incommode the public in the use of such road,' would plainly indicate an intention on the part of the Legislature that the company shall exercise such franchise with reference to the comfort and convenience of the traveling public, and shall not, in any manner, abridge or impair the use, by the public, of the most approved methods of travel and transportation. And a reasonable interpretation of the statute would lead to the conclusion, that to impair the public enjoyment of an approved method of conveyance on the streets, would be in derogation of the statutory prohibition that the public shall not be incommoded in the use of the roads or highways."

The errors assigned to the charge raise the question of the proper interpretation of the act of 1874, but we think the learned judge construed the act substantially in conformity with what is said above. In the case at bar it conclusively appeared from the evidence that there was ample space along the highway for placing the pole in question without planting it in the traveled part of the road, or so near to it that it would inconvenience or interfere with those who might use the highway. The legal width of the road is 33 feet, and but 17 feet were used for the roadway and for the gutter on the east side. The evidence did not disclose on which side of the traveled part was the unused portion of the 33 feet. It is apparent, however, that there was no necessity for placing the pole in a position that would obstruct the use of the road. The plaintiff's negligence was a question for the jury. It is not of itself negligence for a person riding in a wagon on a public highway to permit his feet or arms to extend beyond the side of the vehicle. When one is injured while occupying such position, it is for the jury to determine whether he was at the time exercising the care required by the circumstances, unless

the danger was so apparent that a reasonably prudent person would not have taken the risk. In that event, the court may hold him negligent as a matter of law. Here the testimony clearly sent the question to the jury. Nor can the driver's negligence be imputed to the plaintiff under the facts disclosed by the testimony in the case. The evidence shows simply that at the time plaintiff was injured she was being carried in a private conveyance owned by the coal company, which was driven by a person engaged in the company's service. Under such circumstances it is settled by recent decisions of this court that the negligence of the driver is not imputable to one who is injured while being carried in the conveyance. *Carlisle Borough v. Brisbane*, 113 Pa. 544, 6 Atl. 372, 57 Am. Rep. 483; *Dean v. Pennsylvania Railroad Co.*, 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733; *Jones v. Lehigh & New England Railroad Co.*, 202 Pa. 81, 51 Atl. 590.

We see no error in the court's answers to the defendant's first, fourth, and sixth points. If there was error in admitting the testimony of John Ficht, a witness for the plaintiff, which is the subject of the first assignment, it was cured by the immediate order of the court striking out the testimony.

The assignments of error are overruled, and the judgment is affirmed.

LILLEY v. PITTSBURG, V. & C. RY. CO.
(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. EMINENT DOMAIN—PROPERTY SUBJECT.

An agreement by a railroad company to pay a certain sum of money to construct cattle guards and make a number of wagon roads over its tracks, in consideration of the grant of a right of way, is severable, so that the right to the wagon roads may be condemned by the railroad company, under Act March 17, 1869 (P. L. 12; 2 *Purd. Dig.* 1798), for the purpose of widening its roadway.

[Ed. Note.—For cases in point, see vol. 18, *Cent. Dig. Eminent Domain*, § 104.]

2. RAILROADS—CONTRACTS—PRESUMPTION.

The presumption is that a contract by a railroad company in obtaining a right of way was not intended to barter away its right to make necessary improvements, as contemplated by Act March 17, 1869 (P. L. 12; 2 *Purd. Dig.* 1798), authorizing the widening of rights of way.

Appeal from Court of Common Pleas, Washington County.

Action by Thomas Lilley against the Pittsburgh, Virginia & Charleston Railway Company. From a decree for defendant, plaintiff appeals. Affirmed.

The following are the findings of fact and conclusions of law in the court below:

"Facts found: (1) Thomas Lilley, the plaintiff, is the owner of a tract of land in East Pike Run township, in this county, containing 232 acres more or less, over which the Pittsburgh, Virginia & Charleston Railway Company, the defendant, in the year 1876 (or near that time) constructed its railroad

and has ever since operated the same. The ground occupied by the defendant company as a right of way for the track of its road in 1876 over this farm—for a valuable consideration—was 'granted, bargained, sold, and conveyed' to it by the father of the plaintiff, who then owned the farm, and the plaintiff took title to the farm subject to the defendant company's easement thus conveyed to it. The defendant's way, as described in said conveyance, was 60 feet 'in width at grade, and such additional width as may be required and necessary in the construction of said road at cuttings and embankments to make 60 feet wide at grade and extending in length as far as the said road may pass over' said farm. In the writing dated April 12, 1876, in which this grant is made, the then owner of the farm also released any claim for damages, in these words: 'And I hereby for myself, my heirs and assigns release the said Pittsburgh, Virginia & Charleston Railway Company from any and all damages resulting to me by the location and construction of said railway through my said land, provided said railway company pay me before they enter on said land the further sum of \$250 (that is in addition to the sum paid for the grant of the right of way) and make cattle guards at each end of my line where it is now inclosed, and do not damage my springs, and give me at least five wagon roads under their track or at grade through my farm and remove any buildings at their own expense.'

(2) There is no complaint in plaintiff's bill that the money consideration of the grant to the railway company of the right of way in question, or for the release of damages, have not been fully paid, nor is there any claim that the cattle guards were not built, nor that any springs have been injured, nor that 'the five wagon roads under their track or at grade' were not given. (3) The defendant company, in the year 1890, and now again in the year 1904, seeks to condemn more land on each side of the 60 feet right of way; and in the petition for approval of the bond tendered in the year 1904, and now on file to No. 158, August term, 1904, on the law side of this court and pending for approval, it avers that it seeks also to condemn four of these wagon roads and the right to change the other. The language is as follows: 'Also all the right, title and interest of said Thomas Lilley in four of the grade crossings as claimed by said Thomas Lilley under the release of Thomas Lilley dated April 12, 1876, which calls for five crossings. For the fifth crossing called for by said release the company are to construct an underground or overhead crossing, whichever may be more suitable for a crossing at the point chosen by Mr. Lilley.' The land sought to be condemned in 1890, and to secure the damages for the condemnation thereof for which a bond was then filed to No. 216, February term, 1890, is on and adjoins the

east side of the right of way granted in 1876, and contains in all about $11\frac{1}{4}$ acres. This land has not all yet been actually used by the railroad company, and a view to assess damages has not been held. The land sought to be condemned in 1904, and to secure the damages caused thereby for which the bond was filed for approval to No. 156, August term, 1904, is almost entirely on and adjoins the west side of the right of way granted in 1876, and contains about $6\frac{1}{4}$ acres. (4) The directors of the defendant company have by proper resolution appropriated these additional strips of land on the east and west side of their old right of way, because they believed the land was necessary for the present and future needs of the company, and they intend eventually to cover it all with additional tracks and sidings as a place for the storing and distribution of empty and loaded freight cars, and no more land has been taken than the civil engineer of the company believes is necessary. (5) The plaintiff denies the right of the defendant company to condemn and appropriate the road crossings provided for in contract of April 12, 1876.

"Conclusions of law: (1) That the plaintiff is not entitled to equitable relief, and the restraining orders prayed for should be refused and plaintiff's bill dismissed. (2) That the petition and bond filed to No. 156, August term, 1904, is not an attempt to rescind any part of the agreement of April 12, 1876, executed by it and Thomas Lilley, deceased."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. B. Rodgers, J. W. Kraus, W. S. Parker, Winfield McIlvaine, and Norman E. Clark, for appellant. A. M. Todd and J. A. Wiley, for appellee.

MESTREZAT, J. The learned trial judge has found and clearly stated all the material facts of the case, and in his opinion has fully vindicated the decree which he directed to be entered. The only question in this case is the right of the defendant company to condemn the four grade crossings which the plaintiff claims he is entitled to under the contract of April 12, 1876. It is clear, we think, that this is a severable and not an entire contract. The clause relating to the damages and the wagon roads across the tracks to be given Mr. Lilley may be omitted from the contract, and still the grant of the right of way will have a valuable consideration to support it and be enforceable against the grantor. The conveyance is complete without this clause, and vests in the railroad company the easement through the farm of Mr. Lilley. The only plausible theory, and the correct interpretation of the contract, therefore, is that suggested by the trial judge that the release

of damages was intended to release the railway company from any damages which, by the construction of the railroad, might result to that part of the farm outside the right of way. These damages may have been released by the grant of the easement, as has been held in some jurisdictions, but the parties thought the release necessary to relieve the company from damages, and for that reason it was inserted in the conveyance. Following the release is the proviso, the several matters in which clearly constitute the consideration for the execution of the release and not, as claimed by the plaintiff, for the grant of the right of way. The contract did not provide that the \$250 should be paid, the cattle guards should be constructed, and the company should give Mr. Lilley the wagon roads over its tracks as a consideration for the conveyance of the right of way, but, on the contrary, it expressly sets forth that the grant of the right of way was made "for and in consideration of the benefits and advantages to me from the construction of its railway through my land." The money to be paid and the acts to be done, as required in the proviso, must therefore be regarded as the consideration for the release of damages for injuries done the plaintiff's farm outside the appropriation for the right of way for the construction of the defendant's road. The right to the wagon roads over the defendant's tracks, acquired as the consideration for the release of damages, was the property of Mr. Lilley, and could be appropriated by the defendant company under the Act of March 17, 1869 (P. L. 12; 2 Purd. Dig. 1798). The crossings were easements or private rights of way, and as such may be taken by the company under the statute. In doing so the defendant is not repudiating or rescinding the contract of April 12, 1876, as contended by the learned counsel for the plaintiff, but simply appropriating for its legitimate use the property of the plaintiff in accordance with the laws of the state. In *Jones v. Pittsburg, etc., Railroad Company*, 11 Pa. Super. Ct. 202, it was held that a railway company could, under the act of 1869, appropriate a part of a private right of way, which the company had agreed not to interfere with in the contract made with the owner of the land by virtue of which it had acquired its right of way. In that case it is said by Rice, P. J., delivering the opinion: "The right of a railroad company to make the necessary improvements contemplated by the act of 1869 was intended in large measure to be exercised for the public good, and it will not be presumed, in the absence of clear words, that the company intended to barter away that right and thus disable itself wholly or in part to perform those public functions it has undertaken."

We see no error in the record, and therefore the decree of the court below is affirmed.

RABE v. SHOENBERGER COAL CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. DAMAGES—MEASURE OF DAMAGES—INJURY TO REAL PROPERTY.

The measure of damages for permanent injury to real estate is the resulting depreciation in the value of the property.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 273-278.]

2. TRESPASS — DAMAGES — DESTRUCTION OF SPRINGS.

In trespass against a mining company by the owner of the surface to recover for failure to leave sufficient support for the surface and for the destruction of five springs, the measure of damages is the permanent depreciation in value of the farm caused thereby.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 273, 276.]

3. SAME.

Where a mining company by its operations had destroyed certain springs belonging to the owner of the surface, his measure of damage, where the loss of one spring was supplied by piping water from another, in so far as that spring was concerned, was the cost of the piping.

Appeal from Court of Common Pleas, Washington County.

Action by William T. Rabe against the Shoenberger Coal Company. Judgment for plaintiff, and defendant appeals. Reversed.

On measure of damages the trial court charged as follows: "The measure of damage, gentlemen of the jury, in a case of this kind, as laid down by the Supreme Court and the one which you are to follow, is: 'For the measure of damages for failure to furnish surface support is the actual loss the owners of the surface have sustained to their land'—the surface in this case including the building thereon—'by reason of the cave in.' The actual loss would mean the real loss, if any, that was sustained by the plaintiff by reason of any springs that he may have lost on this portion of the farm, because the farm as yet is not affected as a whole, but the loss here is confined to some 40 or 60 acres, or thereabouts, although I believe the defendant's engineer claimed—the principal engineer in charge of that mine—that the coal was only mined out from 20 or 21 acres of this plaintiff's farm. When you come to the question of loss here and damage, because it is not denied that there is some for which the defendant is liable, and they have told you what that was, you take the elements of actual loss, the actual loss to the plaintiff here; and the cost that it would be to him to restore his buildings or his farm, if possible, to make him as good as he was before, is the measure of damages you will apply in this case. When you come to consider the loss of the spring, you are not bound by any arbitrary estimate that a witness on the one side or the other may place on a spring or the buildings that may be gone or damaged. You take this farm, this portion of the farm that is in controversy here, and, if it would appear to you that there were other springs on this farm that supplied a flow of water that was

sufficient to keep up the supply necessary to carry on the farming, when one of these springs disappeared, it would be for you to say whether the plaintiff would be as much damaged if there was no other water on his place that he could get. And if the spring at the house could be supplied from another spring without diminishing appreciably the supply that was necessary for another part of the farm, the flow through that, would not the actual loss be what it would cost to pipe the water to the house, etc.? That is what I mean when I say you are not bound by the arbitrary estimate of loss that the defendant puts on this plaintiff's spring or springs, or that the plaintiff and his witness themselves may put upon them, but you are to use your own good judgment, considering all the facts and circumstances in the case, taking that part of the land that is affected by the loss of the springs here for all of the purposes for which it could be used in the shape it was made, for farming purposes and for the laying out of lots. You are to use your own good judgment, gentlemen of the jury, guarded within the lines at least of what the witnesses say on both sides here as to how many cracks there were and how they interfere with the cultivation of the surface, or whether they are of such a nature as would be dangerous for stock running in the field, whether they could be filled up and made as safe as they were before any cracks appeared. What is the extent of damages, by way of actual loss to the surface, if you find his farm left in that condition."

Verdict and judgment for plaintiff for \$6,500. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. H. L. Thomson, James I. Brownson, J. W. & Alvin Donnan, and D. W. Kuhn, for appellant. T. F. Birch and McIlvain, Vance & Gibson, for appellee.

POTTER, J. This was an action of trespass, brought to recover damages for injuries alleged to have been caused to plaintiff's property by the defendant company. The plaintiff was the owner of a farm in Washington county, near the town of Donora, and the defendant company owned the underlying coal. During the process of mining, and by reason of its failure to leave proper support for the surface, the defendant company injured a portion of the surface for building purposes, interfered with the use of a private road, damaged the dwelling house, and destroyed certain springs of water. The assignments of error relate solely to the measure of damages. The principal injury of which complaint was made was the destruction of five springs of water. This injury was permanent and irremediable, as was also any damage to the surface which might render it less available for building purposes.

Other injuries, such as the sinking of the dwelling house and the opening of cracks across the private right of way, were remediable. For the latter the cost of repair or restoration is obviously the measure of the damage.

The first assignment of error complains of the admission of testimony as to the value of the springs in themselves. This specification is sustained. The value of the springs was only an element in estimating the value of the realty. If the trespass resulted in permanent injury to the realty, the measure of damages is the diminution in the market value of the land. This principle is laid down in *Schuylkill Nav. Co. v. Farr*, 4 Watts & S. 362, where it was held that the measure of damages is (p. 375) "the difference between what the property would have sold for as affected by the injury and what it would have brought unaffected by such injury." And in *McKnight v. Ratcliff*, 44 Pa. 156, an action for flooding the shaft of a coal mine, the measure of damages was held to be the actual injury sustained in delay, loss of time, damage to machinery, etc., and, if the mine was irreclaimable, then the value of the estate and property. In *Hanover Water Co. v. Iron Co.*, 84 Pa. 279, it was held that the measure of damages for the diversion of a stream, whereby a farm with an ore bank thereon is injured, was the difference in the market value of the property, as a farm and ore bank, immediately before the diversion of the stream and immediately afterwards as affected thereby. In *Vanderslice v. Phila.*, 103 Pa. 102, an action for injuries through the bursting of a negligently constructed sewer, Mr. Justice Trunkley said (page 109): "Compensation for loss is the measure of damages. Permanent injury done to the buildings, cost of repairs, and the loss of rent for the time necessary to make the repairs, are elements affecting the market value, and the difference between that value in their injured condition and such value, if uninjured, is compensation." The sound clear rule is stated in *Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642, *Fulmer v. Williams*, 122 Pa. 191, 15 Atl. 726, 1 L. R. A. 603, 9 Am. St. Rep. 88, *Williams v. Fulmer*, 151 Pa. 405, 25 Atl. 103, 31 Am. St. Rep. 767, and *Thompson v. Traction Co.*, 181 Pa. 181, 37 Atl. 205, and is in substance that, when the injury is permanent, the measure of damages is the difference in market value before and after the injury, or the cost of removing the obstruction, whichever is the lower amount.

In the present case the plaintiff had a dairy farm, which was unusually well supplied with water. It had no less than 12 springs on it, with water in every field. Plaintiff claimed that five of the springs were destroyed by the cracks in the land. The question was, how much was the farm depreciated in value by the loss of the springs? Yet the plaintiff was allowed to

estimate the value of the springs as such, and placed one of them at a valuation of \$10,000, and the aggregate loss of the springs at \$20,000. There was evidence showing that the loss of one spring was supplied by piping water from another. If so, then the damage, in so far as that one was concerned, was the cost of piping. But, in so far as the taking of the springs could not be remedied or made good, the springs should have been valued, not as independent pieces of property, but as elements going to make up the value of the farm as a whole. The farm was not wholly deprived of water. The number of springs had only been lessened. In just so far as any of them were destroyed, their value would be one of the elements of depreciation to be considered in ascertaining the loss in the selling value of the whole property, caused by the injury inflicted by the defendant company. *Kossler v. Pittsburgh, etc., Railway Co.*, 208 Pa. 50, 57 Atl. 66. Counsel for appellant admits that the portion of the charge dealing with the measure of damages for the temporary or remediable injuries was substantially correct. But it is contended that no adequate rule was given to the jury by which they were to arrive at the damages for permanent injury, and that they were merely told to allow the actual loss. Counsel would have been in better position to complain if specific requests for instructions upon the measure of damages had been presented to the court below at the trial. We feel, however, that the charge was not sufficiently specific upon this point. The jury were told that the plaintiff had the right to recover his "actual loss," but were not told how that actual loss was to be estimated in considering the result of the permanent injuries. For all such injuries the rule should have been given to the jury that the measure of damages is the diminution in the market value of the property. Authority for this statement is ample. "The general principle upon which compensation for injuries to real property is given is that the plaintiff should be reimbursed to the extent of the injury to the property. The injury caused by the defendant may be of a permanent nature. In such a case the measure of damages is the diminution in the market value of the property. If the injury caused a total or partial loss of the land for a limited time, the diminution in rental value is the measure. One of these two measures is always applicable. If the injury is easily repairable, the cost of repairing may be recovered. But it must be shown that the repairs were reasonable, and, if the cost of repairing the injury is greater than the diminution in market value, the latter is always the true measure of damages." 3 *Sedgwick on Damages*, § 932, quoting *Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642. This principle was followed in *Fulmer v. Williams*, 122 Pa. 191, 15 Atl. 726, 1 L. R. A. 603, 9 Am. St. Rep. 88, where a riparian owner on a navi-

gable river brought an action against a neighboring riparian owner for injury to his property by reason of loss of water power and diversion of the stream from its natural channel in front of his land by deposit of rubbish and other obstructions. The trial judge permitted the jury to find damages for loss of water power and diversion of the stream from its natural course. The measure of damages, if the injury was permanent, was said to be the difference in the market value before and after the injury, thus applying the rule of *Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642. On appeal the case was reversed on the ground that, in the absence of a grant from the commonwealth, plaintiff had no right to water power; but it was said he could recover as riparian owner for diversion of water. The measure of damages was not discussed in this opinion, but in *Williams v. Fulmer*, 151 Pa. 405, 25 Atl. 103, 31 Am. St. Rep. 767, the same questions came up again. On the measure of damages the trial judge charged that, if the injury was permanent, the damages would be the depreciation in value of the property, or the cost of removing the obstructions, whichever was the lower amount. This was assigned for error. The judgment was affirmed; this court saying: "The learned trial judge followed the rule laid down in *Fulmer v. Williams*, 122 Pa. 191, 15 Atl. 726, 1 L. R. A. 603, 9 Am. St. Rep. 88, and tried the cause with discrimination and ability."

It is suggested in the argument here that the trial court considered the decisions of this court in *Robb v. Carnegie*, 145 Pa. 324, 22 Atl. 649, 14 L. R. A. 329, 27 Am. St. Rep. 694, and *McGettigan v. Potts*, 149 Pa. 155, 24 Atl. 198, as establishing the doctrine that in no instance, and under no circumstances, is depreciation of market value the measure of damages for any injury to real estate in an action between private parties. That these decisions are not to be so understood was pointed out in *Thompson v. Traction Co.*, 181 Pa. 131, 37 Atl. 205, which was an action of trespass against a street railway company which had constructed its railway on a public road in front of plaintiff's property without their consent. Justice McCollum said (page 136): "The right of the plaintiffs to compensation for the injury done to their property by the change of grade of the highway in front of it, and the construction thereon of the railway, is not disputed. The defendant, however, contends that the court adopted a wrong method of ascertaining the compensation they were entitled to receive for the injury thus inflicted. All the specifications of error relate to this contention, and the cases cited as sustaining it are *Lentz v. Carnegie*, 145 Pa. 612, 23 Atl. 219, 27 Am. St. Rep. 717; *McGettigan v. Potts*, 149 Pa. 155, 24 Atl. 198; and *Eshleman v. Martic Township*, 152 Pa. 68, 25 Atl. 178. The rulings and instructions complain-

ed of were to the effect that the depreciation in the value of the property, as the result of the change of grade and the construction and maintenance of the railway, furnished the measure of compensation. * * * No good reason appears for holding that the rulings and instructions in regard to the measure of compensation were erroneous. The mere fact that the defendant was not invested with the power or right of eminent domain is not a sufficient warrant for condemning them. It is true that they were in accord with the settled rule for the ascertainment of compensation in a case where a corporation, invested with the privilege of taking private property for public use, has, in the construction or enlargement of its works, taken, injured, or destroyed the property of another. But this rule is not necessarily limited to such cases. It may be applied in a case of permanent injury to real estate, when the issue is between private persons. An illustration of this may be found in *Williams v. Fulmer*, 151 Pa. 405, 25 Atl. 103, 31 Am. St. Rep. 767. In that case the plaintiff sought to recover from the defendant compensation for an injury to his property by reason of the diversion of the water of a navigable river from its natural channel in front of his land, and it was held that 'compensatory damages in such case would be the depreciation in value of the property, if the injury were permanent, or the cost of removing the obstruction, whichever was the lower amount.'

We do not think it is necessary to enlarge further upon this point. It is sufficient to say that the sound rule is that, where there is a permanent injury to real estate, the extent of the damage caused thereby is to be measured by the resulting depreciation in the value of the property. Permanency of injury is the proper test for the application of this rule. In so far as the property of the plaintiff in this case was permanently injured, the rule should have been applied.

The judgment is reversed, and a venire facias de novo is awarded.

In re GREGG'S ESTATE.

Appeal of WASHINGTON HOSPITAL.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. WILLS—CHARITIES—VALIDITY OF BEQUEST—TIME OF MAKING.

Under Act April 26, 1855 (P. L. 328), providing that no charitable bequest shall be valid if made within one calendar month from the death of the testator, a will containing a charitable bequest, executed October 8, 1899, between the hours of 3 and 5 o'clock in the afternoon, where the testator died November 8, 1905, between the hours of 7 and 8 p. m., was within one calendar month from the death and void.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Time, §§ 5, 8, 53; vol. 49, Cent. Dig. Wills, § 37.]

2. TIME—CALENDAR MONTHS.

A calendar month is not one of any given number of days throughout the entire year, but varies in length according to the Gregorian calendar.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Time, §§ 5, 8, 53.]

Appeal from Orphans' Court, Washington County.

In the matter of the estate of Mary A. Gregg. From a decree refusing petition to sell real estate, the Washington Hospital appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Andrew M. Linn and William A. Way, for appellant. John H. Murdoch and Edgar B. Murdoch, for appellee.

BROWN, J. The will of Mary A. Gregg, under which the Washington Hospital claims a charitable bequest, was executed on October 8, 1899, between the hours of 3 and 5 o'clock p. m. She died on November 8th of the same year, between the hours of 7 and 8 o'clock p. m., and the single question raised on this appeal is whether the bequest to the appellant is defeated by the act of April 26, 1855 (P. L. 328).

By the eleventh section of the act (page 332) it is declared "that no estate, real or personal, shall hereafter be bequeathed, devised, or conveyed to any body politic, or to any person in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible, and, at the time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary hereto, shall be void and go to the residuary legatee or devisee, next of kin, or heirs, according to law." A calendar month is not one of any given number of days throughout the entire year, but varies in length according to the Gregorian calendar. A calendar month beginning in February, except in leap year, is of 28 days' duration; one beginning in April, June, September, or November is of 30 days; and one beginning in either of the other seven months, of 31 days. As the calendar month to elapse between the date of the execution of this will and the death of the testatrix was one of 31 days, the bequest made to the appellant is void, unless, after the will was executed in the manner directed by the statute, "at least" that number of days intervened before her death. In the elaborate brief submitted by counsel for the appellant, decisions by courts in this country and in England have been cited upon the general principles regulating the computation of time, and, in the light of some of them, we are asked to disturb the decree below and declare the bequest operative. We are not, however, dealing with general principles or rules of construction, but with the express

words of a statute, which cannot be over-ridden, even in the furtherance of what may seem to be justice. The fiction of the law that a day has no fractions yields at times, when equity requires that hours be counted, or that the exact time a thing is done be noted, but never when the duration of time, as fixed by a statute, is free from all doubt. "At least one calendar month" must elapse between the execution of a will containing a charitable bequest and the death of the testator, if the bequest is to be valid. The meaning of the words "at least" is "in the smallest or lowest degree; at the lowest estimate, or at the smallest concession or claim; at the smallest number." 4 Cyc. 366. In declaring that "at least one calendar month" must elapse between the execution of a will containing a charitable bequest and the death of the testator, the manifest meaning of the statute is that such a month must fully elapse between the dates of the two events. A calendar month is made up of days—in this case, of 31 days. These are full, clear 31 days, not 30 days and fractions of 2 other days, making in hours another day, and, with the other 30, 31 days, but 31 separate and independent days; the first beginning when October 8th ended, at midnight, and the last ending at the close of November 8th, at midnight. The computation in hours which the appellant makes, from 5 p. m. October 8th, to 8 p. m. November 8th, it is true, would make in hours $31\frac{1}{2}$ days; but this is not the computation contemplated by the statute. It is "at least a calendar month," made up, at certain seasons of the year, of a certain number of full, clear days, and that kind of a month did not intervene between the execution of this will and the death of the testatrix. "When so many 'clear days' or so many days 'at least' are given to do an act, or 'not less than' so many days must intervene, both the terminal days are excluded." Endlich on Interpretation of Statutes, § 391.

The act of 1855 is for the protection of a testator for the last full calendar month of his life against yielding to any influences during that period—so often a susceptible one—which may unduly lead him to devote his estate, or any portion of it, to religious or charitable uses. It must be literally read and strictly construed, if effect is to be given to the legislative intent, and cannot be stretched to save a bequest clearly intended by the act to be void. Charitable or religious institutions claiming bequests or devises must bring themselves within it. As between them and the next of kin of a testator there are no equities, and the rights of each are such only as are given by the statute. As the meaning of the words of the act under consideration is so plain, we do not deem it necessary to apply the rule as to the computation of time, nor refer to the act of June 20, 1883 (P. L. 136), declaratory

of it, requiring the exclusion of the day on which an act is done. Under that rule, with October 8th excluded, the full calendar month would not have expired until the end of November 8th.

Decree affirmed, and appeal dismissed, at cost of appellant.

McCOY v. OHIO VALLEY GAS CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

MASTER AND SERVANT — NEGLIGENCE — EVIDENCE—QUESTION FOR JURY.

In an action against a natural gas company by one of its employés to recover for personal injuries sustained while repairing a pipe, evidence held to require submission of the case to the jury, where the circumstances connected with the accident were such as to warrant an inference of negligence in failing to shut off the gas or regulate its flow.

Appeal from Court of Common Pleas, Washington County.

Action by George McCoy against the Ohio Valley Gas Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Defendant presented the following points: "(5) The uncontradicted evidence in this case being that the defendant followed the usual method and the one invariably adopted by pipe line companies in temporarily repairing lines such as this, and there being no evidence that any accident was liable to occur by reason of the method employed, the plaintiff cannot recover, and the verdict must be for the defendant. Answer: Refused. The case is one for the jury and not the court to determine. (6) The uncontradicted evidence in this case being that the method pursued by the defendant was not only such as is usually adopted by other corporations conveying natural gas, but that the accident itself was unusual and extraordinary and unforeseen, the defendant cannot be held to the duty of warning the plaintiff against such unforeseen and unexpected accident, and the verdict must be for the defendant. Answer: Refused. (7) Under all the testimony in this case the plaintiff cannot recover, and the verdict should be in favor of the defendant. Answer: Refused."

Verdict and judgment for plaintiff for \$4,000. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

A. M. Todd and J. A. Wiley, for appellant. R. W. Parkinson, Jr., for appellee.

STEWART, J. The plaintiff was injured by an explosion that occurred in the pipe line of the defendant company, at a point where he and others of the company's workmen were engaged in the work of repairing, under these circumstances: The pipe line was some three feet underground, and at this particular place it followed the side

of a hill. A landslide had here pushed some of the sections of pipe from their original location, to what extent does not appear, but sufficient to cause a leak where two of the pipes joined. To relieve the line of the pressure and restore it to its place, the earth on the higher side was being removed, and the pipe uncovered so as to admit of its repair. The plaintiff was engaged in this work. It had been ascertained that the leak was about the collar of a joint, but it did not appear that examination had been made to ascertain whether other or further injury had resulted from the slide. At the time the work was being done, there was no interruption in the use of the line. The distribution of gas through the line continued at a pressure of about 225 pounds to the square inch, although by the use of safety valves and gates, which were placed along the line at intervals of three miles, the gas could have been wholly shut off or its flow regulated, at the pleasure of the defendant company, not, however, without serious inconvenience to the consumers, who depended on the line for a regular and constant supply. The explosion occurred at the end of the pipe where the leak was discovered to be, breaking out a piece of pipe varying in width from six to ten inches, and extending back from the mouth some three feet. From the opening thus made the gas escaped against the earth about the pipe, and with great violence threw such material as was in its way against the plaintiff, inflicting upon him serious bodily injury. This action was brought to recover for the injury thus sustained, and the negligence charged as the basis of the action was the failure of defendant company to arrest or sufficiently moderate the flow of gas from the line while the plaintiff and his fellow-workmen were there engaged.

As will be seen, plaintiff's case rested wholly upon the inference of defendant's negligence; no direct evidence of negligence having been adduced. The theory advanced by defendant to account for the explosion was that it occurred in consequence of a latent defect in the pipe. The question raised on the appeal, and the only question is, was the evidence of defendant's negligence sufficient to require a submission to the jury? Whether the explosion occurred in consequence of the latent defect in the pipe, or from a fracture occasioned by the slide, may now never be determined. In the absence of definite knowledge on this point, was the former cause to be presumed, or, as between two conflicting theories, was the former to prevail? An unusual condition existed, and the unusual had happened in consequence. The landslide had pushed the line out of its true place with one evident and apparent result—a leak, from which gas was escaping. What else in the way of injury to line or pipe resulted from the slide, if any, was not for the plaintiff to know. He could exercise

no authority. His duty was to work where he was placed; the operation being wholly and exclusively under the direction and control of defendant's agents. The rule in such cases is thus stated by the present Chief Justice, in *Zahniser v. Penna. Torpedo Co.*, 190 Pa. 350, 42 Atl. 707: "In cases where the duty is not absolute, * * * it is essential that it shall appear that the transaction in which the accident occurred was in the exclusive management of the defendant, and all the elements of the occurrence within his control, and that the result was so far out of the usual course that there is no fair inference that it could have been produced by any other cause than negligence. If there is any other cause apparent to which the injury may with equal fairness be attributed, the inference of negligence cannot be drawn."

In the present case we have two apparent causes suggested; the one giving rise to the inference of negligence, the other negating it. Can the explosion be attributed with equal fairness to either? If so, it was error in the court to permit the jury to draw an inference of negligence as against defendant. A very brief reference to the facts will show how unequal in force these opposing suggestions are. That of the plaintiff suggests neither difficulty in connection with the occurrence itself nor improbability. The ordinary mind would meet with no surprise in discovering a fracture at the end of the section of pipe where, as in this case, a line three feet underground had been subjected to an external force sufficient to push it from its place and open up a joint through which gas escaped. If otherwise, it is rather remarkable that no effort was made to show that such a result is not, under such circumstances, to be anticipated. On the other hand, the suggestion of the defendant encounters improbabilities which, if they do not make it unreasonable, make it much less credible than that of the plaintiff. According to defendant's own showing, the pipe before it was in place had been subjected to a test of 800 pounds pressure to the square inch. After placed in the ground and it had become a part of the line, it was subjected to another test of 450 pounds, and then continuously thereafter, for a period of four years, to the usual pressure of something in excess of 400 pounds. It is, perhaps, possible that, notwithstanding all this, there was a latent defect in the pipe that caused it to break at this unfortunate moment, under a pressure of 225 pounds, but such bare possibility ought not to prevail against the theory which is both reasonable and probable in all its parts, considered in the light of the evidence.

Can it be said, in view of the facts stated and the entire consistency of plaintiff's theory therewith, that the explosion that injured the plaintiff can, with equal reason and fairness, be attributed to a latent defect in

the pipe? To ask the question is to answer it. As was said in *Shafer v. Lacock*, 168 Pa. 497, 32 Atl. 44, 29 L. R. A. 254, a case where the actual cause of the accident was not clearly disclosed by the testimony, but circumstances were shown warranting an inference of negligence on the part of defendant: "The occurrence was not in the ordinary course of things, and the circumstances connected with and surrounding it put on them [the defendants] the duty of showing that it was at least consistent with the exercise of proper care in the performance of their work." This duty in the present case called for something more than a theory that was simply conjectural as to the cause of the explosion. Clearly this was a case where the circumstances connected with the happening of the accident were sufficient to warrant an inference of negligence; and, that being so, submission of the question to the jury followed necessarily.

The judgment is affirmed.

WELLER v. WELLER.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

L. CURTESY—DESEPTION OF WIFE—EVIDENCE.

Where, in ejectment, the question involved is whether the wife had been willfully deserted by her husband for one year previous to her death, so as to deprive him of his curtesy, under Act May 4, 1855 (P. L. 430), it is incumbent on the husband to show a reasonable cause for desertion; but where he shows many attempts to effect a reconciliation, and that he had been locked from the house and told by his wife not to come around again, a verdict in his favor will be sustained.

2. WITNESSES—IMPEACHMENT—EVIDENCE.

In ejectment by a husband claiming by the curtesy, a witness for plaintiff may testify to a conversation not in the presence of plaintiff's deceased wife, where the purpose is to contradict the evidence of a son of plaintiff, who is one of the parties defendant.

Appeal from Court of Common Pleas, Washington County.

Action by Daniel L. Weller against Ern K. Weller and others to recover land. Verdict for plaintiff, and defendants appeal. Affirmed.

At the trial Andrew Mackey, a witness for plaintiff, was asked this question: "Mr. Parker: Q. Now, I asked Lon Weller whether or not he had not in your presence called his father a lying son of a bitch? A. Yes, sir; he— Mr. Irwin: What do you propose to prove? Mr. Parker: We propose to contradict Mr. Weller, the witness, as to that fact, as bearing upon his interest and bias and credibility as a witness. The Court: Well, he was asked that question. Mr. Parker: He was asked it and denied it. Mr. Irwin: The evidence is objected to. Just let me ask a question. Mr. Irwin: Q. Mr. Mackey, are you about to testify to something that occurred not in the presence of Mrs. Weller? A. In the presence of Mr. Lon Weller, Dan Weller, and myself. Q.

Mrs. Weller not being present? A. Mrs. Weller not being present. (The evidence is objected to as incompetent for the reason that, no matter what Lon Weller may have said to his father not in the presence of the mother and wife, it afforded no excuse for the husband deserting his wife, and sheds no light upon the issue involved here; and, the inquiry made of Lon Weller being on a collateral matter, his answer is binding upon the plaintiff, and cannot be contradicted in this case. The Court: I think we will allow you to ask the question, because it is undisputed here that all the children were standing with the mother, and the claim being on the part of the father that they made it so hot for him he had to get out. It bears on the question, at issue here, of whether or not the desertion was willful. We would not allow it if it were independent and unconnected with the family affair. We think this is the kind of a case where the witnesses were members of the same family, and evidently taking sides with one parent against the other, and that the whole transaction and manner of living, and the feeling and conduct towards them, ought to be put before the jury here. We will seal a bill for the defendants and allow the question to be asked.) Q. Now, I asked Lon Weller whether or not he had not in your presence called his father a lying son of a bitch. I ask you whether that is true or not? A. Yes, sir. Q. And who heard it? Who was there? A. Lon, his father, and I. I went down there and Lon was on the wagon. I called him down, and he went back to his father and had a little chewing match, and finally he called him a damned lying son of a bitch. That's what he said—called. (Mr. Irwin: Q. I would like to ask the witness a question preliminary, to make an objection on the record: Mr. Irwin: Mrs. Patterson, the hearing that you refer to now was the hearing on the petition of Mrs. Weller to the court of Allegheny county to be declared a feme sole trader on the ground of her husband's desertion of her; is that correct? A. Yes, sir. Mr. Irwin: The testimony now offered is objected to for the reason that, no matter what Ern Weller called his father at the time of his testimony in the proceeding in Pittsburg, it sheds no light upon the relations between Daniel L. Weller and Mary J. Weller, his wife, and afforded no justification for his desertion of his wife, and his refusal to support her. Mr. Parker: No; nor we don't claim it does. It goes simply to the credibility of the witness Mr. Ernest Weller. The Court: Well, that being the sole purpose, the objection then is overruled, and the offer admitted and on request of defendants, exception allowed and sealed.) Q. What did he say about his father? A. It was after Miss Povard had been on the stand, and it was concerning her testimony, what she had said, and he said that any

man that would go a year or two years without a bath was nothing but a hog."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

R. W. Irwin, A. T. Morgan, and James P. Brownlee, for appellant. Norman E. Clark, John O. Bane, W. S. Parker, and Winfield McIlvaine, for appellee.

ELKIN, J. This is an action of ejectment by the surviving husband to recover possession of certain real estate of which his wife died seised. The defendants are the children and heirs at law of the deceased wife. The right of the husband, as tenant by the curtesy, to enjoy the use and possession of the real estate in question, is denied by reason of the following provisions of the act of May 4, 1855 (P. L. 430), to wit: "No husband who shall have as aforesaid, for one year or upwards previous to the death of his wife, willfully neglected or refused to provide for his wife, or shall have for that period or upwards willfully and maliciously deserted her, shall have the right to claim any right or title in her real or personal estate after her decease, as tenant by the curtesy. * * *" The question tried in the court below, and raised by this appeal, is whether there was a willful and malicious desertion of the wife by the husband from July 4, 1900, to the time of her death, July 7, 1903. Where the facts show a desertion, it is presumed to be willful and malicious, and the burden is on the husband to show reasonable and lawful cause for it. *Bealor v. Hahn*, 117 Pa. 169, 11 Atl. 776; *Hahn v. Bealor*, 132 Pa. 242, 19 Atl. 74. It is conceded that the husband withdrew from the home of his wife July 4, 1900, under circumstances requiring him to show reasonable and lawful cause for his action. At the trial the learned court instructed the jury that the manner in which the husband left his wife and family on the date mentioned, and the fact that he had remained away for upwards of a year before attempting to return, raised the presumption of a willful and malicious desertion under the law, and placed upon him the burden of showing that it was not so. The husband met this burden by testimony giving in detail the occurrences which led to his withdrawal from his house, and his repeated attempts to effect a reconciliation with his wife and live with his family. It is in evidence that on several occasions he went back to his home and attempted to see his wife, but was unsuccessful. He failed in these efforts because the doors were locked, and his wife would not admit him to her presence. The evidence further shows that the wife sent him a letter in which he is notified not to come upon the premises or annoy her further with his visits. The husband is corroborated by other witnesses, showing, or tending to show, that he made efforts to

return to his home and live with his wife and family. Under these circumstances the learned trial judge very properly submitted the case to the jury to determine whether the presumption of willful and malicious desertion had been rebutted by the evidence. The jury returned a verdict in favor of the plaintiff. It was clearly a case for the jury, and, unless testimony was improperly admitted, their decision is final.

The first assignment of error raises the question of the admissibility of the testimony of Andrew Mackey, because the conversation referred to was not in the presence of the wife. It is argued that what the son said in the absence of the mother could not be used for the purpose of showing that the husband did not willfully and maliciously desert his wife. The answer to this contention is that the testimony was offered for the purpose of contradicting Lon Weller, the son, and as bearing upon his interest, bias, and credibility. It was competent for this purpose. The observations of the learned trial judge, wherein it was stated that this testimony bore generally upon the family relations and the question of the willful and malicious desertion of the husband, did no harm, and do not constitute grounds for reversible error.

What has been said about the first assignment of error applies generally to the second. It was a question for the jury to determine whether the husband had willfully and maliciously deserted his wife for one year or upwards prior to her death, so as to deny himself the right, as tenant by the curtesy, to the use and possession of the real estate of which she died seised. The jury has found in favor of the plaintiff, and we see no reason to disturb that finding.

Judgment affirmed.

McCLANE et al. v. McCLANE et al.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

RAILROADS—RIGHT OF WAY—INVALID GRANT—INJUNCTION.

A railroad company constructed its road in good faith on certain lands under deeds to persons without authority to make the grant. Subsequently the devisees of the owner of the land filed a bill to compel the removal of the road. The evidence showed that the real object of the suit was to compel the defendant company to permit certain crossings of the railway necessary for the purpose of marketing coal underlying the land and that the company had obligated itself to permit such crossings. The evidence showed that the construction of the railway had increased the value of the land, and that out of the seven devisees who were parties to the bill five were estopped by their conduct. *Held*, that the injunction will be denied, and that the court will retain the bill to enforce the agreement of the railroad company as to the crossings.

Appeal from Court of Common Pleas, Washington County.

Bill by William McClane and others against Ebenezer McClane and others. From the decree, plaintiffs appeal. Affirmed.

The following is a part of the opinion of McIlvaine, P. J., in the court below:

"From the proofs in the case it is apparent that the interests of each of the seven children of M. W. McClane in the subject-matter of dispute in this controversy are one and the same. Because the four plaintiffs have made their three brothers (who are executors of their father's will) defendants in place of having them join with them as plaintiffs, does not alter the fact that the principal relief specially prayed for (the mandatory injunction) is for the benefit of all; nor does it alter the fact that the seven joined shortly before the bill was filed in a demand upon the railway company that it substitute a new agreement for the old one, and that they then gave the ultimatum that this must be done, or otherwise suit would be entered to compel the company by mandatory injunction to remove from the premises. Let us then see what relation each of these seven persons interested in this farm sustains to the railway company as bearing upon their right to invoke the aid of a court of equity in having it evicted therefrom. And, first, as to the three brothers who are made defendants.

"It is not denied that they in good faith executed and delivered to the assignor of the railway company the agreement attached to the plaintiffs' bill, wherein they, as executors and devisees under the will of M. W. McClane, deceased, granted the right to enter upon the farm in question and occupy the strip of ground now occupied by the Washington & Canonsburg Railway Company for railway purposes, and that they received therefor \$500 in cash and a covenant to pay the additional sum of \$1,500, and that they still retain the sum of \$500, and have not offered to return it. It is not denied that these brothers, when they made the contract, were in possession of this farm; that they cut timber off it and sold the same for the use of themselves, doing business as M. W. McClane's Sons; and that they reopened an old and abandoned coal mine on the farm, and operated it for their joint use in the firm name of M. W. McClane's Sons. It is not denied that the Washington & Canonsburg Railway Company, some months before this bill was filed, under the grant made by these brothers, entered upon this farm and took full and exclusive possession of the strip of land now occupied by its track, and that the company had fenced and graded the same, and that this was done by the company in good faith, under a claim of right, and in the belief that the grant made by the three brothers was a valid conveyance. It is not denied that the three brothers knew that the company so entered, and that it was at large expense constructing its road across

their farm, relying on the validity of the grant in question. And it is not denied that these three brothers, before any question was raised as to the validity of their grant, doing business as M. W. McClane's Sons, sold ties to this company to be used in the construction of its road, and that these ties were made of timber cut from this farm by them. Under these facts, we think it is clear that the Washington & Canonsburg Railway Company, as against these three brothers, is entitled to continue in possession of the strip of ground they have inclosed for its way across this farm, and that they would be estopped from calling in question the validity of the grant they made.

"Let us now consider the case of Mary McClane and Bessie McClane, two of the plaintiffs. These two young ladies lived on the farm in question, and the family relation existed between them and the three brothers who made the grant of the right of way across the farm. They knew that the grant had been made by their brothers. They must have known that the brothers were cutting timber off the farm, and that they had opened an old abandoned mine and were operating it under the firm name of M. W. McClane's Sons. They must have known that the defendant company had entered and taken possession and fenced the way for its track across their farm, and that it was expending large sums of money in grading the track, and that this was done under a claim of right on the part of the company, who relied on the validity of the grant made by the three brothers; and, knowing all this, they never in any way intimated to the defendant company (until very shortly before the bill was filed) that they would claim that this grant was invalid. The relation they sustained to their brothers, their desire to have the road built, their seeing its construction from the house in which they lived, their knowledge that the brothers were selling ties, made of timber cut on the farm, to the railway company to construct its road, would suggest to any reasonable mind that they consented to and approved of the action of the brothers in permitting the railway company to construct its road across the farm, and that it would not be considered as a trespasser in entering thereon for that purpose. If they were unwilling that the road should be built across the farm, it was their duty to speak to the railway company and make known to it their dissent before it improved the way granted to it. In our opinion, they were too late in making known their objections, and that they have failed to show any just excuse for this delay. They were in possession of all the facts, they were of full age, and it will not do to now say that they relied upon what their brothers told them as to a question of law, concerning which they took no legal advice until the brothers discovered that they might need a crossing for a coal road over the railway

track to the track of the steam railroad, and put them and their coplaintiffs forward as persons who could best make the attack on the railway company's title for the joint benefit of all.

"This brings us to the consideration of the other two plaintiffs. William McClane lives in the state of California, and although he did not sign nor verify the bill, and was not examined as a witness, yet we must infer, in the absence of proof to the contrary, that he did not have knowledge of the facts to which we have referred as being within the knowledge of those that lived on the farm. The burden is on the defendant company to prove the facts out of which an estoppel grows. The other plaintiff, Rebecca McClane, at the time the bill was filed, was a minor. As to these two plaintiffs, we are of the opinion that the defendant company has failed to prove such facts as would entitle them to have the bill in this case dismissed unconditionally.

"On the first question for our decision we are of the opinion that, as all the plaintiffs are not estopped from maintaining this bill, the defendant company is not entitled to have it unconditionally dismissed at the plaintiffs' cost. This brings us to the second question for decision: What relief in equity and good conscience are the plaintiffs entitled to under the proofs in this case? Let us first discover the real ground of complaint as it appears from the proofs. It is plain that it is not the presence of the railway upon the farm in question. No one of those interested, so far as the testimony shows, really wants the defendant company ejected and the operation of the railway stopped. It is admittedly a great convenience to those who occupy this farm, and the proof shows that the presence of the road on the farm, and its operation between Washington and Canonsburg, has probably increased the value of the farm. The real complaint against the railway company is that it will not allow a coal switch from the steam railway to the mine on the farm where coal is being mined. Until the developments in a suit between the defendant railway company and the Meadow Lands Coal Company in regard to the right of the coal company to cross the defendant company's track on an adjoining farm brought it to their mind that they might need a switch crossing for coal mining purposes, no objections were made to the presence of the street railway on the farm; and after it was discovered that the reservations in the grant for switches did not include a switch for a coal road, but only switches to manufactories that might be located on the farm, what was demanded by the seven children was not that the company get off, but that a new agreement be executed, with provisions for coal switches and some other matters not in the original grant. If the provision for a coal switch had been in the old agreement,

the claim of irreparable injury, according to the testimony of the plaintiffs themselves, would have been out of the case.

"There are other matters to be considered in connection with this question of equitable relief. One is the position in which the issuing of the mandatory injunction specially prayed for would leave the defendant company. Without any fault on its part it has expended thousands of dollars on the route leading through the McClane farm, after having abandoned what was known as the shaft road route which did not touch this farm. To adopt that route now would require the abandonment of two or three miles of road, and the loss of these thousands of dollars. The plaintiffs and the three brothers, who together own the farm, evidently do not want the road abandoned, but they want a new contract. And, with the alternative of a new contract or loss of thousands of dollars before it, the railway company would be put by the court (if the mandatory injunction prayed for was granted) in a position of inequality in making this new contract, especially when we consider the fact that five of them are not entitled to a more favorable contract than the one they have. Again, this road is mortgaged to secure innocent bondholders whose interests would be prejudiced if the mandatory injunction was enforced. Again, the road is now in full operation between Washington and Canonsburg, and the public is interested in its uninterrupted operation. A mandatory injunction is a drastic remedy. And in a court of equity the effect of its issuance upon the defendant, upon innocent third parties, and upon the public are matters that will be considered, as well as the wrong the plaintiff has suffered. If his wrong can be righted by an action at law or by equitable relief in a form that will not do injury to others, the drastic remedy ought not to be invoked.

"The question therefore logically arises: Can such equitable relief be granted in this case? The plaintiffs pray specifically for an injunction restraining the maintenance and operation of this railway by the defendant company, and that it be compelled by mandatory injunction 'to remove from said premises all material, equipment, and the like used in or about or for the construction and operation of a railroad across said premises'; and it prays generally that the court 'grant such other and further relief as to equity and good conscience belong.' The equitable relief that the plaintiffs are entitled to in equity and good conscience, in our opinion, is a switch crossing for a coal yard to carry the coal mined on the farm to the steam railroad. If this is furnished by the defendant company so that a coal road on either side of the defendant company's track can be connected therewith, then, in our opinion, the drastic remedy should not be resorted to, and no mandatory injunction

should be granted. This will certainly meet the claim of irreparable injury made on the part of the two plaintiffs who are not estopped from making such a claim, and will be giving the other five children more than they are entitled to under the contract, the validity of which we hold they are estopped from denying. How, then, shall our decree be drawn to give this relief? Under the pleadings as they now stand there may be doubt whether we could make an affirmative decree in favor of the plaintiffs giving this relief under the general prayer, although the proofs warranted it. But we believe there is another way of reaching this end. During the trial of the case one of the attorneys of the defendant company made in open court verbally an offer to grant to the plaintiffs and their three brothers a switch crossing, the lack of which the plaintiffs' witnesses complained about, and which one of the plaintiffs at one stage of the examination said was all that she had to complain about. One of the plaintiffs' attorneys replied to this offer: 'Make your offer in writing. You have never done it since this thing begun.' When court met to hear the case argued, the attorneys for the defendant company complied with this request, and with leave of court, and without objection from any one, filed the following paper, which was made part of the record: 'In the Court of Common Pleas of Washington County, Pa. William McClane et al. v. Ebenezer McClane et al. and Washington & Canonsburg Railway Company. No. 1,322 in Equity. Stipulation. And now, August 11, 1904, the Washington & Canonsburg Railway Company, by its counsel, offers to the plaintiffs in this case to permit at all times hereafter the construction of such crossings of the railway of the defendant company as may be necessary for the purpose of marketing the coal underlying the land described in the bill filed in this case, the number and location of said crossings and the method of crossing, whether at grade, under or overhead, to be determined by the court, and the cost of construction and maintenance thereof to be borne by either or both parties, as the court at that time may decree. Washington & Canonsburg Railway Company, by Its Counsel, Walter Lyon, John H. Murdoch.'

"This puts the case in such a shape that justifies the court in filing a conditional decree, and this is the form in which, in our opinion, it should be: 'And now, August 17, 1904, this cause came on to be finally heard and was argued by counsel, whereupon, upon due consideration, it is ordered, adjudged, and decreed that the plaintiffs' bill and prayers for an injunction be, and the same is hereby, dismissed on the following conditions to be performed by the Washington & Canonsburg Railway Company, one of the defendants herein, to wit: (1) That it construct, or allow to be constructed, a crossing or crossings over its railway track

such as may be necessary for the purpose of marketing by the steam railroad south of its railway the coal underlying the land described in plaintiffs' bill, the location of said crossing or crossings, and the method of the construction of said crossing or crossings, whether at grade, under or overhead, and how paid for, to be agreed upon by the parties to this suit. If, however, such an agreement cannot be reached as to the location or method of construction of said crossing or crossings, or how the same shall be paid for, then either party showing this fact may ask that this bill be reinstated and that the pleadings, if necessary, be amended; if the plaintiffs, that their bill be amended, and if the defendant, that its answer be amended, or that it be allowed to file a cross-bill, so that the pleadings as amended shall require the court to determine the location, method of construction, and how the costs thereof shall be borne, and the court so far retains control of the case as to allow it to be so reinstated and the pleadings so amended and the conditions herein named enforced. (2) That the defendant company pay to the executors of M. W. McClane, deceased, the sum of \$1,500, the balance of the contract price which remains unpaid. (3) That the defendant company pay the costs of this proceeding.'

"In reaching our findings of fact as to the contract made between M. W. McClane and Arthur Kennedy, we excluded the testimony of Arthur Kennedy. Being a stockholder in the defendant company, in our opinion, made him an incompetent witness to testify as to the making of the agreement he had with Mr. McClane. There is testimony in the case other than that of Mr. Kennedy to justify the finding we have made as to the existence of this agreement."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

T. F. Birch, James I. Brownson, and J. W. & Alvin Donnans, for appellants. Walter Lyon, and John Murdoch & Son, for appellees.

FELL, J. On a former appeal in this case it was decided that the parties who granted to the corporation defendant a right to construct its road were without power to make the grant either as executors or as devisees, in both of which capacities they had assumed to act. *McClane v. McClane*, 207 Pa. 465, 56 Atl. 996. The order then made reversing the decree and directing that an injunction be issued was afterwards modi-

fied, and the defendants were granted leave to answer. At the second hearing on bill, answer, and proof, the main question was that of estoppel. Three of the parties named as defendants were only nominally such, and were not acting in sympathy and interest with the real defendant, the Washington & Canonsburg Railway Company. They had joined with the plaintiffs in giving notice to the railway company that suit would be brought unless their demand for a new agreement, permitting a coal road crossing of its tracks, was complied with, and the relief sought was for the benefit of them, as well as of the plaintiffs. The court found that three of the seven persons interested in the land were estopped to deny the right of the railway company to maintain its tracks and operate its cars, by their execution of the grant and their subsequent conduct; that two others were estopped by their silence and acquiescence with full knowledge; that, as to the remaining two, one of whom was without knowledge and the other was not of full age, an estoppel had not been established. It was also found that the company had entered on the land and constructed its road thereon in good faith, believing it had a valid grant; that the location, construction, and operation of the road had enhanced the value of the farm, and will increase the value of the shares the plaintiffs will be entitled to receive on the distribution of the estate; that the real ground of complaint, as it appeared from the proofs, was, not the presence of the railway on the farm, but the fact that the company would not allow the construction of a coal switch from a steam road to a mine on the farm to cross its tracks; that permission to make this construction would take out of the case wholly the claim of irreparable injury. The company having obligated itself to permit crossings, an injunction was refused, but the bill was retained to enforce, if necessary, the agreement. This disposition of the case is manifestly equitable. It gives to the two plaintiffs who have a standing all they can justly claim, because their shares in the distribution of the proceeds of the land, when sold, will not be diminished. It relieves the company from incurring a ruinous loss in the removal of its road from the land in question and other lands on either side of it. The grounds on which it is rested are so fully stated in the opinion of the learned judge of the common pleas that further discussion of them is unnecessary.

The decree is affirmed, at the cost of the appellants.

HILES v. GARRISON et al.

(Court of Chancery of New Jersey. Jan. 24, 1906.)

1. WILLS — CONSTRUCTION — JURISDICTION IN EQUITY—APPOINTMENT OF TRUSTEE.

A suit for the construction of a will and the appointment of a trustee to execute the trusts established is properly brought in chancery; the relief sought being the appointment of a trustee.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1686.]

2. SAME — CONSTRUCTION — TRUSTS — DURATION.

Testator provided that his property should be "put in a trust," and declared that the income should be equally divided between his brother, sister, and widow as long as the widow remained unmarried, and in case of her death or marriage her share should go to the brother and sister. *Held* to create a trust, to continue during the widowhood or life of the widow, and on her death or remarriage the corpus of the estate passed to testator's next of kin as intestate property.

3. TRUSTS — APPOINTMENT OF TRUSTEE — JURISDICTION OF EQUITY.

The court, on the failure of a testator to name a trustee, will appoint one to carry out the trusts created by the will.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 204, 205, 207.]

Bill by Caroline W. Hiles against Caroline C. Garrison and others, for the construction of the will of Richard Hiles, deceased, and for the appointment of a trustee. Will construed, and trustee appointed.

W. T. Hilliard, for complainant. T. S. Hilliard, for defendants.

BERGEN, V. C. The bill in this case is filed by the complainant, widow of Richard Hiles, deceased, for the construction of his last will and testament and the appointment of a trustee to execute such trusts as may be determined are established by such will. As the relief sought is the appointment of a trustee, and the necessity for such appointment requires the construction of the will as an incident to the relief sought for, the complainant is properly here.

The pertinent part of the will is the second clause, which reads as follows: "I do devise that all my property and bonds and mortgages be put in a trust, and the income be divided equally between my brother, Biddle Hiles and sister, Caroline Garrison, and my wife, as long as she remains my widow, in case of her marrying or death her share to go to my brother Biddle Hiles, and my sister Caroline Garrison." The testator died possessed of considerable estate; the personalty having been appraised at the sum of \$54,089.88. His real property consisted of an undivided interest in certain real estate in the county of Salem in this state; such interest being estimated by the parties in interest, at something over \$20,000. At the time of his death the only next of kin of the testator was his brother, Biddle, and his sister, Caroline. The will was prepared by the testator, and does not clearly express

his desires, and the purpose of this cause is to ascertain whether a trust has been established by the terms of such will, and, if so, that a trustee be appointed to carry out such trust.

While this will is very inartistically drawn, I think the clear intention of the testator was to create a trust by the terms of which the income of his estate was to be divided equally between his widow, brother, and sister, and that this trust shall continue as long as his widow lives or remains unmarried, and on the happening of either such events the trust terminates. As the testator has made no disposition of the corpus of the fund after the expiration of the trust estate, he died intestate as to the residue of his property, and it will go to his next of kin. That the testator named no trustee will not prevent the execution of the trust, for the court will always appoint a trustee wherever necessary to sustain the trust, and a trustee will be appointed. The will contains no power of sale, and therefore the trustee cannot dispose of the land by virtue of any authority contained in the will. It is, in my judgment, however, included in the trust, and, subject to that, will vest in the heirs at law of the testator.

I will advise a decree in accordance with the above.

AVON-BY-THE-SEA LAND & IMP. CO. v. McDOWELL et al.

(Court of Chancery of New Jersey. Feb. 6, 1906.)

1. EXECUTION — LEVY — CONSTRUCTIVE SEIZURE—SUFFICIENCY—GOODS IN POSSESSION OF MORTGAGEE—INVENTORY OF GOODS.

Where goods of a judgment debtor were in possession of a mortgagee thereof, the taking from the mortgage of a list of the chattels already agreed on between the mortgagee and the judgment debtor, the mortgagor, for the purpose of an inventory, and annexing such inventory to the levy, was sufficient as a legal levy, although the officer did not see the goods.

2. SUBROGATION — PRIOR INCUMBRANCES — PAYMENT BY OWNER—INDEMNITY TO BENEFIT OF SUBSEQUENT INCUMBRANCES.

Where the owner or purchaser of property subject to several incumbrances pays off a prior incumbrance with his own money, the payment inures to the benefit of the subsequent incumbrances, against which the prior incumbrances cannot be kept alive for the owner's benefit, even by express agreement, and on such payment by the owner, without any agreement for subrogation or keeping the security alive, a court will not revive the prior incumbrances by application of the equitable doctrine of subrogation in favor of the owner.

Bill by the Avon-by-the-Sea Land & Improvement Company against Louis G. McDowell and others. Heard on bill, replication and proofs. Decree for complainant.

A. C. Hartshorne, for complainant. S. A. Patterson, for defendants.

EMERY, V. C. Complainant is a judgment and execution creditor of a Mrs. Albertson, and the defendant Thompson is

the purchaser, and the defendants McDowell and Faust are the lessees, of personal property of the judgment debtor levied on or claimed to be levied on prior to the purchase and lease. The lessees, at the time of the levy claimed, were also in possession of the personal property under a lease from the judgment debtor, and McDowell, one of the lessees, was at that time holder of two chattel mortgages on the property for the sum of \$860. Both the mortgages were then due, and expressly authorized the mortgagee, in case of judgments against the mortgagor, to take immediate possession of the mortgaged chattels and sell them to pay the mortgage debt. The judgment was recovered on November 28, 1900, the execution returned with a levy on real estate and personal property of the debtor at the January term (1901) of the Monmouth circuit, and the conveyances of the real estate and personal property by the debtor to the defendant Thompson were made on or about April 9, 1901. On May 14, 1901, Thompson leased the hotel and furniture in question to McDowell and Faust for five months, at the rent of 17½ per cent. of the gross receipts of the business during the tenancy; \$475 to be paid in cash at the time of signing the lease, and the balance at the termination of the lease, or sooner closing of the hotel. The lease contained the further provision that the lessees should have the right, on the final settlement, to deduct from the rents the amounts due on the two notes given to McDowell by Mrs. Albertson, then amounting to \$915.20, principal and interest, which were to be credited as so much paid on the rent, provided the 17½ per cent. amounted to a sum equal to the cash paid and the amount then due on the notes, and if the percentage was not sufficient to satisfy the whole amount of the notes the lessees were to credit on the notes only the amount of the balance due on the rentals. These notes to McDowell were the notes secured by the chattel mortgages on the furniture, and it was admitted on the hearing that \$300 over and above the amount due on the mortgages has accrued as rent under the lease. Complainant in August, 1901, became the purchaser at sale under the execution of the right, title, and interest of the judgment debtor in the furniture for the sum of \$30. The furniture was not taken from the possession of the lessees and mortgagee by the purchaser, but has been sold since the filing of the bill by consent of the parties, and the proceeds of sale deposited subject to the joint order of their attorneys.

Complainant's bill, resting on its title as judgment and execution creditor and purchaser at the sale, was filed before the termination of the lease, and alleged that the mortgages were paid by the rental percentages, and prayed an account of the amount due on these mortgages. The right to an account is resisted by both purchaser and

lessees on two grounds. The first is that the levy under the execution is illegal and void, for the reason that it was made by the sheriff without his actually seeing the property levied on. The return to the execution shows a levy on the personal property with an inventory annexed; and the under sheriff, to whom the execution was delivered by the plaintiff's attorney, together with the list of chattels taken from the chattel mortgages, says that he sent the execution to an officer at Asbury Park to go down and make the levy. This officer's evidence has not been produced by the defendants, and, in its absence, I must hold that the sheriff's return of a levy actually made on the goods has not been so contradicted or shown to be untrue that the sale under it can be affected because of the supposed irregularity in making the levy. But on this point my further conclusion is that under our decisions the levy, by annexing the inventory, was sufficient in this case without actually seeing the goods, for the reason that the goods levied on were, at the time of the levy, in the actual possession of the mortgagee. The sheriff was not entitled to take the goods from the possession of the mortgagee, and his possession under any levy could only be constructive. *Fox v. Cronan*, 47 N. J. Law, 493, 509, 510, 2 Atl. 444, 4 Atl. 314, 54 Am. Rep. 190. And, so far as the levy was concerned, his only right was to see the goods for the purpose of making the levy. Taking from the chattel mortgage a list of the chattels already agreed on by the mortgagor and mortgagee, and annexing this list as the inventory, is, I think, sufficient as a constructive seizure for the purpose of a legal levy. Making an inventory from a list given by the defendant for the purpose of the inventory, and without seeing the goods, operates as a constructive seizure, and is valid against defendant. *Caldwell v. Fifield*, 24 N. J. Law, 150, 160 (Sup. Ct. 1853). And although it has not, in the later cases, been expressly held that a list or inventory made without seeing the goods and without the defendant's consent would be valid where the officer has the right to take the goods into his possession, I think that where he has no such right, but must levy and sell subject to the mortgage, an inventory of the goods in a mortgagee's possession, taken from the mortgage, is a sufficient constructive seizure, for the purpose of the levy, as against both mortgagor and mortgagee, and that they or persons claiming under them have no right to demand an actual view as necessary to a valid levy on the mortgaged chattels.

Second. It is insisted that, if the mortgages of McDowell are paid, the payment was made from Thompson's funds, being the rental of his property, and he is therefore in equity entitled to be subrogated to the rights of the chattel mortgages. But, if the levy was valid, Thompson took title to the chattels subject to the execution as well as the mort-

gages, and the law is settled that, where the owner or purchaser of property subject to several incumbrances, pays off a prior incumbrance by his own money, the payment inures to the benefit of the subsequent incumbrances, and as against them the prior incumbrances cannot be kept alive for the owner's benefit, even by express agreement. *Bolles v. Wade*, 4 N. J. Eq. 458; *Traphagen v. Lyons*, 38 N. J. Eq. 618, 616 (Err. & App. 1884). A fortiori, on such payment by the owner without any agreement for subrogation or keeping the security alive, a court of equity will not revive the prior incumbrance against subsequent incumbrances, by the application of the equitable doctrine of subrogation in favor of the owner.

Complainant is entitled to a declaration that the mortgages have been paid, and that the sale of the goods to Thompson was subject to the lien of its judgment and execution. At the settlement of the decree I will hear counsel on the right to further relief. This may depend on the terms of the agreement for sale of the mortgaged chattels, made by consent of parties after filing the bill.

ROSE et ux. v. COOLEY et al.

(Court of Chancery of New Jersey. Jan. 19, 1906.)

TENANCY IN COMMON — POSSESSION BY ONE TENANT TO EXCLUSION OF CO-TENANTS — PARTITION — RENTAL VALUE OF PREMISES AND PROFITS — ACCOUNTING — ACTIONS — SUFFICIENCY OF EVIDENCE.

In an action for the partition of lands owned in common, evidence that on the death of the parties' ancestor the premises were rented, but were shortly thereafter vacated; that one of defendants, who had been supporting her co-tenants, her half-sisters, and complainant, her half-brother, being unable to continue so doing, suggested that complainant and his two sisters occupy the farm; that, on taking possession thereof, payment of rent was not considered; that the farm was run at a loss, complainant expending his own money in repairs, etc., and repeatedly asking defendant, his half-sister, to relieve him of the burden of the farm, which she declined to do, encouraging him to stay until a favorable sale be made; that on one or two occasions complainant gave defendant money, at one time a check for \$50, indorsed with a memorandum that it was for rent, and on another occasion, when some material was sold from the farm for \$40, giving her \$10 thereof as her share; and that several times defendant applied to complainant for what she called rent—did not show that complainant and his two half-sisters refused possession to defendant, or deprived her of the income of the premises, it appearing that there never was any net income, taking the whole period together, but rather a loss; and hence defendant was not entitled to an accounting for the use of the premises.

Bill by J. Forman Rose and wife against Emma L. Cooley and others. On exceptions to report of master appointed in partition proceedings and objections to confirmation thereof. Report confirmed and exceptions dismissed.

E. R. Walker, for complainant and for defendant Rose. Linton Satterthwait, for defendant Crozier. Vroom, Dickinson & Scamell, for defendant Cooley.

BERGEN, V. C. The bill of complaint in this cause prays the partition of lands therein described, owned as tenants in common by the complainant, his two sisters, Ella P. Rose and Mary L. Crozier, and his half-sister, Emma L. Cooley; the sisters and half-sister being made defendants. Mrs. Cooley answered, praying for an accounting by her half-brother and sisters. An order of reference to a master was made, which directed him to ascertain and report whether or not the complainant and his sisters, Ella P. and Mary L., or some of them, had been in the possession of the whole of said premises to the exclusion of the answering defendant, Emma L. Cooley, and whether their occupation had been of such a character as to exclude her from participation in the enjoyment thereof, and whether they should account to her for the use of the premises, and that the said master should also ascertain the reasonable rental value or income which the land was capable of yielding from the month of March, 1891, to the present time. The master, upon due notice to the parties, proceeded to the taking of the depositions of such witnesses as were produced before him, and thereupon reported that the complainant and his two sisters, Ella P. and Mary L., had not, nor had either of them, been in the possession of the whole of the lands to the exclusion of their half-sister, Emma L., and that their occupation had not been of such a character as to exclude Mrs. Cooley from participation in the enjoyment thereof, and that they were not liable to account for such occupation. The master also reported that, from the evidence offered, he was unable to fix the reasonable rental value of the farm, or the income which it was capable of yielding during the time stated in the order of reference. To this report the defendant Mrs. Cooley has filed exceptions, and objects to the confirmation of the report, which is the matter now to be passed upon.

The evidence taken before the master shows that the father of these four children died seised of the lands in question; that at the time of his death the children, other than Mrs. Cooley, were minors; and that the farm was rented to a tenant for money rent until April, 1891, at which time the tenant left the farm, and for some reason the owners were not able to secure another tenant. Just previous to April, 1891, the husband of Mrs. Cooley died, she having, after her father's death, and until April, 1891, supported the infant children at her house, which was located within sight of the lands in question. Owing to the death of her husband, Mrs. Cooley did not feel able to continue the arrangement and suggested that, as the complainant was then about 19 years of age, he should take

his two sisters and occupy the farm and farm it. It clearly appears from the evidence that when these children went to the farm the payment of rent was not considered, nor, in my judgment, was it expected; for the principal motive which Mrs. Cooley had in making the arrangement was to provide a place where these children could support themselves and at the same time keep the farm in condition to induce a profitable sale of it. The testimony clearly discloses the fact that the running of the farm was not a profitable business, for, after years of renting, it had acquired the characteristics of all farm lands subject to such treatment, the fences had nearly all disappeared, and the buildings were in a decaying condition, so much so that, on one occasion, the end of the barn fell away from the rest of the building, and was repaired by the complainant at considerable expense; that during the period the complainant and his sisters lived on the farm he invested in repairs to the buildings, the putting up of fences, and the fertilizing of the land, not only all the proceeds he derived therefrom, but all the patrimony he had received from his father's estate, amounting, as I am able to gather from the evidence, to about \$1,000; that during this time he repeatedly asked Mrs. Cooley to take the farm and relieve him from the burden, but she declined, and encouraged him to stay, hoping for a favorable sale. On one or two occasions he did give her money, at one time a check for \$50, indorsed with a memorandum that it was for rent, and on another occasion, when some material was sold from the farm for \$40, he gave her \$10 of it, being her share. From these circumstances, and from the further fact that she at different times applied to him for rent as she puts it, or for her share of the farm as the other witnesses say, it was argued that Mrs. Cooley is sustained in her claim that there was an agreement to pay rent; but I do not think that such an inference is properly to be deduced from these circumstances. She did, undoubtedly, on several occasions apply to the complainant for what she called rent; but I am satisfied that what she meant was a proportion of the profits arising from the working of the farm. A reading of this evidence will not justify the conclusion that these three children refused possession to their elder sister and co-tenant, or deprived her of the income from the premises. On the contrary, there never was any net income, taking the whole period together, but rather a loss, which absorbed the little property which the complainant had inherited, and that without taking into consideration the years of labor which he devoted to the preservation of the property.

In *Edsall v. Merrill*, 37 N. J. Eq. 114-117, Van Fleet, V. C., said: "The principle adopted may be stated as follows: Where the tenant in possession has prevented his co-tenants from obtaining from the premises such profits as they were capable of yielding, or has taken

possession of the whole, and used them as his own, and thereby made a profit, he must account either for their fair rental value, or the profits." Applying this rule to the circumstances of this case, the report of the master should be sustained. These co-tenants were put in possession by this claimant, their elder sister and the head of the family, and, so far from preventing her from obtaining from the premises such profits as they were capable of yielding, they were holding, at her request and for the joint benefit of all the co-tenants, possession of the premises at an actual cost to them, to which she never contributed or offered to contribute a dollar to reimburse the complainant for the losses he was sustaining because the premises yielded no profit. Nor did the complainant or his sisters take possession of the whole premises and use them as their own, and thereby make a profit. Instead of taking possession, they were put in possession by their elder sister for her convenience and to keep the property in condition for a purchaser. A considerable portion of the evidence was directed to the question to which of these parties were responsible for the failure to make a sale of the property. I am satisfied that the great preponderance of evidence tends to show that the complainant and the two sisters who were on the farm with him, one, Mary, being there but a portion of the time, were anxious to sell, and that, if the sale was prevented, it was because Mrs. Cooley was unwilling to join in the conveyance.

The master's report will be confirmed, and the exceptions dismissed, with the costs of the accounting to be charged against the share of Mrs. Cooley.

BALTIMORE & N. Y. R. CO. v. BOUVIER et al.

(Court of Chancery of New Jersey. Jan. 15, 1906.)

1. ESTOPPEL—GROUNDS.

Where, in partition proceedings, a master's deed was in substance and effect executed by the direction in writing of a husband and wife, and they received their share of the consideration money, they were estopped from setting up that the conveyance did not pass any interest in the land on the ground that the master's deed was void.

2. EMINENT DOMAIN—RAILROADS—CONDEMNATION PROCEEDINGS—COMPENSATION—MEASURE OF DAMAGES—IMPROVEMENTS.

Where a railroad entered on land under a right of way deed, wherein it covenanted among other things to erect a passenger station and double-track its road for a certain distance, which conditions it failed to fulfill, the improvements made by the railroad on the land were not to be considered in determining, in condemnation proceedings thereafter instituted, the damages suffered by the vendor.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 361½.]

3. SAME—FORFEITURE—EJECTMENT—EFFECT OF JUDGMENT—TITLE.

Under Gen. St. p. 1288, § 44, providing that "a judgment in an action of ejectment shall be conclusive as to the right of possession and

the title to the premises (as the case may be) as the same has been established by such judgment," where a railroad entered upon land under a right of way deed binding it to double-track its road and to erect a passenger station on the vendor's property, which grant it thereafter forfeited by failure to comply with the terms of the deed, and a judgment in ejectment was recovered against it, that fact did not give the vendor such a new and independent title as to bar the application of equitable principles in condemnation proceedings thereafter instituted, in determining whether or not the vendor was entitled to compensation for improvements made by the railroad prior to the forfeiture.

4. SAME—MEASURE OF DAMAGES.

Where, in fixing the price of land conveyed to a railroad for right of way purposes, the benefit resulting to the landowner from improvements to be made by the railroad in the way of a passenger station and double tracks was taken into consideration in fixing the compensation under the deed, the comparative value of the land with and without the advantages of such improvements was determinative of the abatement or allowance to the railroad company in fixing the price for the land conveyed.

5. SAME—EQUITABLE RELIEF—BREACH OF COVENANTS.

Where, under a right of way deed, a railroad company covenanted to double-track its road and construct a passenger station, but it did not appear that any benefit would result to the vendor from such improvements, the road being distinctly one for the carriage of freight, a breach of such covenants by the railroad did not debar it of equitable relief, in condemnation proceedings instituted by it after declaration of a forfeiture for the breach, with respect to the allowance to the vendor of compensation for improvements already made by the road on the land.

6. SAME—COSTS.

Where, in condemnation proceedings, the position and conduct of a railroad was in accordance with the principles of a court of equity, and in such proceedings it substantially succeeded, it was entitled to costs, although in its supplemental bill it asked the court to ignore the findings of the jury and ascertain the amount of compensation to be paid defendant landowner in its own way; no proceedings being had under such prayer, and defendant incurring no expense by reason of the insertion of the prayer in the bill.

Bill by the Baltimore & New York Railroad Company against John Vernou Bouvier, Jr., and others. Decree for complainant in accordance with opinion.

For the previous history of the litigation between these parties, see *Bouvier v. Baltimore & New York Railroad Company*, 65 N. J. Law, 313, 47 Atl. 772; 67 N. J. Law, 281, 51 Atl. 781, 60 L. R. A. 750, on error; and 69 N. J. Law, 149, 53 Atl. 1040, on certiorari.

E. Q. Keasbey, for complainant. R. V. Lindabury, for defendant Bouvier. W. L. McDermott and Charles E. Lydecker, for heirs and devisees of William H. Hume.

PITNEY, V. C. The complainant, on March 22, 1889, purchased and took title from Frederick K. Reichard and William H. Hume to a strip of land (part of a much larger tract) containing $5\frac{52}{100}$ acres, being 2,200 feet, nearly half a mile, in length, and 100 feet in width, for the purposes of its railway,

and proceeded promptly thereafter to construct its railway thereon. The conveyance, however, contained a series of clauses providing for the construction and maintenance of a double-track railway over the land conveyed, and for the erection and maintenance of a passenger station at one end of the strip on a small additional plot outside the 100-foot strip, but included in the conveyance. The deed also contained clauses providing that, if the grantee should fail to construct and maintain a double-track railway, then "it shall and may be lawful to and for the parties of the first part, their heirs or assigns, into and upon all and singular the lands and premises hereby conveyed, or any part thereof, to re-enter, and the same to have again, repossess, and enjoy as in their former estate, this conveyance, or anything herein contained, to the contrary thereof in any wise notwithstanding, together with all and singular, the buildings, improvements, etc., with the appurtenances; subject to the covenants and conditions, hereinbefore set forth, to be kept and performed by the said party of the second part, its successors and assigns, to have and to hold," etc.

The complainant constructed a double-track railway over about two-thirds of the strip only, and did not erect the passenger station. The whole tract was subsequently, in the year 1895, subjected to partition proceedings in this court and actually divided between the tenants in common, with the exception of the right of re-entry in the railway strip, which was sold by a master under a decree of the court, and subsequently, together with the title to some of the lands divided, became vested in the defendant Bouvier. He, early in the year 1900, brought an action of ejectment against the railway company, and recovered, on the ground that the condition subsequent had not been fulfilled and that the right of re-entry reserved by the deed of conveyance had become vested in him. The judgment of the Supreme Court (47 Atl. 772) was based upon the notion that the whole title was vested in him. The complainant brought a writ of error to the Court of Errors and Appeals (51 Atl. 781, 60 L. R. A. 750), and that court affirmed the judgment, but expressed the opinion that Bouvier's title extended only to one undivided half of the premises by reason of the invalidity of the master's deed in partition for the strip in question, but held that as a tenant in common he was entitled to maintain an ejectment. Upon the affirmance of this judgment complainant filed its bill in this court for relief against its execution, and made the defendant Elizabeth Hume, widow and devisee of William H. Hume, former owner of one-half, and their children, parties thereto with Bouvier, on the ground that under the judicial utterance of the Court of Errors and Appeals she was possibly, with or without her children, the owner of one undivided half of

the premises. Interim relief against the writ of habere facias possessionem was granted upon verbal condition that the complainant would take immediate proceedings to acquire by condemnation the title to the strip, and later on the defendants Bouvier and Hume were required to consent that the commissioners, and, in case of an appeal, the jury, should make a double finding, namely: First, find the present value of the land with all the structures and improvements on it; and, second, its value without those improvements and as if never used for railroad purposes. This has been done.

The result was, as found by the commissioners, as follows:

The total value of land and railroad additions at the time of filing the petition for condemnation.....	\$8,935 72
Value of lands without railroad track, etc., as if it had never been used for railroad purposes.....	1,964 00
Damages to Bouvier as owner of adjoining lands.....	500 00
Damages, etc., to Hume.....	500 00

An appeal was taken, and the jury found as follows:

Value of land with railroad track and improvements.....	\$18,212 50
Value of the land without regard to railroad structure.....	2,716 50
Damages to Bouvier as owner of adjoining land.....	8,600 00
Damages to Mrs. Hume as adjoining owner.....	8,780 00

A supplemental bill was thereupon filed by complainant, setting out and attacking the binding effect of this verdict in this court, stating several grounds why the court should disregard it, and by its own method ascertain the proper amount to be paid, and also praying that it might be instructed as to whether the defendant Hume was entitled to any interest on the award, and that pending the further proceedings in this court judgment and execution on the verdict might be stayed. Judgment and execution was stayed upon paying a sum of money into court. The defendants answered severally, and the defendant Bouvier filed a cross-bill against the defendants Hume to establish the validity in this court of his title under the master's deed in partition before referred to. This cross-bill was answered by the defendants Hume, and the cause brought to a hearing. With this brief statement of the history of the cause I will now consider the questions raised by the pleadings.

Two questions present themselves: First, are the defendants Hume entitled to any interest in the premises? Second, upon what basis the defendant Bouvier shall be entitled to compensation. I shall consider the question of the Humes' title first, because its solution will, as we shall see farther on, seriously affect the other question.

The railroad strip was part of a larger tract of land which was bisected by it. Reichard, one of the tenants in common at the

date of the deed of conveyance to the railroad, afterwards conveyed his interest to Salter, who later on conveyed it to Sergeant and De Marmon, the result of which was that Sergeant and De Marmon became tenants in common with William H. Hume. On May 21, 1895, De Marmon filed his bill against his co-tenants in common for a partition of the premises. In it he set out the land conveyed to the railroad company and the condition upon which it was conveyed. To that bill William H. Hume and his wife, Elizabeth, the defendant herein, appeared by their solicitor, Mr. N. C. J. English, and filed their answer. On the 24th of September, 1895, the complainant filed an amended bill, praying special relief as to the railroad strip. On the 2d of December a decree pro confesso was entered against Sergeant and wife, and an order of reference to Master Atwater to ascertain the value and the capacity of the land to be divided was made in the usual form, and to that order Mr. English, as solicitor for Hume and wife, consented. Master Atwater found that the premises were capable of partition, excepting the railroad strip, and recites in his report that he was attended by the solicitor of the Humes. On that report, which was confirmed, partition was had of all except the railroad strip, and a decree was made that the railroad strip should be sold by Master Byington, and that decree is expressly consented to by Mr. English in writing, as solicitor of Hume and his wife, and by Mr. George Biller, as solicitor of Sergeant and his wife. The master made sale to De Marmon and Sergeant for the sum of \$681, which sale was reported and duly confirmed by order dated September 22, 1896, and the deed delivered and the purchase money paid. The master, since deceased, filed his statement showing what he did with that money in detail. All but \$132.05 went for costs and expenses, of which latter Hume's solicitor received \$16.52 and a counsel fee of \$75. There was left for distribution \$132.05, of which Mr. Hume received for his share \$56.03 as certified to by the master. These allowances of counsel fees were made by the court and the whole proceeding validated by a final decree dated October 13, 1896. It was not disputed at the hearing that Mr. English was duly authorized to appear for Mr. Hume, and his attendance as a witness was waived. The only question raised was as to his authority to appear and represent Mrs. Hume, the defendant herein, in protection of her inchoate right of dower in the premises, and that, as I recollect, was submitted on the ordinary presumption that he was so authorized. Mrs. Hume was not sworn as a witness, she being too ill to attend. Mrs. Hume, the defendant herein, succeeded to the title of her husband to these premises after his death.

I think it must be presumed from the report of the master that he actually did pay a portion of the proceeds of the sale to Hume

or his solicitor, so that, not only did Hume authorize, through his solicitor, the sale of these premises by the master, but he actually received, in person or through his solicitor, one-half of the consideration money therefor. Now that the court of chancery has had and exercised since the time of Queen Elizabeth jurisdiction of the subject-matter of dealing with the rights of coparceners and tenants in common in land, and decreeing partition thereof, including owelty where equal partition could not be made, seems to be undisputed. And, while I do not find it necessary to assert that the decreeing of owelty to be paid by one tenant in common to the other amounts to exercising the jurisdiction of sale outright, it certainly approaches it somewhat nearly. Be that as it may, the sale of land by this court in partition proceedings is, and for many years has been, clearly within the jurisdiction of this court. Its exercise is indeed regulated by statute, but its jurisdiction in that behalf clearly and *ex necessitate rei* includes the power to construe that statute, and if the court makes a mistake therein its decree is subject to reversal on appeal. But, if not reversed on appeal, I should have thought, but for what was said by the learned judge, speaking for the Court of Errors and Appeals in *Bouvier v. Baltimore & New York Railroad Company*, 67 N. J. Law, at page 294, 51 Atl. 781, 60 L. R. A. 750, that a conveyance made by order of the court in partition and duly confirmed by the court could not be attacked collaterally. The substance and effect of the decision in its ultimate analysis is, after all, no more than this: The defendant in ejectment contended that the plaintiff's title, derived through the master's deed in partition, was void. To this the court replied: Conceding that it is void, yet the plaintiff remains the owner of an equal undivided one-half part, and that is sufficient to sustain his action.

There was nothing in the decision, or judgment of the court which was based thereon, which could operate as an estoppel against Mr. Bouvier. The rule, as I recollect it, with regard to estoppel by record, is that it must be mutual; that one party shall not be estopped unless the other would be in case of a contrary decision. Now, as Mrs. Hume was not a party to the record before the Court of Errors and Appeals, she could not have been estopped by a declaration of that court that she had no interest in the land in question; hence Bouvier could not be estopped by a contrary decision. Be that as it may, the circumstances attending the making of the decree for sale in this case were not before the Court of Errors and Appeals, nor was that court at liberty in that case to deal with the title of either Bouvier or Mrs. Hume, as between them, from an equitable standpoint. From a chancellor's standpoint the decree for sale and its execution was made, so to speak, by the direction in writing of Mr. and Mrs. Hume, so that the

master's deed was, in substance and effect, the deed of Mr. and Mrs. Hume; and when we have the additional fact that they received their share of the consideration money it seems to me quite plain that they are estopped, on plain principles of justice, from setting up that the conveyance did not pass their interest in the land. For these reasons, expressed orally at the hearing, I shall advise that Mrs. Hume and her children have no interest in the premises.

We come now to the complainant's case as made by the bill, answers, and proofs as against Mr. Bouvier. The proof shows, and it was admitted, that immediately after the rendition of the final judgment in ejectment complainant attempted without success to settle with Mr. Bouvier. But, if he had agreed with Mr. Bouvier as to the price to be paid for the strip in question, he was still embarrassed by the express declaration of the Court of Errors and Appeals, above referred to, that an equal and undivided one-half part of the title still rested in the heirs at law and devisees of Mr. Hume. Mrs. Hume seemed to be the universal devisee of her husband, who had in the meantime died. But then it further appeared that there were children, who were born after the making of Mr. Hume's will, and their conveyances to their mother were, as I now recollect, not yet on record. Bouvier did not admit any title outside of himself. Under these circumstances the complainant had a clear equity to apply to this court for relief: First, to ascertain who were the real owners of the strip; and, second, as I think and am well assured, to ask this court to determine how much it ought to pay those owners when ascertained. This latter equity will be elaborated further on. It is proper for me here to say that, when counsel for complainant first applied to me for an interim injunction against the execution of defendant's judgment in ejectment, he desired me to proceed upon the basis of the practice adopted in *Trenton Water Power Company v. Chambers*, 9 N. J. Eq. 471, but I declined so to do, and declared that I would only grant an injunction upon condition that complainant would take immediate proceedings for condemnation, stating orally at the time that I would so manage it that the commissioners, and jury on appeal, should appraise the value and damages in such manner that this court would be informed of the value and damages, both with and without the improvements, placed upon the premises by the railroad. This course was pursued.

The defendant Bouvier answered the original bill, denying that complainant had any standing in this court for any purpose, and denying that it had any right to take the condemnation proceedings mentioned in its bill, and added to his answer a cross-bill praying that complainant be enjoined from so doing. He shortly thereafter removed the condemnation proceedings by certiorari to

the Supreme Court, and there challenged their validity, and was defeated, as reported in 69 N. J. Law, 149, 53 Atl. 1040. Promptly after this decision complainant applied for, on notice, and obtained leave to amend its bill both in its statement and its prayer, in substance as follows: In the stating part, that if proceedings for condemnation were taken the inquiry before the commissioners will be limited to an appraisement of the land and an assessment of the value thereof at the time of the condemnation, and damages sustained by the owner on the same basis, and that neither the commissioners, nor the jury on appeal, have power to inquire into the circumstances of the case, nor consider the equities set forth in the bill; then alleging the fact that valuable improvements have been made by the complainant since its entry on the premises prior to 1890 under the deed from Reichard and Hume, and that a railroad has been built thereon, part of a greater line, and that an appraisement which should include the value of the railroad tracks would not be a measure of the fair compensation to the owner of the land, and would work great injustice to the complainant, and that the compensation which should fairly be made to the defendant could only be ascertained by this court or under its direction, and in view of the facts hereinbefore set forth; and a further amendment in the prayer that this court may retain the bill and may proceed, in such manner as it may see fit, to ascertain what is the fair and full compensation that should be made by the complainant, under all the circumstances of the case, to the defendant for the taking of the lands and the damages sustained by reason thereof, the complainant tendering itself ready and willing to pay the amount so ascertained, and, further, that if this court should see fit to direct that the proceedings for condemnation should be continued, then an order may be made that the commissioners, and jury in case of appeal, should appraise and estimate the value of the land taken apart from the structure and work and materials placed and done thereon, and without regard to the tracks and cuttings and embankments laid and made thereon, and without regard to the use made by the complainant of the railroad built thereon. No answer was filed to this amendment.

Coincident with the amendment of the bill by the complainant, the defendant Bouvier applied for and obtained leave to withdraw so much of his answer as was a cross-bill, and the complainant's answer thereto was also withdrawn, and then, on motion of the complainant and without objection by the defendant Bouvier, a special order was made as follows: It recites that it appears to the court that commissioners have been appointed to condemn the land in question, and the complainant asks it to make provision for ascertaining the value of the lands proposed to be taken for railroad purposes, apart from

the railroad and structures already made and built thereon by the complainant, and that an order may be made to assure a special assessment by the commissioners, and by the jury in case of appeal, of the value of the land as if it had never been used for railroad purposes and no embankments, cuts, or structures had been built or made thereon; such assessment to be in addition to and independent of such assessment as may be or shall be made under the order made by the judge or court appointing said commissioners, and proceeds: "It is ordered that the defendant shall consent at the hearing before the commissioners in the proceedings for condemnation, and before the jury on appeal, for the purposes of such proceedings and of this cause and for no other purpose, that the commissioners and the jury, respectively, when making an appraisement and assessment in such proceedings, and in addition to the appraisement and assessment so made by them, shall make a special appraisement of the value of the land to be condemned as if it had never been used for railroad purposes, without regard to the railroad track, structures, trestles, embankments, cuttings, additions, and changes made or built thereon by the complainant, or to the use made of the lands and structures by the complainant as a part of its railroad." Under these circumstances I think that simple justice to the complainant requires that the case should be considered in all respects as if the amendments to its original bill, just referred to, had been inserted in the bill at the time it was filed, and the condemnation proceedings should be treated as having been taken by the direction of this court as a convenient mode of ascertaining values to be used by this court in working out and administering the equities between the parties.

The result of those proceedings was the two findings by the jury above mentioned. After the rendition of these verdicts a motion was made in the law court for a new trial, and refused. The complainant then filed a supplemental bill, setting up the proceedings in the law court, praying for relief against a judgment being entered on either of the verdicts, charging that they were unjust and excessive and based upon wrong principles, and asked this court to disregard both verdicts and to ascertain for itself, in such manner as it might see fit, what amount the complainant ought to pay. In his answer to this supplemental bill the defendant merely echoed his previous answer, and denied that the complainant had any equity whatever, setting up that the complainant had deliberately taken his choice to proceed at law without application to this court and is bound by his selection, and stating as a reason why there is no injustice to the complainant in holding it to the larger verdict that the complainant forfeited its title to said land by its own voluntary act and breach of the conditions in its deed. In this con-

dition of the pleadings the cause was brought to a hearing. I declined to hear any evidence to show that either of the verdicts were excessive, unless complainant would satisfy me in argument that it would be just and equitable for me to do so. This he has not been able to do, especially in view of the admitted fact that a motion was made and heard by the learned judge who presided at the trial to set aside the verdicts because excessive. It would be manifestly unjust to permit the complainant to speculate in that manner on the result of an appeal which it had taken itself. Equity will not permit it to find fault with the result of an appeal which it has itself taken and which it was under no obligations to take. If the complainant had rested content with the award of the commissioners, and the defendant had appealed therefrom, with the result which actually occurred, it is quite possible that this court might, under the view which I take of this case, have determined that it would ignore the verdict of the jury and adopt the award of the commission. I feel constrained, however, to say that the great difference in the damages to adjoining property found by the commissioners and that found by the jury—about seven times as much—leads to the suspicion that the jury did take into consideration improper matter in the fixing of the damages.

Two questions remain: First. Shall this court adopt and compel the complainant to pay to Mr. Bouvier the whole value of the strip of land taken, which includes, confessedly, the value of its railroad embankments, cuts, and tracks, or shall it limit Mr. Bouvier's right to the value of the land without the railroad improvements, as found by the smaller verdict? Second. Is Mr. Bouvier entitled, under the circumstances, to any damages to his adjoining land?

As the result of the actual partition of the premises, as shown on the map forming part of the master's report in partition, Mr. Hume became the owner of certain tracts adjoining on the railroad on one side, and Mr. Bouvier's immediate grantors (and Mr. Bouvier in succession to them) became entitled to certain lands adjoining on the railroad on the other side, and by reason of his ownership of these lands, which were a part of the original tract, damages were awarded to him to the extent of \$3,600, and to the Humes, on the basis of their being the owner of an undivided one-half interest, damages were awarded to the extent of \$3,780, in all over \$7,380, while the value of the land itself, without the railroad structures, was put at \$2,716.50. But, as the Humes' interest is eliminated, they are not, of course entitled to any damages to their adjoining lands; hence the amount to be paid by complainant, if the value of the improvements is excluded, is \$6,316.50. The quantity of land originally conveyed by Bouvier's grantors to complainant was $5\frac{1}{2}/_{100}$ acres,

consisting of a strip 100 feet wide and about 2,200 feet, or a little over one-third of a mile, in length, with an addition at one end of $2\frac{1}{100}$ acres, outside of the 100-foot strip, which was intended for a railroad station. The strip conveyed and here in question omits the railroad station and includes only $4\frac{1}{2}/_{100}$ acres. It may be well to observe just here that at no stage of the proceedings did counsel on either side suggest to the court that the commissioners should be instructed to ascertain the value of the land and incidental damages as of the date of the original entry by the railway, with the view of adopting that value, with interest from the date thereof, as a proper method of compensation. Manifestly that rule was inapplicable.

Coming, now, to the first question: A long line of cases in this court, and one in the Supreme Court of this state, and numerous others in other states of the Union, collected and cited by counsel for the complainant, hold with entire unanimity that, except where the railroad company entered in the first place as a willful trespasser, or where it has been guilty of some inequitable conduct sufficient to raise a counter equity, the value of the land without the additions and superstructures is the proper measure of compensation in a case like the present. Such was the expressed declaration, after full consideration, of our Court of Errors and Appeals in *North Hudson County Railroad Company v. Booraem et al.*, 28 N. J. Eq. 450. The foundation of the rule in equity is its intrinsic justice. This appears from an examination of the cases cited. Justice Depue, in the *Booraem Case*, supra, at page 453, says: "But where the company has taken possession by the consent of the owner, and has expended money in the adaptation of the land to the proposed use, and altered and changed its condition, this rule [referring to the fixed rule at law] manifestly is not adapted to reach the just compensation contemplated by the constitutional provision." Then, after showing that it might be unjust to the landowner to compel him to take the value of the land at the time of the appraisement, because it might have been injured in value by reason of the change made by the railroad company, he proceeds: "On the other hand, to compel the corporation to pay, as the value of the land, an increased price because of the improvements made by it, would be unjust to it. The owner has no claim in justice to have expenditures for such purposes inure to his benefit. Under such circumstances he is entitled to be paid the damages he has sustained, and nothing more. That will be represented by the value of the land as it was before it was changed in its condition, irrespective of the structure put upon it by the corporation, and interest from that time. Neither in law nor in equity is the

owner entitled to anything more." The learned judge then proceeds to cite cases in support of that proposition. This rule had been previously applied in the case of *Trenton Water Company v. Chambers*, 9 N. J. Eq. 471 (s. c., 18 N. J. Eq. 199). Confessedly the same rule was adopted at law in *Coster et al. v. New Jersey Railroad & Transportation Co.*, 23 N. J. Law, 227, and *Id.*, 24 N. J. Law, 780. And it was only by what was held by the law court to be the stress of the statute regulating condemnation proceedings that any other rule was adopted at law. For in *Leeds v. Camden & Atlantic Railroad Company*, 53 N. J. Law, 229, 23 Atl. 168, the learned judge who spoke for the Court of Errors and Appeals closed his opinion as follows: "The equitable rule, which appears to have been followed in the present case, is that, when prepayment has been waived, the landowner retains an equitable lien upon the land for the payment of such damages as he has sustained, when the company violates the conditions upon which the entry without compensation was permitted, which may be enforced in a court of equity. *Wood, Railw. L.* 785. The value of the land and damages at the time the entry was made, and interest from that time, have been fixed as a proper measure of damages in some such cases. See *Hudson County R. R. v. Booraem*, 28 N. J. Eq. 450, and later cases that have followed it. "When parties are before that court seeking the adjustment of equitable claims for and against the railroad company, all the rights of the landowner will be protected, and full compensation may be made, not only for the value of the land taken and the damages incident to the taking, but also for the breach of any agreement made with him, and allowance for the occupancy of the land under such agreement or by consent or license. When the company proceeds to condemn lands, under its charter, it can act only according to the exact terms of the power therein conferred. There was error in the ruling, and the judgment will be reversed."

The question in *Leeds v. Camden*, etc., R. R., *supra*, was whether the land should be appraised as of the date when taken or as of the date of the appraisal, and it was held that the statute required it to be taken as of the date of the appraisal. A careful reading of the opinion does not lead me to the conclusion that the court intended to decide that the value of the railroad structure should be added to the value of the land. However that may be, in the case which followed it in the Supreme Court, namely, *Trimmer v. Penn.*, *Poughkeepsie & Boston R. R. Co.*, 55 N. J. Law, 46, 25 Atl. 932, the learned judge who spoke for the Supreme Court seems to have so treated it, and states that there is an apparent inconsistency between the *Leeds* Case and the *Booraem* Case, and reconciles them as fol-

lows: "The difference, however, arises from a distinction taken in the later case between a proceeding to condemn, considered as a purely legal proceeding, and a proceeding in an equitable suit to ascertain the damages which the landowner has sustained by reason of the appropriation of his land. In equity, when a corporation having power to condemn has been let into possession by the landowner and makes improvements, the court will adjust the claims of the landowner upon the basis laid down in the *Booraem* Case. The court will, by means of a reference to a master, ascertain the damages to the landowner according to this standard of compensation. In the *Booraem* Case the award of the commissioners, although made upon an erroneous legal principle, was in conformity with the equitable rule, and so was permitted to stand in place of a report of a master to whom a reference might have been made. If the question of compensation had not been drawn into a court of equity by the foreclosure of a mortgage covering the land condemned in addition to other land, the rule adopted by the commissioners in that case would have been inaccurate. The result of these conflicting rules seems to be that if a corporation, under the conditions mentioned, takes proceedings to condemn lands, the legal rule applies; but, if the question of the value of the land becomes involved in a suit in equity the equitable rules apply. So if, under these conditions, the owner brings an action of ejectment to dispossess the company, a court of equity will stay the action upon payment of damages to be ascertained in conformity with the equitable rule. *Trenton Water Co. v. Chambers*, 9 N. J. Eq. 471; s. c., 18 N. J. Eq. 199." The question, after all, was not involved in the *Trimmer* Case, since the case disclosed no privity by way of succession or otherwise between the railroad company prosecuting the proceedings before the court and that which had built the works upon the ground included in the condemnation proceedings.

The only case which has been cited by the defendant in conflict with the *Booraem* Case and the other cases in the same line is *Briggs v. Railroad Co.*, 43 Pac. 1181, decided by the Supreme Court of Kansas March 7, 1896. The case is much like the *Booraem* Case, and, as in that case, on condemnation proceedings the inferior tribunal held that the value of the land without the additions made by the railroad company was the true measure of compensation. But the Supreme Court on appeal held otherwise, and made the railroad pay the purchaser under foreclosure the full value. The injustice of it was felt by the Supreme Court, but it seems to have felt constrained to do the injustice. I prefer the rule laid down by our Court of Errors and Appeals in the *Booraem* Case, and am glad to feel bound to follow it.

Now the quality of justice or injustice in a given transaction does not depend upon or

vary with the name or character of the court under whose jurisdiction it is brought for consideration. What is considered unjust in a court of equity is also considered unjust in a court of law, and so says Justice Depue in the *Booraem* Case. It is felt to be quite as unjust by a common-law judge for a trustee of the legal title to eject the cestui que trust and hold the subject of the trust against him as it was by the equity judge. The difference, and the only difference, between the two courts, lies in the variance in their several capacities to protect the rights of the cestui que trust. It is a mere matter of judicial machinery. The learned judges in the *Leeds* Case and the *Trimmer* Case, from whose opinions extracts have been recited, did not mean to say, and in fact did not say, that it was just that improvements already put upon the property by the railroad company should be included in making up the valuation and price to be paid by that company on condemnation proceedings, but only that the statute is so framed that it must be done. Aristotle (*Ethics*, book 5, c. 10) defines equity as "a better sort of justice, which corrects legal justice where the latter errs through being expressed in a universal form and not taking account of particular cases." And Grotius condensed this definition into the modern one, namely: "Equity is the correction of the law, wherein by reason of its universality it is deficient." It seems to me that the present case is brought directly and clearly within the definition of these great men, and the propriety and the duty of this court to exercise its corrective power abundantly appears and of itself gives this court jurisdiction to act.

The complainant herein, then, by all the authorities, is properly in this court, and is entitled to have the equitable rules applied precisely as in the *Booraem* Case, unless there are some circumstances in the case to bar its equity. Moreover, its right to ask the aid of the court arises not only out of the injustice of being compelled to pay the defendant for improvements which it has, at its own expense, put upon the premises, but it has a distinct standing in the court by reason of the character of the defendant's title, which rests upon a forfeiture by reason of complainant's failure to perform a condition subsequent. The right of re-entry for such failure was manifestly reserved in the deed, for the purpose of insuring the performance of those conditions. Hence the case assumes the aspect of a mortgage given to secure the performance of those conditions and must be so treated for present purposes.

Let us examine its position. In the first place, at the time it took the conveyance from the former owners it was duly empowered to acquire the lands by ordinary condemnation proceedings. But it agreed with the owners and bought the land, and paid for it the sum of \$1,199, upwards of \$200 per acre. Thus its original entry was entire-

ly lawful. Nothing that it subsequently did or failed to do can alter that position. The right of re-entry in the grantors, found and established by the court, not only does not make that original entry unlawful, but recognizes its lawfulness. This price of \$1,199 was not, however, the whole consideration for the conveyance. The grantors seem to have expected some benefit to their remaining land to arise from the construction of the proposed railway. Hence the insertion of the conditions, first, that a railway passenger station should be erected on part of the land conveyed, and maintained, and, second, that a double-track railway should be constructed and maintained over it. It will be observed here that there is no such provision here as was found in the case of *N. Y. & Greenwood Lake R. R. Co. v. Stanley's Heirs*, 34 N. J. Eq. 55, where the provision was for the running and stopping of four (4) trains daily each way. There was no provision here that any train should be run over the railway or should stop at the station. If the railway had been double-tracked all the way across the land conveyed—for that is the language—and nowhere else on the line of the railroad, and a passenger railway station had been erected and maintained, and no train had ever run over the road, and no passenger train ever stopped at the station, I am unable to see how any court could have declared that the land was forfeited and a right of re-entry had accrued. Be that as it may, the conditions were not fulfilled. The double track was laid two-thirds of the way across the strip, but the passenger station was never erected. In fact, it was admitted that the road was built and intended for the purpose of carrying freight only, and not passengers, and that it never has made it a business of carrying passengers, so that the passenger station would have proved, if built, of no value whatever to the landowners.

Let us now ask what were the actual conditions when this land was conveyed, and what reasonable expectation the landowners had of any appreciable benefit to them? The road in its total length is and was less than 6 miles, and its general course was and is northwest and southeast, which is directly athwart the general course of passenger travel in that portion of New Jersey. Its termini were a point at or near Cranford, on the Central Railroad of New Jersey, and Staten Island Sound, across which it was to be carried by a bridge to Staten Island. The grantors are chargeable with knowledge of all this. Manifestly it was not intended to be used as a passenger road. The land here in question lies between the New Jersey Central or the Lehigh Valley Railroad, at or near Cranford, and the Pennsylvania Railroad at the familiar point where the complainant's road crosses the latter road. Manifestly the only chance the complainant's road had of making a business of carrying

passengers was to make some sort of a passenger traffic arrangement with either the Central Railroad of New Jersey or the Lehigh Valley Railroad, at or near Cranford, or with the Long Branch Railroad on the Sound, and manifestly and confessedly there was no population, present or prospective, along the complainant's road between the Pennsylvania Railroad and the Lehigh Valley Railroad which would warrant the establishment of a set of passenger trains to be run over it and to reach New York by either of those railroad lines. These considerations lead me to the conclusion that complainant's grantors had no reasonable grounds to expect any appreciable benefit from the construction and operation of the road.

With regard to the condition of building a double-track road. Its terms would have been fully and literally complied with, as before remarked, by laying a double track across the strip conveyed. But, suppose the implication was that it was to be double-tracked throughout its length of $5\frac{1}{2}$ miles, of what material benefit would such construction be to the grantor's land. I confess I am unable to see any, unless, indeed, it could be conceived that it was to become a great through route for passengers. But this supposition seems to me quite extravagant and inadmissible. A common experience teaches us that, the greater number of trains that pass over a railroad, the greater injury it is to the adjoining lands, though, on the other hand, the greater the number of passenger trains, the greater the probability of benefit. No evidence was offered before me to show what, if any, benefits were expected to be derived or could be derived by the fulfillment of the two conditions in question. The case was submitted on the bare right arising out of the nonperformance of the conditions. Now I deem this aspect of the case important, since Bouvier's right arises out of a forfeiture by the complainant of its land, for which it had once paid, by reason of the nonfulfillment of certain subsequent conditions. Now it is one of the offices of the court of chancery to relieve against forfeitures, and it does so gladly, but always upon equitable terms; and those terms are to make compensation to the party claiming the forfeiture for his real loss or injury. In the present case the complainant has lost the sum of \$1,199, with the interest on it for all these years, and I am unable to see, on that part of the case, why it ought to lose any more. No allegation of injury or loss is found in the defendant's answer, and no proof of any was offered by him. This, it seems to me, it was the privilege of the defendant to do. One of the reasons given by the learned judge in the Leeds Case for determining cases of this kind in this court is that "allowance can here be made for the breach of any agreement made

by the railroad company with the land-owner."

Let us next inquire if there has been anything inequitable in complainant's conduct since the proceedings to recover the land were commenced. I think it was entirely justified in defending the case at law and saving the forfeiture, if it could do so. The questions raised were real, and not colorable merely, and were such as were fairly debatable. Upon the whole, then, I see no such conduct on the part of the complainant that may be deemed inequitable to such an extent or degree as to bar it from the right to be dealt with as a deserving suitor in this court and to have relief as such in accordance with the principles applicable to such cases. These positions were not seriously contested by counsel for Bouvier, as I understand his oral argument. I understood him to place himself on the ground that all these equitable considerations are barred by the action and judgment of ejectment; that the relation between the railroad company and the original grantors, and himself as their successor, is entirely changed by the judgment in ejectment; and that that judgment gives Bouvier a new, independent, solidified, and crystalized title, which in some mysterious way bars the exercise, or rather the application, of any equitable principles. I am unable to take that view, or to see the least force in the argument presented in its support. A proceeding in ejectment is simply one to obtain possession of land. In order to succeed, the plaintiff therein must show that at the time he commenced his suit he was entitled to such possession. He need show no more. Nothing else is put in issue. The character or extent of the title, whether in fee, or in pledge, or for a term of years, or for a single year, is not put in issue nor determined by the court, if it be in the plaintiff's favor. Nor is the character or quality of the right, whatever it may be, upon which the plaintiff recovered, in the least degree affected, increased, or strengthened by a judgment in his favor. He obtains no new title, nor anything in the nature of a new title, but simply a declaration of the court to the effect that by virtue of the right which he had at the commencement of the suit he is entitled to take possession. This appears clearly from the judgment record in this case. The section of the statute (Gen. St. p. 1288), relied on by counsel for the defendant is as follows: "44. A judgment in an action of ejectment shall be conclusive as to the right of possession, and the title to the premises (as the case may be), as the same has been established by such judgment." The declaration of the plaintiff in ejectment herein declares that the plaintiff Bouvier "demands of the Baltimore & New York Railroad Company, the defendants therein, the possession of all that land," etc. And the judgment is: "Therefore it is considered that the said plaintiff do recover against the said defendant his term yet to

come of and in the tenements aforesaid, with the appurtenances; * * * and thereupon the said plaintiff prays the writ of the state of New Jersey, directed to the sheriff of the county of Union aforesaid, to cause him to have possession of his said term yet to come," etc. Clearly, then, we must look beyond the record for the real character of defendant's title. And when we do so we find that it rests on a forfeiture, and all that is conclusively settled by the judgment in ejectment is that the forfeiture has actually taken place, with all its legal consequences.

But, argues the counsel for the defendant in his written argument, the effect of the judgment in ejectment, if it be limited in its effect to showing that the defendant herein was the party who was entitled to possession at the time of the commencement of his suit, is nevertheless to show that at that time the entire estate of the complainant in the premises was gone forever, and it stood without a shred of right at law to retain possession. Its estate under the deed was entirely gone, and by its own consent Bouvier, the defendant herein, became possessed as of the former estate of Reichard and Hume, and was not entitled by virtue of its former estate, either legally or equitably, for any allowance on account of improvements put thereupon. Granting that may be so in a court of law, it is to be remarked that the same is true of a common-law mortgage after ejectment brought and recovered upon it, or of an absolute deed given to secure a sum of money. But the question here is whether that hard and fast rule of the common law applies to a court of equity. I think not. I am unable to see why it should, any more than in any other case of forfeiture of an estate by breach of a condition subsequent. The effect of the judgment of ejectment based on a mortgage, or an ordinary deed of conveyance by way of mortgage, is simply to establish at law the right of the plaintiff in ejectment, and does not affect the equity of redemption. No case was cited by counsel to sustain his position in that behalf. And the same principle applies in the case of the loss of the legal title by breach of a condition subsequent. If the defendant has an equitable defense, it is undisturbed by the judgment in ejectment.

The principle contended for by defendant would prevent this court from relieving against the loss of an estate, by breach of a condition subsequent, no matter how unimportant the condition or how trifling the injury actually resulting therefrom. This doctrine is enlarged upon by Mr. Justice Story (section 1316) as follows: "In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act), that if he omits to do the act he shall suffer an enormous loss, wholly disproportionate to the injury to the other party. If it be said that it is his own folly to have made such a stipu-

lation, it may equally well be said that the folly of one man cannot authorize gross oppression on the other side." At section 1314, speaking of penalties, he says: "If it is to secure the performance of some collateral act or undertaking, then courts of equity will retain the bill, and will direct an issue of quantum damnificatus; and, when the amount of damages is ascertained by a jury, upon the trial of such an issue, they will grant relief upon payment of such damages." And in section 1315 he says: "And, in cases of this sort, admitting of compensation, there is rarely any distinction allowed in courts of equity between conditions precedent and conditions subsequent; for it has been truly said that, although the distinction between conditions precedent and conditions subsequent is known and often mentioned in courts of equity, yet the prevailing, though not the universal, distinction as to condition there is between cases where compensation can be made and cases where it cannot be made, without any regard to the fact whether they are conditions precedent or conditions subsequent."

Prof. Pomeroy, in section 381 of his treatise on Equity Jurisprudence, says: "The general doctrine was finally settled that, wherever a penalty or forfeiture is inserted merely to secure the payment of money, or the performance of some act, or the enjoyment of some right or benefit, equity regards such payment, performance, or enjoyment as the real and principal intent of the instrument, and the penalty or forfeiture as merely an accessory, and will therefore relieve the debtor party from such penalty or forfeiture, whenever the actual damages sustained by the creditor party can be adequately compensated. The application of the principle in such cases, and the relief against penalties or forfeitures, must always depend upon the question whether compensation can or cannot be made. If the principal contract is merely for the payment of money, there can be no difficulty. The debtor party will always be relieved from the penalty or forfeiture upon paying the amount due interest. If the principal contract is for the performance of some other act or undertaking, and its nonperformance can be pecuniarily compensated, the amount of such damages will be ascertained, and the debtor will be relieved upon their payment. But the principle, in this scope of its operation, is not confined to agreements. It has been extended so as to prevent the forfeiture of a tenant's estate under a clause of re-entry for the nonpayment of rent, or for the breach of some, though not all, the covenants contained in a lease, and to prevent the enforcement of a forfeiture for the nonperformance of conditions subsequent." And in section 433 he says: "Where the penalty is to secure the performance of some collateral act or undertaking, equity will interpose, if adequate compensation can be made to the creditor

party. The original practice in such cases was for the court of equity to retain the bill, direct an issue to ascertain the amount of damages, and to grant relief upon payment of the damages thus assessed by the jury. By the more modern practice the court of equity would doubtless determine the amount of damages itself, without the intervention of a jury."

This doctrine depends upon the intrinsic equity of the affair, and not, as contended by counsel for defendant, upon the other general heads of equity jurisprudence—fraud, accident, mistake, surprise, and the like. Thus we have Prof. Pomeroy, in section 451, distinctly stating as follows: "Although the agreement is not one measurable by a pecuniary compensation, still, if the party bound by it has been prevented from an exact fulfillment, so that a forfeiture is incurred, by unavoidable accident, by fraud, by surprise, or by ignorance, not willful, a court of equity will interpose and relieve him from the forfeiture so caused" upon equitable terms. And he further holds (section 452) in effect that, even where the fault is without what may be termed "equitable excuse," relief may be granted. And it is proper here to remark that the negligence or willful default of the debtor in the payment of the amount secured by an ordinary money bond will not debar the debtor from relief from payment of the amount actually due. And Mr. Justice Scudder, speaking for the Court of Errors and Appeals in *Grigg v. Landis*, 21 N. J. Eq. 494, at page 501, uses this significant language: "Penalties, forfeitures, and re-entries for conditions broken are not favored in equity, and constitute a large branch of equitable relief. Usually they are held to be securities for the payment of money and the performance of conditions, and, where compensation can be made for nonpayment and non-performance, equity will relieve against the rigid enforcement of the contract. This is upon the general principles that a court of equity is a court of conscience, and will permit nothing to be done within its jurisdiction which is unconscionable." The court was there dealing with the case of specific performance of a contract to convey land, and the complainant was met by a clause of forfeiture in the contract. But, says the defendant, there is a class of cases where the damages are so uncertain and so difficult of ascertainment with precision that the court will not undertake to relieve against a forfeiture, and he contends that this is one of those cases, and he ranges it with that class of cases, arising out of ordinary contracts, where the parties have agreed upon a fixed sum of money as liquidated damages in case of breach, and which the courts find to be liquidated damages, because the actual damages are so difficult of ascertainment as to render liquidated damages conscionable. But, even in those cases, where the damages

fixed and declared to be liquidated so far exceed any injury that the court can conceive that it is either probable or possible that the party can have sustained, the courts avoid, if possible, the enforcement of the contract.

Now, let us see how this case stands in that respect. But just here, and before proceeding to consider that precise question, it is proper to remark that counsel for complainant addressed a strong argument to me in favor of his position that by the true construction of the contract it was not within the contemplation of the parties that anything more than the land without the railroad structure should revert in case of the breach of the condition subsequent. Without expressing any opinion on that argument, I refer to what I have already said with regard to the circumstance that the location and length of the railroad was such as to preclude the idea that its establishment and operation could be of much value by way of benefit to the adjoining property, and it does seem to me that the forfeiture of \$13,000 or \$14,000 worth of property for the failure upon the strength of which this ejectment was recovered shocks the conscience and sense of justice of a chancellor. But, after all, are the damages resulting from the nonfulfillment of those conditions incapable of measurement? It is urged by the defendant and it is conceded that the \$1,199 paid was not the full consideration (though the use of odd dollars indicates that there was some price by the acre) and that the landowners expected to derive a substantial benefit from the construction of the road and the establishment of a passenger station on their lands, and (although not expressed in the deed) from the operation of the railroad as a passenger carrier and the stopping of the trains at that station. Now the question is, how much of the actual value of the land conveyed and the incidental damages to the remaining land was abated or allowed to the railroad company in fixing the price for the land conveyed? Now that is the sort of question which is constantly being dealt with and determined according to a familiar rule, and that rule is the comparative value of the land with and without the advantages of the railway station and passenger trains stopping thereat. That I understand to be in the way the question would be put to a jury. It would be so put to the jury for the purpose of ascertaining the incidental damages to the adjoining lands due to the devotion of the same to railroad purposes. The jury would be directed to ascertain how much less the adjoining lands were worth in the market by reason of the construction and operation of the railroad; and that without regard to the general benefits of all the land in the neighborhood to be derived from such construction and operation.

Now let us inquire what has been awarded

to the defendant herein. He has been awarded the full value of the land originally bought and paid for, as it was at the commencement of the condemnation proceedings, precisely as if no railroad structure had ever been placed upon it, and he has been awarded \$3,600 as incidental damages to his adjoining land. Now the presumption is that the jury awarded those damages on the basis which I have stated, namely, as the amount which the other lands of the defendant will be depreciated in market value by the existence of the railroad and its operation. Here, then, it seems to me, we have ascertained by the jury the precise damages which the defendant has or can ever sustain by the failure of the complainant to fulfill its contract. For it must be remembered that it was within the power of the complainant, in the first place, to have acquired these lands by condemnation proceedings, on precisely the same basis as it has now acquired them, and it is not to be presumed that the amount abated from the value of the land and damages at the date of the original purchase was more than the amount which would have been awarded in ordinary condemnation proceedings. Now the defendant will get back all of that, and I have not the least doubt that he will get a great deal more, and I find it impossible to conceive that his land would have been increased in value by the fulfillment of those conditions in the deed by anything like the amount so awarded him. Shortly stated, I think it is impossible to suppose that the damages suffered by the nonfulfillment of the conditions in the deed are greater than the whole value of the land so taken, with the incidental damages to the adjoining land.

But this discussion is academic. In the shape which the case has taken the only forfeiture from which the complainant is asking relief is the value of the superstructure and work put upon the land in question, and that has been ascertained by the jury and is represented by the difference in the amount of the two awards, namely \$13,212.50 and \$2,716.50. It will be observed that no damages to adjoining property were included in the greater verdict. This was explained by counsel for defendant at the argument by his statement that at the trial before the jury he had explicitly waived any damages to adjoining property on the appraisement of the premises in question with the additions. But, says the defendant, the petitioner is not entitled to any relief at the hands of this court, because it deliberately broke its covenant, and therein the case differs from those where, by reason of some equitable circumstance, such as oversight of its duty or pecuniary or physical inability or other exculpatory circumstances, a party has failed in that regard. Against that it is to be observed that there is no proof in this case that the complainant ever had its attention called by the defendant to the existence of this covenant, prior to

the commencement of the ejection, or was requested, and refused, to build the station and complete the double track across the lot. One can imagine that the complainant and its officers had entirely overlooked these conditions found in its deed, and forgotten, if they ever knew, of their existence. But, taking the case as it stands, it is fair to presume that the complainant's officers, knowing that the road was built as a freight road, and not a passenger carrier, and that its assumption of that function would, under the circumstances, be of no appreciable benefit to the defendant, and knowing that it had the right by law to take condemnation proceedings to reacquire the land in case the forfeiture was enforced against it, and relying upon the just and equitable rule for ascertaining the value and damages on such proceedings, deliberately concluded not to fulfill those conditions. I am unable to see how that conclusion, and subsequent action founded thereon, deprives it of its standing in this court, since, for reasons previously stated, I am unable to perceive how the establishment of a passenger station and the building of a double track would benefit the defendant's land in any appreciable degree.

The case of *Bracebridge v. Buckely* in the Exchequer Chamber, reported in 2 Price, 200, cited by defendant, was decided by a divided court, and does not sustain the position claimed by the defendant that relief in these cases is never granted where the forfeiture results from complainant's neglect or willful act, or otherwise than from fraud, accident, surprise, or mistake. It was put distinctly on the ground of the inability of the court to ascertain the damages, and it did not appear that the forfeiture was of any serious injury to the complainant, and the real ground was the peculiar relation between landlord and tenant. Chancellor Kent, in *Livingston v. Tompkins*, 4 Johns. Ch. 433, 8 Am. Dec. 598, in a casual remark relied upon by the defendant, gives an unwarranted force to that case. In fact, the case is cited, among others, by Prof. Pomeroy as authority for the position that the court will relieve where the damages can be ascertained. The canon as claimed by the defendant would exclude relief where there was a failure through inability to pay a sum of money. On the contrary, the authorities show, as before remarked, that the failure without excuse to perform the conditions subsequent does not necessarily affect the defaulter's right to relief.

I have examined the cases collected in the notes to *Peachy v. Duke of Somerset*, 2 Leading Cases in Equity, in which the English courts have held that the injury resulting from a breach of conditions subsequent were not measurable in damages, and have found them to be mainly conditions in leases that the tenant should not assign the lease, or should keep the premises insured and in repair. With regard to the provision for keep-

ing the premises in repair, it was at first held that the damages to result therefrom could be measured, and relief would be granted the tenant upon the terms of making the repairs, but later on this view was overruled. All these instances are those of the failure to observe a line of continuing policy affecting the relation of landlord and tenant. Take the case of failure to insure. It meant simply that the landlord was unwilling to have a tenant of such business habits as that the buildings should not be protected by insurance. For it must be remembered that, though the landlord might protect himself by insurance on the payment of premiums, yet that required care and watchfulness on his part, and a certain condition and use of the premises in order to enable him to insure on any terms. So with regard to the covenant not to assign without the consent of the landlord. The latter had the right to stipulate against occupying the relation of landlord and tenant with any person not agreeable to himself. The same consideration applies to the case of allowing the premises to fall into a state of disrepair, or committing actual waste. The landlord had a right to stipulate that he declined to have such a tenant. No one can read the cases on this subject in the English courts in which a breach of conditions subsequent have been held unrelleable in equity, and which are confined almost exclusively to cases of landlord and tenant, without feeling that the hard and fast rule finally adopted and enforced by the English courts of equity led to great hardships; so great, indeed, that I believe Parliament finally felt constrained to interfere. Be that as it may, those cases have no application here.

Somewhat on the same principle the Court of Errors and Appeals in this state held that failure to fulfill breaches of the conditions precedent in the contract under consideration in *Grigg v. Landis*, 21 N. J. Eq. 494, could not be relieved against on the ordinary principles of making compensation for damages resulting from their breach and unenforcement. The court found that Mr. Landis inserted these conditions in his contracts for sale for the purpose of enforcing the peculiar scheme which he had formed for building up a town, and that they must be performed as far as reasonable. But they relieved Mr. Grigg on the ground of the equities arising out of the acquiescence of Mr. Landis in the breaches. It would have been quite impossible in that case, as in the cases before referred to between landlord and tenant, to show that any damages whatever had been sustained by Mr. Landis by reason of the breaches or nonperformance of the conditions precedent in the contract to convey.

But it was argued by counsel for defendant in his written argument that the right to relief against a forfeiture was not set up in the bill, nor was it framed on any such theory. I am unable to yield to that argument. The

bill as amended, which was done before any proceedings had taken place before the commissioners, must be treated as if the amendments had been incorporated in the bill when first filed, and the bill as amended clearly shows that the complainant was seeking to have the amount to be paid ascertained upon the basis, at the outside, of the actual value of the land without the improvements, and this necessarily included the notion that the improvements ought not to be forfeited. The defendant, therefore, had notice, not only by the bill as amended, but by the special order which was made directing two awards and two verdicts, of what was the precise question intended to be raised. Moreover, he was well aware of the line of decisions on this subject, found in the cases before cited in our own Reports, and he must have known that the whole title rested on a forfeiture, and the great effort of the complainant was to be relieved as far as possible from that forfeiture. It seems to me, therefore, that it was entirely competent for either side to have adduced evidence, at the hearing of any peculiar circumstances existing outside of the record which affected the question thus raised. The complainant should have shown any excuse which it had for its failure to fulfill the covenants, but contented itself with alleging the fact, which was admitted by the answer, that the railroad was never intended for, and never was in fact used as, a passenger road, and upon the absence of any proof or contention on the part of the defendant that his predecessors in title had ever requested complainant to specifically perform those covenants. The defendant was at liberty to prove any facts or circumstances tending to show that it was not inequitable or unjust for him to insist upon the forfeiture provided for in the deed to the extent of obtaining compensation under the condemnation proceedings for additions and improvements put upon the property by the complainant while in lawful and undisturbed possession under the conveyance of his predecessors in title.

It is further urged that it is impossible to apply the principles upon which the *Booraem* decision was based in the present case, because the rule laid in that and kindred cases for the appraisal of damages was the value of the land at the time of the original entry, with interest from the date of taking possession. But this is a mere rule for the ascertainment of value and damages, and not a part of the rule itself. The essence of the rule is that the owner shall not have pay for the improvements put upon the premises by the railroad company before the condemnation proceedings were taken. It does not include any particular rule for the admeasurement of the damages which the railroad company should pay. That rule must depend upon the particular circumstances of the case; and I interpret the language of the learned judge in speaking of it as so implying. Its applicability to the cases where it has in prac-

tice been applied is manifest; but I thought, at the time the motion was before me to direct a special award and verdict, that it did not apply here, and I still think so. In fact, I doubt whether it is ever applicable where there has been a change in title and circumstances.

Mr. Hume, prior to the partition proceedings, never thought it worth while to enforce the forfeiture, but was content to have the right of re-entry sold by the master in partition for the insignificant sum of \$687. And the predecessors in title of the defendant never saw fit to enforce it. It was treated as a mere right of re-entry. The defendant purchased in October, 1899, and in less than three months thereafter commenced this suit in ejectment and recovered. Now manifestly it would be unjust to go back and ascertain the value of the land and incidental damages at the date of the conveyance to the complainant, and give interest thereon to this date to the defendant. His title arises out of the forfeiture and commenced in 1899. I thought, when the bill was first presented to me, that it was equitable and just that the complainant should pay such a sum as would represent the value of the premises at that time, as if they had never been used for railroad purposes, with incidental damages to the adjoining land of the owner. When the order directing what I will call the double award and verdict was advised, counsel for the defendant was heard, and he did not object to that mode of determining the damages, if the value of the improvements and additions were not to be included. Upon the whole, then, I think that he ought not to object to that mode.

Upon the question whether the complainant must pay the incidental damages as well as the value of the strip, I feel constrained to hold against it. I will therefore advise a decree upon that basis, its terms to be settled on motion. With regard to costs, I think the complainant is entitled to costs. Its position and conduct in this court has been in accordance with its principles, and it has substantially succeeded. It is true that in its supplemental bill it asked this court to ignore the findings of the jury and ascertain the amount to be paid in its own way, but no proceedings were had under that prayer, and the defendant incurred no expense by reason of its insertion in the bill. Complainant is also entitled to a counsel fee.

I cannot take leave of this subject without saying that my study of it has led me to doubt the propriety of my imposing upon the complainant, as a term of granting it interim relief by injunction, the taking of condemnation proceedings, and to incline me to the opinion that this court ought, in this case, to have undertaken the ascertainment of the damages incurred by the defendant by reason of the failure to perform the covenants in the deed by its own methods.

VULCAN DETINNING CO. v. AMERICAN CAN CO. et al.

(Court of Chancery of New Jersey. Jan. 13, 1906.)

1. MASTER AND SERVANT—TRADE SECRETS.

The employment of persons by a company using a secret process for separating tin from scrap, with their knowledge that the company was trying to keep the secret, was sufficient to raise an implied agreement on their part not to divulge it.

2. CORPORATIONS — NOTICE TO AGENT — EFFECT.

A corporation is charged with knowledge of its agent employed to purchase a secret process for detinning that the company from which the purchase is made obtained the secret by fraudulent methods from the true owner.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1748.]

3. SAME—EVIDENCE.

Evidence *held* to show that a corporate agent employed to purchase a secret process for detinning knew that the company who sold it had obtained it by fraudulent means from the true owner.

4. INJUNCTION — DEFENSES — CONDUCT OF PARTY SEEKING RELIEF.

The complainant company, which obtained a secret process for detinning by purchase from another company, with knowledge that the latter had procured it fraudulently, is not entitled to restrain its use by another company which obtained the secret from the complainant by fraudulent means.

5. TRUSTS—CONSTRUCTIVE TRUSTS.

Where employes fraudulently used for their own benefit a secret process for detinning obtained from their employer, who had purchased it from a company which was known to have procured it fraudulently from the original owner, and the employes subsequently obtained a license from the original owners to use the process, they did not hold the license in trust for their employer, in view of the unconscientious conduct of the latter.

Bill by the Vulcan Detinning Company against the American Can Company and others to enjoin defendants from operating detinning plants or utilizing or operating factories in imitation of those of the complainant, or operating or utilizing certain secret process. Bill of complaint dismissed.

See 58 Atl. 290.

McCarter, Williamson & McCarter and Henry Wollman, for complainant. Lindabury, Depue & Faulks, for defendants.

BERGEN, V. C. The evidence in this cause shows that the firm of "Th. Goldschmidt," of Essen, Germany, had prior to 1894, as the result of experiments pursued for that purpose, so perfected a process by which well-known chemical and mechanical principles could be so applied in the separation and recovery of different metals as to render the detinning of tin scrap profitable to a degree not theretofore attained. The successful combination was not patented, but its inventors sought to protect themselves against infringement by keeping their discovery a secret; only imparting it to such of their employes as the carrying on

of the business required, and then only upon a promise not to divulge. Dr. Hans Goldschmidt, the member of the firm most active in making the experiments and obtaining the results, testified in detail regarding the agents used, viz., electricity, steam, lime, and caustic soda, and the required relative power and quantity of each, and also described with great particularity the size, character, and relative positions of the machinery and other necessary mechanical instruments used in their detinning plant.

In order to understand precisely what these inventors claimed was the secret process which they had discovered, we cannot do better than reproduce a portion of the cross-examination on this point, which is as follows: "Q. You say that you invented this process that you have described? A. Yes, sir; I did. Q. Wasn't electrolysis well known before the time you claim you invented this process? A. If you mean by electrolysis, electrolytical processes, I answer that there were known a good many electrolytical processes for recovering metals of different kinds. Q. You mean by that the separation of metals by electric current? A. The principles were known, and some of them applied in practice. Q. And this was true of tin, was it not? A. No. Q. So that your answer is that tin had never been removed from iron by electricity? A. That is not my answer. It has been removed before, but on a smaller scale. Q. Regeneration of lye was known before the time last spoken of, was it not? A. What kind of regeneration of lye do you mean? Q. Application of carbonic acid and caustification by lime. A. The principle was known. Q. What, then, was novel in your process of invention? A. There were a good many things new, which I partly described this morning. The main things are the size of the baskets, the size of the tubs, and the distances, especially worked out, of the baskets from the walls of the tubs, then the especial kind of inflow pipes as described, and the overflow, the electric combination of the tubs as described—last, not least, the whole arrangement of the plant, which was set up in a manner that the handling of the bulky material was saved as much as possible. Also, the making of the bundles by the steam hammer was new. All those details, of course, were never published, but were kept secret."

It also appears by a great preponderance of evidence that while, prior to the discovery by Goldschmidt, a number of persons were engaged in detinning scrap, and in so doing used the same agents employed by Dr. Goldschmidt, the business was not especially profitable, but when the processes which Dr. Goldschmidt claims to have discovered were applied to the detinning of scrap a very profitable result followed, leading to the building up of a successful business under their management at Essen. The growth of the

business at Essen required the purchase of large quantities of tin scrap, some of which was bought in England and some in New York; the purchases in the latter city being made largely, if not entirely, from A. Kern & Co., a firm engaged in importing and exporting goods. The scrap from England appears to have been shipped, prior to 1895, through the Zealand Steamship Company, in the employment of which company were M. Laernoës, R. J. Brakema, and H. L. Herman, who, through their connection with the Zealand Company, it is fair to presume, acquired some knowledge of the character and extent of the Essen business, for about this time they built a detinning plant at Vlissingen, Holland, under the name of the "Electro-Tinfabriek," and through newspaper advertisements, followed by personal interviews, induced two of the confidential employes of the Essen factory, namely, William Zeyen, who had been employed by Goldschmidt from August, 1891, as foreman of the electrolysis room, and had become familiar with the Essen process of detinning, and William Foerster, who had been employed in the same factory from 1892, and worked in the cooking room, the place where the brine was prepared and regenerated, to leave their employment in Essen, and enter the service of the Holland company. Both of these employes had agreed with the Goldschmidt firm that they would refrain from communicating the processes in use, which were claimed to be secrets. I have no hesitation in finding that the processes used by Laernoës and his confederates in the Holland factory were, for all practical purposes, the same as those used by the Goldschmidts in their Essen factory, and that it was the intention, deliberately formed and boldly carried out by Laernoës and his partners, to obtain, by stealth and fraud, the secret processes and methods in use in the Goldschmidt factory, and that this theft was accomplished by debauching and corrupting the trusted servants of the Goldschmidts. It can serve no useful purpose to here recite the evidence which justifies this conclusion. It is sufficient to say that there is no denial of the facts offered in display of the iniquity of Laernoës and his partners. Considerable evidence has been taken in this cause in Germany, under a commission issued for that purpose; but Mr. Laernoës was not called as a witness to explain the many damaging circumstances proven. Mr. William Zeyen is in New Jersey, in the employ of the complainants in this cause, and the neglect to produce him, unexplained, justifies the conclusion that he could not deny his wrongdoing. Mr. Foerster was called, and exposed the disreputable methods employed by Laernoës to obtain the secret.

The possibility of erecting a detinning plant in this country attracted the attention of Mr. Adolph Kern, the senior member of the firm of A. Kern & Co., as early as 1892, at

which time he opened negotiations with the Messrs. Goldschmidt, looking to the establishment of such a plant in America, to be operated according to the processes in use in Essen. The negotiations, carried on principally by correspondence until 1897, produced no satisfactory result, and in December of that year a party of gentlemen, seven in number, of whom the defendant Assmann was one, met with Mr. Kern at an office in New York City to consider the desirability of making further efforts towards the founding of a detinning factory in the United States. At that time subscriptions to the amount of \$42,000 towards the organization of a company for that purpose had been secured, and the gentlemen taking part in the conference determined that sufficient progress had been made to warrant the sending of Mr. Kern to Europe for the purpose of obtaining one of the secret processes in use there. In furtherance of this conclusion Mr. Kern first visited the Holland factory, and then went to Essen, where he saw the Messrs. Goldschmidt, and tried to induce them to join the enterprise, but they refused, giving as a reason that in their opinion the cost of wages and materials in the United States would prevent the successful application of the process in that country. From Essen Mr. Kern returned to Holland, and entered into negotiations with Laernoës, who acted for the Electro-Tinfabriek of Vlissingen, which resulted in an optional contract, by the terms of which, in consideration of one-third of the capital stock of a company to be organized for the carrying on of the detinning business in the United States, the Holland company were to furnish the processes according to which they were detinning scrap, together with all necessary plans and instructions to properly install a plant, and also to send over to this country two men qualified to give instructions, and to superintend the erection of the factory. On his return to this country Mr. Kern submitted to his associates the result of the negotiations he had made in their behalf, and he was directed to accept the option and to procure a formal contract based on its terms. This was done, and Laernoës, with Zeyen, came to this country to supervise the erection of the factory and instruct the purchasers how to operate it. On the arrival of Laernoës, the formal contract was prepared and executed between the Electro-Tinfabriek and A. Kern & Co.; Laernoës acting and signing as the representative of the Holland firm. Thereupon a company was formed under the name of the "Vulcan Metal Refining Company," to which company A. Kern & Co. assigned the contract which they had made on behalf of their associates with the Holland company. The method of construction and operation as carried on in Holland was thereupon committed to writing by Laernoës and delivered to the company, and upon the suggestion of Mr. Assmann four copies were made of the

original formula; one being handed to each of four trustees appointed by the board of directors to hold in trust for the company—the reason given by Mr. Assmann being, as stated by Mr. Kern, "that, as we have a valuable secret process, it ought to be preserved, so as to guard against the loss of it by the death of any one of the parties conversant with it." The original and all of the copies, except the one held by Mr. Assmann, as trustee, have been destroyed. The reason for the destruction was not made to appear; and when Mr. Assmann dissolved his connection with the company the copy which he had was delivered to Mr. Kern. A factory was erected during the year 1898 at Seawarren, N. J., and in 1899 another company was organized by the same parties under the title of the "Vulcan Western Company," and this company, supplied with the same formula, erected a similar plant at Streator, Ill. Subsequent to this the two companies were merged into the complainant company. In 1901 Mr. Assmann, having then become a director and officer of the American Can Company, resigned his position with the Vulcan Company, and sold his stock to Mr. Kern, giving as a reason for dissolving his connection with the Vulcan Company that as the American Can Company was a large seller of tin scrap to the Vulcan Company, of the selling of which he had charge, he could not consistently continue to occupy the position of buyer and seller. Shortly after Mr. Assmann dissolved his relations with the Vulcan Company the American Can Company began the erection of two detinning plants, one at Paulsboro, N. J., and the other at Joliet, Ill., and employed the defendants Schmaal, Baumann, and Egbert; Schmaal having until very recently been, and Baumann and Egbert then being, employed by the complainant company in positions of trust, such as necessarily required the imparting to them of the alleged secret processes used by the complainant company. Considerable testimony was directed to supporting and denying the allegation that these defendants were employed under an express contract not to reveal the secret processes in use. I am, however, satisfied, even in the absence of an express agreement, that the confidential relation existing between these defendants and the complainant company, and the effort made by it, to the knowledge of these defendants, to keep secret the methods employed, is sufficient to raise an implied agreement on their part not to divulge any such secret.

No reasonable doubt can exist under the evidence in this cause that the methods and processes in use by the defendants, the complainant, Laernoës and his partners, under the name of the Electro-Tinfabriek, and by the Messrs. Goldschmidt, at Essen, are for all practical purposes identical; the changes in mechanical construction being so small and unimportant as to hardly merit consideration. The bill of complaint prays that the

American Can Company and the defendants Assmann, Baumann, Schmaal, and Egbert, may be enjoined from operating the detinning plants at Paulsboro and Joliet, or constructing or operating any other factories in imitation of those of the complainant, or for the purpose of utilizing or operating under said secret process, or any improvements thereon, and that the three defendants last named be enjoined from performing any further services in the detinning plants of the can company, and that the employés of Assmann and the can company be enjoined from using or communicating any knowledge they may have of the secret process or of the construction or operation of complainant's plant, and that they be required to surrender and destroy all copies of such secret process and of all drawings and designs that might aid any other in the construction of similar plants.

The defendants, among other things, seek to justify their action upon the ground that the process was not a secret one. It certainly appears that a number of persons, particularly in Germany, were engaged in detinning by a process in some particulars not unlike that in use at Essen by the Messrs. Goldschmidt, yet it is equally clear that until the Goldschmidts had perfected their plant the detinning business cannot be said to have been successful, and I am inclined to the belief that the Goldschmidts did discover a method or process for detinning scrap which was not known to their competitors, and that, so far as they are concerned, their secret could not be said to have been divulged by them, and, if it escaped, it was through the gross betrayal of a confidence reposed in a trusted employé. While it thus appears that when Mr. Kern was dealing, on behalf of his associates, with Laernoës and his partners, for a sale of the information which they possessed, and which they had surreptitiously obtained from the Essen factory, the methods and processes then employed were not so well known as to have become the property of the world, it is manifest from this evidence that from the year 1900 down to and including the year 1902 numerous publications appeared in scientific journals describing with some particularity these or similar processes. A notable article on this subject by Dr. Hans Mennicke was published in May and June in the "Zeitschrift für Electrochemie." A reading of this article in comparison with the formula furnished by Laernoës justifies the testimony of Mr. Leitch that it describes the process employed at Paulsboro and Joliet. So, if this case was devoid of what the complainant insists is a trust relation between the parties, I should have no hesitation in declaring that the process is no longer such a secret as to justify the interference of this court in preserving it to the complainant. What the complainant insists upon is that Mr. Assmann, as one of the original associates, occupies a relation of trust and confi-

dence towards those who, in conjunction with him, purchased this secret, and who, relying upon his agreement to preserve the secret, became stockholders of the complainant company, and invested their money, and he ought now to be estopped from declaring that the process is no longer a secret, without regard to whether or not Laernoës and his partners had a title which they could properly convey. This contention they claim is supported by the following expression to be found in the opinion of Vice Chancellor Reed, overruling a demurrer interposed to the bill of complaint in this cause: "Now, the title to this trade secret held by the Vulcan Company was, I think, good against every one but Dr. Goldschmidt and his assignee. A person who became bound to the Vulcan Company by contract or by confidence cannot, as against that company, when suing for a breach of such contract or confidence, set up that the Vulcan Company had no right to such trade secret, because it had been obtained honestly from owners who had dishonestly obtained the knowledge from the discoverer." *Vulcan Detinning Company v. American Can Company* (N. J. Ch.) 58 Atl. 290-293. While the proposition thus stated by Vice Chancellor Reed appeals with great force to a court of equity, and is one which I would be bound to follow if the conditions which he states were present, viz., that "It had been obtained honestly," it has no application here, because in my judgment the secret was not honestly obtained by Mr. Kern for his associates, because he had sufficient knowledge of the dishonest manner in which the Holland people obtained the secret from the rightful owner to charge him with notice of all such facts as a proper inquiry would have disclosed, and that knowledge will be imputed to his associates and the officers of the company for whom he was acting in the business to which it related.

A corporation is liable for the fraud of its agents acting within their authority and in due course of its business, and cannot shield itself from responsibility by showing that the agent also failed in his duty to the corporation. *Bank v. Christopher*, 40 N. J. Law, 435-439, 29 Am. Rep. 262. "The fact that the information had not been acquired by him in the course of his agency does not militate against the application of the rule in question, when the agent personally participates in the later transaction in behalf of the corporation. Where information is casually obtained by an agent for a corporation, the corporation is not charged with notice from the mere fact of its agent's knowledge; but, if the corporation act through such agent in a matter where the information possessed by him is pertinent, the knowledge of the agent will be imputed to the principal. To bring about this result two things must concur, viz., the possession by the agent of pertinent information, and his personal participation in respect thereto on behalf of his corporation." Wil-

lard v. Denise, 50 N. J. Eq. 482, 26 Atl. 29, 35 Am. St. Rep. 788.

Mr. Kern admitted that before he had any dealings with Laernoës, and on the 16th day of May, 1896, he learned from Dr. Goldschmidt by correspondence that Laernoës, representing the Holland concern, had obtained his secret processes through Mr. Zeyen, one of his servants, and that Zeyen had been arrested and punished in a German court for taking from the Essen factory, for the purpose of conveying it to Laernoës, a sample part of a metal basket used in the Essen factory, and that one of these letters from Goldschmidt, if not two, contained copies, taken from German newspapers, of articles describing the alleged offense. A part of the article, which Mr. Kern had, reads as follows: "During the duration of the shipping contract by which the Zealand Co. acted as agents for Th. Goldschmidt, the officers of this company advertised anonymously in the Essen papers for workmen on goods such as the Goldschmidt concern was making. After several workmen had applied, and had been engaged, although they remained for the time being in the employ of the Essen firm, Inspector Laernoës obtained from them an exact description of the process and drawings of the apparatus. Workman Zeyen, who is now accused, refused to furnish samples, as only a short time before another workman had been punished for a similar theft. After the necessary apparatus had been constructed in accordance with drawings obtained from the man Zeyen, employed by Laernoës, Zeyen took leave of absence under false pretenses, went to Vlissingen, and made the first experiments on a steamer belonging to the Zealand Co. The workman thereupon returned to Essen, and remained after his engagement, by order of the company, as it were, as a spy, with the firm in Essen. Later the Essen firm got wind of the competition, but without knowing that the Zealand Co. was back of it. The firm of Goldschmidt therefore turned to the Zealand Co., whom they considered as their friends and asked for information regarding the new firm, whereupon they were told that the Zealand Co. knew nothing of such a firm in that place; at the same time, the workmen engaged by Laernoës and his associates were speedily called away from Essen to Vlissingen. Later it was learned that the workmen had not only furnished information and plans, but also samples which were of the greatest importance in the carrying on of the work."

When Mr. Kern went to Holland for the purpose of obtaining the secret process, he had with him the letters and newspaper extracts which he had received from Dr. Goldschmidt, and the only steps which he took to verify or disprove these charges was to communicate them to Laernoës, who very naturally denied them. The following extracts from the cross-examination of Mr. Kern on this point are very suggestive: "Q. Did you make any in-

quiry as to whether or not the plant at Flushing differed in the smallest detail from the Essen plant? A. I did not. Q. Did you inquire as to whether or not the process used at Flushing differed in the smallest detail from the process used in the Essen plant? A. Mr. Laernoës told me that it was a different process. Q. Did you ask him how it differed? A. We did not go into details, because he refused to speak of it. He refused to go into details in regard to it. Q. Did you ask him how it was that he had enticed this man away from Dr. Goldschmidt; why he did that? A. I did not. Q. Did you ask him how it was that he had the man that he had employed from Essen bring samples from the works there? A. I did not. Q. Did you ask him whether they did or not? A. I did not; but he told me that they did not. Q. Did he tell you they did not? A. Yes; he told me that of his own accord. He gave me that information himself. Q. Did he explain, then, how it was that both of them were convicted of doing it? What did he say to you about that? A. He said that he was not convicted. Q. He said that personally to you, now, the paper told you that both of the men he employed were convicted and sent to prison? A. He explained it on the score of prejudice on the part of the court of Essen. Q. Did he deny that the men had brought samples from the Essen plant to him? A. He did. Q. Did you ask him about his keeping the man at the Essen plant as a spy after he had employed them to put up the Flushing plant? A. I did not. Q. Did he say anything to you about that? A. He did not. Q. You knew that the paper—the Steel and Iron paper—had charged that? A. Yes, sir. Q. Did you ask him about his having advertised in Germany for men understanding this process? A. I did not. Q. Did you ask him whether or not, in fact, he obtained from these two men that he had employed from Essen a thorough and detailed description of the process and a drawing of the apparatus? A. I did not. Q. Did he make any statement on that subject to you? A. I do not think he did. He simply denied having stolen anything, and stated that the man whom he engaged knew very little about the process. Q. Did he state whether or not he availed himself of what that man did know about the process? A. He did not."

A careful reading of Mr. Kern's testimony discloses that he not only made no effort to obtain the whole truth from Laernoës, but admits that he made no attempt to find out from Dr. Goldschmidt, whom he afterwards saw, whether there was any truth in what Laernoës did deny, nor whether the story published was true or false. It is perfectly clear to me that, being unable to negotiate with Dr. Goldschmidt, he decided to obtain the information he was so anxious to get from Mr. Laernoës, although, if not already convinced that he was purchasing from Laernoës stolen property, he very care-

fully abstained from so using the information which he had as to ascertain the truth. When stripped of all refinements, the situation presented is this: Dr. Goldschmidt discovers a secret process for detinning; Laernoës entices Zeyen, a trusted employé, to betray his master, whereby he became possessed of a secret process belonging to another; that secret the complainant purchases, under conditions which charge it with knowledge of the wrong committed against Dr. Goldschmidt, thereby helping Laernoës and Zeyen to market their stolen property. It is not to be conceived that a court of equity will stain its hands by contact with such a disreputable proceeding.

It was most strenuously insisted on the argument by the complainant that its association with Laernoës in procuring this secret was a matter entirely distinct from the present controversy, and that the rule requiring a complainant to come into a court of equity with clean hands does not require that all his acts be pure, and that the uncleanness for which the rule may be invoked must have some relation to the other party. My conclusion is that the rule applies in this case. The foundation of the complainant's right rests upon the assignment to it by Laernoës of the right to use this secret, and if in ascertaining its title, for without title it would have no property to protect, it is made to appear that the title was acquired knowingly from one who could never equitably invoke the court's protection, good conscience requires that the court should abstain from interfering. It is not alone fraud or illegality which will prevent a suitor from entering a court of equity. Any really unconscientious conduct connected with the controversy to which he is a party will repel him from the forum whose very foundation is good conscience. *Pom. Eq. Juris.* § 404. In *Edward Thompson Co. v. American Law Book Co.*, 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607, relief by way of injunction was refused upon the ground that the acts of the defendant of which the complainant complained were of the same character as those in which the complainant was itself indulging, and that, if the defendant was guilty of literary piracy, the complainant was guilty of the same offense, and that a literary pirate was not entitled to consideration in a court of equity; Judge Coxe saying: "Consistency requires that the defendant should not be punished for doing that which the complainant does with perfect impunity." In *Krauss et al. v. Peebles' Sons Co.* (C. C.) 58 Fed. 585, Judge Taft stated the rule as follows: "The reason why relief is refused complainant in such cases has nothing to do with the defendant's rights or wrongs. It is that the court will not protect a fraudulent business of a plaintiff, however much in the wrong the defendant may be." In cases of this class the jurisdiction of the court is rested upon its duty to protect property from wanton destruction, and it interferes by injunction

because that is the only efficient method by which property of this character can be preserved to the owner. This complainant claims to be the true owner of a secret process, a recognized species of property, but, when the owner asks the aid of the court to restrain the defendant from injuring his property, it is essential that he should not be guilty of any wrongdoing in connection with the property he seeks to protect. He cannot represent to the court that he came honestly by the property when the contrary is the truth, and then successfully invoke the help of a court of equity, for he is guilty of a false representation regarding the very right which he desires protected. The complainant in this cause pirated a secret process belonging to the Goldschmidts. The defendants are, if we accept the complainant's contention, guilty of the same offense, one step removed; and as each is using the same secret process, the property of another, from whom, to the knowledge of each, it was dishonestly obtained, they are both in *pari delicto*. *Leather Co. v. Amer. Leather Cloth Co.*, 4 De G. J. & S. 187; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706.

The proposition advanced by the complainant, viz., that, the defendants having agreed with the complainant either as joint purchasers or employés to keep secret this process, they cannot now be heard to question the title of the complainant because of a trust relation, either express or constructive, thereby raised, would appeal with great force to a court of equity if, in the purchase of the secret process, the complainant had acted honestly, and was justified in the belief that the vendor's title was without fault. But the mainstay of this proposition is absent in the case at bar. The purchasers knew, or were bound to know, that in treating with Laernoës and his partners they were obtaining for use the property of another dishonestly procured, and for which they had unsuccessfully negotiated with the true owner. That they afterward disagreed as to which of them should appropriate what they had thus improperly secured does not make it the duty of a court of equity to interfere and by injunction protect some of the wrongdoers against the assaults of their confederates. The want of honor among thieves is not a ground of equitable jurisdiction.

Since the bill of complaint was filed in this cause the defendants have obtained from the Goldschmidts a license, executed in due form, permitting them to use their secret in the United States forever, and in Canada for 10 years following the date of such license, which was October 17, 1904. This assignment conveys to the American Can Company a title to this secret process from its discoverer, and is superior to any rights which the complainant has. The claim made by the complainant that this assignment of, or license to use, the secret process, although made to the American Can Company,

must be taken to have been made to that corporation in trust for the complainant, does not, under the facts disclosed in this case, meet my approval, nor has it the sanction of judicial authority. The trust, if any, which existed between these parties, was based upon their agreement to keep secret a process purchased in bad faith from Laernoos, and it needs no argument to sustain the proposition that the parties to such a trust have no standing in equity.

After a careful examination of the whole case, I am satisfied that the complainant has failed to present a cause calling for equitable aid, and a decree will be advised, dismissing the bill of complaint, with costs.

STEVENS v. HEADLEY et al.

(Court of Chancery of New Jersey. June 24, 1905.)

1. EASEMENTS—PRIVATE WAYS—PURCHASERS WITH NOTICE.

In a suit to quiet title to certain land as against an alleged highway easement, evidence held to require a finding that defendant L's grantor and attorney, before purchasing his part of the land, had knowledge that plaintiff had bargained for another part of the whole tract, which included a part of the road in question, and was thereby put on inquiry as to the precise extent of complainant's purchase.

2. SAME—PRIVATE RIGHTS—APPURTENANCES.

Where no map of certain lots in a city addition had ever been filed in any public office, and part of a road on one side of the plat in dispute had never been worked, accepted, or used by the public, the right of the owner of a lot abutting on such alleged road, which ended in a cul-de-sac, to have the same kept open, was at most a mere private right of way appurtenant to the lots conveyed to him.

3. SAME—PRIVATE WAYS—CREATION.

Easements of private way are not the subject of possession, but lie in grant, and hence can only be created by express or implied grant, by adverse user, or by estoppel.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, §§ 13-62.]

4. COVENANTS—PERSONAL COVENANTS.

Certain deeds of lots which abutted on a road ending in a cul-de-sac referred to the road "laid out across the whole tract," and contained covenants on which the grantors bound themselves and their heirs and assigns not to erect or permit to be erected on the property owned by them adjoining the property conveyed any house costing less than \$5,000, or nearer than 40 feet from the street [road] line. Held, that such covenants were personal to the grantees, and did not extend to the benefit of subsequent purchasers.

5. SAME—HIGHWAYS.

A declaration, in deeds to certain lots abutting on a highway, laid out, but not open, that the same shall remain open and be used as a public road by all persons desiring to use the same, can operate only as a private covenant to the several grantees or as a dedication which can be only made available to third persons by acceptance by the public.

6. EASEMENTS—IMPLICATION FROM CONVEYANCE.

Where a deed to certain land abutting on an alleged private road contained a building restriction prohibiting the erection of buildings nearer than 40 feet to the northwesterly side

line of such road, the deed did not by implication convey any right of way over that part of the road ending in a cul-de-sac, which was beyond the property conveyed toward the closed end of the road.

7. ESTOPPEL—TO WHOM AVAILABLE—CLOSING PRIVATE WAY.

Where a grantee of certain land abutting on a private way would not be injured by the closing of the way beyond his property and toward the end of the road in a cul-de-sac, he was not entitled to object that the owners thereof were estopped to close it.

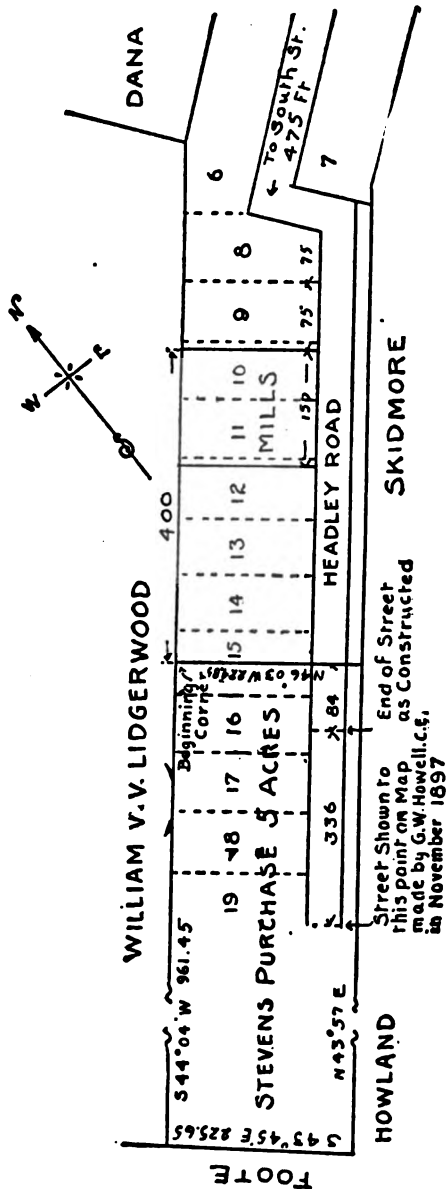
Suit by Frederic W. Stevens against William T. Headley and others. On final hearing. Judgment for complainant.

C. Franklin Wilson, for complainant. John M. Mills, for defendants Headley. Charlton A. Reed and Edward K. Mills, for defendant Wm. V. V. Lidgerwood.

PITNEY, V. C. (called on for his reasons for purposes of appeal, October, 1905). The complainant, Frederic W. Stevens, by his (amended) bill seeks to enforce the specific performance of a contract in writing for the conveyance of land, entered into by him with the defendants Wm. T. Headley and Helen T. Headley, dated April 6th and executed by the Headleys April 7, 1903. He makes the defendant Wm. V. V. Lidgerwood a party defendant, because, as owner of other land, he claims an easement over the lands covered by the contract, and complainant prays that that claim of easement may be dealt with by the court, and decreed not to exist. The easement claimed is a right of way over a portion of the land comprised in complainant's purchase. The defendants the Headleys answer the bill, admitting the complainant's equities and denying that defendant Lidgerwood has any easement in the land in question. They add to their answer a cross-bill against Lidgerwood, praying that the land in question may be decreed to be free of any easement such as is claimed by Lidgerwood. They make Mr. Edward K. Mills a party to their cross-bill because the title to Lidgerwood's land passed from them to him and from him to Lidgerwood. Mills and Lidgerwood answered the complainant's bill and Headley's cross-bill in one pleading, and without objection to the form of either. The case was brought regularly to hearing on these pleadings. At the hearing counsel for Lidgerwood took the preliminary objection to complainant's bill of multifariousness and misjoinder. I overruled this objection on two grounds: First, that it was not taken in time; and, second, that it was without merit.

The facts developed at the hearing are as follows: The Headleys acquired title to the land in question by descent from their father, J. Boyd Headley, and hold it subject to the right of dower of his widow, Helen T. Headley, the elder (not a defendant). The particular land in question is a part of a larger tract which may be, for the present purposes, described as a long, narrow strip of land,

about 225 feet wide, with one end bounding on the southwesterly side of South street, one of the principal streets of Morristown. The annexed sketch shows as much of it as is necessary for present purposes:



It was formerly bounded on the northwesterly side for a few hundred feet on its South street end by the lands of the Female Seminary (owned by Miss Dana), and in the rear of the seminary lot it is bounded on that side by land of the defendant Lidgerwood. On the southwest end it is bounded by lands of Mr. Foote. On the southeast side by other parties. Its only connection with any highway is its junction with South street. In the year 1897 the Headleys caused about two-thirds of this strip next to South street to be

laid out and plotted on a map into building sites; and, with a view of their sale, caused a road to be laid out on the map, from South street, along and near to the southeasterly side of the tract, but not touching the same, and ending at the bottom of a steep bluff on their own land. The reason for their stopping at this point with their scheme was that the remainder of the land, about 600 feet in length of the strip, was low and flat and unfit for building purposes, except perhaps of a very cheap class of dwellings. Over the part of the land here in question the lots were laid out about 167 feet in depth and 75 feet in front. At the time of the making of the contract here in question they had all been sold and built upon, from South street down the new street, except 10, at the extreme end. Of these, the three furthest southwest were, by reason of the configuration of the land, unavailable and unsalable as separate lots. Of those that had been sold and conveyed the one farthest from South street was owned, built upon, and occupied by Mrs. Romaine, whose husband, Wm. J. Romaine, was a real estate agent, and had the lots in his hands for sale on behalf of the Headleys, who lived in a suburb of Philadelphia. The Headleys had blue prints of their map made and circulated, for use in selling, but they had never filed it in any public office. This blue-print map did not include the whole tract, but only so much as covered the road and lots facing on it. As before remarked, the road (called "Headley Road") is laid out wholly on the lands of the Headleys. It kept some 14 feet away from the southeasterly side of the tract, and ended, so to speak, in the midst of it. The Headleys worked and graded on the ground about 1,400 feet in length of this road, stopping at the top of the bluff, from whence the land descended rather abruptly and irregularly to the low land before mentioned, leaving about 250 feet of the lower end of the paper road untouched and unaltered and covered with a thick growth of small trees and brush. No part of the road was ever accepted or worked by the municipal authorities, and it was never used by the public beyond the residence of Mrs. Romaine. Over that part of the road which is here called in question there was growing brush and small saplings. The Headleys, in making conveyance of lots, mentioned the Headley road, and inserted, in several instances, a limitation against building nearer than a certain number of feet from the side of the road. These allusions to the road will be referred to farther on. No mention was made of the map.

The complainant, in the latter part of the year 1902, opened negotiations with Mr. Romaine for the purchase of the southwest end of the whole tract, including about four and one-half of the most southwesterly of the lots laid out on the map, of which about 75 or 100 feet (defendant's surveyor says 84 feet) faced on the road as acutally worked on the ground. The negotiation included all of the

road as laid out on the map within these lines. The quantity in the tract so negotiated for was five acres, and its northeasterly end was roughly marked on the ground by a stake set up, and in due course was surveyed and a description thereof made. The beginning point was 400 feet southwest from Mrs. Romaine's lot. This lot would give the complainant a large building site on comparatively high ground, with an outlet to South street over Headley road. As I interpret the evidence, the parties came to a substantial agreement on the 21st of January, 1903. This is fixed by a letter from Mr. Romaine to complainant of that date. But, owing to the necessity of measurements on the ground and other details, the agreement (set out in full in the bill) was not finally settled and executed until April 7th. Judge Vreeland, who was counsel for the Headleys, prepared an agreement in March and sent it to them, and it was by them recast and executed on that day, April 7th, and forwarded to Judge Vreeland. This sale left still belonging to the Headleys 400 feet of frontage on Headley road, or a little over 5 lots, 75 feet front each, between the complainant's lot and the Romaine lot. Hence the contract contained a restriction against the complainant building on his lot nearer than 25 feet to the northeasterly front of it and against the Headleys building on their remaining lots nearer than 40 feet to the Headley road. It also provided for a right of way from the lot to be conveyed to South street by the Headley road, which is described by metes and bounds. It also contained the following significant clause: "And the said Wm. T. Headley and Helen T. Headley, the younger, hereby further agree that they will procure the execution and delivery to them by all the owners abutting on what is known as the 'Headley Road' of a release of any and all right, title and interest of such abutting owners (if any) of, in and to any right of way or easement over the lot hereby agreed to be conveyed, or any part thereof." The Headleys anticipated and encountered little difficulty in procuring these releases, because the parties interested would at once infer, and could be assured, that the complainant purchased for the purpose of erecting a dwelling for himself, which would result in insuring the permanent character of the neighborhood, and in cutting off all danger of the low, flat land on the southwest end of the tract being devoted to the erection of cheap cottages for laborers, whose existence along the possible extension of the Headley road would, to say the least, not increase the desirability as residences of the high-class dwellings already erected on that road. Such a use of that low land was contemplated by the elder Mrs. Headley, and was an obstacle in the way of her joining in the conveyance to the complainant, and this was known to Mr. J. H. Lidgerwood, the brother and agent of the defendant W. V. V.

Lidgerwood, as early as February 27, 1903, as appears by his letter of that date to his brother, the defendant, who was a resident of London.

In the meantime, the defendant Lidgerwood, who, as we have seen, owns the land on the northwest side of the Headley tract, commencing in the rear of the seminary lot, instructed his brother, John H. Lidgerwood, a New York business man, residing in Morristown, to open negotiations for the purchase of the two lots (Nos. 10 and 11) next adjoining Mrs. Romaine's. His object in doing this, as declared in his testimony (taken by commission), and explained at the hearing by a map, was to obtain access from his land to South street by way of the Headley road. Besides, his land immediately adjoining those two lots is high, and would make a valuable addition to them, and the union of his land and the two lots would greatly increase the value of each, especially the high land of Lidgerwood, which is small in extent and area and so situate as to be of little value by itself. Mr. John H. Lidgerwood employed for this purpose the defendant Edward K. Mills, who opened negotiations at once with Mr. Romaine. Throughout their negotiations they used a blue-print copy of the original map, and also a vellum copy of it, produced by Mr. Mills, which showed a slight variation in the lines of the lots as laid on the original map, which had to be observed in locating the two lots for which Mr. Mills was negotiating. The only obstruction to an immediate sale to Lidgerwood was the price demanded by the Headleys, viz., \$9,000, for the two lots. Mr. Mills offered \$6,000. He negotiated entirely in his own name. The first interview between Mr. Mills and Mr. Romaine, the date of which is recollected by Mills, was on the 21st of February, 1903. On that occasion Mills swears he first heard of the Stevens purchase verbally concluded a month before. He then, as he says, heard from Romaine that Judge Stevens was negotiating for a lot of five acres at the lower end of the property at a price of \$5,000. And on his (Mills) hinting that he thought the price was low Romaine answered, "Yes; but we think it will be a good thing; it will establish the property," and added that he was afraid the sale would not go through, because the elder Mrs. Headley would not consent to such a low price, because she thought she could get more money by selling off lots to different purchasers, rather than the whole thing in a lump. Here we have the exact amount of land purchased by complainant stated by Romaine, and we also have the origin of that part of the letter from John H. to the defendant Lidgerwood, dated February 27, 1903, in which he says. "Old Mrs. Headley refuses to sign. She has a dower right. She refused to sign Vice Chancellor Stevens purchase which was the last lot on the road, \$3,000,

and the swamp lots, because the swamp lots were not plotted in city lots and sold for \$500 each." And, again, on March 3d he wrote to his brother: "All waiting now on Mrs. Headley, Sr. She refuses to make title to Chancellor Stevens who has bought 120 foot lots and some swamp, \$8,000." The mention in this letter that Stevens purchase included "120 foot lots," which must have meant front on the road, is significant when we consider that Mr. Lidgerwood and Mr. Mills, from whom he got his information, probably had in mind the frontage on the road as worked on the ground which we have seen did not extend by 250 feet to the end of the road as laid out on the map. Indeed, the defendant Lidgerwood's surveyor, by a recent measurement, makes the complainant's frontage on the street as worked on the ground to be only 84 feet. I am unable to perceive how this idea of 120 foot lots could have been obtained by Mills, unless he either went on the ground and made a measurement and personal inspection or that Romaine pointed out to him on the map the place to which the complainant's land would extend, and this was easily done by showing on the map where complainant's land would commence, namely, as stated in the agreement, "400 feet southwest of Mrs. Romaine's lot."

The inference which I draw from the whole evidence, up to this time, February 21, 1903, including that of Mr. Mills, is that on that day Mills was informed by Romaine of the verbal agreement of purchase he had a month previously concluded between the Headleys and complainant, and that the only obstacle to its complete execution was the objection of the widow to join in the deed, and that Mr. Mills was then informed with approximate accuracy of the extent on the ground of the complainant's purchase. The parties (Romaine and Mills) proceeded with their negotiations, being divided only as to price. On or before the 20th of March Mills procured from Romaine a verbal option on his proposed purchase at \$9,000. On that day (so his diary shows) he examined the records for conveyances and for building restrictions and the like, and there found the restrictions and references to Headley road previously mentioned; and at once told Mr. J. H. Lidgerwood that, if he took title to the lots, he must come under a restriction not to put a building on the lots nearer than 40 feet to Headley road. Nothing was at any time said between Mills and Romaine on the subject of restrictions, or rights of way, or the like. They finally, on the 4th of April, agreed on \$8,500, and proceeded together to the office of Judge Vreeland, who was counsel for the Headleys, to arrange for the carrying out of their contract. It must be borne in mind here that Judge Vreeland had recently drafted and forwarded to the Headleys for approval and execution the contract between the Headleys and the complainant.

The result of the conference was that it was concluded that there was no occasion for a written contract, but that he (Vreeland) would prepare and forward promptly to the Headleys the deed for execution. It is plain from the contemporaneous letters from John H. Lidgerwood to his brother, the defendant, that he was in doubt whether the elder Mrs. Headley would unite in their deed. On that date, April 4th, Mills prepared a receipt, to be signed by Miss Headley, as follows: "April 4, 1903. Received from Edward K. Mills, a certified check for five hundred dollars being part payment of the purchase price of eight thousand five hundred dollars for lots 10 and 11 of the Headley tract (being 150 feet on Headley road next to W. J. Romaine lot) which the said Edward K. Mills has agreed to purchase at the price above named (\$8,500) and Helen T. Headley to sell. [Signed] Helen T. Headley, Jr." I can only infer from the omission of the name Wm. T. Headley, as a vendor in this short contract, that Mr. Mills was in haste about getting a binding contract, and was unwilling to wait to get the signature of Wm. T. Headley, whose business appears to have called him away from home at times. Be that as it may, the check and receipt were forwarded to Miss Headley and returned promptly, duly signed by her, and the check was indorsed by her and her brother, Wm. T. I recollect no evidence as to the exact date when this receipt was signed by Miss Headley. April 4th was Saturday. The complainant's contract is dated on Monday, the 6th, and was acknowledged by the two Headleys, brother and sister, in Philadelphia on the 7th, so that so far as the execution of a binding contract goes I conclude that the parties stand on an equal footing as to time.

Much testimony was given as to what occurred in the way of conversation in Judge Vreeland's office on the 4th of April, and it is somewhat conflicting. It is conceded that one or more copies of the blue-print map were on Judge Vreeland's table. Judge Vreeland and Mr. Romaine both testified that Romaine then and there pointed out on the map to Mr. Mills in a general way how far to the northeast the complainant's purchase extended. Mr. Mills is emphatic and positive in denying this testimony. Each of these witnesses is entitled to complete credit. Judge Vreeland and Mr. Mills are known to me personally to be so entitled to it. It is my duty to reconcile the evidence, if I can. I think the probability is that what was said and done in that respect made so little impression on Mr. Mills' mind that it has escaped his memory, and for the simple reason that he was not interested either personally or on account of his client Lidgerwood in the precise point or limit on the northeast of the complainant's purchase. The evidence of the defendant Lidgerwood, which was taken by commission, in connec-

tion with the letters written to him by his brother, show that what he had in mind mainly was access from his large tract of land to South street over the Headley road, and that he had little or no interest in the extension of that road upon the Headley land to the southwest of the two lots he was trying to purchase. I feel constrained then to hold that Mills, before he paid his money on April 4th, had direct notice and knowledge that complainant had bargained for a part of the whole tract which included a part of the road in question and approximately of its extent, and that he was thereby put upon inquiry as to the precise extent of that purchase, if it was of any consequence to his client, but I believe that the precise extent was pointed out to him on the map.

But it may be argued that the fact that defendant Lidgerwood, through his agent and counsel, is chargeable with notice that complainant's purchase included a portion of the southwest end of the road as laid out, and the lots facing thereon, did not necessarily indicate that he intended to close the southwest end of that road, even if he had a right to do so. Let us consider this suggestion. The width of the whole tract is about 225 feet. I believe the lines are not precisely parallel. This width was divided where these lots in question were laid out into 167 feet, more or less, for the depth of a lot, 45 feet, more or less, for the width of the street, and 14 feet for a strip of land between the road and the southeasterly side line. Now, it seems to me the question at once suggests itself, would the complainant contemplate or entertain the idea for a moment of building a dwelling on the comparatively small piece of high ground on the northeast end of a tract 225 feet wide and nearly 1,000 feet deep, with a public road in existence 45 feet wide passing near to his house and ending in his ground in the rear thereof? It seems to me that the question answers itself.

But to return to the subsequent events. Judge Vreeland shortly after April 4th prepared the two deeds for execution and sent them in one envelope to Philadelphia. I infer the dates were left blank. It was in that to complainant. The original deed to the defendant Mills was not produced. That is dated the 16th of April, and executed and acknowledged on that day by the elder Mrs. Headley and by the brother and sister Headleys, and the wife of the brother. It was promptly returned to Judge Vreeland. The deed to the complainant, with the date in a different handwriting, is dated the 29th of April, and was executed by Wm. T. Headley and wife on that date and returned to Judge Vreeland unexecuted by the other Headleys. Undoubtedly the brother and sister encountered difficulty in inducing their mother to sign it. She did finally

unite with her daughter in executing it before Judge Vreeland in Morristown on the 15th of May. In the meantime, the deed to Mills had remained in Judge Vreeland's hands undelivered. The parties are not agreed as to the cause of delay in its delivery. Mr. Vreeland and Mr. Romaine and Wm. T. Headley understood that Mills was unwilling to accept his deed and pay for it until after Mrs. Headley had joined in executing the deed to the complainant. Mr. Headley is very emphatic on this subject. They seemed to have understood that Mills did not wish to carry out the contract unless the danger of the low lands being devoted to laborers' cottages was substantially removed by the sale to complainant. On the other hand, Mr. Mills understood that the delay was for the benefit and accommodation of the Headleys, in order to enable them to constrain their mother to join in the deed to complainant, and in this he is supported by letters written about that time by Mr. John H. Lidgerwood to his brother in London. I deem it of little importance to determine this question, since the fact was that the delivery of the deed to Mills was delayed until that to complainant was executed, and as soon as the complainant's deed was executed, to wit, on the 16th of May, Mr. Mills was notified of its execution, and immediately called on Judge Vreeland, paid the balance of his purchase money, took his deed and had it recorded, and promptly executed a deed from himself to Wm. V. V. Lidgerwood.

At the date of the delivery, so far as appears, nothing was said between Judge Vreeland and Mr. Mills as to this right of way; and this seems somewhat strange, because Judge Vreeland was well aware of the clause in complainant's contract requiring releases from each of the other property owners on the street, and those releases had been prepared by him or by one of his firm, and work was being done industriously in procuring the signatures of the various releasors, the accomplishment of which was delayed by reason of the absence out of the country of some of the parties. Judge Vreeland explains this apparent oversight on his part by saying that he supposed that it was all understood by Mr. Mills, as I am satisfied it was, and that no release from him was necessary, but, being reminded by complainant of the strict terms of the complainant's contract, he, within two or three days, prepared a release to be executed by Mr. Mills and asked him to execute it. This Mr. Mills expressed himself as being personally entirely willing to do, but that he had already conveyed the property to Mr. Lidgerwood, for whom he was acting as agent in the matter, and offered to forward a release to Mr. Lidgerwood to be executed by him. Such a release was prepared and either revised or redrawn by Mr. Mills and forwarded to Mr. Lidgerwood, who declined to

sign it. Hence this suit. Upon this part of the case I am of the opinion that complainant's equity is superior to that of defendant.

Let us now inquire into the validity of the defendant's claim as evidenced by the various deeds, including that to Mills, upon which he relies. Since the proof is clear that no map of this property showing the road has ever been filed in any public place, and as that part of the road which is here in dispute or any part of it has never been used by the public or worked or accepted by it, it follows by the clear-settled rules of law that any right which the defendant Lidgerwood has in that part of the road here in question can be no more than that of a private right of way appurtenant to the lots conveyed to him. I deem it unnecessary to cite authorities to sustain this plain proposition. Now the familiar rule is that easements of a private way lie in grant, and are not the subject of possession; hence they must be created by a written grant or its equivalent. This may be by express grant, or by implication, as in the case of a way of necessity, or by long adverse user, which, for the sake of consistency, was always supposed to arise out of a lost grant, or a right of way may be created, so to speak, in equity, by an estoppel, as where a party so acts as to lead another to believe that a right of way does exist, and that party has so far acted upon it as to render it inequitable for the other to deny that the right of way exists.

One quality of a private right of way is that it must be from somewhere to somewhere. Thus, by the ancient rules of pleading in pleading a private right of way, the pleader should state the terminus a quo et ad quem of the way. Gale on Easements, p. 416. It must lead from some place to some place. Chief Baron Comyn (volume 3, p. 56, tit. "Chimin") says: "A private way is such as goes to a church, house, vill, or close and is not common for all the king's subjects. So it may be from a meadow or close to a street or to a highway. So it may be from one part of a close across the ground of another to another part of the same land (close). But a man cannot have a way from one part of the land of another to another part." And the same learned author (Comyn, Dig. vol. 1, p. 284, tit. "Proceeding in an Action for a Disturbance") says: "The declaration ought to show the certainty of the thing in which the disturbance is alleged, as in an action upon the case for stopping his way, it ought to allege the terminus ad quem the way goes, and likewise the terminus a quo, so if the plaintiff prescribe for a way to such a close he must show a title to the close, otherwise if the way claimed be to a high street, or to a common field." And he refers in support to the case of Parker v. Newsham, Latch's Rep. 160, the translation of which is as follows: "In an action on the case for stopping a way which the plaintiff had from a certain place across B acre where the nul-

sance was, to a certain field. That is good, without showing what interest he had in the field; because it shall be presumed it was a common field. Otherwise if it had been to such a close. There he must show what interest he had in the close." Comyn also cites Alban v. Brounsall, Yelverton's Rep. 163; s. c., 1 Brounwell, 215—which was an action of trespass and a plea of a right of way by prescription, and at page 164 we find this "the prescription is not good because it is not shown a quo loco ad quem locum the passage or way is."

It may be assumed that in these two cases the easement was based on either implied grant or long adverse user, especially is it probable in the case reported by Latch, which holds that the party must show some right or interest at each end of the way. It may be conceded that a right of way ending in private grounds may be created by express grant, where the grantee has no interest in those private grounds. But the necessity for a legal interest on the part of the person claiming the right in each end of the way as claimed, except where it is a public place or highway, is, as I understand the law, a necessary ingredient in the element of adverse user or mere implication in such cases. This principle was in substance acted upon, as to public rights of way, in the very recent case of the Attorney General v. Antrebus, L. R. Ch. Div. 1905, vol. 2, p. 188. There the Attorney General of England attempted to prevent the inclosure by the owner of the fee of the famous Stonehenge, on the ground that the public had enjoyed free access to it from time immemorial. But it was held that the public had no right in that great curiosity, and that the mere visiting of it for curiosity by numerous people, using, however, a definite route, must be presumed to have been with the permission of the owner. The court held that there was no such thing known to our law as a subject-matter of a grant or prescription as a *jus spatlandi* or *manendi*.

Let us see what language is found in any of the deeds executed by the Headleys. The first is Headley to Willis, dated October 30, 1897, and conveys land fronting on South street and abutting on one side "in the middle of a new road fifty feet in width." And then follows this clause: "It is understood and agreed [the Headleys and Mrs. Willis] that the fifty foot road referred to in the above description is to be and remain open as a road forever hereafter for the benefit of all parties interested." Next is a conveyance dated April 1, 1898, from the Headleys to Miss Dana. The lot thereby conveyed fronts on South street, and runs the depth of the Dana lot, and mentions a stake at an angle in the northwesterly line of the "new road laid out across the whole tract, called 'Headley Road,'" and further contains a clause as follows: "The said Headley road to remain open and to be used as a public road by all

persons desiring to use the same." The next is a deed from the Headleys to Mary O. March, dated November 16, 1898. The description in that conveyance refers to a new street "known as 'Headley Road' laid out across the whole tract. * * * The Headleys especially covenant on behalf of themselves, and their heirs and assigns not to erect or permit to be erected on the property now owned by them adjoining the March lot to the southwest and within 800 feet of the property conveyed, any house that shall cost less than \$5000 each or that will be nearer than 40 feet to the street line." It also contains a restriction against building within 40 feet of the street line by Mrs. March. The next deed is to Mrs. Romaine, dated March 15, 1899, and contained a like covenant to that of Mrs. March as to building within 40 feet of the street line, and a covenant on the part of the Headleys not to build within 40 feet of the line of the street for a space 500 feet west of her line. The next is a deed to Walsh, dated February 27, 1899. This refers to the Headley road as laid out across the whole tract and conveys half the road in front of the land conveyed.

With regard to these two covenants in favor of Mrs. March and Mrs. Romaine, it is enough to say that they were covenants in favor of the two lots conveyed to those ladies, respectively, and cannot by any proper construction be extended to any subsequent purchasers. With regard to the declaration or agreement in the deed to Mrs. Willis, it covers only the road which adjoined Mrs. Willis' land. With regard to the conveyances in which reference is made to a road laid out across the whole tract, it is quite plain that the draftsman of those deeds had before him the Howell map, which, as we have seen, includes only a part of the whole tract. The declaration "said Headley road to remain open and to be used as a public road by all persons desiring to use the same" can operate only in two ways: First, as a private covenant with the several grantees, in which no other person has any interest as an individual; and, second, as a dedication to the public. In neither aspect can Mr. Lidgerwood take advantage of it, since the public have never accepted the dedication. But these several mentions of the Headley road—the map was never mentioned in any of the deeds—were undoubtedly the moving causes of the complainant, out of abundant caution, making it a condition that he should have a release from these parties before he accepted his conveyance.

We come now to the deed to Mills. The description of the land conveyed found in that deed refers to the Headley road, but nowhere to any map. Then is found this clause: "The parties hereto hereby agree that no dwelling house or other building shall be erected on the lot above described or on the remaining land of the parties of the first part, nearer than 40 feet to the northwesterly

side line of Headley road aforesaid." This clause was inserted in fulfillment of the clause on the subject found in complainant's contract of April 6, 1903, as above quoted, and the deed to complainant subsequently executed in pursuance of it, which provided that such erection shall not be made on the lands of the Headleys. It must be confessed that taken literally it restricts the building of a house within 40 feet of the line of the Headley road on a part of the property covered by complainant's contract, if the Headleys were the owners of it at the time that the deed to Mills was delivered. Good conveyancing required that the lands under contract to the complainant should have been expressly excepted in that deed. Mr. Headley swears that he executed the deed intelligently, because he understood that the deed to the complainant was to be delivered prior to the deed to Mills. Judge Vreeland swears that he did not limit the scope of that covenant by taking back from Mr. Mills a contemporaneous declaration in writing to that effect because he thought it was thoroughly understood by Mills, and I am of the opinion that he was justified in so supposing. But the precise effect of the deed in restricting the complainant's right to build is not involved in this suit, since it is not within the issue, which, as I read the pleadings, is confined entirely to a right of way, hence I shall express no opinion upon it. I can find no language in Mr. Mills' deed which gives by implication any right of way over that part of the Headley road which is included in complainant's purchase. The only implication which can justly be raised therefrom is a right of way over Headley road to South street.

The right to drive or walk over the lower end of the road across the line of complainant's purchase is neither necessary or convenient for the beneficial enjoyment of the lands conveyed to him. Further, it will be observed that, unlike the deeds to Miss Dana, Mrs. March, and Mrs. Romaine, the deed to Mills contains no language by which the extent of the road to the southwest can be determined. As in the other cases, there is no mention of a map.

But say counsel for Lidgerwood: The Headleys spoke of the road and a map was used. The road was visible on the ground for at least 85 feet within the limits of complainant's purchase, and on the map for over 300 feet, and they claim that the Headleys are now estopped in equity, and so is the complainant as their grantee, from setting up that the road does not exist. It is of the essence of equitable estoppel that the party setting it up must have so far acted upon it as that it would work injustice to him to permit the other party to retract his position. Now, I am unable to see how Lidgerwood will be injured in the least by the closing of this road, as proposed by the complainant. The case is not only bare of any proof that he

bought with a view of making any use of or deriving any benefit from the existence of the road at the point in question or that he can possibly derive any benefit therefrom, but, on the contrary, it abundantly appears that the sole use that he expected to make of the road was to have access over it to South street. I have said that the object of an estoppel is to promote justice. To set it up and enforce it in this instance would, in my judgment, work a gross injustice on the Headleys and the complainant, since it would simply give to Mr. Lidgerwood a right to injure them without benefitting himself or his land, except in so far as it gave him power to compel the parties to buy him off. The result is that complainant had an oral contract for the purchase of his premises as early as the 21st of January, 1903, which as against third parties with notice of it was binding and valid; that it was crystallized by a written agreement, complete in all its parts, executed on the 7th of April, 1903; that Lidgerwoods' agreement was perfected as a verbal agreement on the 4th of April, and crystallized into what may be deemed a valid and binding agreement on the same day as the complainant's; that Lidgerwoods' agent, Mills, had complete notice of complainant's agreement before he paid any money, and that a deed to complainant had been executed to his knowledge before he accepted his title and paid his money, and that therefore the complainant is first in time and is entitled to priority in equity.

Second. I find that the deed to Mills does not, either expressly or by implication, convey any right to him in the Headley road over the parts here covered by complainant's contract, and that the case not only does not warrant, but forbids, the raising of any estoppel in favor of giving Mr. Lidgerwood any right in the premises. For these reasons, briefly stated orally at the hearing, and without commenting upon or very carefully examining the cases cited by the counsel for defendant, I advised the decree now under appeal.

I have now examined the authorities cited by counsel for Mr. Lidgerwood, and find in them nothing to conflict with that result, except one or two cases in Massachusetts. The judges of that state, in ascertaining the rights of parties arising under circumstances more or less similar to the present, early adopted the judge-made doctrine that the mention in the description of land in a conveyance of a street or road adjoining the same amounted by implication to a positive and solemn covenant, with all its characteristics, and results on the part of the grantor that such a street did exist, and they applied that doctrine so far in one or two instances as to give the grantee an absolute right of way over the whole length and breadth of the street, whether such right was of the least benefit to him or not. I have always conceived that the right in such a case was to be derived either from an implied grant of a

right of way to the nearest public highway, as in the nature of a right of way by necessity, or from an estoppel, which prevents the grantor from denying the existence of the road, where and so far as the doing so would injure the grantee, or that, if a covenant was to be presumed, it was to be confined in its operation and effect within such limits as the presumed intention of the parties and the very right and justice of the case required. The indisposition of our courts to presume a covenant in the strict sense of that word in such cases is manifested by the case of *Hopkinson v. McKnight*, 31 N. J. Law, 422.

Let us look at some of the cases in our own Reports relied upon by defendant. I pass over those which deal with the sufficiency of certain acts to affect a dedication to the public, since they have little or no application here. In *Dill v. Board of Education*, 47 N. J. Eq. 421, 20 Atl. 739, 10 L. R. A. 276 (where most of the cases up to that date, 1889, are collected), the claim was one for light and air over a lane immediately adjoining the lands of the complainant, so that there was no question as to the right of way in that lane at any point beyond its contact with complainant's land, and could be, therefore, no question as to a right of way in a cul-de-sac at a distance from complainant's lot. In fact there was no cul-de-sac, but the lane in question was part of a network of streets; all opening directly or indirectly upon recognized public highways. So with the case of *White v. Tide Water Oil Co.*, 50 N. J. Eq. 1, 25 Atl. 199. That was the case of an elaborate network of streets laid out on the official map of the city and connecting with public highways, so that the element of cul-de-sac did not exist. Just here I will refer to the careful language of Chancellor Zabriske, in *Attorney General v. Railroad*, 19 N. J. Eq. 386, where, at page 394, in speaking of the effect upon the right of the individual abutters of the lawful vacation of a street once dedicated and accepted by the public, he says: "The purchaser of a lot upon a street so dedicated acquires a perpetual, indefeasible right of access to his lot over the same, or at least over so much as leads from his lot to the next adjoining public street on each side, whether the same be accepted and adopted by the public as a highway or not, and retains it if, after acceptance, the same be abandoned by the public as a public highway." I conceive this to be an accurate statement of the law, and it fully recognizes the doctrine laid down by Baron Comyn, above stated, namely, that each end of a private way must either be some public place or some private place where the occupant has some right to go. To the same effect as Chancellor Zabriske's statement is the well-considered opinion of *Van Fleet v. C.*, in *Dodge v. Penn. R. R. Co.*, 43 N. J. Eq. 351, 11 Atl. 751, adopted by the Court of Appeals in affirming his decree in 45 N.

J. Eq. 368, 19 Atl. 622. The case is too long for extensive citation, but refused to extend the right of way beyond the first street on each side of the complainant's lands, precisely in accordance with Chancellor Zabriskie's doctrine. And I think it is quite consistent with what was said by Mr. Justice Depue in *Boornem v. North Hudson Co. R. R. Co.*, 40 N. J. Eq. page 564, 5 Atl. page 108. There, in speaking of rights arising out of conveyances referring to streets, the learned judge speaks of the implied right of access to the land. He does speak of it as an implied covenant thus: "By such conveyances the grantees are regarded as purchasers by implied covenant to the right to the use of the street as a means of passage to and from their premises"—by which he means passage from some public place to and from their premises. And, further on, he says: "For a grantor may acquire an easement in lands conveyed by apt words in the deed to create such a right, which, by way of estoppel, covenant, or implied grant will bind the grantee." But it is quite plain from this and other similar language used by other judges in this state in such cases that the implication arising under such circumstances, whether it be founded on implied covenant or on estoppel, is confined to such use of the road or street as is necessary or useful for the beneficial enjoyment of the lot conveyed. And in general the language used by the judges is that the right is to a right of way for access from some public highway to and from the premises conveyed.

No case, in New Jersey or elsewhere, that I have found, except in Massachusetts, presently to be mentioned, has gone so far as to hold that in the present case, for instance, that if the Headleys, after conveying the two lots on the corner of Headley road and South street to Mrs. Willis and to Miss Dana, had chosen to obliterate and close the street they had already worked in the rear of these premises, they might not have done so, provided it did not appear that such closing would work any injury to those grantees. I will mention here the case of *Holdane v. Trustees of Village of Cold Spring*, 21 N. Y. 474. There the owners of a tract of land had laid out on the ground and fenced a strip of land for an avenue, extending from one already opened, across their lands to lands of one Morris, and there ending in a cul-de-sac, and had this street so laid out on the ground plotted and designated as a highway on a map of the village made and published by one Bethan. Years afterwards, and before any lots had been sold off from it, or there had been any acceptance by the public, the owners closed up the road and shut out the public. It was held by an unanimous court that the owners had the right to revoke their dedication at any time before the public accepted it; therein affirming the judgment of the Supreme Court, where two

of the judges went on the ground that there could be no dedication of a cul-de-sac and the others went on the ground that there had been no acceptance. Another case cited by the defendants is *Bissell v. N. Y. Central R. R. Co.*, 23 N. Y. 61. There the sole question before the court was whether the conveyance of land bounding on the side of a street laid out, but not yet accepted by the public, carried the title by implication to the centre of the street, and the court held that it did do so. The facts were that one Morgan, owning one half of a block of land in the city of Rochester surrounded by open streets, laid out through it a street called Erie street, cutting his land in two and ending in a cul-de-sac in the line of the owner of the other half of the square, who never continued it across his half. Morgan sold all the lots facing on this street not including in the descriptions the street itself. Subsequently the defendant acquired the title to all these lots and erected a building or buildings upon them, including the dedicated street. Subsequently Morgan conveyed his title to the bed of the street to the plaintiff, who brought ejectment to recover the land so conveyed to him. Judgment was given, reversing the Supreme Court, for the defendant, and it is difficult to see how it could have been otherwise.

I come now to the Massachusetts cases. First. *Tufts v. City of Charlestown*, 2 Gray, 271. There the question arose upon the amount of damages to be awarded to the owner of the soil of a street proposed to be laid out by the city of Charlestown. It was, I believe, originally a cul-de-sac, but the only land granted out on the street extended to the whole depth of the street, so that the grantee had a clear right of way over the entire depth. It was held that the grantee had an interest in the whole length of the street amounting to an easement, which reduced the value of the interest therein of the grantor, which should be taken into account in estimating the value of his interest. As the land conveyed, bounding on the street, extended to the full depth, the question here did not arise.

The next case is *Thomas v. Poole* (1856), 7 Gray, 83. There one Butters the owner of a tract of land bounding on a public street conveyed to the plaintiff a lot facing on this public street, and on one side "upon a new street now staked out and to be opened by said Butters, 30 feet wide extending from said main street along on the northerly side of said lot hereby conveyed westerly to the land of the heirs of Dr. Luther Stearns, deceased." The case does not show whether this staked out street was then or ever carried across the land of Stearns. Subsequently Butters altered the location of the street on the ground to the west of the plaintiff's land, and sold to the defendant, an entirely innocent purchaser, a lot facing on it which included a portion of the street as staked out on the ground at the date of the plain-

tiff's purchase. The defendant proceeded to build upon his lot. The action was for damages for the obstruction of the street as staked out when the plaintiff bought. The court held that the plaintiff was entitled to recover, although by reason of the removal of the stakes the defendant had no knowledge or notice of the first location of the street. The decision was based on the doctrine of a hard and fast covenant on the part of the grantor of the plaintiff that a perpetual immovable street existed at the point in question, although it did not appear that such existence at that particular point was or could be of the least benefit or advantage to the plaintiff or his land. To my mind the judgment was unjust and inequitable, and not warranted by law. It was in fact carrying the doctrine of implied covenant to a mischievous extent. The next case is *Rodgers v. Parker* (1857) 9 Gray, 445. In that case the owner of the whole tract sold at auction by a map several lots lying on each side of a street called "Hancock Avenue," leading southwesterly from Hancock street (a public highway) to lands of Greenleaf, but whether extending through Greenleaf's land or not does not appear, but presumably it did not. The plaintiff was the purchaser of one of these lots nearest the open street, and annexed to his deed, and recorded therewith, was a copy of the map used at the auction. The defendant bought a lot facing on the street, in about the middle of it, and reference was made by his deed to the map recorded with plaintiff's deed. The plaintiff subsequently bought the lots lying on each side of this new street on the end next to Greenleaf's lands, one of these lots immediately adjoined the defendant's purchase. The plaintiff built a fence across the avenue at the extreme outer edges of his lots, and immediately in front of the adjoining edge of defendant's lot. The defendant removed the fence. Plaintiff sued him in trespass for tearing down his fence. The court held that the plaintiff had clearly, though slightly, so mislocated his fence as to interfere with defendant's right of way in the street immediately in front of his lot, and therefore the defendant was justified in removing the fence. But the court went further and held, on the authority of the previous cases in that state and the doctrine of hard and fast covenant before referred to, that the defendant was entitled to have the street as laid out on the map kept open to its full depth. The case in its facts is distinguishable from the one in hand. First. In that the paper street there extended entirely across the original grantor's land and it might be said that, peradventure, the adjoining owner would at some time be willing to have it extended across his land to some public highway, while in the present case the road ended in the midst of the grantor's land. Second. That the map was referred to in defendant's deed, and, so to speak, made a part of the conveyance,

while here it is not so referred to. Third. The plaintiff proposed to close the street up to a point immediately in front of the side of the defendant's lot, instead of 250 feet away from it, as in the present case.

But over and above those distinctions, I cannot bring my mind to acquiesce in the soundness of its doctrine. I think it carries the doctrine of implied covenant beyond what is warranted by reason or justice. I have taken the trouble to look through the subsequent Massachusetts Reports to ascertain how far the doctrine of the two cases just mentioned have been approved and followed in the subsequent decisions. In the case of *Stetson v. Dow*, 16 Gray, 372, the way mentioned extended from one street to another. In *Fox v. Union Sugar Refinery Co.*, 109 Mass. 292 (cited by defendant's counsel), the passageway over which the right of way was claimed led from one street to another street, so that, as in the case in 16 Gray, 372, there was no question of a cul-de-sac. In the prior case of *Light v. Goddard*, 11 Allen, 5, which is later than *Rodgers v. Parker* and *Thomas v. Poole*, the court refused to extend the doctrine of implied covenant as it had been done in those two cases; and *Biglow, C. J.* (page 7), says: "In these and similar cases it is regarded as a question of intent; and as ways or streets adjoining land, and by which it is bounded are usually appurtenances, or used to obtain access to the land, the inference is a reasonable one that the grantor intended that the street or way named in the deed should continue open and be for the use of the grantee, so far as it might be beneficial to the estate granted, and was within the power of the grantor to convey." And, again (on page 8): "We are by no means prepared to adopt as a sound rule of exposition the general proposition on which the argument for the plaintiff rests. We do not think that a mere reference to a plan in the descriptive part of a deed carries with it by necessary implication an agreement or stipulation that the condition of land, not adjacent to, but lying in the vicinity of, that granted, as shown on the plan, or the use to which it is represented on the plan to be appropriated, shall forever continue the same so far as it may be indirectly beneficial to the land included in the deed, and was within the power or control of the grantor at the time of the grant." In *Tobey v. City of Taunton*, 119 Mass. 404, *Tobey* was the owner of a lot on the corner of Main and Prescott streets, in the city of Taunton, which last-named street that city proposed to lay out and widen, taking in a portion of what *Tobey* claimed to be his land. The city claimed that that portion was within the limit of Prescott street, as mentioned in a deed by *Tobey's* grantor to a party bounding on Prescott street in the rear of *Tobey's* land. Manifestly it has no application here. In *Killion v. Kelley*, 120 Mass. 47, there was also a dis-

pute between several owners of lots bounding on a court and an owner of the lot on the corner of the court and the main street. *Williams v. Boston Water Power Co.*, 184 Mass. 406, was a case in which the purchaser claimed, as a logical result of *Thomas v. Poole and Rodgers v. Parker*, that he had a right to light and air over a piece of land shown on the lot by which he purchased, but the court refused to carry the doctrine that far. The next case is *Regan v. Boston Light Co.*, 187 Mass. 87. There the plaintiff bought a lot by a plan showing a great number of streets. Morton, J., at page 41, says: "These deeds undoubtedly give the plaintiff a right of way over the streets named in them, namely, Commercial and Union streets, so far as to furnish him with a communication with the public streets with which they connect. This right is not questioned, but they refer to the plan merely for the purpose of description and identification of the lots conveyed, and do not either expressly or by implication annex to these lots a right of way over all the streets laid down on the plan." And on page 42 he says: "The references to the plan in the deed by the grantor was merely for the purpose of description and boundary, and not with the intent to convey by implication remote rights of way not necessary to the enjoyment of the premises conveyed." And again on page 43: "What is the purpose and effect of a reference to a plan in a deed is a question of the intention of the parties. In the absence of an express grant, a grant by implication of an onerous servitude upon other lands of the grantor not necessary for the enjoyment of the land conveyed is not to be presumed unless such is clearly the intention of the parties." In *Coolidge v. Dexter*, 129 Mass. 167, it was held "a mere reference to a plan in the descriptive part of a deed of a lot of land does not import a stipulation by the grantor that the plan shall not in any respects be subsequently changed in parts not adjacent to the land sold." And, finally, in *Pearson v. Allen*, 151 Mass. 79, 23 N. E. 731, 21 Am. St. Rep. 426, the court refused to give to the complainant a right of way over an avenue plainly laid down on a map by which he bought, because it did not lead to any public street. The court says: "The cases here and elsewhere show that there are limits to the easements raised by way of implication, even if there are not limits to the power of creating easements when it is attempted by express words." While these cases do not expressly overrule the cases cited above, they do seem to me plainly to limit their effects as precedents.

If we inquire what was the intention of the parties to the deed to Lidgerwood with regard to the use of that part of Headley road here in question, we shall find that it was not the intention of the Headleys to grant to Lidgerwood any right in that part of the road, and that Lidgerwood could not have supposed that such was their intention, be-

cause he had notice through his agents, Mr. Mills, and his brother, that the Headleys had no such intention. And, if we inquire what beneficial use to Lidgerwood's lot such a right of way would be, we find absolutely none.

HITCHENS v. SCHOOL DIST. NO. 180 IN SUSSEX COUNTY.

(Superior Court of Delaware. Sussex. April 12, 1905.)

1. SCHOOLS AND SCHOOL DISTRICTS—EMPLOYMENT OF TEACHER—CONTRACT—VALIDITY.

A contract employing a teacher, entered into at a meeting of which all the members of the school committee had notice and at which a majority were present, is binding on the district.

2. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—WRONGFUL DISCHARGE.

An employé, discharged without just cause before the expiration of the term of his employment, is entitled to recover the agreed compensation for the remainder of the term.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 50.]

Action by Frank D. Hitchens against school district No. 180 in Sussex county. Verdict for plaintiff.

Action of assumpsit on an alleged verbal contract between the plaintiff and the defendant corporation, under which he agreed to teach the public school at Redden, in Sussex county, for seven months, beginning September 30, 1901, at \$40 per month. At the trial the plaintiff testified to the facts of his employment, and stated that after teaching for 11 days the schoolhouse was locked by the school committee, and that he was not permitted by said committee to complete his contract, although tendering himself ready so to do.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Robert C. White, for plaintiff. John M. Richardson and C. W. Cullen, for defendant.

When the plaintiff had rested, counsel for defendant moved for a nonsuit on the ground that there was no valid contract proved, inasmuch as the employment of the plaintiff was not effected at a meeting of the school committee duly convened.

SPRUANCE, J. In *Smith v. School District*, 1 Pennewill, 401, 42 Atl. 368, the agreement for the employment of the teacher was made with the commissioners individually, and not at a meeting of the board, and the court very properly held that said agreement did not bind the corporation defendant, saying that "in the employment of teachers the contract to be valid should either be made at a meeting of the committee in the first instance, or else be ratified at such a meeting of the committee, of which meeting all the committee should have notice and the opportunity to attend, and at which a major

ity must be present and act. Such contract may not rest in agreements made upon solicitation, or otherwise, with the individual members of the committee apart from each other; but only upon united action at a meeting duly convened." In the present case the member of the board who did not attend the meeting at Hill's store, at which the agreement with the plaintiff was made, had notice of said meeting, and was requested to be present. The said meeting was held by the other two commissioners, a majority of the board, and their action in making the agreement with the plaintiff bound the defendant. The nonsuit is refused.

SPRUANCE, J. (charging jury). This action is brought by the plaintiff, Frank D. Hitchens, against the defendant, school district No. 180 in Sussex county, to recover damages for an alleged breach of contract. If there was no breach of the contract by the defendant, there can be no recovery.

We are asked by the defendant to charge you that if, from the evidence, you believe that the plaintiff was not employed by the committee duly convened, your verdict should be for the defendant. We decline to so charge; but say to you that, in view of the uncontradicted testimony, the meeting at Hill's store, of which the other commissioner had due notice, was such a meeting of the school committee as qualified the two members then present to bind the defendant corporation by entering into an agreement with the plaintiff employing him as a teacher of the school of said district.

It appears by the testimony on both sides that in the latter part of July or the early part of August, 1901, the defendant made a verbal agreement or contract with the plaintiff by which he was employed to teach the school of said district for 7 months, at \$40 per month, and that under said agreement, on September 30th of the same year, the plaintiff took charge of said school and continued teaching for 11 days, when he was discharged. The plaintiff contends that up to the time of his discharge he had performed all of the duties and conditions of his employment, and that he was ready and willing to continue so to do to the end of the period for which he had been hired by the defendant, and that his discharge was without any sufficient cause. The defendant contends that at the time of the making of the said contract or agreement it was agreed by both parties (1) that the plaintiff should take his dinner to the school, and remain on the school premises during the recess and noon periods; and (2) that he should not board at the house of one Dutton, who lived a very short distance from the school. If these conditions were a part of the agreement, they were binding upon the plaintiff.

The defendant claims that these were material conditions of the plaintiff's employment, and that he was discharged by

reason of his breach of these conditions and his refusal to observe the same in the future. It will be your duty to determine from the evidence whether these, or either of these, conditions was a part of the said agreement between the parties, and, if so, whether they, or either of them, was broken by the plaintiff.

Where one employed for service for a certain period, at a certain compensation, enters into the service of his employer, and is discharged without sufficient cause before the expiration of the period, he is entitled to recover the wages he would have been entitled to had he been permitted to remain in the service to the end of said period. But, if such discharge was for the failure or refusal of the employé to observe any material condition of his employment, such discharge would be justified, and the employé could not recover compensation for the residue of the period.

The claim in this case is for wages at the rate of \$40 per month for seven months, making \$280, less \$22, which is admitted to have been paid. If there was on the part of the plaintiff no breach of any of the conditions of his employment, and he was discharged, he would be entitled to recover the said amount, less this credit of \$22. If, on the other hand, he was discharged by reason of his breach of any of the conditions of his employment, or his refusal to perform the conditions thereof, then he would not be entitled to recover anything, and your verdict should be for the defendant.

Verdict for plaintiff for \$258.

MacFEAT v. PHILADELPHIA, W. & B. R. CO.

(Superior Court of Delaware. New Castle. March 4, 1904.)

1. DEATH—ACTIONS FOR CAUSING—DAMAGES—EVIDENCE.

In an action against a carrier for wrongful death, a question asked a witness as to decedent's habits with respect to industry at the time of his death, with reference to decedent's earning capacity and to show that his life was of more value than that of a careless man, was too general.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 86, 87.]

2. EVIDENCE—EXPERT TESTIMONY.

In an action against a carrier for wrongful death, a question asked a medical expert, who testified to the nature of the wounds on decedent's body, as to whether the injuries and the shock were such as would have been caused by being struck by an express train going at the rate of 25 or 30 miles an hour and his body being rolled or crushed under the running board of a shifting engine, was not a proper one for an expert to answer.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2336.]

3. SAME—CONCLUSION OF FACT.

In an action against a carrier for wrongful death, a question asked a witness as to whether or not, in his judgment, the platform on which decedent was killed and the passageway or

crossing over the same were an unusual and unsafe crossing for persons to use and wait upon for trains, was inadmissible as calling for a conclusion of facts.

4. CARRIERS—INJURIES TO PERSON AT STATION—ACTION—EVIDENCE.

Where, in an action against a carrier for wrongful death, it appeared that, while plaintiff was waiting on defendant's platform for an approaching train, he was frightened by steam from a shifting engine coming up on a parallel track, causing him to jump in front of the approaching train, a question as to whether witness had seen the shifting engine and the cars attached at any other position than where they were at the time of the accident, on other days, when witness was waiting for the daily train for which decedent was waiting, asked for the purpose of showing a custom on defendant's part of standing a shifting engine and one or more cars in front of the station at the time of the approach of the passenger train to act as a fence to keep people back off the dangerous part of the platform, was inadmissible.

5. SAME—CITY ORDINANCE—SPEED OF TRAINS.

Where, in an action against a carrier for causing the death of plaintiff's intestate while awaiting transportation at a station, plaintiff's declaration alleged that defendant's train which caused the accident was at the time moving at an unlawful rate of speed through the city, city ordinances in reference to the speed of trains passing through the city were admissible as against the objection that such ordinances were not identified and described with particularity in the pleadings.

6. TRIAL—OBJECTIONS—STRIKING OUT TESTIMONY.

Where no objection to the reception of evidence is made, a motion to strike out the same must be made at or about the time the evidence is given.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 245.]

7. EVIDENCE—PHOTOGRAPHS.

In an action against a carrier for wrongful death, a photograph of the station at which decedent was killed, showing the situation of the tracks and station, was admissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1509, 1511.]

8. SAME—EXPERT EVIDENCE.

In an action against a carrier for wrongful death, evidence of a photographer as to where a camera was placed to take a photograph of defendant's track and the station where decedent was killed was inadmissible; the question not being one for expert testimony.

9. CARRIERS—INJURIES TO PERSON AT STATION—QUESTION FOR JURY.

In an action against a carrier for causing the death of plaintiff's intestate while awaiting transportation at a station, evidence examined, and held sufficient to take the case to the jury.

10. TRIAL—NONSUIT—JUDICIAL DISCRETION.

An exception does not lie to the court's ruling on a motion for a nonsuit; the question being one entirely within the discretion of the court.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 868.]

11. CARRIERS—INJURIES TO PERSON AT STATION—ACTION—EVIDENCE—REBUTTAL.

Where, in an action against a carrier for wrongful death, plaintiff's witnesses testified that they saw one of defendant's witnesses standing on the railroad track two or three minutes before the accident, testimony of such witness as to where he was at or about the time of the accident was admissible in rebuttal.

12. NEGLIGENCE—PROXIMATE CAUSE OF INJURY.

In an action for injuries resulting from

negligence, defendant is liable only for such negligence as constituted the proximate or immediate cause of the injury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 69-82.]

13. CARRIERS—INJURIES TO PERSON AT STATION—SPEED OF TRAIN—CITY ORDINANCE—VIOLATION.

The violation of a city ordinance respecting the rate of speed at which railroad trains may be run through the city is of itself an act of negligence, proof of which renders a railroad liable for any injury resulting therefrom to a person awaiting transportation at a station.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1155.]

14. SAME—ORDINARY CARE.

The term "ordinary care," when applied to the management of railroad engines and cars in motion, imports all care which the peculiar circumstances of the place or occasion reasonably require, and this will be increased or diminished according as ordinary liability to danger and accident and to do injury to others is increased or diminished in the movement and management of such engines and cars.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1087.]

15. SAME—WARNING BY BELL OR WHISTLE.

It is the duty of a railroad company to give timely and sufficient warning, by bell, whistle, or otherwise, of the approach of trains, and to run such trains at a rate of speed proper and reasonable under the circumstances.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1155.]

16. SAME—CARE TO AVOID INJURY—PERSONS—CROSSING TRACKS.

Persons crossing railroad tracks are bound to reasonably use all of their senses for the prevention of accident, and also to exercise all such reasonable caution as ordinarily prudent and careful persons would exercise in like circumstances.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1365; vol. 41, Cent. Dig. Railroads, § 1022.]

17. SAME.

Common carriers of passengers are responsible for any negligence resulting in injury to the passengers, and are required, in the preparation, conduct, and management of their means of conveyance, to exercise every degree of care, diligence, and skill which a reasonable man would use under such circumstances.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1087.]

18. SAME—RIGHTS OF PASSENGER AT STATION—CROSSING TRACKS.

When the arrangement of a railroad station is such that a passenger has to cross the track either before entering or after leaving the cars, he has a right to assume that the track may be crossed safely, provided he crosses the same at a proper and reasonable time.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1365.]

19. SAME—EVIDENCE—PRESUMPTIONS.

In the absence of any evidence to the contrary, the law presumes that at the time of an accident occurring to a passenger at a railroad station through being struck by an approaching train, such passenger exercised reasonable care and caution to prevent injury.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1399.]

20. SAME—CONTRIBUTORY NEGLIGENCE—LIABILITY.

A railroad company is liable for injuries to a passenger if, notwithstanding any previous negligence of the latter, the company could have

prevented the accident by the use of ordinary and reasonable care.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1087.]

21. SAME—RAILROAD CROSSING.

One approaching a railroad crossing to take a train is bound to know that it is a place of danger.

22. NEGLIGENCE—ACTIONABLE INJURIES—ACCIDENT.

A pure accident, without negligence on the part of the party responsible therefor, is not actionable.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 80.]

23. DEATH—ACTION FOR CAUSING—MEASURE OF DAMAGES.

In an action for wrongful death, the measure of damages is such sum as the jury believe from the evidence deceased would probably have earned in his business during life and have left as his estate at the time of his death, taking into consideration his age, his reasonable probabilities of life, his ability and disposition to labor, and his habits of living and expenditure.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 109.]

Action on the case by Alexander L. MacFeat, administrator of Walter MacFeat, deceased, against the Philadelphia, Wilmington & Baltimore Railroad Company, to recover damages for the death of said deceased, which was alleged to have been caused by the negligence of said company on the 26th of June, 1902, at its French Street Station in the city of Wilmington. Judgment for defendant.

At the trial plaintiff proved: That on the 26th of June, 1902, Walter MacFeat was standing upon or crossing over the spur track of the defendant company nearly opposite and south from the waiting-room door of the defendant's French Street Station about the time the 1:37 p. m. Philadelphia express was due. That several others who were waiting for said train were also standing or moving about said tracks. That there was a cement pavement extending entirely around said station, 137 feet long and varying in width from 28 to 35 feet. That near the side track or spur on which MacFeat was standing, and to the south of it, was the south-bound track of the defendant company, and six feet further to the south of the latter track was the north-bound track of said company, all of which tracks were at grade and had boards between them, forming a crossing or passageway from the said station to certain of defendant's trains. That when the said express train was coming up to the station on the north-bound track, suddenly and without prior warning, a shifting engine of the defendant company, with two empty passenger cars attached, started west on said track on which MacFeat was standing and at the same time began to blow off steam. That MacFeat, apparently startled by the unexpected movement of the shifter, and in order to escape being run over by the same, moved away from said

track, with his right side towards the north-bound track, on which the express train was then coming in at a very rapid rate (the testimony being that at the time of the accident the train was running from 25 to 30 miles an hour), and in so doing was struck in the hip or back by the projecting timbers of the cowcatcher of the engine of said express train, whereby he was hurled in front of and underneath the running board at the front of the moving shifter. That his body was rolled over a few times and crushed under said running board before the shifter came to a standstill. That by said striking by the engine and rolling under the running board of the shifter MacFeat was so badly injured that he died in about six hours thereafter. It was further proved: That the deceased was employed at the Klamensal Woolen Mills, near Wilmington, but usually went to his home in Philadelphia on Saturdays to visit his family, and as a rule traveled over the Baltimore & Ohio Railroad, but sometimes used the defendant company's road. That on the Saturday in question he rode into town from Stanton with a witness named Guest, and told the latter that he was going home to Philadelphia from Wilmington on the train that left there somewhere about 1 o'clock. That on arriving in Wilmington about 12 o'clock said witness stopped his team at Front and Madison streets and MacFeat got out and walked on down Front street towards the defendant company's station. Witness learned the following morning that MacFeat had been struck and killed by one of the defendant's trains.

The defendant produced evidence to the effect that MacFeat crossed the track in front of the shifter at a rapid rate and proceeded diagonally across the south-bound to the north-bound track, on which the express train was approaching, with his head down and his hands in his pockets, and never looked or stopped until he was struck by the said express train.

Argued before LORE, C. J., and PENNEWILL and BOYCE, JJ.

Levin F. Melson and Horace G. Knowles, for plaintiff. Herbert H. Ward and Andrew C. Gray, for defendant.

During the course of the trial the following rulings were made as to the admission of testimony:

Alexander L. MacFeat, the plaintiff, was asked by Mr. Knowles the following questions:

"Q. State as to your brother's habits, with respect to industry, at the time of his death. A. He was a very steady man, and never lost any time from his work, that I know of. Q. Was he or not a careful man? A. I would consider him to be very careful."

Mr. Gray: We object. That question has been ruled on in this court before. It is not whether he was an ordinarily careful man or not. The sole issue here is—if there

is any issue as to his care—as to whether at the time of the accident he was in the exercise of due care.

Mr. Melson: The object of the question is to show that, if he was careful, his life was of more value than that of a careless man. I believe the court ruled it in the Cox Case.

PENNEWILL, J. You mean it has reference to his earning capacity?

Mr. Melson: Yes; reference to the loss.

PENNEWILL, J. We think it too general.

Mr. Ward: I move that the testimony on that point be stricken out.

PENNEWILL, J. Let the answer to that question be stricken out.

Dr. James A. Draper, who testified to the nature of the wounds upon the body of Walter MacFeat, was asked by Mr. Knowles the following question:

"Q. Were those injuries that he received, and the shock, such as would have been caused by being struck by an express train or the engine of it, going at the rate of 25 or 30 miles an hour and his body being rolled or crushed under a running-board of a shifting engine? (Objected to by counsel for defendant, as not a proper question for an expert to answer. Objection sustained.)"

John Sharp, a witness produced and duly sworn at the trial of the above stated case on behalf of the plaintiff, was asked by Mr. Knowles, among others, the following questions:

"Q. Are you familiar with the tracks and the crossing there [referring to the tracks and crossing at the French Street Station of the defendant company]? A. Yes, sir. Q. Right in front of the station? A. Yes, sir. Q. And have seen others passing over it to trains going backward and forward? A. Yes, sir; I have traveled over it every day for over a year. Q. Is that platform there and passageway or crossing, or not, in your judgment an unusually unsafe crossing for persons to use and to wait upon for the north-bound trains? (Objected to by Mr. Ward, of counsel for defendant, on the ground that it was calling for a conclusion of fact, which was for the jury to determine and not for the witness.)"

PENNEWILL, J. The majority of the court hold the question to be inadmissible.

"Q. In being down to take the 1:37 train, and other north-bound trains, have you seen the shifter and those waiting cars at any other position than where they were on that day? (Objected to by counsel for defendant as irrelevant. Counsel for plaintiff stated that they wished to show a custom on the part of the defendant company of standing the shifting engine and one or more cars in front of the station about the time of the approach of the 1:37 train, to act as a bar or as a fence to keep the people back off of the dangerous part of the platform where the tracks are; that it was proper to have the train there; that it was frequently seen there and did serve that purpose.)"

PENNEWILL, J. We think this question is inadmissible.

Mr. Knowles: We offer in evidence City Ordinances, p. 376, § 12, in reference to speed of trains passing through the city. (Objected to by Mr. Gray, of counsel for defendant, on the ground that, in order to introduce in evidence an ordinance of a municipality, said ordinance should be identified and described with particularity in the pleadings, whereas the allegation in plaintiff's declaration concerning the same was that the defendant's train which caused the accident was at the time moving at an unlawful rate of speed through the city, to wit, at a speed greater than six miles an hour. No authority was cited in support of the above contention.)

PENNEWILL, J. We think the ordinance is admissible if you have no other ground than that which you have stated.

Mr. Gray, of counsel for defendant, here states to the court that the witness Lewis Guest, called on behalf of the plaintiff at the afternoon session of the preceding day, had testified to certain statements made by Walter MacFeat on the morning of the accident to the latter concerning said MacFeat's intentions about going to Philadelphia on the afternoon train of that day; that such statements were obviously improper, and, although no objection was made to the testimony at the time, yet he considered that under the principles of evidence there could be no time limit, before the case was submitted to the jury, for a motion to strike out evidence, and therefore he made the motion that all such evidence as he had above referred to given by said witness should be stricken out.

PENNEWILL, J. You made no objection at the time to this evidence, and under our practice we think it is too late to make the motion now. Our practice is to require the motion to be made at or about the time the evidence is given. One reason for such a rule of practice, it occurs to us, is that, if at any time during the trial you could make such a motion, it would consume a great deal of time in going back and reading the testimony to ascertain what it was.

LORE, C. J. Another reason for our rule is that if you make no objection you waive your right and the testimony goes upon the record and becomes a part of it. The practice, as stated by Judge PENNEWILL, has been quite uniform in this court.

PENNEWILL, J. The court refuse your motion to strike out the testimony.

Harry Bucher, a witness, being produced, sworn, and examined on the part and behalf of the plaintiff, testifies as follows:

By Mr. Knowles: "Q. Where do you reside and what is your occupation? A. At 902 West Eighth street, and I am a photographer. Q. At the request of counsel for plaintiff in this case, did you make a photograph of French Street station? A. I did.

Q. Are you familiar with that locality? A. I am. Q. Have you been familiar with it for the last several years? A. Yes, sir. Q. What is the date of the photograph or negative which you made? A. The 14th of December, 1903. Q. Was the condition of the track and station there at that time the same as it had been for two years prior to that? A. To the best of my knowledge. Q. You have been familiar with it all of that time? A. Yes, sir. Q. You have been down there going to take the trains? A. Yes, sir. Q. Is that the photograph from the negative made at the time and place you just stated (shows photograph to witness)? A. This was made a week prior to that."

The above photographs are here offered in evidence by Mr. Knowles, objected to by Mr. Gray, who, pending the decision of the objection, cross-examines the witness as follows:

Cross-examination by Mr. Gray: "X. Where was your camera posted when you took that photograph—being the one showing the train? A. This one was made by a man in my employ. X. It was not made by you? A. No, sir; the other was made by me. X. You don't know where that was taken from? A. This was made from the position of French street looking east. X. Do you new where the camera was posted? A. I imagine from this view, about the middle of the street. X. Was it taken with a camera? A. Yes, sir. X. What kind of a camera? A. I could not say. X. What paraphernalia was there? A. An ordinary focus camera. X. Is it such as you would use in your studio? A. No, sir; it is different, but it is a view camera. We use different focus lenses for outdoor and indoor work. X. You did not take that one yourself? A. Not that one; no, sir."

Mr. Gray: We object to the admission of the photograph, showing the train, as not being taken by this witness at all.

The witness: It was made under my supervision though.

"X. You were not present, though? A. No, sir."

PENNEWILL, J. Do you offer both of them, or only one, Mr. Knowles?

Mr. Knowles: We will offer them separately. We will withdraw this one showing the train, for the present, and our offer covers the one now without the train.

Mr. Gray continues: "X. Who took this other one? A. I did. X. What time of day did you take it? A. I took that about half past 8 o'clock in the morning. X. Where was your camera posted there? A. I was standing at the southwest corner of Water and French streets."

Mr. Ward: We object to the admission of this photograph, the conditions not being the same as testified to in this case.

PENNEWILL, J. We think this is admissible. The objection is overruled.

The same is marked by the stenographer "Plaintiff's Exhibit D."

Mr. Knowles: We now offer this other photograph in evidence—the one showing the train.

By Mr. Knowles: "Q. Who made that photograph? A. Mr. Wingfield, who is in my employ. Q. Was it made at your request? A. Yes, sir. Q. Is Mr. Wingfield an employé of yours? A. Not at the present time, but was at the time this was made. Q. Was the order for that photograph given to you at your place of business? A. It was. Q. And in accordance with that did you send your employé or representative out to take that photograph? A. I did. Q. Can you identify it as being a photograph of that particular place or station, the camera having been placed at or near the northeast corner of Water and French streets? (Objected to by counsel for defendant, and form of question changed as follows:) Q. You are an expert photographer? A. I am a photographer. Q. How long have you been engaged in that business? A. About 25 years."

Mr. Knowles here states that he desires to examine this witness, to see whether or not, as an expert, he can say where the camera was placed to take the picture or photograph, which he desired to offer in evidence.

PENNEWILL, J. We think this is not a question for expert testimony; and we hold that this picture is inadmissible at this time.

At the conclusion of plaintiff's evidence, counsel for defendant moved for a nonsuit, on the ground of contributory negligence on the part of the plaintiff. After said motion had been fully argued by the respective counsel, the court rendered the following opinion overruling the said motion:

PENNEWILL, J. Gentlemen, we have carefully considered the motion for a nonsuit made in this case, and while we have very grave doubt of the plaintiff's right to recover upon the evidence presented, we think the case should go to the jury. Therefore we decline to order the nonsuit.

Mr. Knowles: I ask to note an exception to the remarks of the court in refusing the nonsuit.

LORE, C. J. We do not think this is an exceptionable matter; the question as to a nonsuit being one entirely within the discretion of the court.

Mr. Knowles: May it please the court, I desire to note an exception to the ruling of the court upon my application for an exception to the remarks of the court in refusing the motion for a nonsuit.

LORE, C. J. Let it be noted that you asked leave to except, which was refused.

Frank Hyatt, a witness, being produced, sworn, and examined on the part and behalf

of the defendant, testified, among other things, as follows:

By Mr. Gray: "Q. Do you remember the 26th day of May, 1902, the day this man MacFeat was killed? A. Yes, sir. Q. Where were you standing about half past 1 o'clock, or somewhere along there? A. I was standing at Front and the depot—Front and French—on the pavement of the station. Q. Did you see this man who was killed? A. Yes, sir. Q. Where did you first see him? A. The first I seen of him he ran into me. Q. He was running? A. Yes, sir; he was on a zig-zag."

By Mr. Melson: "X. Where was this man, on Front street? A. Front and French. I was standing on the corner."

Mr. Melson: We object to the testimony as to what this man was doing at Front and French streets, or on any other street, or to what he was doing at any time or place other than the time and place of the accident.

Mr. Gray: Their witnesses have testified that they saw this man standing on the south-bound track two or three minutes before the accident. This is to meet that testimony.

PENNEWILL, J. We think it is admissible.

Plaintiff's Prayers.

First. If a person has the bona fide intention of taking passage by a train, and if he goes to a station at a reasonable time, he is entitled to protection as a passenger from the moment he enters upon the carriers' premises. Purchase of a ticket is not necessary to create the relation of passenger and carrier. *Grimes v. Pennsylvania Co. (C. C.)* 36 Fed. 72; *Gordon v. Grand St. & Newton R. R.*, 40 Barb. (N. Y.) 546; *Gordon v. West End Ry.*, 175 Mass. 181, 55 N. E. 990; *Jeffersonville, etc., R. R. v. Riley's Adm'r*, 39 Ind. 568; *Allender v. C. R. I. R. R.*, 37 Iowa, 264; *Inness v. Boston, etc., R. R.*, 168 Mass. 433, 47 N. E. 193; *B. & O. R. R. v. State to Use of Chambers*, 81 Md. 371, 32 Atl. 201.

Second. "The law in its beneficence will not allow any trifling with the lives or personal safety of human beings, and therefore exacts great care, diligence, and skill from those to whose charge as common carriers they are committed. * * * This obligation is imposed on them as a public duty and by contract to carry safely, as far as human care and foresight will reasonably admit." *Flinn v. P. W. & B. R. R.*, 1 Houst. 469, 500; approved in *Betts v. W. O. Ry.*, 3 Pennewill, 448, 53 Atl. 358; *McElroy and wife v. Nashua, etc., R. R.*, 4 Cush. (Mass.) 400, 50 Am. Dec. 794; *Indianapolis, etc., R. R. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Carroll v. Staten Island R. R.*, 58 N. Y. 126, 17 Am. Rep. 221; *Watson v. St. Paul Ry.*, 42 Minn. 46, 43 N. W. 904; *Raymond v. Burlington, etc., R. R.*, 65 Iowa, 152, 21 N. W. 495; *Sherlock et al. v. Alling's Adm'r*, 44 Ind. 184; *Pittsburg, Cin.*,

etc., R. R. v. Thompson, 56 Ill. 133; *Hegeman v. R. R.*, 18 N. Y. 9, 64 Am. Dec. 517; *Coddington v. Brooklyn, etc., R. R.*, 105 N. Y. 66, 5 N. E. 797.

Third. "Carriers are affected by what are called 'legal duties' towards their customers. * * * And these duties of observance towards those employing the carriers, as they grow out of their occupation as public agents, do not require to be proved, on the trial of suits against them, but exist in legal contemplation, and therefore are recognized by the courts without any proof. Among the duties with which carriers are charged by law is that of providing a safe means of ingress and egress. * * * The law, indeed, would be sadly deficient, did it not require this duty at the hand of railroad carriers." *Wallace v. W. & N. R. R.*, 8 Houst. 529, 18 Atl. 818.

Fourth. "Where the arrangement of a station is such that a passenger has to cross a track either before entering or after leaving the cars, he has a right to assume that the track may be crossed safely, and the railway is liable if he be struck by a train moving on that track when he is approaching or leaving the cars or station." *Terry v. Jewett*, 78 N. Y. 838; *Brassell v. N. Y. C. R. R. Co.*, 84 N. Y. 241; *Penn. R. R. v. White*, 88 Pa. 327; *Klein v. Jewett, Recv'r Erie Ry.*, 26 N. J. Eq. 474; *B. & O. R. R. v. State to Use of Chambers*, 81 Md. 371, 32 Atl. 201; *Beecher v. L. I. R. R. Co.*, 161 N. Y. 222, 55 N. E. 899.

Fifth. Independent of any ordinance upon the subject, the running of its north-bound express train at a high rate of speed through a station where persons were waiting to take its trains would be evidence of negligence on the part of the defendant. *B. & O. R. R. v. State to Use of Chambers*, 81 Md. 384, 32 Atl. 201.

Sixth. "The plaintiff would be entitled to recover, notwithstanding there had been some negligence on the part of MacFeat, if it was the negligence of the defendant alone that was the proximate or immediate cause of the injury, provided the negligence of MacFeat was not then continuing and did not at the precise time enter into the accident; in other words, if, notwithstanding the previous negligence of MacFeat, the company could have prevented the accident by the use of ordinary and reasonable care." *Cox v. W. O. Ry. Co.*, 4 Pennewill, 162, 53 Atl. 569; *Ford v. Warner Co.*, 1 Marv. 93, 37 Atl. 39; *Chielinsky v. Hoopes & Townsend Co.*, 1 Marv. 273, 40 Atl. 1127.

Seventh. "As MacFeat is dead, not here to speak for himself, the law clothes him with the presumption, that when using the platforms and passageways of the defendant at the French Street Station on that day, that he did his duty; used such care and precaution as an ordinarily prudent and careful man would use in like case, and by that presumption you are to be governed, unless the evidence, directly or indirectly, rebuts it and

shows that he did not use such care and precaution." *Martin v. B. & P. R. R.*, 2 Marv. 130, 42 Atl. 442; *Cox v. W. C. Ry. Co.*, 4 Pennewill, 162, 53 Atl. 569.

Elghth. If, from the evidence, the jury believe that the defendant company started up its shifting engine and cars along and across the platform or that part of the station used and occupied by passengers while waiting for and boarding the north-bound trains, at or about the time the 1:37 train was coming in and up to the station, and that by reason of such action on the part of the defendant company, Walter MacFeat, in making an effort to escape from the danger of the approaching shifter, moved his position on the platform, and in doing so got so near the north-bound track that he was struck by the 1:37 north-bound train while running at a speed in excess of six miles an hour, and, either by the blow of the 1:37 train engine or by the shifting engine which partly ran over him, came to his death, then the defendant company is guilty of negligence, and the verdict of the jury should be for the plaintiff. *Cannon v. Pittsburgh Trac. Co.*, 194 Pa. 159, 44 Atl. 1089; *Stevenson v. Chic.*, etc., R. (C. C.) 18 Fed. 493; *Willson v. N. Pac. R.*, 26 Minn. 278, 3 N. W. 333.

Ninth. The rule as to contributory negligence is that where the deceased even acts erroneously, if he so acts "through fright or excitement induced by the defendant's negligence, or adopts a perilous alternative in the endeavor to avoid an injury threatened, he is not guilty of contributory negligence. And in considering the conduct of the deceased, if the peril seemed imminent, more hasty and violent action was to be expected than would be natural at quieter moments; and such conduct is to be judged with reference to the stress of appearances at the time, and not by the cool estimate of the actual danger formed by outsiders after the event." *Gannon v. N. Y.*, etc., R., 173 Mass. 40, 52 N. E. 1075, 43 L. R. A. 833; *Penn. R. v. Kilgore*, 32 Pa. 292, 72 Am. Dec. 787; *Indianapolis R. v. Carr*, Adm'r, 35 Ind. 510; *Penn. R. v. Ogler*, 35 Pa. 60, 78 Am. Dec. 322; *Ward v. Chic. R.*, 85 Wis. 601, 55 N. W. 771; *Chicago v. Hering*, Adm'r, 83 Ill. 204, 25 Am. Rep. 378; *Wesley City Coal Co. v. Healer*, 84 Ill. 126; *Schmidt v. Burlington R.*, 75 Iowa, 606, 39 N. W. 916; *Twomley v. C. Park R.*, 69 N. Y. 158, 25 Am. Rep. 162; *Willson v. N. Pac. R.*, 26 Minn. 278, 3 N. W. 333; *Iron R. Co. v. Mowery*, 36 Ohio St. 418, 38 Am. Rep. 597; *Buel v. N. Y. C. R.*, 31 N. Y. 314, 88 Am. Dec. 271; *Louisville R. v. Lucas* (Ind. Sup.) 21 N. E. 968, 6 L. R. A. 193.

Tenth. If the defendant "seeks to avoid liability for its negligence upon the ground of contributory negligence on the part of MacFeat, then the defendant must show such contributory negligence on the part of MacFeat by a preponderance of proof, or the plaintiff will be entitled to your verdict." *Louth v. Thompson*, 1 Pennewill, 156, 39 Atl.

1100; *Wilkins v. Wilmington*, 2 Marv. 132, 42 Atl. 418.

Eleventh. "If you should believe from the evidence in this case that at the time of the accident the north-bound train which struck MacFeat was running at a rate of speed in excess of six miles an hour in violation of the ordinance of the city of Wilmington, and that such excessive speed was the proximate cause of the injury to the plaintiff, then your verdict should be for the plaintiff. The violation of an ordinance of this city is of itself (per se, as we may say) an act of negligence which, in a legal controversy like this, only requires to be proved to render the wrongdoer liable for any injury resulting from such misconduct." *Knopf v. P. W. & B. R. Co.*, 2 Pennewill, 392, 46 Atl. 747; *Robinson v. Simpson*, 8 Houst. 400, 32 Atl. 287; *Giles v. Diamond State Iron Co.*, 7 Houst. 453, 466, 8 Atl. 368; *Diamond State Iron Co. v. Giles*, 7 Houst. 566, 11 Atl. 189; *Jones v. Belt*, 8 Houst. 563, 564, 32 Atl. 723; *Carswell, Adm'r, v. Mayor and Council of Wil.*, 2 Marv. 360, 365, 43 Atl. 169.

Twelfth. If you find for the plaintiff, "in estimating his damages, you may consider the reasonable probabilities of the life of the deceased and ascertain as nearly as you may the value of that life, including the past losses and such prospective damage as has resulted, or may result from his death." *Carswell, Adm'r, v. City of Wilmington*, 2 Marv. 360, 43 Atl. 169.

Defendant's Prayers.

The defendant prays the court to instruct the jury as follows:

First. That the jury bring in a verdict for the defendant.

Second. That if the jury believe that Walter MacFeat negligently placed himself in a position of danger and was injured in consequence thereof, the said MacFeat was guilty of such contributory negligence as would prevent his recovery.

Third. That if the jury believe that Walter MacFeat negligently placed himself in a position of danger, and while in such position was confronted with an apparent imminent peril, and in attempting to escape such peril exposed himself to the injury by which he was killed, then the jury must find a verdict for the defendant.

Fourth. That if the jury find that the negligence of MacFeat contributed to and entered into the accident the jury shall return a verdict for the defendant, as MacFeat in that case would be guilty of contributory negligence. Where there is contributory negligence, the law will not attempt to measure the proportion of blame or negligence to be attributed to each party.

Fifth. If the jury find that any negligence, however slight, on the part of the plaintiff contributed to the accident, they must return a verdict for the defendant.

Sixth. If the jury should find that the-

defendant, at the time of the accident, was negligent by a violation of running its train at an unlawful speed, the defendant will not be liable if the injury was caused in any degree by the negligence or careless conduct of the plaintiff. The law does not permit any one to recover damages from another for an injury if his own negligence has contributed thereto, or where by the exercise of reasonable care he could have avoided it.

Seventh. If the jury believe that it has not been shown by the preponderance of the testimony that the negligence of the defendant was the proximate cause of the injury to the plaintiff, or if the jury should believe that the negligence of MacFeat himself contributed to the injury complained of, the jury should return a verdict for the defendant.

PENNEWILL, J. (charging the jury). This is an action brought by Alexander L. MacFeat, administrator of Walter MacFeat, deceased, against the Philadelphia, Wilmington & Baltimore Railroad Company, to recover damages for the death of said deceased, which is alleged to have been caused by the negligence of said company on the 26th day of May, 1902, at its French Street Station in this city. The declaration filed in the case consists of numerous counts, but we think the negligence averred therein and relied upon by the plaintiff may be summarized as follows:

That the defendant did not provide or furnish sufficient, suitable, and safe platforms and passageways for the deceased at said station; that the defendant negligently and carelessly failed to properly warn the deceased of the movement of the cars operated and controlled by the defendant by guard, bell, whistle, or otherwise; that the defendant, knowing that deceased was caught and fastened by, under, and beneath its engine, did negligently move, start, and back said engine, thereby crushing and mangling the deceased; that by and through the negligence of the defendant its engine or car was driven or struck against the deceased without any notice or warning being given to him; that the defendant negligently furnished the deceased unsafe ingress to its trains, in that it failed to have the supply train in the proper and usual position, and by reason thereof an engine or car of the defendant was driven and struck against the deceased; that the defendant, knowing of the position of the deceased under its engine or shifter, negligently started, moved, and backed said engine or shifter, thereby wounding and injuring the deceased; that the defendant negligently ran and operated its engine, with the cars thereto attached, at the time and place of the accident, at a speed greater than it was authorized by law to do, to wit, at a speed upwards of six miles an hour.

It is also averred in said declaration that the defendant was negligent in causing one of its trains to approach said station with-

out being stopped before reaching a passenger train that was receiving passengers, and also in failing to have its servants and employees standing at the proper place upon the said platforms and passageways of said station to give proper notice to the deceased of the movement of its trains. It is, however, admitted by the plaintiff that there is no evidence in the case to support either of these last two averments, and they are, therefore, not to be considered by you. In some of the counts of plaintiff's declaration it is alleged that the deceased was a passenger of the defendant company at the time and place of the accident, and in other counts it is alleged that he was on the platforms and passageways of the said company at the time of the accident lawfully or with the knowledge of the defendant.

The defendant company denies that it was guilty of any negligence that caused the death or injury of the said Walter MacFeat, and, moreover, insists that, if there was any negligence, it was the negligence of him, the said Walter MacFeat, and not the negligence of the company.

We have been asked by the defendant to direct you to find a verdict for the defendant. This we decline to do. We say to you, gentlemen, that with the facts or evidence in the case the court have nothing to do. They are for your determination alone. You are the sole judges of the effect and weight of the testimony. You have heard all the evidence, and it is now for your careful consideration and determination, applying thereto the law as we shall declare it to you.

This action is based upon negligence, which has often been defined by this court to be the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would use under similar circumstances. It is for you to determine from the evidence whether there was any negligence that caused the accident complained of, and, if there was, whether it was the negligence of the defendant or of Walter MacFeat, the plaintiff's intestate. To enable the plaintiff to recover at all, he must show to your satisfaction by a preponderance of the evidence, that the negligence which caused the accident, if any there was, was the fault of the defendant company. The burden of proving such negligence is upon the plaintiff, and the defendant can be held liable only for such negligence as constitutes the proximate or immediate cause of the injury.

There are certain things which amount to negligence in law, whether any positive or active negligence be proved or not. The violation of an ordinance of this city is of itself (per se, as we may say) an act of negligence, which only requires to be proved to render a wrongdoer liable for any injury resulting from such misconduct. In such case, however, the defendant would not be liable unless the violation of the ordinance—that is, the excessive speed of the train—caused

the accident complained of; nor would the defendant be liable if the injury was caused by the negligence of the deceased. The law does not permit any one to recover damages from another for an injury if his own negligence has contributed thereto, or where by the exercise of reasonable care he could have avoided it.

The term "ordinary care," when applied to the management of railroad engines and cars in motion, imports all the care which the peculiar circumstances of the place or occasion reasonably require; and this will be increased or diminished according as the ordinary liability to danger and accident and to do injury to others is increased or diminished in the movement and management of such engine and cars. It is the duty of a railroad company to give timely and sufficient warning, by bell, whistle, or otherwise, of the approach of trains, and to run its trains at a rate of speed proper and reasonable under the circumstances; and, if the defendant failed to make use of such usual and appropriate means to warn the deceased at the time and place of the accident, it would be negligence on its part; and, if the accident occurred by reason of its failure so to do, the defendant would be liable, provided the deceased did not by his own negligence or want of care contribute to the accident. But, on the other hand, it is equally well settled that the person injured was also bound at the same time to use ordinary care to avoid the injury, and the care and diligence which he was bound to exercise must be in proportion to the danger to be avoided. It is a general rule that persons crossing railroad tracks are bound to the reasonable use of all their senses for the prevention of accident, and also to the exercise of all such reasonable caution as ordinarily prudent and careful persons would exercise in like circumstances.

As we have before stated, the plaintiff claims in certain counts of his declaration that the plaintiff's intestate, at the time and place of the accident, was a passenger of the defendant company; this, however, being denied by the defendant. It is for you to determine, from the evidence, whether he was such passenger or not. It is not necessary to constitute him a passenger that he should have had a ticket, or that he should have been actually upon the train of the defendant. If you believe that it was the bona fide intention of Walter MacFeat, at the time of the accident, to board the defendant's train, and that the defendant had knowledge of that fact, or that the acts and conduct of the deceased and the other facts and circumstances were such as to reasonably inform or notify the defendant that he intended to board the train, he was entitled to such care and protection on the part of the defendant as is required under the law where the relation of passenger and carrier exists. A common carrier of passengers is liable for injuries to the latter only in

case of the carrier's negligence, and not when the passenger could have escaped the injury by the use of such care on his part as a reasonably careful person would take of himself under like circumstances. The law, however, exacts great care, diligence, and skill from those to whose charge as common carriers passengers are committed. Common carriers of passengers are responsible for any negligence resulting in injury to them, and are required, in the preparation, conduct, and management of their means of conveyance, to exercise every degree of care, diligence, and skill which a reasonable man would use under such circumstances. This obligation is imposed on them as a public duty, and by their contract to carry safely, as far as human care and forethought will reasonably admit. *Flinn v. P. W. & B. R. R. Co.*, 1 Houst. 469; *Betts v. W. C. Ry. Co.* 3 Pennewill, 448, 53 Atl. 358.

When the arrangement of a station is such that a passenger has to cross the track either before entering or after leaving the cars, he has a right to assume that the track may be crossed safely, provided he crosses the track at a proper and reasonable time and is not struck because of his own negligence. The tracks of a railroad company over which frequent trains are passing is a place of danger, and neither a passenger nor other person has a right to go upon them at an improper or unreasonable time. In the absence of any evidence to the contrary, the law presumes that at the time of the accident the deceased did his duty and did exercise reasonable care and caution. This, however, is merely a presumption of law, and may be rebutted by evidence showing that he did not exercise such care and caution. If the negligence of the deceased, Walter MacFeat, contributed to and entered into the accident at the time the injuries were received, the plaintiff cannot recover, even though the company was also guilty of negligence. In such case the deceased would be guilty of contributory negligence, and the law will not attempt to measure the proportion of blame or negligence to be attributed to each party.

The plaintiff, however, would be entitled to recover, notwithstanding there had been some negligence on the part of the deceased, if it was the negligence of the defendant alone that was the proximate or immediate cause of the accident, provided the negligence of the deceased was not then contributing to and did not at that precise time enter into, the accident; in other words, if, notwithstanding any previous negligence of the deceased, the company could have prevented the accident by the use of ordinary and reasonable care. The plaintiff's right to recover is based upon the negligence of the defendant. The burden is upon the plaintiff to prove such negligence to your satisfaction by a preponderance of the evidence;

and, where contributory negligence is set up as a defense, it must be proved by the defendant in like manner.

While a person should not be held guilty of contributory negligence who, in the effort to avoid immediate danger, in the exigency of the moment, suddenly and without time or opportunity for reflection, puts himself in the way of other peril without fault on his part, and particularly so if the defendant has placed the person in such position, yet no one has a right to needlessly place himself in a place of danger; and if a person, failing to observe due care, walks into a danger that the observance of due care would have enabled him to avoid, he is no less guilty of contributory negligence than he who by the observance of due care could extricate himself from danger, but fails to make any effort for his personal safety, and because thereof is injured. One approaching a railroad crossing is bound to know that it is a place of danger, and he must give that attention to the sights and sounds of warning of an approaching train, if any there are, that a man of ordinary caution, under like circumstances, would give.

A pure accident, without negligence on the part of the defendant, is not actionable; and if you should believe that it was of such character, it would come under the head of unavoidable accident, and the plaintiff could not recover.

If you shall believe from a preponderance of the evidence in this case that at the time of the accident the train that struck the deceased was running at a rate of speed in excess of six miles an hour in violation of the ordinance of the city of Wilmington, and that such excessive speed was the proximate cause of the death of the deceased, and shall also believe that the deceased was free from any negligence on his part that contributed to the injury, your verdict should be for the plaintiff. But the plaintiff would not be entitled to recover, because of such excessive speed, if such excessive speed was not the proximate cause of his death.

Or if you should believe that at the time of the accident the defendant was not exercising ordinary care, as we have defined it to you—that is, all the care and circumspection, prudence, and discretion that an ordinarily prudent and careful man would have exercised under the circumstances—and that the want of such care and diligence was the proximate cause of the injury to the plaintiff, and shall also believe that the deceased was free from any negligence that contributed to the accident, then your verdict should be for the plaintiff. But if you should believe that it has not been shown by the preponderance of the testimony that the negligence of the defendant was the proximate cause of the death of Walter MacFeat, or if you should believe that the negligence of Walter MacFeat himself contributed to his death, your verdict should be for the defendant.

If you should find for the plaintiff, your verdict should be for such a sum as you believe from the evidence the deceased would probably have earned in his business during life and left as his estate at the time of his death, and which would have gone to his next of kin, taking into consideration his age, his reasonable probabilities of life, his ability and disposition to labor, and habits of living and expenditure.

Verdict for defendant.

MILLEMAN et al. v. KAVANAUGH et al.
(Supreme Court of Pennsylvania. Jan. 2, 1906.)

PARTNERSHIP—DEATH OF PARTNER—ACCOUNTING—SUIT BY CREDITORS.

The individual creditors of a deceased partner agreed with the surviving partner and the widow of the deceased, who was his administratrix, that the surviving partner should take the partnership property and pay the partnership debts, and pay the administrator whatever would be due the estate of the deceased partner. He also agreed to furnish the creditors of the partner with a statement of the amount paid. The creditors also made a subsequent agreement with the widow as an individual that, if the interest of the deceased's estate in the surplus, after payment of the debts, was insufficient to pay the individual debts, she would pay them with the profits from a new partnership between herself and the surviving partner. Thereafter the creditors who were not paid filed a bill against the administratrix and the new firm, and the corporation succeeding to it for an accounting with the second partnership. Held that, inasmuch as the creditors' remedy was against the widow as an individual, the bill was properly dismissed.

Appeal from Court of Common Pleas, Butler County.

Bill by H. C. Milleman and J. C. Milleman against Mary S. Kavanaugh and others. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. D. Marshall, for appellants. W. H. Lusk and W. D. Brandon, for appellees.

FELL, J. The right which the plaintiffs seek to enforce by the bill filed arises from two agreements made under the following circumstances: William Kavanaugh had been one of three members of a partnership which had been dissolved by his death. Letters of administration on his estate had been granted to his widow, Mary S. Kavanaugh. One of the surviving partners proposed to purchase the property of the partnership; the purchase money to be applied to the payment of the partnership debts, and the balance, if there should be any, to be divided according to the interests of the partners. It was also proposed to form a new partnership, composed of the surviving partners and the widow of the deceased partner, to continue the business. The plaintiffs were creditors of the deceased part-

ner, but not of the partnership, and their assent to the proposed method of closing the affairs of the partnership was desired. Both of the agreements are inartificially drawn, but their meaning is obvious. The first, signed by the plaintiffs and the surviving partner who purchased the property and paid the partnership debts, recites the terms of the purchase and his agreement to pay to the administratrix whatever should be due her husband's estate; and by it he agrees, at the completion of the settlement, to furnish the plaintiffs with a statement of the amounts paid with vouchers. To this method of winding up the partnership the plaintiffs agreed. The second agreement, dated one day after the first, is between the plaintiffs and Mrs. Kavanaugh, as an individual, and not as administratrix. It recites the terms of the sale, the purpose of the surviving partners and Mrs. Kavanaugh to form a new partnership, and by it she agrees that, if the interest of her husband's estate in the surplus after the payment of the partnership debts is not sufficient to discharge the debt of the plaintiffs, she will pay it with the profits she derives from the new partnership. The plaintiffs agree that they will not demand payment of her in any other manner. The bill is against the administratrix, the three members of the new partnership, and a corporation that succeeded to the business of the partnership. Its prayers are for a decree directing the partner who purchased the property and paid the debts of the first partnership to render a statement showing the amounts paid; for an account of the affairs of the second partnership, and a decree that it, pay the plaintiffs the amount due the estate of the deceased partner after the payment of partnership debts and Mrs. Kavanaugh's share of the profits; for a decree that Mrs. Kavanaugh transfer so much of the stock she holds of the corporation as may be required to pay the plaintiffs' claim; for the appointment of a receiver for the corporation. The demurrers are on the ground that the bill sets forth no ground of equitable relief, and that it is multifarious.

The purpose of the first agreement was to secure the consent of the plaintiffs to the sale of the partnership property, and its only effect is to estop them as creditors of a deceased partner from asserting that the price was inadequate, and that more could have been secured by the administratrix if the affairs of the partnership had been wound up and an account rendered by the surviving partners to the administratrix of the deceased partner. By the second agreement they secured an additional security in the personal obligation of Mrs. Kavanaugh to make up any deficiency out of the profits she should receive from the new partnership. She, and she alone, was to pay. The liquidating partner was not to pay them nor to pay her for their use, but to pay her as adminis-

tratrix for distribution among all the creditors of her husband's estate. There was no substitution of the liability of the liquidating partner nor of the new firm for that of the estate of the deceased partner, nor were assets received by either under a promise to pay. The new partnership had not been formed when the agreement was made, and the only obligation assumed by the partner who purchased the property was to furnish an itemized account, with vouchers, after the settlement of the business of the partnership. It is not averred that the business has been settled, nor that an account has been demanded and refused. The bill shows no right except against one of the defendants, for a breach of her promise to pay the profits arising from the new partnership. The remedy for this at law is plain and adequate. It is unnecessary to consider the other ground of demurrer.

The decree is affirmed, at the cost of the appellant.

In re SOUTHWESTERN STATE NORMAL SCHOOL.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. DEDICATION—SALE ACCORDING TO PLAT.

Where a sale of lots is had according to a plat, on which streets and alleys are shown, it operates as a dedication of them to the public use, which cannot be revoked by the vendor.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 46, 47.]

2. EMINENT DOMAIN — PUBLIC USE — NORMAL SCHOOLS.

Act July 10, 1901 (P. L. 632), authorizing the condemnation of real estate needed for the use of state normal schools, does not authorize such a school to condemn for a campus streets and alleys dedicated to public use.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 110.]

Appeal from Superior Court.

In the matter of the Southwestern State Normal School. From an order dismissing the petition for approval of a bond, the school appeals to the superior court, and from an order affirming such judgment it again appeals. **Affirmed.**

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

T. F. Birch, for appellant. Norman E. Clark, W. S. Parker, and Winfield McIlvaine, for appellee.

BROWN, J. The facts in this case appear in the opinion of the superior court, 26 Pa. Super. Ct. 99, and need not be repeated here. In its petition to the court below, the Southwestern State Normal School set forth that a plot of 36 lots, known as "Morgan's Addition to California, Pa.," and recorded in the office of the recorder of deeds for Washington county, was lately laid out by Lewis W. Morgan, and lots were sold therefrom

with reference to certain streets and alleys marked upon the said plan; that it had purchased twelve of these lots for campus purposes; that through them run Main street, 50 feet wide, and other streets and alleys of different widths, all being on the said plan; that after it had purchased these lots it proceeded to condemn the streets and alleys running through them and adjoining them on the north and south—and prayed, first, for the approval of its bond to secure to the owners of other lots on the plot, having rights of way or easements over the said streets and alleys, the damages sustained by its condemnation of them; and, second, that the title to the real estate, which it held within the boundaries described in its petition, be decreed to be free of any easement or right of way on account of the location of the said streets and alleys thereon, subject to the payment of such damages as may be agreed upon or assessed according to law. The petition was filed under the act of July 10, 1901 (P. L. 632), authorizing the condemnation of real estate needed for the use of state normal schools. Whether the act is invalid for the reason that the ground which it authorizes to be so taken is not for a public use is not the question raised in this proceeding. It is whether the appellant is authorized by the act to do what it has undertaken to do.

The sales of the lots according to the Morgan plan, which showed them to be on streets and alleys, implied a grant or covenant to each purchaser that the streets and alleys should be forever open to the use of the public, and operated as a dedication of them to public use. Such dedication cannot be revoked by the vendor, and the purchaser of each lot abutting on one of the streets or alleys, as well as all other persons purchasing and owning lots on the plan, may assert the public character of the streets and alleys, and the right of the public to use them. *Transue v. Sell*, 105 Pa. 604; *In re Opening of Pearl Street*, 111 Pa. 565, 5 Atl. 430; *Quicksall v. Philadelphia*, 177 Pa. 301, 35 Atl. 609. The finding of the court below is that Main street has been used by the public as well as the lot owners for over 21 years as a way of access to and from the Monongahela river. What the appellant seeks to do is, not to take land belonging to and in the use of a private owner, but is to condemn property already dedicated to public use and used by the public as public highways, and to devote the same to what it claims to be another public use. Property already devoted to public use, including franchises, is subject to eminent domain, and may be taken for other public uses; but, while this is true, it cannot be so taken without legislative authority expressly conferred or arising by necessary implication. *Groff's Appeal*, 128 Pa. 621, 18 Atl. 431. There is no such express power conferred upon the appellant by the act of 1901, and surely none

exists by implication, in view of our cases upon power arising by implication. Of this power it is clearly and forcibly said by Mr. Justice Gordon: "This plea of necessity is so frequently used to cover infractions of both public and private rights that prima facie it is suspicious, and must be closely scrutinized, especially where it is used to carry corporate privileges beyond charter limits. This plea, in the first place, must be tested by the rule, now of universal acceptance, that all acts of incorporation, and acts extending corporate privileges, are to be construed most strongly against the companies setting them up, and that whatever is not unequivocally granted must be taken as withheld. This rule is to be held in all its rigor, where the attempt is so to construe a corporate grant as to interfere with a previous grant of the same kind. *Packer v. Railroad Co.*, 19 Pa. 211. It is true that a franchise is property, and as such may be taken by a corporation having the right of eminent domain, but in favor of such right there can be no implication, unless it arises from a necessity so absolute that without it the grant itself will be defeated. It must, also, be a necessity that arises from the very nature of things, over which the corporation has no control. It must not be a necessity created by the company itself for its own convenience or for the sake of economy. To permit a necessity, such as this, to be used as an excuse for the interference with, or extinction of, previously granted franchises, would be to subject these important legislative grants to destruction on a mere pretense in fact at the will of the holder of the latest franchise." *Pennsylvania Railroad Co.'s Appeal*, 93 Pa. 150.

For the reason that the appellant has not been authorized to condemn the streets and alleys set forth in its petition, the decree of the superior court affirming the decree of the court below is affirmed, with costs to the appellee.

DILWORTH v. NICOLA.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

SPECIFIC PERFORMANCE—SALE OF INTEREST IN PROFITS—ASSIGNMENT.

Where plaintiff purchased a half interest in the profits of a real estate transaction, receiving a receipt for the money as his only evidence of such interest, he may by a bill in equity compel the other party to formally assign such share, though there could be no severance of interest until the transaction was closed, 25 years thereafter.

Appeal from Court of Common Pleas, Allegheny County.

Bill by H. P. Dilworth against Frank F. Nicola. Decree for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, O. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William Scott and Wm. M. Hall, for appellant. A. M. Imbrie and J. S. & E. G. Ferguson, for appellee.

ELKIN, J. On August 2, 1901, the appellant entered into an agreement with Mary E. Schenley for the purchase of certain property located in the city of Pittsburg for the sum of \$2,000,000, payable \$100,000 in cash on signing the agreement and the balance on April 1, 1902. The appellee paid one-tenth of the hand money, and took from appellant a receipt in the following language: "Received of H. P. Dilworth \$10,000, being the tenth of hand money stipulated in agreement with Mary E. Schenley dated August 2, 1901, and being in payment of one-tenth interest in said agreement." On August 17th following the appellant sold and afterwards transferred the Schenley agreement to H. C. Frick, who agreed to perform the covenants thereof, take title to the property, refund all moneys expended by the appellant, including the \$100,000 advanced, and, upon the final sale of the property, whatever money Frick had advanced to be repaid, together with interest thereon, and the balance was to be equally divided between the two parties. Frick subsequently entered into an agreement with the Pennsylvania Railroad Company to sell and convey said property for the sum of \$2,850,000, to be paid on or before July 1, 1927, prior to which date the railroad company agreed to pay an annual rental of \$99,750. At the time the agreement between Nicola and Frick was made, the interest of Dilworth in the transaction was not disclosed. It is, however, not denied that he is entitled to a one-tenth interest of Nicola in said transaction. The only evidence he has of his interest therein is the receipt above mentioned. This bill was filed in the court below asking for a decree requiring the defendant to execute and deliver to plaintiff a formal assignment of a tenth of his interest in the Frick agreement. Upon a hearing of the case the court below held that he was entitled to the relief prayed for, and entered a decree requiring the assignment to be made.

If it is the subject-matter of equitable jurisdiction, and of this there seems to be no doubt, the decree was properly entered. The appellant admits that the appellee is entitled to a one-tenth interest in the agreement, but contends that he cannot have it severed and set apart until the transaction is finally closed in 1927. We do not agree with this contention. If Dilworth has a tenth interest in the agreement, he is entitled to have some evidence of that interest at the present time. It would be inequitable and unjust that he should be compelled to wait until the final payments are made, 25 years in the future, before he has anything but the receipt to show his interest therein. It is argued that the provisions of the agreement with Frick are such as to make it impossible that there should be a severance

of interests. This contention is without merit. The interest of Mr. Frick in the agreement is not affected by the rights and liabilities of the parties to this suit. Under the agreement Mr. Frick is authorized to collect the annual rentals from the Pennsylvania Railroad Company and apply them to the interest and advances made by him until July 1, 1927, at which time he is to collect the purchase money, and after reimbursing himself for his expenditures and advances he is to divide the remainder thereof between himself and Nicola. Dilworth assented to and is bound by that agreement, and is only entitled to receive a tenth of the profits which accrue to Nicola under the terms thereof. How, then, can Frick be injured by the interest that Dilworth has in the transaction? At all events, Frick is entitled to one-half, Nicola to nine-twentieths, and Dilworth to one-twentieth, of the profits. Then, again, the agreement provides that it is to be considered as if made between the parties, their heirs, executors, administrators, and assigns. It thus appears in the express language of the agreement itself that it is to apply to the assigns thereof. How, then, can Nicola be heard to say that Dilworth is not entitled to have a decree by a court of equity directing an assignment to be made of the interest which it is admitted he has in the transaction?

Decree affirmed, at the cost of the appellant.

COMMONWEALTH ex rel. UNDERWOOD v. SHRONTZ.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. ELECTIONS—QUALIFIED VOTERS—PAYMENT OF TAX.

Where property is actually owned by two members of a firm as tenants in common, but is assessed in the firm name, and the tax has been paid, each of such partners has paid a tax, qualifying each as an elector within the election law.

2. SAME—ERROR OF ASSESSOR.

Where an assessor erroneously assessed real estate in a firm name which in fact belongs to two members of the firm as tenants in common, and the taxes are paid, the error in the form of assessment cannot deprive the electors of their constitutional right to vote, based on the payment of a tax.

Appeal from Court of Common Pleas, Washington County.

Quo warranto by the commonwealth, on relation of Owen C. Underwood, against John F. Shrontz, Jr. From a judgment for defendant, plaintiff appeals. Affirmed.

John F. Shrontz, Jr., is a native-born citizen of the United States, 26 years old, and has resided with his father continuously in the Fifth Ward of the borough of Washington, Pa., for more than three years last past. At the borough election held February 21, 1905, he was elected to the office of councilman of the Fifth Ward. On the day of the

election his right to vote was challenged on the ground that he had not paid a state or county tax within two years next preceding the day of the election. The election board, after a hearing on the question, accepted his ballot. The receipt which the respondent produced before the election board as written evidence of his having paid the required tax was in words and figures as follows:

No. 1409.	Washington, Pa. Aug. 1, 1904.
Treasurer's Office, Washington County.	
B'd Debt \$1 30	Received from Shrontz Bros.
County Tax 7 50	State and County tax for 5 ward
	Wash. township for 1904 as per
Total 9 10	margin.
Abatement 45	W. H. Ulery
	County Treasurer
Amt rec'd 8 65	Per M.

What oral evidence was produced before the election board we have no way of knowing, but it was conceded that respondent was one of the owners of the property and a member of the firm of Shrontz Bros. against whom the tax was assessed. On August 1, 1904, the respondent's father, being duly authorized thereto by the respondent and his brother, Clark Shrontz, paid the state and county taxes assessed against the said lot for and on behalf of the respondent and his brother. The court entered judgment for defendant on the commonwealth's demurrer to defendant's answer.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

T. F. Birch, Owen C. Underwood, Dist. Atty., Parker, McIlvaine & Clark, and Donnans & Brownson, for appellant. James P. Eagleson and Boyd & E. E. Crumrine, for appellee.

MITCHELL, C. J. On the admitted facts the appellee was a qualified elector, entitled to vote at the election, and therefore eligible to office. He was a natural-born citizen, upwards of 21 years of age, and, having regard to the substance of the qualification by payment of a tax, he had complied with that requirement. The appellant argues that there was a defect in the form of the assessment which destroyed its efficacy. The tax was assessed against certain property in the name of Shrontz Bros., but it was admitted that Shrontz Bros. were the appellee and his brother, who were owners as tenants in common of the land assessed. It also appeared that this fact was known to the assessor and was intended to be truly set forth in the assessment. Even without this, however, the conclusion would have been the same. No error of the assessor, accidental or otherwise, could deprive an elector of his right, if in fact he was qualified. The distinction is well taken by the learned judge that the appellee's vote might have been properly refused at the election because he was not armed with the proper evidence of his right; but in a judicial inquiry into the existence of the right the court is not debarred from ascertaining the actual facts no matter what the prima facie

case presented by the tax receipt. The Constitution regards substance, not mere form. It makes no requirement that the tax shall be assessed against the elector by name, or personally, or as owner of property in severalty. If it is against ascertained property, and he, being in fact the owner, pays it, the requirement is fulfilled. As the learned judge below said, if the assessment had been in the names of John F. Shrontz, Jr., and Clark Shrontz individually as tenants in common, there could have been no question about the tax payment, and if the expression Shrontz Bros. in fact meant the same thing the result would be the same. A blunder of the assessor in the form of the assessment could not deprive the elector of his constitutional right.

Catlin v. Smith, 2 Serg. & R. 267, is cited as deciding that the tax must be assessed against the elector individually. That expression is used in the case, but in an entirely different sense from that now sought to be given to it. That was an action against the inspector of an election for refusing the plaintiff's vote. Under the Constitution of 1790 the requirement was that the elector should have paid a tax "which shall have been assessed at least six months before the election." On demurrer to the declaration it appeared that the tax had been laid on the county six months before, but that plaintiff had not been assessed until the day before the election when he had himself put on the list by the assessor and paid the tax. The court held the payment insufficient. The plaintiff, said Tilghman, C. J., "insists that the Constitution intends a tax laid and assessed on property and persons in general at least six months before the election. But this will not accord either with the sense in which the words had been generally used or with the reason for introducing them into the Constitution. The voter is to have paid the tax assessed, not upon others, but himself. A tax assessed upon others is no tax as to him." That is the sense in which the words "assessed upon him individually" were used. There is nothing in that case that touches the question raised now.

Judgment affirmed.

KELLY v. KEYS et al.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. EJECTMENT—TITLE TO MAINTAIN.

Where plaintiff acquired the exclusive privilege to go on land to prospect and mine for oil, the grantor to receive part of the oil mined, he acquires no estate in the land or oil, but is a mere licensee, and cannot maintain ejectment against the grantor, or those claiming under him by a subsequent grant, if he has never been in possession, though at the time of the ejectment oil was being produced in paying quantities.

2. MINES AND MINERALS—GRANT TO MINE FOR OIL—CONSTRUCTION.

Where a grant of an exclusive right to mine for and produce oil has been executed, and oil has been discovered, it is the grantee's right to produce and sever it from the soil, and the oil thus severed belongs to the parties entitled under the terms of the grant as a chattel, and not as a part of the real estate, and only so much as is thus produced and severed passes on the grant.

Appeal from Court of Common Pleas, Washington County.

Action by W. C. Kelly against A. M. Keys and others. Judgment for plaintiff, and defendants appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Eugene Mackey, R. W. Irwin, Isaac Baum, James W. Lee, Cornelius D. Scully, and Ralph R. Lee, for appellants. Samuel Am-spoker, John M. Buchanan, and Arthur E. Barnett, for appellee.

STEWART, J. The defendant Keys, being the owner of a certain tract of land in Washington county, by instrument in writing, duly executed and acknowledged, granted to Kelly, the plaintiff, the exclusive right to mine and produce therefrom petroleum and natural gas, with possession of so much of the land as might be necessary for such purposes, for a term of two years, subject to certain conditions and stipulations which do not here call for recital. Kelly never exercised any rights under the grant, and never entered into possession of any part of the premises. Subsequently Keys, claiming that by reason of a default Kelly had forfeited his rights under the grant, conveyed a like right in the premises to C. D. Greenlee and the Southern Oil Company, the other defendants, who proceeded to explore the property and succeeded in producing oil therefrom in paying quantity. Kelly, averring compliance on his part with all the conditions and stipulations of the grant under which he claimed, and denying a forfeiture, brought this action of ejectment against the defendants to compel surrender of possession to himself. The action resulted in a verdict for the plaintiff, subject to the decision of the court on a question reserved, viz., whether ejectment in such case would lie. Upon consideration, judgment was rendered upon the reserved point in favor of the plaintiff. The assignment of error that relates to the action of the court on this point is the only one that calls for present consideration.

In reaching his conclusion on the point reserved, the learned judge gave full recognition to the binding authority of *Funk v. Haldeman*, 53 Pa. 229, and the cases that follow it, wherein it is held that the grant of exclusive privileges to go on land for the purpose of prospecting for oil, the grantor to receive part of the oil mined, as in this

case, does not vest in the grantee any estate in the land or oil, but is merely a license or grant of an incorporeal hereditament. This court has found frequent occasion to assert its continued adherence to the doctrine of these cases. Only recently, in the case of *Hicks v. American Natural Gas Company*, 207 Pa. 570, 57 Atl. 55, 65 L. R. A. 209, it reasserted it without qualification. Once it was determined that the subject of such a grant was an incorporeal hereditament, and not an estate in the land or oil, it logically and necessarily resulted that it would not support an action in ejectment. And this view has been steadily adhered to. In no case has ejectment been sustained under such a grant, except where possession had been acquired by the grantee and he had been wrongfully dispossessed. In the present case disseisin was not, and could not be, asserted. Nor could it be contended that the instrument under which Kelly claimed, though spoken of as a lease, and so denominated in the instrument itself, is in point of fact and law a lease, notwithstanding it allows possession of so much of the surface of the premises as may be necessary to conduct mining operations. This much will be implied without express stipulation; and the stipulation, being expressed, in no way distinguishes this from the cases where such an instrument is held to be merely a grant or license. The court below put no other construction on this, so long as it concerned no one but grantor or grantee; but because the defendants, holding under a subsequent lease, being in possession, had produced and were producing oil in paying quantity, he reached the conclusion that what had been the grant of an incorporeal hereditament, now that the oil had been found and was being produced, was an estate in the land, since oil was a mineral, and therefore part of the land, and that, Kelly being entitled to be put in possession of so much of the estate, ejectment could be brought for such purpose.

This line of argument overlooks the very consideration on which the authorities cited rest. In no case is it held that the grant of an exclusive right to mine for and produce oil, though it be a mineral, is a sale of the oil that may afterward be discovered. When under such a grant oil has been discovered, it is the grantee's right to produce it and sever it from the soil. So much as is thus severed belongs to the parties entitled under the terms of the grant, not as any part of the real estate, however, but as a chattel, and only so much as is produced and severed passes under the grant. As to oil not produced there is no change of property. It is expressly so ruled in *Funk v. Haldeman*, 53 Pa. 229; and the same ruling was repeated and emphasized in the case next following on the same subject. *Dark v. Johnston*, 55 Pa. 164, 93 Am. Dec. 732. These were the first cases in which grants

of rights to explore for oil were considered and passed upon by this court. The rulings therein have been steadily and consistently followed. In this connection it is only necessary to refer to the case of Union Petroleum Company v. Bliven Petroleum Co., 72 Pa. 173, where the grant was the same as in the present case, with the additional fact that there, as here, oil had actually been discovered and was being produced, and *Barnhart v. Lockwood*, 152 Pa. 82, 25 Atl. 237. The reason for the rule thus established, is to be found in the peculiar character of mineral oil. This is very clearly indicated in the earlier cases, where the distinction is drawn between minerals which are fugacious in their nature, such as water, gas, and oil, and those which have a fixed situs and are necessarily part of the land; and this distinction has been allowed with controlling significance whenever oil in situ has been the subject of the dispute. Both rule and reason are against the theory that prevailed with the court below, to the effect that, the mineral once discovered, all that was in situ became in law part of the real estate.

With the rights of the appellee thus defined and limited by the cases cited above, it is manifest, without discussion, that he is in no position to maintain ejectment for the property. The question reserved was to this very point, and was raised in the first point submitted by the defendant, denying plaintiff's right to ejectment. The latter should have been affirmed. Its refusal is the subject of the eighth assignment of error, which must be sustained. It is unnecessary to consider the other assignments of error.

Judgment reversed, and judgment is directed to be entered on the point reserved in favor of defendant non obstante veredicto.

MANKEY v. STOCKING et al.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

ARREST—IN CIVIL CASES—BOND—ACTION ON.

On a judgment for slander, a *capias ad satisfaciendum* was issued, and with the consent of plaintiff's counsel defendant gave bond, as required by Act June 16, 1836 (P. L. 729), to take the benefit of the insolvency law, but did not give the bond provided by Act June 4, 1901 (P. L. 404), and thereafter, without the objection of plaintiff's counsel, took the benefits of the act of 1836. *Held*, that the surety on the bond was not liable in an action by plaintiff on the ground that the act of 1836 had been repealed by the act of 1901 and that the proceedings were void, as, if they were void, the bond was also void.

Appeal from Court of Common Pleas, Washington County.

Action by Grace Mankey against H. L. Stocking and James S. Stocking. From an order refusing rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

62 A.—58

The following is the opinion of McIlvaine, P. J., in the court below:

"On January 24, 1904, the plaintiff in this case in an action of slander in this court obtained a judgment for \$6,200 against H. L. Stocking. On June 28, 1904, the said H. L. Stocking, having been arrested on a *capias ad satisfaciendum* issued on this judgment, secured his temporary release by giving to Grace Mankey, the plaintiff, a bond in the sum of \$10,000, with James S. Stocking as surety. This bond was approved by the prothonotary and filed to the number and term to which the writ of *capias ad satisfaciendum* was docketed. After its approval the prothonotary gave the sheriff a written notice to discharge the defendant, 'as he has filed a bond sec. leg.' The condition of this bond was 'that if the said H. L. Stocking shall appear at the next term of the court of common pleas of said county and then and there present his petition for the benefit of the insolvent laws of this commonwealth and comply with all the requirements of said law and abide all the orders of the said court in that behalf, or in default thereof and if he fail in obtaining his discharge as an insolvent debtor he shall surrender himself to the jail of the said county, then this obligation to be void; otherwise, of force.' 'The insolvent laws of the commonwealth,' at the date of the execution of this bond, were found either in the enactments of an act of assembly approved June 16, 1836 (P. L. 729), or in an act of assembly approved June 4, 1901 (P. L. 404). The act of June 4, 1901, in section 42 (page 422), provides among other things, for the repeal of the act of June 16, 1836 (P. L. 729), except sections 42-45, none of which related to the matter now before this court. The Congress of the United States in the year 1898 enacted a bankrupt law in which provision for the discharge of insolvents is made, and it is still in force.

"By reason of the doubt existing as to whether the act of 1901 would become operative so long as the national bankrupt law of 1898 remained on the statute books (see *Potts v. Smith Mfg. Co.*, 25 Pa. Super. Ct. 206), the defendant H. L. Stocking evidently gave a bond under and containing the conditions provided for in the act of 1836, and this must have been done with the knowledge and consent of the plaintiff's attorney, who objected to a previous bond offered because not given to the plaintiff as provided in the act of 1836. H. L. Stocking, in giving a bond, and in attempting to comply with the conditions of this bond, to wit, 'that he should appear at the next term of the court of common pleas of said county and then and there present his petition for the benefit of "the insolvent laws of the commonwealth,"' had necessarily to determine before he acted what then were 'the insolvent laws of the commonwealth'; and the form of the bond agreed upon after consultation with the plaintiff's counsel clearly indicates that the parties treated the act

of 1901 as inoperative, for, if they had thought it was operative, then they would have treated the act of 1836 as having been repealed, and the form of the bond would have been different, and it would have been given under the direction of the court, as is provided for by the fifth section (page 407) of the act of 1901.

"H. L. Stocking, in accordance with the expressed condition of his bond, appeared at the next term of the court of common pleas (August term) and on August 15th (the first day of the term) presented his petition, praying for the benefit of the insolvent laws of the commonwealth, as provided in the act of 1836. The court adjudging the petition to be in proper form, entertained jurisdiction of its subject-matter (evidently under the act of 1836) and made the following order: 'And now, August 15, 1904, the within petition presented in open court and directed to be filed, and Monday, September 19, next, at 10 o'clock fixed as the time for hearing the same in open court; 15 days' notice of the time and place of hearing to be given by the petitioner to his creditors.' Notice of this hearing was given Grace Mankey by handing to her attorney—who had issued the capias, and who had objected to the first bond and had required another bond—a copy of this order of the court. On September 19, 1904, none of the creditors of H. L. Stocking (all of whom had been served with notice) entered an appearance, and on September 20, 1904, on motion of the attorney of H. L. Stocking, made in open court, the court, after asking if there was any one present who objected, made the following order on the said H. L. Stocking's petition: 'And now, September 20, 1904, this case came on for further hearing, and thereupon it is ordered and decreed that the said H. L. Stocking is hereby discharged from further liability for or on account of the capias issued at No. ——— term, 1904; that the said H. L. Stocking shall not at any time hereafter be liable to imprisonment by reason of any judgment or decree obtained for the payment of money contracted, accrued, or occasioned and due before the date of this order.' The attorney for the writ of capias was present when this order was made, and offered no objection to its being made, neither did he appear nor in any way express his consent to such an order being made. It can be fairly inferred, from the suit that was afterwards brought on the bond and the statement that has been filed, that he was silent because he was willing for the defendant in the capias to bring about conditions, as he thought, that would forfeit the bond of the defendant, which would be more benefit to his client than to prevent his discharge and secure his surrender to the custody of the sheriff again.

"On December 18, 1904, suit was brought by Grace Mankey on the bond given on June 28, 1904, and the statement filed by her attorneys avers that there has been a breach of

the condition of the bond, in that the said petition of H. L. Stocking presented to the court of common pleas, and all proceedings thereon, are absolutely null and void, and that the surety on said bond of the said H. L. Stocking is liable for the penal sum of said bond, because the regulations of the act of assembly of June 4, 1901 (P. L. 404), had not been complied with. The surety on said bond appeared, and filed an affidavit of defense, and avers, in substance: First, that H. L. Stocking was discharged by this court, and that thereby the conditions of his bond were satisfied; second, that the bond, if taken as given under the act of 1901, is void in toto, as it contains conditions different than those required by that act, and that it was taken for the use of the plaintiff alone and not all of the defendant's creditors, and was not taken under the direction of the court; third, that the act of 1901 was not in force when the bond was given, by reason of the existence of the national bankrupt act of 1898. The plaintiff now moves for judgment for want of a sufficient affidavit of defense. The facts in this case are not disputed, and the whole defense can be summed up by saying that the plaintiff's statement fails to show a good cause of action.

"To our minds it is evident that the bond in this case was filed under the provisions of the act of June 18, 1836, and as the plaintiff's counsel wanted the bond taken in the name of the plaintiff and not the commonwealth, and made no suggestion that the court ought to fix the security, he evidently acquiesced in the filing of such a bond, and the temporary discharge of the defendant by order of the prothonotary. The first question, then, that suggests itself in this: Can the plaintiff now claim that all the steps taken by H. L. Stocking under that bond are void because not in accordance with the provision of the act of 1901, and still the bond be good against the surety? To make the claim that all the proceedings taken by the defendant should have been under the act of 1901, is the counsel not in danger of being 'hoisted by his own petard'? If the act of 1836, as to the manner that the insolvent is to proceed, is no longer in force, is it in force as to the form of the bond and the manner in which it is to be given, and, if not, is not the bond given by the defendant just as null and void as any other step that he took in the proceeding to be relieved from imprisonment? It cannot be pretended, under all the facts of the case as they are made to appear in the affidavit of claim and the affidavit of defense, that the bond given was 'the security for his appearance, surrender and compliance with the decrees of the court and the requirements of the act of 1901 such as the court might deem requisite.' The court never saw the bond. It never deemed \$10,000 the required sum in which the bond should be given, or that James S. Stocking was a good and sufficient surety. We are therefore of the

opinion that the plaintiff cannot blow hot and cold. If the proceedings taken by H. L. Stocking under the act of 1836 to be relieved from arrest as an insolvent are void because taken under that act and not under the act of 1901, then they are wholly void, which would include the giving of the bond as given; and, if the bond is void, then no recovery can be had on it.

"I know there is a class of cases which are authority for the contention that an obligor of a bond given in a proceeding of this kind cannot be relieved from his obligation because of a slight difference between the condition in his bond voluntarily given and that required by an act of assembly, or on account of some irregularity for which he is wholly responsible. But that is not the case at bar. The bond filed by H. L. Stocking, now sued upon, was taken in the name of the plaintiff, as provided in the act of 1836, at the suggestion of her counsel, who objected to the first bond because it was taken in the name of the commonwealth; and the face of the bond itself, and the circumstances under which it was given, was notice to the counsel for the plaintiff that the bond was not the one required by the fifth section of the act of 1901. He knew, or should have known, that H. L. Stocking's counsel were acting under the act of 1836, and treating the act of 1901 as inoperative, and he at least passively acquiesced in the action taken by Stocking to obtain, not only his temporary, but his final, discharge. In other words, the bond in question, when given (and as understood by both the obligee and obligors), meant by the words, to wit, 'the insolvent laws of the commonwealth,' and 'with all the requisition of said laws,' the act of 1836, and not the act of 1901. If, then, the defendant complied with the conditions of his bond by complying with 'all the requisitions of the act of 1836,' and was discharged by the court as an insolvent debtor, how can the plaintiff aver a breach of the condition of the bond because he did not comply with the requisitions of the act of 1901, and say that what he did in complying with the conditions of the bond given under and to comply with the terms of the act of 1836 is 'wholly null and void,' without also saying that the bond which was given to compel him either to do what he did or pay \$10,000 is also void? The facts before us certainly make a very different case from those cited in the very exhaustive and able brief of the plaintiff's counsel to show that a bond given by an applicant for the benefits of the insolvent laws of the commonwealth is often held to be valid, even though it may not strictly conform to the requirements of the law as to the manner of giving it or in its conditions. We are therefore of the opinion that if the act of 1836 was repealed, and the act of 1901 was in force when the bond was given, and 'all proceedings thereon' taken by the court at the instance of the defendant

in his endeavor to comply with the conditions of the bond 'are absolutely null and void,' then the said bond was also wholly null and void, and the prothonotary's direction to the sheriff to discharge the defendant unauthorized, because he had not 'given a bond "sec. leg.,"' and the plaintiff's remedy was either against the prothonotary for directing the discharge of the defendant until he had given a bond sec. leg., or to appear and resist the final discharge of the defendant and secure his surrender to the sheriff, or to issue an alias capias ad satisfaciendum.

"This brings us to the consideration of another question, and that is the order of discharge made by the court on September 20, 1904. It is certain that the court is given jurisdiction to discharge an insolvent debtor who may have been arrested on a capias ad satisfaciendum, and this is so under both the act of 1836 and the act of 1901, and it had jurisdiction to determine, at the date of the hearing, whether the act of 1901 was inoperative by reason of the national bankrupt act of Congress passed in 1898 and the act of 1836 still in force; and, although no opinion is filed, it must be taken that the court duly considered all questions involved, and after having done so found that the defendant had complied with the requirements necessary to entitle him to a discharge, and thereupon discharged him. If the bond was valid and binding on the defendant, it certainly was the duty of the court, on September 20, 1904, to determine whether he had so fully complied with the conditions thereof as to entitle him to a final discharge from imprisonment on the capias, or whether his failure to comply with these conditions was such that he ought (to avoid paying the penalty of his bond) to surrender himself to the custody of the sheriff to again meet the demands of the capias ad satisfaciendum. The court said: 'You have complied with the conditions of your bond. You can go, and you need not surrender yourself to the sheriff.' The plaintiff now wants the penalty of the bond because the plaintiff did not surrender himself to the sheriff—a thing the court in legal effect told him he need not do. The plaintiff's counsel, who issued the capias, had full notice that this decree would be asked for, was present in court when it was made, and has never taken exceptions to the same nor an appeal therefrom. If the decree was simply voidable or reversible, that fact can be adjudged only on appeal or certiorari, and cannot be set up here. If, on the other hand, the decree was wholly null and void, and all the defendant did to secure his discharge from the grip of the capias was done without authority of law, and this case comes under the class of cases of which *Tenan v. Cain*, 188 Pa. 242, 41 Atl. 594, cited by counsel, and *Insurance Co. v. Tenan*, 204 Pa. 332, 54 Atl. 172, are examples, then as we have already said, everything that the defendant did under the act of 1836 was wholly null

and void, including the giving of the bond which he gave to the plaintiff, and the plaintiff cannot recover for the breach of a bond that is wholly void. Suit on the bond, under such circumstances, would not be his remedy. It would be to take a new start and issue an alias capias. In other words, if the plaintiff would issue an alias capias on this judgment, and the defendant would set up the decree of September 20, 1904, as a bar against a second arrest, the plaintiff could reply that the bond and all proceedings thereon were wholly void (not voidable or reversible); and if the court found this to be so, and made such a decree as was made in *Insurance Co. v. Tenan*, 204 Pa. 332, 54 Atl. 172, then the defendant would have to give a proper bond and pursue the proper proceeding de novo to be discharged. In saying this we do not want to be taken as indicating that the court thinks the decree of September 20, 1904, wholly void. We were simply assuming that what the plaintiff claims as to this decree, under the authority of *Tenan v. Cain*, was correct, and then suggesting the result on certain contingencies. Our opinion, however, is that the decree of September 20, 1904, at most is only reversible by a higher court on appeal on account of error of judgment committed by the court below, and not on account of such a total want of jurisdiction in the court below as would make its decree 'void and of no legal effect,' as was the judgment in the case of *Tenan v. Cain*, 188 Pa. 242, 41 Atl. 594, and *Ins. Co. v. Tenan*, 204 Pa. 332, 54 Atl. 172.

"And now, July 12, 1905, rule for judgment for want of a sufficient affidavit of defense discharged."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

R. W. Irwin and L. R. Boyd, for appellant. James I. Brownson, John W. Donnan, A. M. Todd, and J. A. Wiley, for appellees.

PER CURIAM. Judgment affirmed, on the opinion of the court below.

DOLLAR SAVINGS FUND & TRUST CO. v. PITTSBURG PLATE GLASS CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. CORPORATIONS—STOCK CERTIFICATES.

Any one taking a stock certificate, showing on its face that it will not be valid unless countersigned by a transfer agent, without the signature of such agent, takes it at his peril.

2. SAME—FORGED SIGNATURE—NEGLIGENCE.

Plaintiff lent money on a certificate of stock on which the signature of the transfer agent was forged. It appeared that, after the certificate had been signed by the president and secretary and the seal of the corporation was attached, a clerk who had access to it took it and forged the name of the transfer agent. Held, that the certificate was not valid in the hands of such person, as against the company, on the ground of its negligence.

Appeal from Court of Common Pleas, Allegheny County.

Action by the Dollar Savings Fund & Trust Company against the Pittsburgh Plate Glass Company. Judgment for defendant on demurrer, and plaintiff appeals. Affirmed.

The following is the opinion of McClung, J., in the court below:

"In the present discussion we must, of course, take as absolutely true every fact well pleaded in the statement, and must also draw therefrom every reasonable inference which a jury might draw in plaintiff's favor. The sixth cause of demurrer is properly criticised as 'speaking' because it involves an inference of fact against the averments of the declaration, and hence we disregard it. Allowing plaintiff every legitimate advantage, we should regard him as averring that the wrong done in issuing the stock certificate was done by C. H. Alward, a clerk or ordinary employé of defendant company. To assume that the certificate was abstracted and Carr's name signed by an outsider would be against plaintiff, because as to such party the responsibility of defendant for his acts would not be as great as it would be for those of an employé. On the other hand, if Alward occupied a higher position, with higher and greater powers with respect to the issue of these stocks, whereby defendant's responsibility for his acts was increased, it was plaintiff's duty to aver these facts in his narr., and this he has not done. We cannot fall in with plaintiff's contention that the name, 'Union Trust Company of Pittsburgh,' printed in the forms with a blank for the signature of the proper officer, is a signature by the trust company without having the blank filled. We take it that the necessity for the signature of some officer is well known in such cases, and plaintiff certainly never looked upon the Carr signature as surplusage. We may treat Carr as the proper officer of the company, because otherwise plaintiff is in no better condition, in that he has not even a pretended signature of the party who was to countersign.

"We are, then, to deal with the following as admitted facts, viz.: (1) The defendant company caused the certificate for 75 shares of stock to be signed by its president and secretary, and the seal of the corporation attached, and left it where Alward, a clerk, had access to it, and could and did take it out of the book, sign the name of Carr in its proper place, thus making it apparently complete, and then transferred it to Lillian K. Alward, who, by pledging it to plaintiff, obtained a large sum of money. (2) This certificate contained, below the signatures of the president and secretary and above the seal, the following, viz.: 'This certificate will not be valid unless countersigned by the Union Trust Company of Pittsburgh, registrar of transfers.' (3) Although the defendant company was notified some months before it

was pledged to plaintiff that this certificate had been taken from the book and had not been registered, it did not advertise this fact, nor in any way attempt to warn persons to whom it might be offered for sale or as collateral security. If plaintiff prove all these facts, will she have a case which the court will submit to the jury? We assume that, if these certificates are binding upon defendant as between it and plaintiff, there can be a recovery here of damages either to the amount of the loan or the value of the stock. We need not now concern ourselves as to this.

"Plaintiff contends: (1) That the certificates are valid and binding without countersigning by the registrar; or (2) that, if not, then a jury would legally be justified in finding the defendant guilty of such negligence in dealing with the certificate as to estop it from repudiating it, even if Carr's name was forged by Alward or by his procurement.

"Act June 24, 1895 (P. L. 258), provides that any stockholder of a corporation shall be entitled to receive a certificate of the number of shares standing to his credit on the books, 'which certificate shall be signed by the president or vice president or other officer designated by the board of directors, countersigned by the treasurer and sealed with the common seal of the corporation.' This, however, does not prevent the corporation, if it is willing to give such certificates, from taking such further precautions as it sees fit, to provide against the simulation of such signatures; and if a party who receives a certificate signed and sealed as provided by the act of assembly is at the same time given express notice that the certificate is not good and will not be recognized as a certificate until it has another signature, such party cannot then pay money for such stock and claim that the company is in equity estopped to deny the validity of the certificate, and bound to recognize the party as a stockholder or to pay him damages, if the certificate was in fact fraudulently or improperly issued. In the present case, the notice of this requirement was right on the face of the certificate and preceded the seal of the corporation. It matters not that the good effects of the additional precaution may in this particular case have been nullified, by its leading to the sealing and signing by president and treasurer in blank. The fact still remains that this was not a complete certificate until it had the signature of the Union Trust Company, or practically the signature of James S. Carr. His signature was just as necessary to the completion of the certificate as was the signature of either the president or the secretary.

"This brings us to the main question in the case, viz.: Whether or not the proof of the fact that the president and secretary signed this certificate and sealed it and left it where it could be taken by an employé, and it was

so taken, and James S. Carr's signature forged, and the certificate pledged for money advanced by plaintiff, would present such a case as would make it proper to submit to a jury the question of fact as to whether or not defendant's negligence was the proximate cause of plaintiff's loss. We take it that upon the presentation of such a case it would be the duty of the court to say that, even assuming negligence on the part of defendant in dealing with the certificate, the proximate cause of the loss was the failure of plaintiff to verify the signatures to the paper—a duty which rested on it. All the cases show that it is only when a party holds a certificate, to which is attached the genuine signatures of the parties who must sign to make it good, that the question arises as to whether or not the company is liable to him because of negligence, when the certificate is in fact false by reason of having been improperly or fraudulently issued. The doctrine is stated thus in *Allen v. South Boston Ry. Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185, viz.: 'The ground upon which a corporation is held liable to a bona fide purchaser for value of false certificate of its stock issued under its seal signed by the proper officers and apparently genuine, is that the certificates are statements by the corporation of facts which it is its duty to know, and which cannot well be known to the purchasers.' So in *Railway Co. v. Citizens' National Bank*, 56 Ohio St. 351, 47 N. E. 249, 43 L. R. A. 777, and *Railroad Co. v. Schuyler*, 34 N. Y. 30, the obligation of the purchaser to make inquiry as to the genuineness of the signatures is recognized, and it is only when the signatures are found to be genuine that the duty of the company to stand by its representations comes into play, or that its duty to the purchaser to take care as to the issue of the certificate arises.

"These three cases are cited and relied upon by plaintiff: Even the cases of strictly negotiable instruments, where such changes are made in the instrument as to amount to the crime of forgery, and the maker is held liable because he signed negotiable paper in such form as to readily admit of fraudulent alteration, all assume the genuineness of the signature and do not even suggest that any business man owes to another the duty of seeing that a third party does not forge his signature to an instrument of writing. See *Zimmerman v. Rote*, 75 Pa. 188; *Garrard v. Haddan*, 67 Pa. 82, 5 Am. Rep. 412; *McSparan v. Neeley*, 91 Pa. 17. The case of *Robb v. Penna. Co.*, 186 Pa. 456, 40 Atl. 969, 65 Am. St. Rep. 868, does not aid plaintiff, because in that case no one even suggests liability on the part of the ostensible drawer of the check, save upon the assumption that the rubber stamp signature was his genuine signature. Until the plaintiff shows a certificate, to which are attached the genuine signatures of all the parties whose signatures are neces-

sary to its validity, he is not even entitled to enter the lists where the contest as to the negligence of the company is to be fought out. When he has such signatures, he may well say that it is the company's business, not his, to know whether or not its officers used the money received for the stock honestly or dishonestly, or whether or not there was an overissue, or whether the issue of this certificate was in fact without authority, or whether it was by negligence put into circulation unintentionally.

"In the present case, if the certificate had been signed by the president and secretary and sealed and left with Carr, and he had signed it without authority and issued it fraudulently, the company would doubtless be bound to recognize its validity, or if Alward had obtained Carr's genuine signature the result would be the same. But the duty to ascertain the genuineness of the signatures, or the risk of acting without inquiry as to this, rests upon the purchaser, and when he neglects this duty or assumes this risk he has no standing to show negligent conduct on the part of defendant, or any conduct not amounting to an adoption of the forged signature as his own. Possibly if this certificate purporting to have Carr's signature attached had been put upon the market by an officer of defendant company, such as the president and secretary, who, in dealing with the issue of stock, must be regarded as the company, it would be estopped; but we do not have such a case. That 'where one of two innocent persons must suffer from the fault of a third, the loss must be borne by the one whose negligence enabled the third person to commit the fraud' is a generalization sanctioned by use for considerably more than a century; but, like many another excellent rule, its application calls for discretion and discrimination, and when plaintiff falls in a duty of care which he owes to himself, fully as imperative as any owed to him by defendant, and thus, and thus alone, brings himself within the scope of the effects of defendant's negligence, he cannot be heard to say that defendant's negligence, and not his own, was the proximate cause of his loss.

"Nor can it with any propriety be said that one who simply leaves a paper where his employé may complete it by forging a signature is estopped to deny the genuineness of the signature as against one whose duty it was to satisfy himself as to such signature. We cannot see that defendant is estopped by failure to give notice of the fact that a certificate not fully executed had disappeared. Plaintiff is again met by its own failure to take care on its own behalf. Failure to give notice could not make good a certificate void for want of a necessary signature. The authorities cited by plaintiff are simply to the effect, that, when a negotiable instrument is in the hands of some unknown person who cannot recover it, the proper course for the maker to pursue is to attempt to give such notice that it cannot come into the hands of a

purchaser without notice, and thus prevent him from setting up his defense. This is only incidental advice, as so common sense a proceeding does not need the sanction of a court's judgment.

"The conclusions arrived at by us are sustained by many cases, amongst them the following, viz.: *Penna. Co. for Ins. on Lives, etc., v. Franklin Fire Ins. Co.*, 181 Pa. 40, 87 Atl. 191, 37 L. R. A. 780; *Hill v. Jewett Publishing Co.*, 154 Mass. 172, 28 N. E. 142, 18 L. R. A. 193, 28 Am. St. Rep. 230; *Knox v. Eden Musee Co.*, 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700; *Maas et al. v. M. K. & T. Ry. Co.*, 83 N. Y. 223.

We are of the opinion that the demurrer to the statement of plaintiff should be sustained."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

D. T. Watson, James W. Collins, and John M. Freeman, for appellant. William Scott and R. H. Hawkins, for appellee.

PER CURIAM. Judgment affirmed on the opinion of the court below.

WRIGHT v. MONONGAHELA ST. RY. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

STREET RAILROADS—COLLISION—EVIDENCE.

In an action against a street railroad company for injuries caused to plaintiff by collision between a car of defendant and the team which plaintiff was driving, evidence held to authorize entry of nonsuit.

Appeal from Court of Common Pleas, Allegheny County.

Action by Mary G. Wright against the Monongahela Street Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The following is the opinion of Kennedy, P. J., in the court below:

"This is an action of trespass for the recovery of damages for injuries resulting to the plaintiff, as claimed by her, through the negligence of the defendant company. The accident occurred on September 24, 1901, on Forbes street, in the city of Pittsburgh, and she claims that the accident, and the resulting injury to herself, was caused by the negligence of the defendant company in the management of its car by the motorman. It appears from the testimony that while the car of the defendant company was approaching the vehicle in which the plaintiff was riding, and while it was yet several hundred feet away, the horse drawing the vehicle was observed to rear once and then proceed on its way without further rearing or plunging until it reached the car of the defendant company, and that then it jumped immediately in front of or against it, and the plaintiff was thrown

from the vehicle and injured. There is nothing in the testimony which indicated that the driver of the vehicle had lost control of the horse. It is true that one of the witnesses, a boy of 14 years, testified that the horse was jumping; but there is nothing to show that he made more than one plunge before reaching the car, and that while it was a long way distant. The testimony seems to be plain that after this first and only plunge the horse proceeded on its way under control of the driver until it reached the car, and jumped immediately in front of or against it. We do not think that the motorman could be held guilty of negligence, unless the horse was acting in such a way as to indicate to him (the motorman) that the driver had lost control of him, or was likely to do so, and that at a sufficient distance to make it possible for the motorman to avoid the accident. The one plunge or rearing of the horse at the great distance from the car was not sufficient to indicate to the motorman that the driver had lost control of it. To so indicate, the demonstration must be continued as he approached the car. A number of witnesses, called on behalf of the plaintiff, saw the accident, and if more than one plunge or demonstration had been made by the horse, indicating a want of control by the driver, it would certainly have been seen and testified to by some of the witnesses. While the boy stated that the horse did some more jumping, there was nothing in his testimony that would indicate that the driver lost control of him, and all the other witnesses state that the horse proceeded up the street, approaching the car in the usual way, and at a moderate rate of speed.

"The rule to show cause why the judgment of nonsuit should not be taken off must be discharged. It is so ordered."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Ralph P. Tannehill and Thos. M. & Rody P. Marshall, for appellant. Samuel McClay, for appellee.

PER CURIAM. Judgment affirmed, on the opinion of the court below.

SPANGLER v. BALTIMORE & O. R. CO.
(Supreme Court of Pennsylvania. Jan. 2, 1906.)

**MASTER AND SERVANT—INJURY TO SERVANT—
NEGLIGENCE OF FELLOW SERVANT.**

Where plaintiff's husband, an employé of defendant railroad company, was killed in a collision while on an engine of the company, and the accident was caused by the violation by fellow servants of the rules of the company, it was not liable.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 352.]

Appeal from Court of Common Pleas, Allegheny County.

Action by M. E. Spangler against the Baltimore & Ohio Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The following is the opinion of Brown J., in the court below:

"This matter arises upon a motion to take off a compulsory nonsuit in an action by Mary E. Spangler against the Baltimore & Ohio Railroad Company to recover damages resulting from the death of her husband, caused by a head-on collision between an east-bound freight engine and a west-bound passenger train. Mr. Spangler was upon the east-bound freight engine operated by the freight crew proceeding to the scene of a wreck upon the Wheeling Branch of said company.

"The undisputed evidence shows: (1) That the telegraphic message (under which the freight engine was proceeding) was subject (a) to the rule and railway schedule of the company giving priority of right of way to passenger trains, and (b) to the rule requiring a flagman approximately a mile ahead of the freight engine to protect its crew against passenger trains. (2) That, in violation of these rules and schedules well known to the employés of the railroad company (of whom Mr. Spangler was one), the freight engine, without any flagman ahead, proceeded easterly several miles to the point of its collision with the west-bound passenger train.

"The violation of these rules by fellow servants, being the proximate cause of the collisions, bars a recovery. The case is ruled by *Kennelty v. Baltimore & Ohio Railroad Company*, 168 Pa. 60, 30 Atl. 1014, in which it is said by Mr. Justice Fell, delivering the opinion: 'It was clearly shown by the testimony produced by the plaintiff that the collision was caused not by an unsafe schedule or defective rules, but that it was due to the reckless disregard of clearly defined and well-understood duties by those in charge of the train. As they were co-employés of the plaintiff's husband, there was nothing to leave to the jury, and the nonsuit was properly entered.'

"Motion overruled."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Joseph Howley and W. A. Hudson, for appellant. John S. Wendt and Johns McCleave, for appellee.

PER CURIAM. Judgment affirmed, on the opinion of the court below.

PARK STEEL CO. v. ALLEGHENY VALLEY RY. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. RAILROADS—RIGHT TO MAINTAIN TRAMWAY ACROSS TRACKS.

A manufacturing corporation constructed a tramway across railroad tracks; the land occupied by the tramway being a public street. The corporation obtained permission from the railroad company to cross its tracks and had expended money in reliance on such permission, so that the license had become irrevocable. *Held*, that the manufacturing corporation was entitled to an injunction restraining the railroad company from interfering with or removing the tramway, especially in view of the fact that the railroad company had refused to allow the tramway to be constructed in a manner which would have prevented the delay of which it complained.

2. SAME—CROSSINGS.

Act June 19, 1871 (P. L. 1361), relative to railroad crossings, providing for their regulation by courts, and authorizing such courts to define by decree the mode of such crossing which will inflict the least injury on the rights of the company owning the road, does not apply where the parties have established a crossing and are using it, nor to grade crossings of railroads over ordinary streets and highways.

Appeal from Court of Common Pleas, Allegheny County.

Action by the Park Steel Company against the Allegheny Valley Railway Company. From a decree for plaintiff, defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas Patterson, for appellant. John S. Wendt and John McCleave, for appellee.

POTTER, J. In this action the Park Steel Company filed a bill in equity against the Allegheny Valley Railway Company, praying for an injunction to restrain the defendant company, its agents, and employes from interfering with or removing a tramway constructed and operated by the plaintiff along Thirty-First street, in the city of Pittsburgh, across the tracks of defendant's railroad. The court below, after hearing, granted the injunction prayed for, and further enjoined defendant from unreasonably obstructing or interfering with the operation of the tramway in the hauling of materials to and from different parts of the plaintiff's manufacturing plant. From this decree defendant has appealed.

The tramway is stated by the trial judge in his findings of fact to be a narrow-gauge track, 32 inches in width, extending from the interior of plaintiff's furnace buildings, on the southerly side of Railroad street through said buildings to Thirty-First street, and thence along and close to plaintiff's buildings across the railroad tracks; then along and into the finishing mills lying between Railroad street and the Allegheny river. The car used is a small flange-wheeled iron truck, about

18 inches wide and 42 inches long. The materials hauled are ingots and billets weighing from 1,000 to 7,500 pounds. The average load is about $4\frac{1}{2}$ tons. The car is loaded by cranes and is usually hauled by mules, although sometimes pushed by men, to its destination. In its passage over the tracks of defendant each car is in charge of experienced men. Plaintiff has a watchman stationed at the railroad crossing. Its rules to regulate the use of the crossing are most stringent. The total average crossing of the railroad tracks, both loaded and unloaded, is about 100 times per diem. It also appeared by the testimony that the rails of the railroad company are not cut, and there are no crossing frogs, it being what is termed a "jump crossing." The rails of the tramway are a little higher than the rails of the track, and there is a space left for the flange and tread of the wheels of the railroad cars.

The court below found as facts that public travel is not obstructed by this tramway; that its rules for the regulation of the crossing are all that could reasonably be required of plaintiff; that the use of horses and wagons for this transportation is impracticable and would be an equal damage to the railroad; that from the operation of the tramway no serious accident resulting in either loss of life or personal injury has occurred; that on a few occasions defendant suffered a trifling property loss to its rolling stock by striking derailed trams or their loads; that occasionally, but not frequently, loaded trams are derailed upon defendant's tracks; that defendant's serious complaint is that its trains are delayed by these derailments, which are caused by reason of the construction of the crossing, it being a "jolt" crossing; that a modern frog construction of the crossing would greatly lessen the number of derailments, as well as reduce the time consumed in crossing; but the defendant has refused to allow plaintiff to construct such a crossing; that the construction of a tunnel under the railroad tracks would be difficult, if not impossible, and very expensive; and that an overhead system of conveyance had been tried and proved unsatisfactory and unsuccessful.

The first assignment of error is to the decree of the court below. The second, third, and fourth assignments are to findings of fact. It is sufficient to say with regard to these findings that there is ample evidence to support all of them, and they will not be disturbed. It is very evident that what the defendant company is really complaining of is not the tramway or its rails, for these do not in any way interfere with or injure the defendant's tracks or property, or delay its trains. It was the manner and extent of the use of the grade crossing over its tracks by the plaintiff which the defendant company thought was objectionable, and with which it sought to interfere. Much of the argument for appellant goes upon the theory that the

right to cross the tracks at the point in question is based upon a license, or permission, extended by the railway company; and it is contended that the permission given by its president could not ripen into a grant and become an indefeasible right, but is necessarily revocable whenever the railroad company reaches the conclusion that it is inconsistent with the proper management of the railroad and the protection of its trains and passengers.

But this line of reasoning is not relevant to the issue now under consideration, because of the fact that the plaintiff is making use of a public street. The crossing in question is that of a public highway, and the plaintiff has the right to make use of it, as part of the public, and is under no necessity to ask for permission, or seek license to do so, from the defendant company. Whatever inconvenience the railway company may be under from the crossing of its tracks at grade by a public highway, it is bound to submit to, or else take the proper means to abolish a grade crossing. Furthermore, in this particular instance, it appears from the act of incorporation that it is the duty of the railway company to avoid obstructing or impeding the free use and passage of any public roads which it may intersect, and that the duty of constructing causeways over the public roads, in order to enable all persons and vehicles to pass over the railroad with safety and convenience, is placed directly upon the railroad company.

If, however, the question of license were important in this case, we should feel obliged to hold that under the facts the plaintiff company has obtained from the defendant an express license which has become irrevocable. One of our latest cases upon this subject is *Harris v. Brown*, 202 Pa. 16, 51 Atl. 586, 90 Am. St. Rep. 610, where our Brother Mestrezat says (page 22, of 202 Pa., and page 587, of 51 Atl., 90 Am. St. Rep. 610): "It is undoubtedly true that a mere license without consideration is determinable at the pleasure of the licensor. But that is not the rule in this state where the enjoyment of the license must necessarily be, and is, preceded by the expenditure of money. In such cases the license becomes an agreement on a valuable consideration, and is irrevocable"—citing *Rerrick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497, and other cases. And as far back as 1868 in *Cumberland Valley R. R. Co. v. McLanahan*, 59 Pa. 23, Justice Sharswood held that a license to a railroad company to cross private lands, upon the faith of which valuable improvements had been made by the company, was not within the statute of frauds, and was irrevocable, and that such license might be given or ratified by parol. It appears in the testimony in this case, and is found as a fact by the trial judge, and is admitted in the argument for appellant, that the appellee and its predecessors have made

valuable improvements to their property in connection with, and in reliance upon, the agreement for this crossing.

The argument that the use of the crossing by the plaintiff company interferes with the discharge by the railroad company of its primary duty to the public is negated by the finding of fact by the court below that the obvious remedy is to permit the plaintiff to put in a modern frog construction, and that having refused to accept a modern up to date crossing, when proffered by the plaintiff, the responsibility for any resulting inconvenience or delay, caused by the use of the antiquated construction, must be borne by the defendant company.

It is also contended that the authorities under the act of June 19, 1871 (P. L. 1361), should be applied to this case. But, even if the act could be extended to such a case as this, it has been expressly held in *W. N. Y. & P. Ry. Co. v. Railway Co.*, 193 Pa. 127, 44 Atl. 242, that it does not apply where the parties have established a crossing and are using it. In *Railroad Company v. Upper Darby Twp.*, 202 Pa. 429, 51 Atl. 1030, it was pointed out that under this act of 1871 the authority of the courts does not extend to the regulation of grade crossings of railroads over ordinary streets and highways.

The assignments of error are overruled, the appeal is dismissed, at the cost of the appellant, and the decree of the court below is affirmed.

McKEE v. CRUCIBLE STEEL CO. OF AMERICA.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES.

In an action by an employé to recover for injuries caused by defects in appliances which could not have been revealed to plaintiff, except by a special investigation, evidence held to sustain verdict for plaintiff.

2. APPEAL—HARMLESS ERROR.

Error in admitting evidence which could not have prejudiced defendant, because of the careful instructions given, is not ground for reversal.

Appeal from Court of Common Pleas, Allegheny County.

Action by George McKee against the Crucible Steel Company of America. Judgment for plaintiff, defendant appeals. Affirmed.

At the trial plaintiff's counsel asked witnesses the following questions: "Q. Mr. Guenther, if you had known there was no bolt here, or that it had been allowed to get out and had not been replaced, would you have regarded that as a safe place to work? (Objected to by Mr. Castle as incompetent, irrelevant, and immaterial, and not binding upon defendant in this matter. Objection overruled, and bill sealed.) Q. Mr. Baer, if you had known that this bolt, if it ever had

been put in, had gotten out, and that there was nothing supporting it except this hanger without any bolt, would you have regarded it as safe? A. I would have gotten it fixed. (Objected to by Mr. Castle: "This is objected to as not the test of negligence." Objection overruled, and bill sealed.) Q. Well, Mr. Holdred, when they were carrying the material out to the end of this rail, would you have considered it safe to have used it, if you had known that the bolt had gotten out and had not been replaced at that end? (Objected to by Mr. Castle: "Your honor will note my objection as before, and in addition, now, we have discovered that the employes are using that for some other purpose than it was evidently designed for. I add that as a further objection." Objection overruled and bill sealed.)"

Verdict and judgment for plaintiff for \$4,200. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Homer L. Castle, for appellant. J. S. Ferguson, John G. Silveus, and William P. Carter, for appellee.

STEWART, J. Defendant company made no attempt to meet the evidence offered on behalf of the plaintiff, but at its conclusion moved the court to direct a verdict in favor of the defendant. The court's refusal to so direct constitutes the principal assignment of error. Plaintiff was employed in defendant's mill, the work assigned him being the removal of steel plates from the anvil after they had been hammered. To facilitate this work a contrivance very simple in its construction was used. An ordinary steel rail some 18 or 20 feet in length was suspended from the beam above, and held in place about 25 feet above the heads of the workmen below by two hangers, one at either end of the rail, or approximately so. Along this rail ran a trolley, an iron rod from which extended down to the anvil, fitted at the lower end with clamps or hooks. It was the business of the plaintiff to adjust these clamps and hooks to the steel plates that had been hammered, and then, as they were suspended from the rail above, push them along the trolley until the place was reached where they were to be deposited. While he was so engaged, the end of the rail farthest from the anvil separated from the hanger on which it rested, with the result that the end being without support fell, striking the plaintiff and inflicting upon him serious hurt. The hanger and rail were not in any way tied together, that is to say, nothing kept the rail in place in the hanger but its own weight. The force of the burdened trolley running against the hanger would almost necessarily have the effect of driving the hanger back towards the end of the rail, and this, if repeated often without correction or readjustment, would, in all probability, result in push-

ing it entirely clear of the rail. Indeed, this is the only explanation of this particular accident that is suggested, and it is accepted by both sides as the true explanation. The rail inclined somewhat upward from the anvil, and so permitted the trolley to return for for its next burden without force being applied. At the lower end of the rail—that is, the end nearest the anvil and beyond the hanger—there was a bolt through the rail which prevented any separation between the hanger and the rail at that end; at the other end there was a place in the rail for the bolt, but it clearly appears that there was no bolt there when the accident occurred, and witnesses testified that, from the appearance of the hole, none could have been there for months. It does not appear that the absence of this bolt would have made the contrivance insecure for the party handling it, except as the trolley was pushed against the hanger. The hanger could only be reached by the trolley by the application of force since it was up-grade to that point.

Was the contrivance, in the condition stated, reasonably safe for the use intended? The court below thought this was a question for the jury, and submitted it to them in a charge so clear and impartial, that no exception is taken but to the fact of submission. We think the facts afforded sufficient basis for the inference of negligence by the jury. This, of itself, without more, would make a submission imperative. The rail along which this trolley ran was about 20 feet in length, including the part that extended outside the hangers. Until about a year before the accident, the plates carried on the trolley were discharged at a point about half the length of the rail from the anvil, and while the work was so conducted, only half the length of the rail being traveled, the hanger or trolley did not come together; but the size of the plates being then increased, greater space was required for their discharge, and it became necessary to use the rail along its entire length, so that the trolley was liable at any time in such use to strike the hanger. In testifying on this point, the witness, Holdred, says: "You had to get away out of the road so a fellow on the back end of the hammer could work, and you had to run it [the trolley] away out." We have here the explanation of how the accident occurred, showing conditions which invited disaster, so long as there was nothing to arrest the outward push of the hanger by the trolley. A simple bolt or rivet would have averted all danger, but neither was there. The defendant company is chargeable with knowledge of the conditions that there existed for so long a period. If it did not know that the increased size of the plates made it necessary to use the rail for its entire length, in order to deposit the plates in the place where they were required, it ought to have known it; if it did not know that there was no bolt or rivet in the end of the rail to keep the hanger in place, it

ought to have known that fact, for it was responsible for the changed conditions that made such bolt necessary to safety in the operation of the trolley. It is not simply a case that would warrant an inference of negligence by the jury; it is a case which, upon its admitted facts, would seem to make such conclusion almost unavoidable. The obligation and duty were wholly with the defendant company. No duty rested on plaintiff to investigate whether there was a bolt in the rail; he had a right to assume that something adequate was there to keep the hanger in place. The absence of everything of this kind was not such a manifest and conspicuous fact that he was bound to observe it. It could not have been revealed to him except by very special investigation, for it was at least 20 feet above his head. The witness, Holdred, whose testimony is above referred to, says: "Yes, sir, and you could not see that thing [the connection between the hanger and the rail]; it's about 20 feet high, and it is all steam above the hammer, and sometimes you couldn't see 5 feet up." We refer to this feature of the case only that the actual situation may appear. Whether plaintiff contributed by negligent omission or commission to the accident, was for the jury, and this, with the question of defendant's negligence, was submitted. A verdict for the plaintiff resulted, which it is conceded accords with reasonable compensation for the injury sustained. It was for the jury to say whether, under the law as given by the court, that compensation should be required of defendant.

The other assignments of error relate to rulings of the court with respect to questions put by defendant's counsel to witnesses who were interrogated as to the safety of the trolley appliance. Objection was made that the questions as put admitted and invited answers that regarded absolute safety, whereas all that is required to exonerate the employer is that the machinery be reasonably safe. The objection was well taken. The court should have required counsel to so frame the question that the witness would know the standpoint from which he was to speak; failing to do this the objection should have been sustained. In view of the very careful instructions from the court in its charge, as to the duty that rests on the employer with respect to the machinery he provides, for those in his service, we are satisfied that in this particular case, the defendant could not have been prejudiced by the answers elicited by the questions objected to. But for this, these assignments might seriously imperil the judgment in the court below. It is of course very familiar law to those accustomed to deal with such questions, that it is only reasonable safety that is required in this connection, and all that is necessary to relieve from liability; but it would be a great mistake to assume that the average person who comes into court to testify is acquainted with it. Asked

whether it would be safe to work with or about machinery under certain conditions shown to exist, such person, except as he is instructed as to the measure of safety he is to regard, would speak from the standpoint of his own individual notions as to what the law ought to require of the employer, and not what it does, or else from the standpoint of absolute safety. It is enough to know that prejudice would likely result from such a course. The defendant was saved that prejudice by the subsequent action of the court; but the better and safer plan is to avoid the error in the first instance.

The assignments of error are overruled, and judgment affirmed.

McNEIL v. CLAIRTON STEEL CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

MASTER AND SERVANT—NEGLIGENCE—INJURY TO THIRD PERSONS.

In an action against a steel company to recover for injuries to an employé of another company, who was putting up structural work at the plant of the company, evidence held to show that the accident was caused by the contributory negligence of plaintiff.

Appeal from Court of Common Pleas, Allegheny County.

Action by Frank McNeil against the Clairton Steel Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Ralph P. Tannehill and Thos. M. & Rody P. Marshall, for appellant. George E. Shaw, for appellee.

POTTER, J. The appellant in this case complains of the refusal of the court below to take off a judgment of compulsory nonsuit. The action was brought to recover damages for the loss of three fingers of the right hand by the plaintiff. At the time of the accident he was engaged in putting up structural work at the plant of the defendant company. A small car, operated by electricity, ran upon a track past the point where he was at work. In order to permit the car to pass, it was necessary to depress a guy rope temporarily in use, and this the plaintiff did by standing on it. He steadied himself in this position by reaching out to the girder or channel upon which the rails were laid, and in so doing inadvertently put his hand upon the rail. It was clearly unnecessary for him to do this. The car had passed him once before, and he had depressed the rope in the same way, and steadied himself by putting his hand on the flange of the girder below the rail.

The trial judge says, in his opinion refusing to take off the nonsuit: "The rail was laid on a beam which was wider than the base of the rail, and it is plain that there was no necessity for plaintiff putting his fingers over the top of the rail. He could

just as well have steadied himself, while standing on the rope to depress it, by placing his hand on or holding to the beam or lower part of the rail, and thus have escaped injury." The rail was not high in the air, but seems to have been only five or six feet from the ground, while the rope which was to be depressed was only about a foot from the ground. The accident was evidently the result of the carelessness of the plaintiff in putting his fingers upon the track, rather than against the flange below the rail. He knew the car was advancing towards him and that it would pass him, for he was depressing the guy rope in order that it might do so. We see no error in the refusal to take off the nonsuit.

The assignment is dismissed, and the judgment is affirmed.

McMULLIN et al. v. REID.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)
ACCOUNT STATED—QUESTION FOR JURY.

Where, in an action on an account stated, the evidence shows a course of dealing between the parties, a submission of the statement of account to defendant, with demand for payment and notice that collateral pledged would be sold in 15 days, and that there was no answer to such demand, it was a question for the jury whether the account was stated.

Appeal from Court of Common Pleas, Allegheny County.

Action by M. K. McMullin and E. A. Clark against William Reid. Judgment for plaintiffs, and defendant appeals. Affirmed.

Shafer, J., filed the following opinion on a motion for a new trial:

"The plaintiffs having brought an action of assumpsit against defendant on an account stated, the defendant filed an affidavit of defense in which he denied that he ever had any dealings with the plaintiffs. The evidence showed that M. K. McMullin had originally dealt as a stockbroker with the defendant and had undertaken to carry for him certain stock; that some time after the transaction was begun between the parties McMullin took into partnership with him a young man in his office named Clark, and that thereafter the style of the firm was M. K. McMullin & Co.; that of this change the defendant had no formal notice, but that at the time of the formation of the partnership the letter heads were changed and the letters thereafter sent to the defendant in relation to the matter were written on the letter heads of McMullin & Co., and were sometimes signed McMullin & Co., and sometimes McMullin; that statements were sent regularly, from time to time, of the condition of the accounts to the defendant, the old printed form being used, and in some instances the words '& Co.' being added to the name of McMullin, and in others this was neglected, and that notes were renewed by the defendant sometimes in the name of McMul-

lin, and sometimes in the name of McMullin & Co.; that after the defendant had been in default for a considerable time in paying interest and notes which had fallen due a statement of account showing a certain balance in favor of the plaintiffs was on June 17, 1904, served upon the defendant at his home in the city of Detroit, Mich., accompanied with a written demand for the payment of the amount, and a notice that, unless payment was made, the collateral held by McMullin & Co. would be sold 15 days thereafter.

"This suit was brought July 11, 1904; no answer of any kind having been received by the plaintiffs from the defendant, and no communication having in the meantime passed between them. The defendant offered no evidence. We are of opinion that there was enough in the evidence to show a course of dealing between the plaintiffs as partners and the defendant upon which an account stated might be founded. There being some parol evidence, although very little, of the dealings of the parties upon which the account stated is founded, there may be some question whether it was proper to leave it to the jury to find whether under all the circumstances an account had been stated between the parties, or whether that should have been determined as a matter of law. The question was submitted to the jury, but this, if erroneous, did the defendant no harm. If the question is one of law for the court, we are of opinion that the circumstances showed an account stated.

"The motion for a new trial is therefore refused."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Walter Lyon, for appellant. J. S. Ferguson and E. G. Ferguson, for appellees.

PER CURIAM. Judgment affirmed, on the opinion of the court below.

GROGAN et al. v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

NEGLIGENCE—FENCES—TRESPASSERS.

A railroad company owning real estate abutting on a street is not required to construct a fence sufficiently strong to provide against the contingency of a crowd of trespassers coming on the inclosed property and pushing the fence over on a person walking on the street, though some of the trespassers were the servants of the company.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 67.]

Appeal from Court of Common Pleas, Allegheny County.

Action by Patrick and Mary Grogan against the Pennsylvania Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

M. W. Acheson, Jr., for appellant. F. C. McGirr and John Marron, for appellees.

ELKIN, J. There can be no recovery of damages in this case without announcing the rule that it is the duty of the owner of real estate abutting on a street or highway to construct and maintain a fence sufficiently strong and adequately safe to provide against a contingency arising by reason of a crowd of trespassers coming upon the property inclosed and pushing the fence over on a person walking on the street. The defendant is the owner of a tract of land abutting on Carson street, in the city of Pittsburgh, around which it caused a fence to be erected, one part of which is near the property line which divides the lot inclosed from the street named. The fence was built for the use and protection of the defendant. In the building of the fence it owed no particular duty to any one. Whether it was six feet high or three; whether it was built of stone, boards, or iron, were matters entirely within the discretion of the defendant, and about which the plaintiff and the public had no concern. The defendant was ordinarily under no duty to build a fence of any particular degree of strength, or, indeed, to build a fence at all. On the principle, however, that no one can use or maintain his property in such a dangerous or unsafe condition as to endanger the life, limb, or property of others, the defendant was under the duty of maintaining its fence strong and safe enough to resist such forces or conditions as should have been foreseen by ordinary forecast. In *McGrew v. Stone*, 53 Pa. 436, Mr. Justice Agnew stated the rule in the following language: "The general rule is that a man is answerable for the consequences of a fault which are natural and probable and might therefore be foreseen by ordinary forecast, while it is true that if his fault happened to concur with something extraordinary, and therefore not likely to be foreseen, he will not be answerable for the unexpected results." Again, Mr. Justice Strong in *Phila. & Reading Railroad Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457, said: "It is true that what amounts to ordinary care under the circumstances of a case is generally to be determined by the jury, yet the jury cannot hold parties to a higher standard of care than the law requires, and they cannot find anything negligence which is less than a failure to discharge a legal duty."

We concede that under ordinary circumstances it would be for the jury to determine whether the defendant used proper care in the construction and maintenance of the

fence. But the defendant company did not owe a legal duty to the plaintiff or any one else to construct and maintain the fence so strong that a crowd of trespassers, wrongfully coming upon its land, could not push it over and thus cause the injury complained of. There can be no negligence in a legal sense, unless there is a violation of the legal duty to exercise care. In the present case the inquiry is, were the consequences such as should have been foreseen by ordinary forecast and provided against? It was not the duty of the defendant company to foresee and provide against the contingency of 40 or 50 trespassers coming upon its land for the purpose of witnessing an arrest by a police officer in the public street, and, while thus gratifying their idle curiosity, climb upon, lean against, and push over the fence, causing the injury for which damages are sought to be recovered. This is a higher standard of care than the law requires, and it is the duty of the court to say so. In this case the defendant stands in the same position as every other owner of real estate. Its rights, duties, and liabilities are no greater and no less. The rule established in this case will apply, not to common carriers as such, but to the real estate owners of the commonwealth. It is conceded that the accident would not have occurred, except for the fact that a crowd of 40 or 50 persons, without authority, came upon the land of the defendant, climbed upon or leaned against the fence, so that it gave way and injured one of the appellees, who was walking on the street below. The direct cause of the accident was the negligent act of these trespassers, which, under the law, it was not the duty of the defendant to provide against.

The contention that some of these trespassers were employes of the defendant, and that their negligent acts can be visited upon the company, is without merit. Their duties as employes did not call them to climb upon or to lean against the fence, or to be at that place in the performance of their work. In these respects they acted entirely outside of their duties as employes, and were trespassers as much as the other persons assembled in that crowd. Our attention has been called to a number of cases relating to questions of concurrent negligence and proximate cause, cited by the learned court below and relied upon by counsel for appellees here. We do not deny the doctrine of these cases, but they apply only where negligence by the defendant is established. If no negligence by the defendant is shown, questions of concurrent negligence and proximate cause do not arise.

Assignments of error sustained, and judgment reversed; and it is now ordered that judgment be entered in the court below for defendant.

MULVANEY v. PITTSBURGH RYS. CO.
(Supreme Court of Pennsylvania. Jan. 2, 1906.)
STREET RAILROADS—INJURY TO PERSON ON TRACK.

Where a man 36 years of age was struck by one of defendant's cars near a street crossing at midnight, and the car was so brilliantly lighted that it could be seen for about 300 feet, and there was no evidence of undue speed or failure to give proper signals, a nonsuit in an action to recover for his death is proper.

Appeal from Court of Common Pleas, Allegheny County.

Action by John Mulvaney against the Pittsburgh Railways Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Rody P. Marshall and James B. Drew, for appellant. James C. Gray, Clarence Burleigh, and Wm. A. Challener, for appellee.

PER CURIAM. The plaintiff's son, 36 years of age, was struck by one of the defendant's cars at midnight, at or near a street crossing. The car was well lighted, and there was no evidence of undue speed or of a failure to give notice of its approach. The only support the plaintiff's case had was the presumption that the deceased had exercised reasonable care and the assumption that the headlight was not burning. The only effect of the presumption was to establish prima facie the absence of contributory negligence, and there was no satisfactory evidence that the headlight at the front of the car was not burning. No witness who saw the accident was called. It was shown that the lights at the front and at the back of the car would not both burn at the same time, and a witness who saw the car at a distance of 250 feet, after the accident, thought, but was not willing to testify, that the light at the back of the car was then burning. Proof that the rear light was burning after the accident, when the car had stopped and the body of the deceased was being removed from the street back of it, was not ground for the inference that the front light was unlit when the car was in motion; nor would the fact, if established by proof, have warranted a recovery, because the car was brilliantly lighted and was seen by a number of witnesses when 250 or 300 feet from it. The plaintiff having failed to establish any ground of recovery, the nonsuit was properly entered.

The judgment is affirmed.

In re TIOGA ST.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—CONFIRMATION—MOTION TO RESCIND.

Where proceedings to ascertain and assess damages for grading a certain street had been in progress for 12 years, and one who excepted

to the report of the viewers had represented certain property interested, first as agent of the owner and afterwards as trustee, and the same attorney had been counsel for him during the whole period and had notice of the exceptions and participated in the hearing, an order refusing to rescind confirmation, on the ground that such party had no notice of the hearing on exceptions, will not be reversed.

Appeal from Court of Common Pleas, Allegheny County.

In the matter of Tioga street. From an order refusing to rescind an order confirming the report of the jury of view, A. L. Rich, trustee, appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

S. W. Cunningham and Sion B. Smith, for appellant. T. D. Carnahan and W. B. Rodgers, for appellee.

PER CURIAM. The proceedings in this case were under the remedial act of May 16, 1891 (P. L. 71), to ascertain and assess the damages, cost, and expenses of grading and paving Tioga street. Exceptions were filed to the second report of the viewers by the appellant as agent for the owner in 1893. The owner has since died, and the title to the land has become vested in the appellant as trustee of her estate. In 1904, on notice to counsel of record, who had been in the case from the beginning, and a full hearing by the court, in which he participated, the exceptions were dismissed and the report of the viewers was confirmed. The assignment of error is to the order of the court refusing to rescind the order of confirmation and to allow the appellant to intervene. The allegations in the petition for a rule to show cause are that the appellant had no notice of the hearing on the exceptions, that counsel was not authorized at that time to represent him, and that the city by delay had lost all right and claim against the property. We have no means of knowing what took place at the hearing on the rule; but as the counsel of record, when the report was confirmed, had been in the case 12 years and had once secured a reversal by this court, and as the appellant had filed exceptions, and had represented as agent the same interests he now represents as trustee, we assume it was found that he was represented by counsel and had had his day in court.

The order of the court discharging the rule is affirmed.

DOUGHERTY v. PITTSBURGH RYS. CO.
(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. TRIAL—ARGUMENTS OF COUNSEL.

Where counsel, in summing up in an action for damages, erroneously states that a certain sum is admitted, but, on objection, states that he meant to say that the testimony as to such items of damages was uncontradicted, it is not ground for reversal, when followed by a statement of

the court in the charge that no amount had been admitted.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 816.]

2. CARRIERS — INJURY TO PASSENGERS — PRESUMPTION OF NEGLIGENCE.

Where the brakes of a street car fail to work because of a broken chain, and a passenger is injured, the presumption of negligence arises, which is not overcome by evidence that the brakes held on a previous trip of the car.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1290.]

Appeal from Court of Common Pleas, Allegheny County.

Action by Josephine Dougherty against the Pittsburgh Railways Company. Judgment for plaintiff, and defendant appeals. Affirmed.

At the trial it appeared that the accident was due to the failure of the brakes to work on the car on which the plaintiff was riding as a passenger. The brakes did not work because of a broken chain.

The court charged in part as follows:

"When a passenger gets upon a street railway car and pays his or her fare, a contract is made with him or her to be taken safely to destination. So that in this case all that was necessary for the plaintiff to make out what is called a *prima facie* case was to prove that she was a passenger for hire on the street railway. The burden of proof is then put upon the defendant to show that there was no negligence at all on its part. As you can see, that rule is a very strict one. As the carrier of passengers must exercise the highest degree of care and use all such appliances as the highest human foresight would suggest under the circumstances, you will see that there are comparatively few cases in which the street car company attempts to show that it is not liable, because there are so few cases where they could escape. Sometimes there is some defective appliance for which they are not responsible, something that they could not have foreseen, some latent defect by reason of which they may escape.

"The case here is in such shape that the defendant has not overcome the burden, or, to use a better expression, has not met his burden of proof. They have shown how the accident happened, that the brake failed to work, but they did not go into details, but put in this evidence so as to show that they were not simply recklessly negligent and careless. They claim it was an accident. Without troubling yourselves about that branch of the case, you have sufficient here on the question of negligence, and the question that you have to determine is, how much this young woman was hurt? and, if she was hurt, what is her damage?"

Argued before FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James C. Gray, Clarence Burleigh, and William A. Challener, for appellant. Thomas M. Marshall, Jr., for appellee.

PER CURIAM. The first assignment of error is to the refusal of the court to withdraw a juror because counsel for the plaintiff in his closing address said that the defendant had admitted that damages amounting to \$9,000 or \$10,000 had been sustained, when, in fact, no admission had been made. Counsel should be held to a strict accountability for language used in addressing the jury, and, where willful or reckless misstatements of the evidence are made, a juror should be withdrawn or a new trial granted, but such action by the court was not called for in this case. There was no contradiction of the plaintiff's testimony as to the loss she had sustained by being unable to work and of the expenses she had incurred because of her injuries, and the evidence produced by the defendant tended to show what treatment might benefit her and the cost thereof. It was in summing up these items that the statement objected to was made. The counsel was interrupted while making the statement, and he at once said that what he meant was that the testimony was uncontradicted as to these items. This was followed by a statement by the court in the charge that no amount had been admitted by the defendant, and that the amount spoken of as admitted was the amount claimed. The error of counsel was thus corrected without having prejudiced the defense.

The remaining assignment is that in charging the jury the court treated the negligence of the defendant as not being in dispute. Where injury to a passenger is caused by a defect in the means of transportation, there is a presumption of negligence on the part of the carrier. The plaintiff was a passenger in one of the defendant's cars, and the accident was caused by the failure of the brakes to work because of a broken chain. It was not shown what caused the chain to break, nor what its condition was before the accident. The only proof by the defendant was that the brake held the car on the previous trip. This did not rebut the presumption.

The judgment is affirmed.

BUEL v. BERGMAN.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

MALICIOUS PROSECUTION — INSTRUCTIONS — BURDEN OF PROOF.

In an action for malicious prosecution, where judgment was rendered for defendant, plaintiff alleged as error a failure to instruct that proof that prosecution was instituted to collect a debt put the burden of showing probable cause on the defendant. The proofs were slight and the evidence was conflicting. *Held*, that the question as to the burden of proof was of so small importance that failure to refer to it in the charge was not error.

Appeal from Court of Common Pleas, Allegheny County.

Action by Fred Buel, Jr., by his next friend, Fred Buel, Sr., against Daniel A. Bergman.

Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Franklin A. Ammon, for appellant. A. G. Smith and E. L. Kearns, for appellees.

PER CURIAM. This action was to recover damages for a malicious prosecution. The only assignment of error is to the charge. It is conceded that the instruction given as to the law applicable to the action was correct. The ground of complaint is that there was a failure to instruct the jury that proof that a prosecution was instituted for the purpose of collecting a debt imposed on the defendant the burden of showing probable cause. The proofs upon this subject were meager and inferential, and were met by countervailing proofs of at least equal force, and the question did not become one of such importance in the case that the failure to refer to it in the charge was error. If specific instructions were desired, they should have been asked for.

The judgment is affirmed,

REED v. BOROUGH OF TARENTUM.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. MUNICIPAL CORPORATIONS — SIDEWALKS — MAINTENANCE.

A city is only bound to maintain its sidewalks with reasonable care, and the question as to the plan on which a sidewalk was constructed is, not whether it is the best and safest plan, but whether it is reasonably safe.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1612.]

2. SAME—DEGREE OF CARE.

Plaintiff sued to recover for injuries caused by the projection of a paving stone above adjoining stones in a sidewalk, and the court instructed that if the stone projected as stated by plaintiff, and if it was negligence for the borough to so allow it to project, and it should have maintained a better and safer sidewalk, considering the size of the place and the number of the foot passengers, then the question was whether the negligence caused the injury, was erroneous, as the question whether the pavement was reasonably safe was to be determined by the standard of ordinary usage, and not by the standard which might be set up by the jury.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1612.]

Appeal from Court of Common Pleas, Allegheny County.

Action by E. N. Reed against the borough of Tarentum. Judgment for plaintiff, and defendant appeals. Reversed.

At the trial it appeared that plaintiff's injuries resulted from a fall occasioned by striking his foot against the edge of a paving stone, which projected above the adjoining stones in the sidewalk of a street which was much frequented, but poorly lighted.

The court charged in part as follows: "If you find it did project up as stated by the plaintiff—and some of the defendant's witnesses show pretty much the same state of affairs; of course there is a difference in their testimony—but if you find that that is a negligent thing for the borough to do, and would fix a better standard for the borough, and think that they ought to have maintained a better and safer sidewalk under the circumstances, and that this was a much-traveled street, taking into consideration the size of the place and the number of foot passengers there, then the next question is whether that negligence caused the injury."

Verdict and judgment for plaintiff for \$2,510. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Nelson McVicar, for appellant. Daniel Harrison, for appellee.

FELL, J. The plaintiff's injury was caused by a fall occasioned by his striking his foot against the edge of a paving stone, which projected above the adjoining stones in the sidewalk of a much-used, but poorly lighted, street. The instruction in relation to the duty of the borough to supervise its sidewalks and to maintain them in a reasonably safe condition was free from error, except the part covered by the sixth assignment of error. This part of the charge left it to the jury to fix a standard for the maintenance of sidewalks, and to find the borough negligent if there had been a failure to come up to their conception of what a sidewalk ought to be. The law fixes the standard of duty as reasonable care, and it cannot be left to the judgment or caprice of a jury to establish any other standard. The necessity for and the plan of municipal improvements are matters within the discretion of the municipal authorities. The question of necessity is never for a jury, and the question as to the plan is not whether the best and safest plan has been adopted, but whether that adopted is reasonably safe; and reasonable safety, as in the case of machinery and methods, is to be determined by the standard of ordinary usage. Borough of Easton v. Neff, 102 Pa. 474, 48 Am. Rep. 213; Canavan v. Oil City, 183 Pa. 611, 35 Atl. 1096. The same rule applies as to the duty of maintenance. The question in this case was whether the pavement was reasonably safe. This was to be determined by the standard of ordinary usage, and not by a standard the jury might set up.

The sixth specification of error is sustained, and the judgment is reversed, with a venire facias de novo.

ROLLINS et al. v. ATLANTIC CITY R. CO.
(Supreme Court of New Jersey. Feb. 15, 1906.)

1. EVIDENCE—PEDIGREE—ANCIENT DEED.

A recital of pedigree, contained in an ancient deed, is of itself evidence of the matter recited, if the deed was made by one related to a branch of the family which the pedigree concerns.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1411.]

2. SAME.

Such a recital is evidential, although the deed was not made by one related to the family, if it is supported by a long possession consistent with the fact recited, or supported by the fact that no persons have claimed title adversely to such recital, and by the fact that the ancient deed has been on record for a long time and grants have been repeatedly made by its grantee and successors in title without question.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1408, 1411.]

3. SAME—BEST AND SECONDARY.

The trial justice committed no error in overruling a question put to a witness inquiring whether a certain deed had been made to a third person, which deed, if made, would have put the title to the property injured by fire out of the plaintiff.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 471.]

4. PLEADING—VARIANCE.

The date when a fire occurred having been laid under a videlicet, there was no error in permitting it to be proved to have happened upon another date.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1806.]

5. RAILROADS—FIRES SET BY LOCOMOTIVES.

It having been proved that the plaintiff's goods were fired by defendant's engine, and admitted by defendant that it was unable to prove that it had used all practicable means to prevent the escape of sparks from its engine, the question whether the fire was first ignited on or outside of the defendant's right of way, became unimportant.

(Syllabus by the Court.)

Action by George F. Rollins and others against the Atlantic City Railroad Company. Verdict for plaintiffs. On rule to show cause why verdict should not be set aside. Rule discharged.

See 58 Atl. 344.

Argued June term, 1905, before the CHIEF JUSTICE and FORT, PITNEY, and REED, JJ.

Collins & Corbin, for plaintiffs. Thompson & Cole, for defendants.

REED, J. This is an action brought by the plaintiffs, as heirs at law of Daniel Rollins, against the Atlantic City Railroad Company, to recover damages for the loss of timber claimed to have been burned through the negligent conduct of the defendant's servants. The first reason assigned upon the argument was that the plaintiffs failed to show title to the property injured. There was no proof of actual possession by the plaintiffs, but they relied upon a title derived from the proprietors. This title was regularly traced to Charles Schumacher,

George Ashbridge, Morris Robeson, John Paul, and Joseph Paul, who held undivided interests in the property. All these, except Ashbridge, conveyed their interests to Joseph Ball and Samuel Richards. It is claimed that Samuel Richards got the interest of Ashbridge through a deed executed to him in 1820 by one John S. Condit and Mary, his wife. This deed contained the following recital respecting the pedigree of Mary, the wife: "She being the issue and heir at law of George Ashbridge." It is insisted on the part of the defendants that this recital is not evidence of the fact thus recited, and thus there is no evidence that George Ashbridge's interest ever passed to Samuel Richards. The interest which Joseph Ball held in common with Richards is claimed by the plaintiffs to have passed to Richards by a deed executed May 1, 1882, by one Sarah Hastings. The evidence of her kinship to Ball rests upon a recital in that deed. The deed recites that she, Sarah Hastings is a widow, and that she was formerly Sarah Richards, and the sister of Mary Ball, who was the mother of Joseph Ball, deceased. It is insisted on the part of the defendants that this recital is not competent evidence that Sarah Hastings was entitled to Joseph Ball's interest in the property. If these contentions on the part of the defendants are true, then neither the interests of Ashbridge nor of Ball are proved to have passed to Daniel Rollins, whose heirs are suing. Although the plaintiffs held the other undivided interests in the property, yet, the entire loss occasioned by the fire having been assessed in favor of the plaintiffs, the verdict is obviously irregular.

The rule best sustained by the authorities, says Mr. Freeman, is that although the form of action be such that all the co-tenants should have joined, yet if the action be for the conversion of or injury to the common property, and if one sue alone, and the defendant, instead of pleading the nonjointure in abatement, pleads to the action, the plaintiff will recover for his share of the damages. Freeman on Co-Tenancy, par. 353. Respecting torts to chattels, Mr. Chitty observes that if one of the several part owners sue alone, and the defendant do not plead in abatement, the other part owners may afterward sue alone for the injury to their individual share, and the defendant cannot plead in abatement to such action. In the same connection he states the rule to be that, if a party plaintiff in an action ex delicto be omitted, the objection can only be taken by plea in abatement or by way of apportionment of the damages on the trial. 1 Chitty on Pl. marg. p. 66. So it was said in *Wheelwright v. Depeyster*, 1 Johns. (N. Y.) 471, 3 Am. Dec. 345, that defendants may give the joint interests of others in evidence in mitigation of damages. In *Call v. Buttrick*, 4 Cush. (Mass.) 345, which was an action for a nul-

sance to a well, Metcalf, J., remarked: "If it were certain that the plaintiff is tenant in common of the well, the nonjointure of his co-tenant could be excepted to only by plea in abatement, though he would be entitled to recover damages only *pro interesse suo*." *Putney v. Lapham*, 10 Cush. (Mass.) 232, was an action of trespass on the case for an injury to the reversion brought by one of two reversioners. The rule enunciated in the preceding case was reiterated. The case of *Hasbrouck v. Winkler*, 48 N. J. Law, 431, 6 Atl. 22, cited for the plaintiff, is not in point. The husband was in the actual possession of the chattels destroyed, in which chattels his wife had a part interest. In the present case the plaintiffs were not in actual possession of the injured property, and unless they had a constructive possession of the Ashbridge and Paul interests there was no foundation for the assessment of damages for such injury as resulted to those interests. *Schenck et al. v. Cuttrell*, 21 N. J. Law, 5.

The question therefore confronts us whether it was proved that the title to those interests was lodged in the plaintiffs. There is no question raised respecting the authenticity of the ancient deeds in which the recitals occur. The only question is whether, regarding them as such, the recitals of pedigree therein are evidential against the defendant. It was held in *Saxton v. Fuller*, 20 N. J. Law, 61-65, that the recital in an ancient deed or will of any antecedent deed or document consistent with its own provisions, will, after the lapse of a long period, be presumptive proof of the former existence of such a deed or document, and especially where no deed, declaration, act, or claim is shown to rebut such presumption. The ancient will in that case referred to a previous deed for the division of property; and it was held that this reference might raise the inference that the testator had got an estate of severalty in the property by this deed. The plaintiff derived his title from a survey and return under a warrant from the council of proprietors, and the defendant rested his title upon an independent and subsequent survey. In *Havens v. Sea Shore Land Co.*, 47 N. J. Eq. 365, 20 Atl. 497, a recital in an ancient deed made by one Joseph Lawrence was as follows: "Which I bought of John Curtis, which was left to him by his father, David Curtis, deceased, which he bought of Elisha Lawrence, deed bearing date July 9th, 1770"—was held to be competent evidence to show that John Curtis had made a deed to Joseph Lawrence for the land conveyed to Lawrence. This was a partition suit, and the opposite party was a stranger to this title. These cases, as is perceived, do not deal with recitals of pedigree, but only with recitals of muniments of title. The query is whether recitals of pedigree

stand upon the same footing, as testimony as recitals of muniment of title.

That pedigree may be proved by hearsay testimony is settled. Such testimony is admitted because of the great difficulty, often impossibility, of proving the fact or degree of kinship between alleged relatives; the subject of inquiry being frequently of an ancient date. Respecting what facts come within the meaning of the word "pedigree," and by whom the declaration reproduced as hearsay must have been made, there was some divergence of opinion in the earlier cases. But it seems to be now settled that a declaration, to be admissible, must not only have been made by a person since deceased, and must have been made *ante litem motam*, but must also have been made by a person related by blood or affinity with some branch of the family, the pedigree respecting which is in question. In the words of Mr. Phillips: "Some relationship of the declaration to some branch of the family must be shown aliunde the declaration itself. Phillips on Evidence, marg. p. 276. This requirement has been held to appertain, not only to recitals made verbally, but also to recitals in ancient deeds and wills. Thus says Mr. Phillips: "Recitals in deeds, which are not family documents, are receivable if it be shown that the deeds were executed by some member of the family to which the statements have reference." And he proceeds to say that in two modern cases in chancery it has been considered that recitals in deeds were not evidence of pedigree against persons who were strangers to the deed, citing *Fort v. Clarke*, 1 Russ. 604, and *Slaney v. Wade*, Mylne & C. 338. Mr. Taylor's language is this: "Recitals of descent and description of parties in deeds or other family instruments will be received, provided the deeds come from the proper custody and are proved, or may from age be presumed to have been executed by some member of the family to which the statement refers; but the execution by a relative is an indispensable requisite." Taylor on Ev. 651. In the case of *Fulkerston et al. v. Holmes et al.*, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. Ed. 915, a deed 60 years old was produced from the custody of the heirs of the grantee. In it was a recital that the grantor was the only child and heir of the patentee of the lands in controversy. Mr. Justice Wood, after observing that the deed was admissible in evidence as an ancient deed, proceeded to discuss the question whether the recital was admissible against the defendant, who did not claim under the deed. He proceeded to say: "The rule is that declarations of deceased persons who were *de jure* related by blood or marriage to the family in question may be given in evidence in matters of pedigree. The qualification of the rule is that, before the declaration can be admitted

in evidence, the relationship of the declarant with the family must be established by some proof independent of the declaration itself. *Monkton v. Atty. Gen.*, 2 Russ. & Myl. 156; *Atty. Gen. v. Kohler*, 9 H. L. Cas. 660; *Rex v. All Saints*, 7 B. & C. R. 789. But it is evident that slight proof of relationship will be required, since the relationship of the family might be as difficult to prove as the very fact in controversy."

An examination of the cases demonstrates, however, that evidence that the defendant is of kin by consanguinity or affinity with some branch of the family to which the pedigree relates is not required in all cases to make the recital of pedigree evidential. Where the recital stands alone, it is undoubtedly essential to its competency that it shall be the statement of a deceased kinsman. But there may be other facts which support the credibility of the fact recited, and which, together with the recital, will be sufficient to prove the fact recited. In the case of *Fulkerson et al. v. Holmes et al.*, just mentioned, the facts relied on to support the recital were these: (1) That the name of the declarant was Samuel C. Young, and the name of the person who by his recital conveyed the property in question to one Holmes was Samuel Young; (2) that the patent to Samuel Young was found among his papers after his death; (3) that Samuel C. Young, as grantee, claimed title for 60 years, which never, so far as appeared, had been questioned or challenged by any person claiming under Samuel Young. In that case the title came through a patent made in 1787 from the commonwealth of Virginia to one Samuel Young. The next deed, executed in 1819, was by a person named Samuel C. Young to Holmes, from whom the title was regularly traced. The question was how Samuel C. Young got title from Samuel Young. The deed from Samuel C. Young to Holmes contained a recital of a grant by the commonwealth of Virginia to Samuel Young, and a recital that Samuel Young, the patentee, had died intestate, and that Samuel C. Young was his only child and heir, and that the title to the land had vested in him. The only fact to show relationship was the similarity of the names, Samuel Young and Samuel C. Young. The other two facts were possession of the patent by Samuel C. Young, and the possession of the property consistent with his grant. In his opinion in *Fulkerson et al. v. Holmes et al.*, supra, Mr. Justice Wood said that the conclusion holding that this recital was proof of the fact that Samuel C. Young was the son and heir of Samuel Young was sustained by the case of *Deery's Lessee v. Cray*, 5 Wall. 795, 18 L. Ed. 653, which he said was directly in point. In *Deery's Lessee v. Cray*, supra, title to land was shown to have been in one William Brent. The next step in tracing title from him was a deed purporting to have been executed by the ex-

ecutors of one Samuel Shaw, from whom the title was derived. This last deed recited that William Brent, Sr., deceased, by his will, constituted the grantors his executors and authorized them to sell the land in question, and that William Brent, who united in the conveyance as executor, was also heir at law of William Brent, Sr. The evidence, aside from this recital, consisted in acts of possession by the grantees under a deed of William Brent as heir and as co-executor. Mr. Justice Miller remarked: "Not a single circumstance is to be found inconsistent with the fact that William Brent, one of the grantees in the deed, was the son and heir of William Brent, Sr. * * * That recitals of this kind in an ancient deed may be proof as against persons who are not parties to the deed, and who claim a right under it, is too well settled to admit now of controversy. Such is the doctrine of this court in *Carver v. Jackson*, 4 Pet. 1, 7 L. Ed. 761, and in *Crane v. Morris*, 6 Pet. 598, 8 L. Ed. 514, *Stokes v. Dawes*, 4 Mason, 268, Fed. Cas. No. 13,477, and *Garwood v. Dennis*, 4 Bin. (Pa.) 314."

Now it is clear that in the mind of Mr. Justice Miller the same kind of testimony that would support a recital of an ancient muniment of title would sustain a recital of pedigree. This appears, not only from the facts of the decided case, but also from the character of the cases cited in support of his conclusion. *Stokes v. Dawes*, supra, so cited, was tried before Mr. Justice Story. It involved the question whether the person from whom title was derived was the son of Rebecca Stokes. A deed was offered, executed in 1765, by this person, which deed purported to convey all the interest of his grandfather, Benjamin Stokes, and of his mother, Rebecca Stokes. It was proved that one of the grantees under this deed had taken and held possession until 1786, and then by his will devised it, from which devise title was regularly traced. Justice Story held that after a possession of 30 years the fact of heirship stated in the deed was a presumptive fact, and left the question of heirship to the jury. The other three cases cited by Mr. Justice Miller did not involve the question of pedigree at all. *Garwood v. Dennis*, supra, contained a recital in an ancient deed of the existence of another deed, and it was held that possession was held presumptively under the recited deed, and that the recital was evidence of the existence of the deed so recited. *Carver v. Jackson* and *Crane v. Morris*, cases concerning the same title, involved the recital of the execution of a lease contained in a deed of release. Mr. Justice Story in the first case remarked that if the transaction be an ancient one, and that if the possession had been long held under such release and is not otherwise to be accounted for, the recital then of itself, under such circumstances, materially fortified the presump-

tion from lapse of time and length of possession of the original existence of the lease. In line with these cases is that of *McKinnon et al. v. Bliss*, decided by the Court of Appeals of New York and reported in 21 N. Y. 206. In that case the will of Sir William Johnson recited that George III had given the testator a patent for a tract of land which Sir William devised, under which devise the plaintiffs claimed title. The New York court held that, as there was no proof of long and undisputed possession in accordance with the title claimed, the recital was not evidence. The cases of *Doe v. Phelps*, 9 Johns. (N. Y.) 169, *Jackson v. Lamb*, 7 Cow. (N. Y.) 431, and *Jackson v. Lunan*, 3 Johns. Cas. (N. Y.) 109, were considered, and it was pointed out that in each of these cases there was evidence of long and undisturbed possession consistent with recited muniment of title.

Respecting the question whether this kind of evidence will support a recital of pedigree, the observation of the Master of the Rolls in *Fort v. Clarke*, 1 Russ. 601, is significant. The bill in that case was filed for specific performance. The title which the purchaser was to take rested upon a recital of pedigree. The recital not having been proved to have been made by a relative, the bill was dismissed. In doing so, however, the Master of the Rolls remarked that, "if evidence of possession had followed and accompanied the recited pedigree, the aspect of the case would have been different." In *Little v. Pallister*, 4 Greenl. 209, it was held that recitals in ancient deeds are good presumptive evidence of pedigree, where no adverse title by inheritance has been set up under the same ancestor, even although the land conveyed by the deeds be the subject of the controversy. This statement was adopted in *Bowser v. Cravener*, 56 Pa. 182. The case of *Jackson v. Russell*, 4 Wend. 546, affirmed 22 Wend. 277, is illustrative of the point that a recital of pedigree may be supported by evidence other than that of the kinship of the declarant. In that case there was testimony, aside from the recital supporting the pedigree, as well as evidence of possession; but there was no testimony showing that the person who made the recital was of kin to any branch of the family, the pedigree of which was in question. The rule, I think, may be regarded as settled that a recital, whether of an ancient deed, will, lease, or pedigree, may be supported by any testimony which renders credible the truth of the fact recited.

The remaining query is whether there is any evidence to support the recitals in the deeds now in question. There has been no actual possession by the grantees of the property conveyed by Condit and wife and Sarah Hastings, because the property was not of a character which called for the exercise of possessory acts. The deeds, however, in

which the recitals occur, have been on record for 80 years. For 80 years, as far as appears, no other persons claiming the interests of Ashbridge and Joseph Ball have set up any rights in this property. There seem to have been conveyances made repeatedly by the grantees, purporting to convey these interests. Under these conditions, I think the recitals are evidence of the facts recited. I also think that, in the absence of anything to contradict these facts, directly or inferentially, any number of verdicts against the probative force of these recitals would be set aside, and therefore the trial justice was warranted in saying to the jury that the plaintiff had proved title.

It is also insisted that the trial justice erred in overruling the question put to a witness called by the defendant. The witness was Mr. McGrath, and the inquiry of him was whether there was a deed standing in the name of Mrs. McGrath for the locus in quo, which deed was not recorded. Mrs. McGrath had at one time been the holder of a legal title to the property, and she had conveyed to Hood, who conveyed to Daniel Rollins. Rollins had executed a declaration of trust, stating that the property was in law and equity, except as to record title, the property of Mrs. McGrath, and stating, further, that it was to be conveyed to her upon her paying to Rollins \$2,500, with interest. This is what occurred at the trial: The question being propounded to Mr. McGrath, who was called by the defendant, "if he knew whether or not there was such a deed," he replied, "I do." This was followed by the question, "Is there?" This question was objected to on the ground that the only way to prove the contents of a deed was by the deed, and the way to get it was by subpoena duces tecum. The counsel for the defendant replied: "I do not know whether there is anything of that sort or not." The court remarked, "The only way to prove the existence of a deed is by the production of the deed," to which the counsel for the defendant replied: "My idea about this is that I am not bound to the line of examination that I would be with an ordinary witness." The question propounded was asked for one of two purposes, either to discover whether a paper existed purporting to be a deed to Mrs. McGrath, or to show title to Mrs. McGrath by parol. For the second purpose the question was, of course, improper. Nor can it be said that the judge was bound to permit the question for the former purpose. The deed, if made, was not made to the witness. The question was merely for the purpose of discovering whether other evidence existed and where it could be found. The question was not asked to explain why certain testimony which the defendant would be expected to produce was not produced. It seems to have been designed merely to put the defendant upon the track of evidence which, if discovered, might thereafter be produced. Be-

sides, the answer to the question as put might have led the jury to misconceive the purport of the answer, and to think that the existence of such a deed was equivalent to proof of transfer of title. I think under the conditions there was not injurious error in the ruling of the judge.

Another reason assigned is that the legal title, if proved in any one, was in the eldest son of Daniel Rollins. The answer to this reason is that there is nothing to show that Daniel Rollins ever had a son, and the stipulation entered into by counsel contains the admission that the plaintiffs are the heirs of Daniel Rollins.

It is assigned as another reason that, inasmuch as the declaration lays the date of the fire as April 1st, it follows that testimony that the fire in question occurred on April 29th was erroneously admitted, over an objection. The date was laid under a videlicet, and the defendant was not required to prove that the fire occurred on the precise date alleged. If, as insisted, this rule works harshly if enforced in actions of this kind, the court could relieve against the harshness only by a continuance of the cause in case of manifest surprise arising from the variance in dates. There was, however, no surprise in this instance; for the cause had been already once tried, and on the former trial the 29th of April was fixed by the witnesses as the date when the fire occurred.

It is further insisted that it was injurious error for the judge to say to the jury that they might assume that the tracks of the defendants were in the middle of the right of way. This observation, we think, was of no material import; for, as the case shaped itself on the trial, it became of no account where the tracks were laid.

The negligence of the defendants was alleged to have been either in leaving its right of way incumbered with combustible materials, which, being first ignited, were the means of spreading the flames to the plaintiffs' property, or in a defective construction or management of the defendants' engines. In either case the jury must have found that the fire was communicated to the plaintiffs' property directly or indirectly from its engines. Upon proof of that fact a liability was imposed upon the defendants, unless they used all practicable means to prevent the communication of fire from their locomotive engines to the plaintiffs' property. This duty included care in the construction and use of such engines, and includes other means within their control by which fire from the engines might be communicated. *West Jersey R. R. Co. v. Salmon*, 39 N. J. Law, 299, 23 Am. Rep. 214. It having been proved, as it must have been, that the fire was communicated from the engines, the company was liable for its consequences, unless it appeared that they had used all practicable means to prevent such communication. *Wiley v. West Jersey R. R. Co.*, 44 N. J. Law, 247. If the

fire began outside of the company's right of way, the company was bound to show a properly equipped and managed engine. If it began inside its right of way, it was equally bound to show a properly constructed and managed engine. It is true, of course, that for a fire kindled inside its right of way it might have been liable, although its engine was perfect in construction and management; but, as a properly equipped and managed engine was one of the practical means for preventing the communication of fire to combustible matter, it was incumbent upon the defendants to show such equipment and management, and a failure to show this left a prima facie case arising from proof of communication of fire from the engine unanswered, whether the fire originated inside or outside of the right of way. Now, it was not shown on the trial whether the engine hauling the cinder train from which the fire had its origin was equipped with all practical means to prevent the escape of fire. The engine was not identified, and the court, without objection, charged that upon that subject the defendant had relieved the jury of difficulty, for that in the argument of the counsel for the defendant he admitted that they had not been able to prove that they used all practical means to prevent the escape of sparks from the locomotive. In this posture of affairs we think it became immaterial whether the fire originated inside, upon, or outside the defendants' right of way.

I am also of opinion that there is no ground for a new trial disclosed by the alleged newly discovered evidence, nor do I think the damages were such as to warrant a new trial.

The rule is discharged.

SCHRAFFT et al. v. FIDELITY TRUST CO.

(Supreme Court of New Jersey. Feb. 15, 1906.)

FRAUD—FALSE REPRESENTATIONS—DECLARATION.

Two counts of a declaration in an action for deceit set up that the defendant, for the purpose of inducing the plaintiff to sell all his stock in a gas company at \$155 per share, falsely represented to plaintiff that defendant was desirous of purchasing all the outstanding stock of the gas company, and that it would pay to the plaintiff any difference between \$155 per share and the highest price it should pay for any other stock of the said company. The counts then state that the defendant, at the time it made this representation, was not desirous of purchasing all the outstanding stock of the gas company, but was desirous of purchasing only such stock as it could purchase by contracts similar to the one made with plaintiff, and such stock as it could buy at the same or less price, and was desirous of purchasing as trustee all those shares for which the holders received a price higher than \$155 each. The counts then state that defendant had bought shares as trustee paying more than \$155 a share.

Held, that the counts stated no cause of action for deceit.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 14.]

(Syllabus by the Court.)

Action by Robert Schrafft and Frederick H. De Bow, executors, against the Fidelity Trust Company. Demurrer to declaration sustained.

Argued November term, 1904, before the CHIEF JUSTICE, and GARRISON, GARRETON, and REED, JJ.

William J. Kearns, for plaintiffs. Samuel W. Beldon and Chandler W. Riker, for defendant.

REED, J. The first count in the declaration sets out that Frederick R. Wolters, in his lifetime, was the owner of 165 shares of the stock of the Newark Gas Company, which the defendant requested Wolters to sell to it; that Wolters told them he was unacquainted with the value of the shares, but that he would sell them for their value when the same could be ascertained and agreed upon between him and the defendant. It sets out that the defendant, knowing that Wolters was unacquainted with the value of the shares, fraudulently represented to Wolters that the defendant was desirous of purchasing all of the outstanding stock of the said Newark Gas Company, and that if Wolters would assign his stock to the defendant for the sum of \$155 a share the defendant would enter into a contract with Wolters and would covenant, in case any of the outstanding stock of the Newark Gas Company should cost the defendant any more than \$155 per share, that the defendant would at once pay to the said Wolters or his representatives such sum of money as would represent the difference between the price so paid and \$155 a share. The narr. further sets out that in consequence of such representation, the said Wolters, believing that the defendant was desirous of purchasing all of the outstanding shares of capital stock of the Newark Gas Company, and that he would receive the highest price paid for any of the other outstanding shares, afterwards entered into an agreement for the purpose aforesaid, and the stock of Wolters was delivered to the defendant. The narr. then sets out that the defendant was not, at the time of making such representation, desirous of purchasing the other outstanding stock of the Newark Gas Company in the manner and form and under the terms set forth in the preamble of the said contract; but, on the contrary, the said defendant, before and at the time of the said false representations, was preparing to acquire the said outstanding stock in a manner other than that set forth in the preamble of the contract, as defendant well knew; that the intent of said agreement and covenants was, not that Wolters should receive for his shares a sum equal to the highest price to be paid by the defendant for any other of the outstanding shares, but, as the defendant knew, the intent was to enable the defendant to defraud Wolters by binding him to a covenant

which in no way interfered with the fraudulent designs of the defendant. The count then sets out that in the execution of said fraudulent designs the defendant acquired, either in its own right or as trustee, all of the capital stock of the said gas company, except 200 shares, and, for the purpose of defrauding Wolters, by means of the agreement into which Wolters had been fraudulently induced to enter by the false representations of the defendant, the defendant acquired in its own right the shares of those stockholders who it was willing to trust to an agreement similar to the one which Wolters had been induced to enter into or were willing to sell at the same or less price than that set forth in the said agreement, and acquired in trust the shares of those stockholders, who knew the value of the shares and would not sell without having received therefor full consideration; that the defendant bought, as trustee, 720 shares from Zabriskie and 50 shares from Fleming; that Zabriskie received \$308 a share and Fleming \$305 a share. This count further states that Wolters, by the means set forth, lost the value of the shares over and above the sum of \$155 a share. The second count sets out the same representations as those contained in the first count, the same contract, and the delivery of the stock. It then charges that the defendant was not desirous of purchasing all the outstanding stock of the Newark Gas Company, but was desirous only of purchasing such stock as it could by like false representations and pretenses, and such stock as it could purchase at the same or less price, and it was desirous of acquiring as trustee all those shares of stock for which the holders received a higher price than that paid by the defendant to the plaintiff. It then sets out a purchase by the defendant as trustee at a higher price. The first count differs from the second count in that it sets out a desire of the defendant to acquire as trustee or in exchange for other securities, all those shares for which the holders received a price higher than \$155 a share. The third count is substantially the same as the second. There is a demurrer to each of the three counts.

The first count is defective, in that it does not charge with certainty what the false intention of the defendant was. It charges that the defendant was not desirous of purchasing the other outstanding stock in the manner and form and in the terms set forth in the preamble of the said contract under its seal as aforesaid; but, on the contrary, was preparing to acquire such stock in a manner other than that set forth in the preamble of the craftily worded contract. There is no contract set out in, attached to, or made a part of the declaration by reference thereto in the declaration. What is meant by the preamble to the contract does not appear. For this reason alone there

must be judgment for the defendant upon the demurrer to the first count.

The second and third counts first charge that the defendant, for the purpose of inducing the plaintiff to sell all its block of gas stock at a certain price, represented that it was desirous of purchasing all the outstanding stock of the Newark Gas Company, and that it would pay the plaintiff a price equal to the highest price which the defendant should pay for any other of the said stock. The counts then charge that the defendant was not desirous of purchasing all the outstanding stock of the Newark Gas Company, but was desirous only of purchasing such stock as it could purchase by contracts similar to that made with the plaintiff, and such stock as it could buy at the same or less price, and was desirous of purchasing as trustee all those shares of stock for which the holders received a higher price. The counts then charge that the defendant did not buy for itself all the outstanding shares of stock, but bought only such as it could buy for the same or less sum than that paid to the plaintiff, and bought, not for itself, but as trustee, such stock as cost more than the price paid to the plaintiff. If it be assumed that the representations so charged stated a condition of mind in the plaintiff equivalent to an intention to purchase for itself all the stock, the question would arise whether the falsity of that statement, followed by a failure of the defendant to carry out that intention to the injury of the plaintiff, lay a foundation for an action of deceit. It seems to be settled that the false statement of an intention may constitute a fraud for which the courts will grant relief. It is true that Mr. Kerr observes: "As distinguished from the false representation of a fact, the false representation as to a matter of intention, not amounting to a fact, though it may have influenced the transaction, is not a fraud at law; nor does it afford a ground for relief in equity." Kerr on Fraud and Mistake, 88. On the other hand, Mr. Bigelow says: "That to profess an intent to do or not to do, when a party intends the contrary, is as clear a case of misrepresentation and of fraud as could be made." Bigelow on Fraud, 484. The cases cited by Mr. Kerr in support of his text, when analyzed, do not support his observation. The latest case of which I am aware in the English courts is that of *Eddington v. Fitz Maurice*, 29 Ch. Div. 459. This was an action to recover money paid through the influence of a misrepresentation through a prospectus issued by the directors stating that the object of the company was to spend the money raised for certain purposes, when in fact the purposes stated were not the real purposes. The Court of Appeals held that the misstatement of the intention of the defendant was a misstatement of fact, and the plaintiff was permitted to recover the money

paid through the influence of the misrepresentation. Then there is a line of cases holding that, if one purchases property on credit with an intention never to pay for it, he is guilty of fraud. In none of these cases, however, with one exception, did the question arise in an action for deceit. They were all cases resting upon the right to rescind, and to recover the money paid and property delivered on the faith of false representation of intention. In a note to Pollock on Torts, p. 242, it is said that whether an action for deceit would lie for such a false representation of intent is a speculative question. The exceptional case to which I have alluded is *Swift v. Rounds*, 19 R. I. 527, 35 Atl. 45, 33 L. R. A. 561, 61 Am. St. Rep. 791, in which it was held that an action for deceit, for a false statement of intention to pay for goods sold on credit, would lie.

A further discussion, however, of what would have been the situation had the plaintiff set out a representation by the defendant that it intended to purchase for itself all the stock of the gas company, and that it would pay as much to the plaintiff as it was compelled to pay to any other stockholder, and had then charged that the defendant had no intention, when its declaration was made, to purchase all the stock for itself, and had purchased parts of it, as trustee, at a higher price, would be profitless. Such discussion is out of place, because the representation stated in the counts falls short of that just indicated.

The statement that the defendant was desirous of purchasing all the stock does not amount to a statement that the defendant intended to buy all the stock. Nor does the statement of a desire to buy all the stock, when coupled with a promise to pay to plaintiff any excess over \$155 a share which it should pay any other stockholder, signify that the defendant intended to buy all the stock of the gas company. The statement only indicated that the desire of the defendants to purchase was such as might lead it to purchase at a price greater than that paid to the plaintiff. If the defendant had bought for itself at a price higher than \$155 a share, the contingent promise would have become an absolute promise by the happening of the contingency. Nevertheless the defendant was not bound to buy such outstanding stock at any price which might be asked for it, nor, indeed, was it bound to buy at all. The pleader's view of the scope of the representation is shown by his allegation of its falsity. The counts do not merely assert that the representation was false, but state in what way it was false. The pleader does not content himself with an assertion that the defendant was not desirous of purchasing all the stock, but sets out what its desire really was. He says it was to buy either by contracts similar to the contract made with the plaintiff, and to buy as

trustee whenever it could not buy for itself at \$155 or less per share. It seems entirely clear that a subsequent contract to pay another stockholder the same amount as it had agreed to pay plaintiff would not be a violation of the alleged expressed intention to buy all the stock. If, therefore, the intention to do this existed at the time the representation was made, it did not exhibit any falsity in the representation, even if the representation was of an intention to buy all the stock.

But, as already observed, the expression was not so comprehensive. It did not state an intention to buy stock at any price, however great, necessary to obtain it. If the price asked was in excess of what the defendant was willing to pay, there was no representation that it would buy for itself. It follows, therefore, that there was nothing in the representation which destroyed the ability of the defendant, as agent or trustee, to buy for another purchaser who was willing to pay the excessive price. If, therefore, the defendant represented that it was desirous of buying all the gas stock, and if its real intention was that set out in these counts, nevertheless the pleader exhibits no legal injury to the plaintiff resulting from defendant's conduct as charged in the second and third counts.

There should be judgment for the defendant upon each demurrer.

STATE v. HILL.

(Supreme Court of New Jersey. Feb. 15, 1906.)

1. INDICTMENT—DUPLICITY.

A defendant can be charged in the same count of an indictment with uttering and also with exposure to the view of another an indecent picture, in violation of section 53, p. 808, of the Acts of 1898.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 337.]

2. OBSCENITY — INDECENT PICTURES — EVIDENCE.

Evidence of either uttering or of exposing to the view of another of indecent pictures will support a general verdict of guilty upon such a count.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Obscenity, § 5.]

3. SAME.

Where it appears that the defendant took a person into a room in which there was a book containing indecent pictures, and pointing to the book said, "There they are," whereupon the person opened the book and inspected the pictures, *held*, that the evidence was sufficient to support the charge of exposing the pictures to the view of another; *held*, that the evidence did not support the charge of uttering the pictures.

(Syllabus by the Court.)

Error to Court of Quarter Sessions, Essex County.

George Hill was convicted of crime, and brings error. Affirmed.

Argued June term, 1905, before the CHIEF

JUSTICE, and FORT, PITNEY, and REED, JJ.

Thomas S. Henry, for plaintiff in error.
Henry Young, for the State.

REED, J. This writ of error brings up a judgment entered upon a conviction of the plaintiff in error for a violation of section 53 of the Crimes Act of 1898 (P. L. 1898, p. 808). This section provides that any person who, without just cause, shall utter or expose to the view of another, or have in his possession with intent so to utter or expose to view or to sell the same, any obscene or indecent book, pamphlet, picture, etc., shall be guilty of a misdemeanor. The indictment charged that George Hill did without just cause utter and expose to the view of two persons two obscene pictures.

The counsel for the plaintiff in error asserts that the indictment is defective in charging two distinct offenses, namely, the offense of uttering and also the offense of exposing to view two indecent pictures. If this insistence possessed any substance, it is urged at a stage of the case too late to be cognizable by this court. *Larison v. State*, 49 N. J. Law, 258, 9 Atl. 700, 60 Am. Rep. 606. But this objection is entirely without substance. The offense of uttering and that of exposing to view could each have been charged in a distinct count. But it is not essential to the validity of the indictment that they should have been so charged. The rule is entirely settled that, if a statute makes it a crime to do this or that, mentioning several things disjunctively, the indictment may, as a general rule, embrace the whole in a single count; but it must use the conjunctive "and" where "or" occurs in the statute, else it will be defective as being uncertain. *Bish. Cr. Pro.* § 581; *People v. Davis*, 56 N. Y. 95-101; *Comm. v. Grey*, 2 Gray, 501, 61 Am. Dec. 476; *State v. Price*, 11 N. J. Law, 203-215. There are doubtless instances where the offenses disjunctively set out in a statute are so dissimilar in substance that a separate count for each may be necessary. But the offenses created by the statute now under consideration are not of this kind. The acts mentioned in section 53, *supra*, all belong to the same transaction, each one of which may be considered as representing a phase of the same offense. They could therefore, with entire propriety, be included in one count. *State v. Bartholomew*, 69 N. J. Law, 162, 54 Atl. 231.

Our attention is next directed to the fact that there was a general verdict of guilty. It is insisted that there was no evidence sufficient to support a verdict for either uttering or exposing to view; and it is further pressed that, if only an exposure to view is proven and not an uttering also, the offense charged is unproven, and judgment should be reversed. The testimony supporting the charges was this, namely: The defendant, Hill, was

in a room where there was a book lying upon a bureau. In the book were the indecent pictures. Hill pointed to this book and said to Deering, whom Hill had previously promised to show some pictures: "There they are. There are the pictures on the bureau. When you get through with them turn the gas down low." Deering went over to the bureau, or table, picked up the book and looked at the pictures. In the meantime Hill had gone into another room, but returned just as Deering, after examining the pictures, started to leave the room. Deering then asked Hill what he would charge for one of the pictures. Hill said that he would not sell it. If the jury believe this testimony, it could draw the conclusion that Hill exposed to the view of Deering the pictures, within the meaning of the statute. It is true that Hill did not himself open the book in which the pictures were concealed. But he directed Deering to where the pictures were, and invited him by his words and conduct to inspect them. Hill was the exhibitor on this occasion. If he had taken Deering into a gallery of lewd pictures each covered by a veil, and had told Deering that there were the pictures for his inspection, it would matter nothing that Deering himself pulled aside the veils in making his examination. Hill would still be the showman. He would be the one who, in the language of the statute, exposed the pictures to view. So, in the present case, he exposed the pictures in the book as obviously as if he himself had opened the book and thus exhibited the pictures to the visitor. While there was thus evidence of an exposure to view, we are of the opinion that there was not evidence of an uttering of the pictures within the meaning of the statutory language. The word "utter" means to put out, to pass off. There was no attempt by Hill to do this with these pictures; to the contrary, he refused to part with one of them. It is true that there may be an uttering of forged paper or counterfeit money without an actual tradition of the paper or the money. Such an uttering rests upon a fact which cannot exist in connection with the subject-matter of the present statute. The fact upon which an uttering without delivery may exist respecting spurious money or paper is that the money or paper may be asserted to be genuine when in fact false. When the assertion is made for the purpose of deception and to gain something by leading another to believe in the genuineness of the paper or money, it amounts to an uttering. In the language of Mr. Bishop: "An attempt to cheat by such an instrument [forged instrument] is an indictable attempt. This attempt is called in law an uttering." 2 Bish. Cr. Law, § 605. It is at once perceived that there was nothing in the exhibition of the pictures by Hill which was of the nature of a cheat. There was no assertion that the pictures were not what they appeared to be. Indeed, the stat-

ute was not dealing with cheats. Those utterings which consist, not in passing away, but in an attempt to use paper or money as a means of deceit, have no analogy with the utterings of indecent pictures. There being no delivery of the pictures or offer to transfer them, the charge of uttering them was not proved. But it cannot be conceded that, because there was evidence to support a conviction for exposure to view only, it follows that there must be a reversal of the judgment entered on the general verdict of guilty. The general rule is that, when an offense may be committed by doing one of several things, the indictment may in a single count group them together and charge the defendant with having committed them all, and a conviction may be had on proof of any one of these things without proof of the commission of the others. 4 Elliot, on Ev. § 2714; Roscoe's Cr. Ev. 763; 3 Russ. on Cr. 105; Reese v. Middlehurst, 1 Burrow, 399; Reese v. Hunt et al., 8 Camp. 583, 584; People v. Rynders, 12 Wend. 480; Harris v. People, 64 N. Y. 148; Bork v. People, 91 N. Y. 5-13; Comm. v. Grey, 2 Gray, 501-508, 61 Am. Dec. 476; Comm. v. Morgan, 107 Mass. 199. The verdict was good, although supported only by evidence of the exposure of the pictures to the view of Deering.

It is objected in the brief of the counsel for the plaintiff in error that the trial judge misstated the evidence in his charge to the jury. The error consisted in the statement to the jury that the state's witnesses had sworn that the defendant, Hill, opened the book and showed the pictures to Deering. This error is not specified among the causes for reversal; the whole record being certified. But it was not an injurious error. The question was whether Hill showed the pictures. In deciding this, it was immaterial whether Hill opened the book or invited Deering to do so. Deering's testimony was equally credible whether he swore to the one or the other of these facts.

There is no other specification requiring remark.

The judgment should be affirmed.

McGUINNESS v. McGuinness.

(Court of Chancery of New Jersey. Feb. 13, 1906.)

DIVORCE—DECREE—ALIMONY—MOTION TO VACATE.

A wife filed a bill against her husband, praying a divorce from bed and board for his extreme cruelty, and also praying the custody of children of the marriage and alimony, etc. The subpoena issued thereon was returned without service, and an order of publication was made, notice of which was served on defendant in an adjoining state. Defendant not having appeared or made defense, the cause was referred to a special master, who reported that the complainant had established by proofs, the allegations of her bill. Thereupon a decree was made for the divorce sought, awarding the custody of the children and fixing the

amount of alimony. Property of defendant in this state was afterward sequestered to enforce the decree. Defendant thereafter filed a petition in the cause, praying that the whole decree should be vacated and set aside and that the complainant's bill should be dismissed, on the ground that he had not been served with process within this state.

Held, that he is not entitled to any relief upon his petition.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 535.]

(Syllabus by the Court.)

Bill by Mary Ellen McGuinness against Thomas McGuinness for divorce. On rule to show cause why service of subpoena and orders for alimony and counsel fees should not be set aside. Discharged.

Clarence Kelsey, for complainant. Howard Carrow, for defendant.

MAGIE, Ch. On July 7, 1899, Mary Ellen McGuinness filed her bill in this court against her husband, Thomas McGuinness, praying for a divorce a mensa et thoro on the ground of extreme cruelty, for the custody of three of the four children of the marriage, and for the support of herself and the children whose custody she sought. A subpoena was issued upon the bill, returnable August 1, 1899, and was returned served by the sheriff of Hudson county. On the 7th of August, 1899, an order, returnable on August 14, 1899, was made, to show cause why an order should not be made for alimony pendente lite and counsel fees. On the hearing of that order a solicitor of this court appeared specially for the defendant, for the purpose of objecting to the sufficiency of the service of the notice of that application. Upon the proofs it was found that the service was good and sufficient for the purpose of the application for alimony and counsel fees, and an order was made directing payment. That order was made on September 11, 1899. On January 15, 1900, an order was made, upon the motion of a solicitor and counselor of this court, appearing for the defendant specially for that purpose, and upon the consent of the solicitor and counsel for the complainant, that the subpoena and return of the sheriff, and the order for temporary alimony and counsel fees, and all proceedings based thereon, should be set aside. Thereupon a new subpoena was issued, tested January 15, 1900, which was returned by the sheriff of Hudson county, with an affidavit of nonresidence, and on February 7, 1900, the usual order of publication was made. Notice of this order was shown to have been personally given to the defendant on February 7, 1900, in the manner required by the statute and the rules of court. The defendant having interposed no defense, the matter was referred to a special master. He reported on January 20, 1901, that the complainant had established her right to the relief she sought. On another and supplemental order the same mas-

ter made an additional report, on March 13, 1901, upon the faculties of the defendant. Thereupon, on May 13, 1901, a final decree was made, decreeing a divorce from bed and board, giving the custody of the children to the complainant, and fixing the sum which should be paid for the future support of complainant and the three children. A certified copy of the final decree, and of the taxed bill of costs, was served on the defendant personally, on July 9, 1901, and a demand was made upon him for the payment of the costs and the amounts ordered to be paid by the decree, and he refused to comply therewith. Thereupon, on September 27, 1901, an order of sequestration was made, and John S. McMaster, one of the masters of this court, was appointed sequestrator. It appears from the records and files of this court that he has taken charge of some of the defendant's real estate, and has received the rents thereof under the authority of his appointment.

On February 24, 1902, the defendant filed a petition in the cause. It was signed by him and a firm of solicitors of this court. The petition set forth the proceedings, the final decree, and order of sequestration, and averred that the defendant was not, when the bill was filed, a resident of the state of New Jersey, and had not been served with process within this state, and for that reason, charged that not only the order for sequestration, but also the final decree should be vacated and set aside. Its prayers were that the enrollment in the cause be opened, that the final decree and all orders in the cause be opened and set aside; that the subpoena and service, and the writ of sequestration be set aside; that the complainant's bill be dismissed, and that the petitioner should have further relief. The petition was accompanied by affidavits. Upon this petition, an order to show cause why its prayers should not be granted, was advised by a vice chancellor upon the motion of defendant's solicitor and counsel. The order was returnable on March 3, 1902, and service of the order was directed to be made. For some unexplained reason, this order was not brought to hearing, and no service, as required, appears. The matter remained in this condition until April 3, 1905, when the present solicitor of defendant applied for, and obtained, an order substituting him for the firm of solicitors previously appearing for defendant, and thereupon, on his motion, another order to show cause why the prayers of the petition of February 24, 1902, should not be granted, was advised by another vice chancellor. That order was returnable on May 1, 1905. The hearing was adjourned to May 9, 1905, and it was then agreed by counsel that it should be heard by briefs, which were furnished about July 1, 1905. On the part of the defendant, no affidavits, other than those appended to the

petition, have been presented. On the part of the complainant no affidavits have been presented. From these recitals, it is obvious that the prayers of defendant's petition are altogether too broad. In respect to some of them, there is not disclosed any ground on which they can be granted. By the files and records in the cause, as well as by the admissions of defendant's petition, it appears that the defendant was notified of the pendency of his wife's suit for divorce on the ground of extreme cruelty, in the manner which, under our statute and rules, gave jurisdiction to this court to decree a divorce from bed and board for that cause. He was afforded an opportunity to contest her claim if he desired to do so. He failed to present any defense. Thereupon adjudication was made that the cause alleged was proved, and the divorce asked was decreed.

There can be no question of the power of this court to make such a decree. *Felt v. Felt*, 59 N. J. Eq. 606, 45 Atl. 105, 49 Atl. 1071, 47 L. R. A. 546, 88 Am. St. Rep. 612. The jurisdiction has been exercised in innumerable cases, from the time of the earliest divorce laws, and no serious question has ever been raised thereon. The power to make such decrees, upon such notice to a defendant, has been declared by our Court of Errors to be conferred upon this court, and it has been recognized as the public policy of the state on the subject of divorce. A résumé of the legislation on the subject is contained in the opinion of Vice Chancellor Pitney in *Wallace v. Wallace*, 62 N. J. Eq. 509, 50 Atl. 788. When that case came before the Court of Errors, it was there declared that, upon our statute, and service of notice of the suit out of the state of New Jersey, a decree of divorce could be made having extraterritorial force. 65 N. J. Eq. 361, 54 Atl. 433. Nor do I think there is any possible doubt as to the jurisdiction exercised in this case in making a decree respecting the children of the marriage. When courts are empowered to separate husband and wife and to break up the family, in my judgment, it necessarily follows that power is given to make provision for the custody of the offspring of the marriage thus interfered with. By section 19 of the divorce act of 1874 (2 Gen. St. p. 1269) the Legislature empowered this court, when it decreed a divorce to take order adjudicating upon the care and maintenance of the children, and still broader powers are now conferred by section 19 of the present divorce act (P. L. 1902, p. 507). Jurisdiction to decree a divorce a mensa et thoro was invoked by complainant's bill, and in my judgment, a decree respecting the custody of children of the marriage, may be supported upon the jurisdiction to decree the divorce and as an incident thereto.

Since the decision of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, it has been frequently held that a decree awarding alimony cannot be effectually made against a defendant

not served with process within the jurisdiction of the court making the decree. It has been declared in this court that while a decree for alimony, which was purely a decree in personam, would be subject to the doctrine of *Pennoyer v. Neff*, yet it might be otherwise as to such a decree, if based on the control of the matrimonial status, by a court having jurisdiction over that status. *Hervey v. Hervey*, 56 N. J. Eq. 166, 38 Atl. 767. That was a case in which a wife sought a decree against a husband for support and maintenance, under the twentieth section of the divorce act, and an interlocutory order had been made for temporary alimony. The defendant, not having been served with process, entered a special appearance to move, and did move, to set aside that order. That motion was denied. Upon an appeal from such denial, the order therefor was reversed, upon the ground that, as the defendant had not been brought in by process served, nor proceeded against by publication and notice as a nonresident, no jurisdiction had been conferred by the twentieth section, to make an order for alimony pendente lite on the ground that the defendant owned property in New Jersey. 56 N. J. Eq. 424, 39 Atl. 762. In a subsequent case, a decree for divorce and alimony had been made upon service of a notice of an order or publication, upon the defendant, in the state of his residence, and the defendant, having come into this state, had been seized and held to bail on a ne exeat. The defendant, having moved to discharge the writ and vacate the order for bail, the motion prevailed on the ground that the decree in such a case was purely in personam, and fell within the doctrine of *Pennoyer v. Neff*. *Elmendorf v. Elmendorf*, 58 N. J. Eq. 113, 44 Atl. 164.

It will be observed that the case last referred to is one in which the relief primarily sought, was the complete abolition of the marriage relation between the parties. Alimony was sought as an incident of that kind of relief. Among the numerous cases in which the subject I am now considering has been discussed, and in which the doctrine of *Pennoyer v. Neff* has been applied to judgments or decrees for alimony, I have failed to find any in which the primary relief did not involve the complete severance of the marriage relation. The case before me is of a different character, and the relief sought by this bill of a less stringent nature. It seeks a divorce from bed and board for extreme cruelty. Under the divorce act then in force, this court was empowered, for such a marital offense, to decree a divorce from bed and board either forever thereafter, or for a limited period, as should seem just and reasonable. Upon such decrees, jurisdiction is conferred on the Chancellor to make orders for the maintenance of the wife and children, and to enforce such orders upon the husband's property which can be reached by sequestration. Decrees

of divorce from bed and board do not involve any severance of the marital relation. The parties remain husband and wife. The wife retains her right of dower in the lands of the husband. The husband will not thereby be deprived of curtesy in his wife's lands. Alimony upon such a separation is merely the enforcement of the duty which the husband owes, to support her who is still his wife, and his family. Mr. Nelson declares that an allowance on a decree of separation is equivalent to the award of alimony by the ecclesiastical courts of England upon a decree of divorce a mensa et thoro. 2 Nelson on Divorce, § 902. The distinction between alimony in the two cases seems recognized in the opinion of Mr. Justice Pitney in *Lynde v. Lynde*, 64 N. J. Eq. 736, 750, 52 Atl. 694, 58 L. R. A. 471, 97 Am. St. Rep. 692. In the case of *Bunnell v. Bunnell* (C. C.) 25 Fed. 214, which is recognized as a leading case on the subject of the application of the doctrine of *Pennoyer v. Neff* to decrees for alimony, Mr. Justice Brown suggested that if the state permitted the wife to proceed in her claim for alimony as upon an inchoate lien, the proceeding might be considered as one in rem, and a decree upon a service by publication might be sustained. If it were necessary to the decision of the present motion, I should hold that, considering the peculiar character of this proceeding which leaves the marital relation unbroken and recognizes the right to enforce the husband's duty of support of his wife and family, and the provisions of our statute for enforcing a decree which fixes the amount of such support, upon the husband's property in this state, this decree for alimony, although perhaps not enforceable in another state, is enforceable here.

There is another ground, however, upon which the relief sought by defendant's petition must be denied. It is well-settled doctrine that if a defendant who claims that the court in which the suit is pending has not acquired jurisdiction over him, attacks the jurisdiction, even under a special appearance, he will be held to have submitted himself to the jurisdiction, if under such appearance he seeks some relief upon the merits. The doctrine is recognized by the text-books and illustrated by many cases, the leading case being that of *Livingston's Ex'r v. Story*, 11 Pet. (U. S.) 351, 9 L. Ed. 746. It was adopted and applied by our Court of Errors to a case where the defendant answered in full on the merits, although he had attempted to reserve an objection to the jurisdiction, which he presented by a plea to the jurisdiction, which had been overruled. *Poihemus v. Holland Trust Co.*, 61 N. J. Eq. 654, 47 Atl. 417. The reason of this doctrine is equal-

ly applicable to proceedings to challenge the validity of a judgment on the ground that jurisdiction of the defendant had not been acquired. If, under such proceedings, he ask other relief against the judgment on the merits, he will be held to have submitted himself to the jurisdiction. In *Crane v. Penny* (D. C.) 2 Fed. 187, Judge Choate, in dealing with an application of a defendant to vacate a judgment taken by default, which included other relief and a stay pending the application, held that the defendant had thereby submitted himself to the jurisdiction, so that all defects therein were cured. In *Burdette v. Corgan*, 26 Kan. 102, Judge Brewer held that when a party against whom a judgment has been entered, files a motion to vacate it as void, and the motion is based on nonjurisdictional as well as jurisdictional grounds, he thereby enters a general appearance. The doctrine is illustrated by many other cases. *Grantier v. Rosecrance*, 27 Wis. 488; *Anderson v. Coburn*, 27 Wis. 558; *Alderson v. White* (per Dixon, C. J.) 32 Wis. 308; *Blackburn v. Sweet*, 38 Wis. 578; *Dikeman v. Struck*, 76 Wis. 332, 45 N. W. 118; *Henry v. Henry* (S. D.) 87 N. W. 522; *Curtis v. Jackson*, 23 Minn. 268; *Yorke v. Yorke* (N. D.) 55 N. W. 1095; *Pry v. Han. & St. Jos.*, 73 Mo. 123.

Defendant's application, which is to vacate, not merely the decree for alimony and its incidents, but the whole decree, although it appears that under the order of publication and service of notice thereof the court acquired jurisdiction to decree divorce and custody of children, must be denied. I come to this conclusion more readily because the case shows that, while the matrimonial domicile was in this state, defendant was guilty of such extreme cruelty as justified his wife seeking the relief afforded by our statute; that although defendant left the state in time to avoid service of process, yet he went only to an adjoining state, and was served there with notice of the pendency of her suit; that although he thus knew of complainant's claim, he made no defense, and after decree and sequestration, waited nearly a year before he filed this petition and procured a rule to show cause, which for three years he failed to bring to hearing, although his property in this state, ample to afford a support for the wife he had ill-treated and the children she has to support, was under sequestration, and has only after this lapse of time and the changed circumstances come forward to interpose this technical defense.

As I think defendant is not entitled to any relief, his rule to show cause will be discharged, and his petition will be dismissed.

SIEGMAN v. KISSEL et al.

(Court of Chancery of New Jersey. Feb. 10, 1906.)

CORPORATIONS—UNAUTHORIZED PAYMENT OF DIVIDENDS—LIABILITY OF DIRECTOR.

The corporation act (P. L. 1896, p. 286) provides that no corporation shall make dividends except from the surplus or net profits, and that directors, under whose administration a violation of the statute may occur, shall be liable to the corporation and to its creditors. *Held* that, where a director of a corporation voted for the payment of a dividend, knowing that it was to be paid from capital, the mere fact that a committee appointed by a new board of directors, and the board itself, and a majority of the stockholders, deemed an action against the director in question "inexpedient," was no bar to the maintenance of an action against him by a stockholder.

Suit by Richard Siegman against Rudolph H. Kissel and others. Heard on bill and plea and motion to overrule plea. Motion granted.

R. V. Lindabury, for complainant. James E. Howell, for defendants.

STEVENS, V. C. The question raised by the plea has been very recently twice considered: First, by Vice Chancellor Garrison, in *Groel v. United Electric Company* (N. J. Ch.) 61 Atl. 1061; and, then, by Judge Lanning, in *Siegmán v. Electric Vehicle Company* (C. C.) 140 Fed. 117. In both cases the plea was overruled. The case in the United States Circuit Court is identical with the one in hand. Were it not that an appeal is to be taken, I should not think it necessary to write an opinion. As it is, I shall state, as briefly as possible, the ground upon which I think the suit is sustainable.

The complainant bases his case upon section 30 of the corporation act (P. L. 1896, p. 286), which provides that no corporation shall make dividends except from the surplus or net profits arising from its business, and that in case of a violation of the provision the directors under whose administration the same may happen "shall be jointly and severally liable at any time within six years after paying such dividend to the corporation and to its creditors in the event of its dissolution or insolvency." In *Appleton v. American Malting Co.*, 85 N. J. Eq. 375, 54 Atl. 454, the Court of Appeals construed this provision and held that it gave a remedy, not only in cases of insolvency or dissolution, but also in cases where the company was going and solvent. The bill alleges that on April 1, 1889, the board of directors of the Electric Vehicle Company declared a dividend of 8 per cent. on the preferred stock and 2 per cent. on the common stock, and that these dividends aggregated \$184,800, and that on June 30, 1899, they declared a further dividend of \$140,000. It then alleges that the defendant Rudolph H. Kissel, a director of the company, at meetings of its directors, voted to declare said dividends, and that the same, to the knowledge of Kissel,

were declared and paid, not out of the surplus or net profits, but out of capital. Under the decision above cited Kissel thus became liable to make them good. Now the plea does not deny these allegations. What it sets up, and all that it sets up, is this: That after the declaration and payment of these dividends an entirely new board of directors was chosen; that such board, after being requested to sue, appointed a committee to examine and report upon the matter; that the committee reported against bringing suit, and that the board, after examination, approved the report and adopted a resolution that the company should not sue unless a majority in interest of the stockholders, other than the former directors, so ordered; that at the demand of complainant a meeting of stockholders was called, at which complainant was represented, and that by a vote of 124,759 to 650 it was resolved by them that no just ground for suit against the former directors existed, and that, it not being expedient or for the interest of the company to bring suit, the action of the directors in refusing to do so was ratified and approved. This plea does not deny that the dividends in question were declared and paid out of capital, and that Kissel knew that they were; consequently, it does not deny that there was a clear cause of action against Kissel for \$324,800. All that it sets up in excuse or justification for not bringing suit is that the present directors and a large majority of the stockholders now think that no just ground exists therefor, and that it is not for the interest of the company to prosecute; in other words, admitting that, under the statute, Kissel is liable to refund the money, it is not thought fair to him or expedient for the company to enforce the liability. Now, as I understand the decisions, and as Judge Lanning, on an identical state of facts, decided, neither of these reasons is good as against dissenting stockholders.

In *Dumphy v. Traveler Newspaper Association*, 146 Mass. 495, 16 N. E. 428, the court said that it is not always best to insist upon all one's rights; that a corporation acting by its directors or by vote of its members may properly refuse to bring a suit which one of its stockholders believes should be prosecuted; and that in such case the will of the majority must control, but they add, "the court cannot interfere with the management of corporations in matters which are properly within their discretion, so long as their discretion is fairly exercised."

In *Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U. S. 455, 23 Sup. Ct. 167, 47 L. Ed. 256, Mr. Justice Brewer says: "This court will examine the bill in its entirety and determine whether under all the circumstances the plaintiff has made such a showing of wrong on the part of the corporation or its officers and injury to himself as will justify the suit. The directors represent all the stockholders and are presumed to act honestly and accord-

ing to their best judgment for the interest of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder or, at his instance, submitted for review to a court of equity. The directors may sometimes properly waive a legal right vested in the corporation, in the belief that its best interests will be prompted by not insisting on such right. They may regard the expense of enforcing the right or the furtherance of the general business of the corporation in determining whether to waive or insist upon the right. As said in *Dodge v. Woolsey*, 18 How. (U. S.) 344, 15 L. Ed. 401: 'The circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought.'

In the *Corbus Case* the relief was denied; in the *Dodge-Woolsey Case* it was granted under the following circumstances: Woolsey was a shareholder in the Branch Bank of Cleveland. The bank was incorporated under an act of the state of Ohio, which provided that it should be taxed in a certain mode. It was subsequently sought to impose a greater tax. The contention on behalf of the bank was that the first act constituted a contract on the subject of taxation which the subsequent legislation impaired, and such was the view taken by the Supreme Court. The directors, it was alleged in the bill, had been requested by Woolsey to take measures by suit or otherwise to assert the franchises of the bank against the collection of the unconstitutional tax, and, while admitting the illegality of the tax, had refused, "because of the many obstacles in the way of testing the law in the courts of the state." Although the case was devoid of any element of ultra vires, fraud, or oppression, the Supreme Court held that the suit was maintainable; in other words, the constitutional right to protection against the imposition of a further tax being adjudged, the stockholder was permitted, as the representative of the company, to override the judgment of the directors on the question of the expediency of testing the right in the courts.

This case appears to me to control the decision of the case in hand. We must, as the pleadings stand, regard the right of recovery against Kissel to be clear, for, as I have said, it is expressly averred in the bill that he knew that the dividends were all paid out of capital, and, notwithstanding this knowledge, voted for their payment. This makes a perfectly clear case against him, however the matter may stand as to the others. The fact that a committee of the directors may have thought that, as to the liability of the directors generally, in office when the dividends were declared, there might be some doubt or question, is immaterial; for, taking the facts to be as al-

leged by the bill and not denied by the plea, this doubt does not extend to Kissel. Then, the only other ground assigned for not suing is found in the bare statement that suit is inexpedient. But if the circumstances of each case are to determine the question of jurisdiction, then, the right being clear, it ought to appear why it is inexpedient. If Kissel be solvent, and there is no intimation of insolvency, and if the right to recover so large a sum (\$324,000) be undoubted, some good reason should be given for not suing. But no reason whatever is given. The case, therefore, as it now stands, must be regarded as falling rather within the ruling of *Dodge v. Woolsey*, 18 How. (U. S.) 344, 15 L. Ed. 401, than within that of *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, and *Corbus v. Mining Co.*, 187 U. S. 455, 23 Sup. Ct. 157, 47 L. Ed. 256.

SNEDAKER v. SNEDAKER.

(Court of Chancery of New Jersey. Jan. 30, 1906.)

DIVORCE — DESERTION — EVIDENCE — SUFFICIENCY.

In divorce by the wife, her testimony that defendant left her, stating that when he got work he would send for her, and that he afterwards obtained work but failed to do so, did not establish a desertion at the time of the breach of the promise, where the promise was shown only by her uncorroborated evidence.

Suit for divorce by one Snedaker. Confirmation of master's report in favor of plaintiff denied.

Alfred F. Stevens, for petitioner.

MAGIE, Ch. Having doubted whether the report in favor of the relief sought by this petition was supported by the evidence, I have heard counsel, and reconsidered the proofs. The petitioner's evidence as to the circumstances under which defendant left her is wholly uncorroborated. She states, however, that he told her he was going to Far Rockaway to get work, and promised to send for her when he got work. If her uncorroborated evidence be given probative force, it indicates no then existing intent on the part of the defendant to desert his wife. The proof that he afterward procured remunerative work and failed to send for her will not establish a desertion at the time of such breach of his promise, because the evidence of his promise depends upon her uncorroborated evidence, and the sole proof that defendant obtained remunerative employment fixes the date as about September, 1903. If from that it can be inferred that he then intended to abandon his wife, the period fixed by the statute had not expired when this petition was filed, on May 22, 1905.

The master's report cannot be confirmed.

SPEER v. ERIE R. CO.

(Court of Chancery of New Jersey. Jan. 21, 1906.)

1. RAILROADS—ROAD CROSSINGS—USE—COVENANTS IN RIGHT OF WAY GRANT.

A strip of land through a farm was conveyed to a railroad for a right of way by a deed in which the railroad covenanted to provide the grantor with a convenient road crossing. One of the severed portions of the farm was intersected by a road, but there was no method of egress from the other portion, except over the railroad crossing, and through the intersected portion to the road. *Held*, that the right to use the crossing was not limited to the use of it as a farm crossing, but that the original grantor and his grantees had a right to use it for any purpose to which the land became adapted.

2. SAME—PERSONS ENTITLED.

The right to use the crossing was not restricted to the original grantor and his grantees of the whole tract, but grantees of subdivisions thereof were entitled to use it.

3. SAME—GATES AT CROSSING—RIGHT TO MAINTAIN.

A strip of land through a farm was conveyed to a railroad for a right of way by a deed in which the railroad covenanted to provide the grantor with a convenient road crossing and make necessary fences on both sides of the track. The railroad company erected fences with gates at the crossing composed of sliding bars. *Held*, that the company had no absolute right to maintain these bars after they had become unnecessary and inconvenient, because the land had ceased to be used for agricultural purposes and been platted and sold for residence lots.

4. SAME—DESTRUCTION OF CROSSING—DAMAGES.

In a suit to enjoin the maintenance by a railroad company of an embankment destroying a crossing to which complainant was entitled under a covenant in his grantor's deed to the railroad company, evidence *held* to show that complainant was damaged to the extent of \$8,000.

Bill by Abram Speer against the Erie Railroad Company to restrain defendant from maintaining an embankment where complainant had a private road crossing the railway tracks. A decree requiring defendant to open a tunnel under the tracks was reversed, with directions to retain the bill for the purpose of assessing complainant's damages. On hearing as to damages sustained.

See 60 Atl. 197.

Mr. Faulks and Mr. Barrett, for complainant. Cortlandt Parker, Jr., and R. Wayne Parker, for defendant.

STEVENS, V. C. The bill in this case was filed to restrain the defendant from maintaining its embankment where the complainant had a road crossing over defendant's railway, between the severed portions of his farm. This court decreed that the company should construct a tunnel or opening through the embankment, substantially at grade, such opening to be not less than 12 feet in height and width. On appeal it was thought that this direction was too onerous. It was held that the complainant's right to a crossing was not destroyed by the elevation of the

tracks, but it was thought that the complainant was only, under the circumstances, entitled to damages, and that, if he was willing to have them assessed in this court, the bill might be retained for that purpose. The submission has been made. The question thus presented is not without difficulty, for the amount of damages will depend upon the precise nature of the complainant's right. If the crossing is to be regarded as a mere farm or agricultural crossing, and not a crossing for all purposes, I think that \$500 would be an adequate compensation for its destruction. But, if the crossing is to be regarded as a crossing for all the purposes for which the land is or may become adapted, then I think that his damages are considerably greater. In the opinion on the application for injunction, I held that the covenant that the predecessor of the defendant company would "provide the party of the first part with a suitable and convenient road crossing across the track of said railway" gave an unlimited right—a right of passage for all purposes. I do not find in the opinion on appeal any dissent from this view, and further reflection has only confirmed me in its soundness. Speer, the complainant's ancestor, when he conveyed to the railroad company in June, 1870, was the owner of a farm extending easterly from Cliffside avenue to Valley Road, and thence across Valley Road to a line about 800 feet distant therefrom. The railroad, running north and south, cut this farm in two. The tract which lay west of the railroad embankment contained a little more than nine acres, and was completely severed, not only from the land lying east of the embankment and west of the Valley Road, but also from the dwelling house and barn, which lay east of that highway, and could only be reached, without trespassing upon neighboring property, by making a long circuit of three-quarters to seven-eighths of a mile.

Now, Speer's right being a right to pass from the land west of the railway to the land on both sides of Valley Road and to Valley Road itself and back again, can it be said that, if he had built a house or barn on the severed tract, he would not have had the right of passage therefrom to Valley Road? And if he had built two or three houses would not his right have been the same? And suppose he had conveyed the entire farm to two or three, or twenty persons as tenants in common, would they not have acquired the same right? Where do we find it written or implied in the covenant that, when Speer ceased to use the land for agricultural purposes, his right to pass over the crossing terminated? The language of Jessel, M. R., in *Newcomen v. Coulson*, 5 Ch. Div. 133, is applicable to the situation here. "It was said that the grant conferred a right to use the way only so long as the allotment was used for agricultural purposes. I cannot find any such re-

striction. The right is to the owner or owners for the time being of the land. Now, land, according to English law, includes everything on or under the soil. All buildings that you may erect on it; all mines that you may sink under it. I have no doubt that the word 'land' was used advisedly. This being so, it appears to me that the right is a general right of way—a right of way to all the houses that may be built on the land in question." That the right as Speer had it passed to his grantees has been conclusively settled in this case; for the suit has been adjudged by the Court of Errors to be maintainable by the present complainant, who is the heir of the original grantee.

But it is contended, further, that, while Speer and his grantees of the entire farm would have the right, a grantee of a lot in the tract west of the railway would not have it, and that consequently the possibility of utilizing portions of the land for building purposes and selling it for those purposes cannot enter into the question of value or of damages. In other words, that, so far as this question is concerned, the land must be regarded as farm land only, for all time to come. The cases relied upon to support this contention are *Marino v. Central R. R. Co.*, 69 N. J. Law, 628, 56 Atl. 306, and the *Pipe Line Case*, 62 N. J. Law, 254, 41 Atl. 759. In the first case a railroad company, empowered to take by condemnation, was required, by statute, to maintain over or under its road suitable wagonways where the railroad intersected the land of an individual owner "so that he may pass the same." It was held that the owner had a right of way across the railroad, appurtenant to each of his divided tracts, but that his right was not transmitted to a grantee of a portion of the lands lying only on one side of the railroad. Chancellor Magie said: "The right reserved and the duty imposed by that section [section 9 of the charter of the S. & E. R. R. Co.] is only in favor of the person who owned the lands intersected by the railroad when the railroad right was acquired by condemnation, or his grantees of the whole or a portion of said lands still intersected by the railroad." The decision was rested upon the authority of the *Pipe Line Case*. There one Stewart had conveyed to the Morris & Essex Railroad Company a strip of land on which to lay its tracks, with a reservation of "a suitable wagon road or crossing * * * so as to enable said Stewart to travel and cross freely between his lands on each side of said granted premises." The Stewart title, excepting the strip conveyed to the railroad, became vested in one Meagher. Meagher conveyed to Breckenridge, not the entire farm (see page 275 of 62 N. J. Law, and page 766 of 41 Atl.), but two lots, each 50 by 250 feet, one on the north side and the other on the south side of the lands conveyed to the railroad company. These lots adjoined such

lands and extended on each side of them entirely across the passageway. It was conceded in that case that, under the various conveyances, Breckenridge had a right of crossing between these two lots thus severed, but it was held that such right did not give the right to lay oil pipes under the railway. Mr. Justice Depue said: "The laying of these pipes in the roadway in no sense conferred a benefit on the lands to which the way was appurtenant, nor were the pipes adapted to facilitate access between the two parcels of land to which the easement was appurtenant."

I have particularly mentioned these cases because it appears to me that, so far from supporting the position of defendant, they are authorities for the opposite view, at least to this extent: They concede that a grantee of a part of the land has a right of crossing if the land acquired lie on both sides of the crossing and adjoin it; and this, too, in cases where the right is a limited right and not a right of crossing for all purposes. In the *Marino Case* the right was held to be limited by statute in the same way that in the *Pipe Line Case* it was held to be limited by the explicit language of the deed. It was not decided in either of those cases that, where the crossing given was a crossing for all purposes, the lot owner, owning on one side, would not have the benefit of it. In the case of *United Land Co. v. Great Eastern Railway Co.*, L. R. 10 Ch. App. 586, cited with approval in the *Pipe Line Case*, it was held that he would. But I am not obliged to decide whether he would or would not, for the reason that it is quite within the power of the complainant to avoid the question altogether. I must assume that, as a reasonable man, intent upon getting the full value of his property, he would subdivide his land so as to preserve and perpetuate all his rights. The complainant has put in evidence a map or plan. It, and the additional evidence, make it clear that at the time the embankment was built and the crossing destroyed the land in the neighborhood had come into the market for building purposes. New streets had been laid out around the Speer tract and new buildings had been erected. Upper Montclair had reached out to that point. The plan shows a road running east and west through the middle of the tract, touching the crossing east and west of the railway. It also shows lots plotted on both sides of it. Now, it would be easy for the complainant to give to each purchaser of such a lot a right of way along the whole course of this road, or, if that did not satisfy the requirements of the *Marino* and *Pipe Line Cases*, he could divide the land over which the road is shown into as many undivided parts as there are lots, and with each lot he could give one of these parts. The grantee of any lot would then own in fee simple land on both sides of the railway continuously from his lot to Valley Road.

But another and somewhat singular point has been raised. The entire clause in the Speer deed reads as follows: "The party of the second part [the railroad company] doth, for itself and its successors, agree to make and maintain the necessary fences on both sides of said tract of land, which shall be built before the grading on said tract is commenced and shall provide the party of the first part with a suitable and convenient road crossing across the track of said railway where the party of the first part may direct." The proof shows that the company made the fences and put in sliding rails at the crossing. The argument is that the company had a right to maintain these rails, that those who might have lawfully crossed would have been obliged to replace them as often as they took them down, and that the lots west of the track would have derived from such a crossing so obstructed little, if any, benefit. The evidence is that, if the lots fronted on a roadway thus barred, they would have less value than they would if the crossing were unobstructed.

The company's right is asserted to have been an absolute right to maintain bars, however inconvenient they might have been to the lot owners. The deed itself is silent on the subject. The general rule is that gates or bars may be placed at the terminus of a way, particularly an agricultural way. It is based on the great preponderance of convenience to the landowner, over the slight inconvenience to the way owner. It ceases when the preponderance of convenience is in favor of the way owner. *God. on Eas. 331. In Jewell v. Clement (N. H.) 39 Atl. 582, Wallace, J., says: "From the creation of a way by deed in general terms, without a provision giving the owner of the land over which it passes, the right to erect gates or bars, neither a grant nor a denial of that right is necessarily to be implied. But the right to erect them cannot be implied if they constitute an unreasonable obstruction to the reasonable and proper use of the way. Neither party could have intended that the reserved way was to be subject to any unreasonable obstruction. Whether the erection of the bars by the plaintiff was a proper use of his premises, compatible with the defendant's reasonable enjoyment of the easement or was an unreasonable obstruction of the way is a question of fact."* Gates or bars were deemed proper in the following, among other cases: *Boyd v. Bloom (Ind. Sup.) 52 N. E. 751; Connery v. Brooke, 73 Pa. 80; Short v. Devine (Mass.) 15 N. E. 148; Bakeman v. Talbot, 31 N. Y. 366, 88 Am. Dec. 275. The right to maintain them was denied in the following: Smith v. Worn (Cal.) 28 Pac. 944; Devore v. Ellis (Iowa) 17 N. W. 740; Jewell v. Clement (N. H.) 39 Atl. 582; Welch v. Willcox, 101 Mass. 162, 100 Am. Dec. 113; Williams v. Clark (Mass.) 5 N. E. 802; Dickinson v. Whiting (Mass.) 6 N. E. 92. Williams v.*

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Clark was the case of a railroad crossing. H. conveyed to a railroad company by a deed which provided that the company should furnish him with two convenient crossings, to be thereafter designated. One was so designated and a crossing built. *Devens, J., said: "While, in terms, it was not provided that this crossing should be unobstructed by gates or bars, yet the fact that it was to be convenient, and that the company itself constructed and for many years permitted the existence of such a one, sufficiently shows that what it intended to grant was a free right of passage. No usage or circumstances such as are shown where one grants a way or right of way over a field devoted to agricultural or other purposes, indicating that the right granted is to be subordinate to the right of the grantor or the use made by him of the premises, here exist. That a crossing obstructed by gates or bars is far less convenient to those entitled to use it is fully conceded by the defendant's argument."* In this case gates or bars were not erected in the first instance. In the case at bar they were. But I do not understand that this circumstance was regarded as decisive. It was one to be taken into account. *Bakeman v. Talbot, supra*, was the case of a way over a farm and wood land, where it was thought that "slip rails" or bars were not an unreasonable obstruction. *Denio, C. J., used this language: "There is nothing inconsistent in holding the present arrangements are suitable and sufficient under existing circumstances; and, after these circumstances have changed, and the question shall arise as to what shall then be proper, to determine that a passage perpetually open or a system of gates better adapted to such increased use than the present fences and bars shall be required of the defendants. * * ** The doctrine that the facilities for passage where a private right of way exists are to be regulated by the nature of the case and the circumstances of time and place is very well settled by authority." If a way given for all purposes cease to be used for agricultural purposes and become useful for other purposes, it may be adopted to those purposes. It is a well-established rule that, "In doing the works that are necessary for the enjoyment of the easement, the owner of the dominant tenement may do everything that is required for the full and free exercise of his right." *Gale on Easements (7th Ed.) 464. In Finlinson v. Porter, L. R. 10 Q. B., 188, the grantee of an easement of drain was allowed to deepen it in order to adapt it to the sewer as altered by the local authority. In Dand v. Kingscote, 6 M. & W. 174, the proprietor of an old colliery who had a right of way to it, granted long before the days of railways, was held entitled to make a railway thereover, for the purpose of transmitting his coals. In*

Newcomen v. Coulsen, 5 Ch. Div. 138, *Malins, V. C.*, held that a lane that had been used for agricultural purposes might be converted into a metalled road for the benefit of newly erected cottages. His judgment was affirmed on appeal. In these cases the cost of the alteration was borne by the owners of the dominant tenement. I see no reason why if sliding rails, because of the changed use, become a source of danger rather than a means of safety, the owner of the dominate tenement may not become entitled to have substituted cattle guards, such as the law prescribes in the case of country roads, but, perhaps, notwithstanding the language of the deed, at his own expense. But whether he should do the work under the supervision of the railway officials or whether they should do it at his request and at his charge, or whether the company should do it at its own costs, is a matter of no consequence here; for the cost, in any event, would be so small that it would not materially affect the result.

This brings me to the question of the amount of damages to be awarded. The supplemental evidence makes it clear that the land is not to be treated as farm land. Excluding the lots on Mountain avenue and Valley Road, the most valuable part of the tract, the highest estimate of the interior land, about 9 acres, by any of the complainant's witnesses is \$1,200 per acre, and the lowest estimate of any of defendant's is \$300. The depreciation caused by the destruction of the way is variously estimated by complainant's witnesses at from \$300 to \$700 per acre; that is, from \$2,700 to \$6,300. These witnesses all agree that gates or bars would materially diminish the value of the land. Of the defendant's witnesses, two, Mr. Crane and Mr. VanDuyne, give an estimate of the value of the interior land on the basis of a crossing obstructed by gates or bars. They do not expressly estimate it on the basis of an unobstructed crossing. Of the other estimates for defendant, Hink thinks that the closing of the way has been of benefit to the property; while Holmes thinks it a detriment to the extent of \$50 per acre. He says; "of course, land that has no interior access is not worth as much, ordinarily, as land that has." I do not think it can be doubted that an unobstructed passageway from the lots, as they would naturally be laid out, and as shown on complainant's map, to Valley Road, would be likely to make them more attractive to that class of buyers who would build houses costing from \$3,000 to \$4,000. The neighborhood is being rapidly improved by the erection of dwellings of that description, and this particular tract appears to be suitable for inexpensive residences. Buyers, without carriages of their own, would regard a direct way to Valley Road, a main thoroughfare with a trolley line on it leading into the heart of Montclair, as a considerable con-

venience, and as such it could not fail to have its influence upon the price. Such a road would, no doubt, be regarded as preferable to a more roundabout way over neighboring land, if complainant were able to purchase it.

It is necessarily a matter of conjecture as to how much complainant has been injured. Resort must be had to opinion evidence of a somewhat unsatisfactory kind. But it is the best available, and it has been necessitated by defendant's action in destroying complainant's right in the face of actual notice. Under these circumstances it does not seem to me that all doubts should be resolved in defendant's favor. I think the weight of the evidence fairly warrants a finding that the right destroyed is worth \$3,000.

SAVIDGE v. MERRILL et ux.
(Court of Chancery of New Jersey. Jan. 19, 1906.)

EASEMENTS—OBSTRUCTION OF ALLEY—INJUNCTION.

A preliminary injunction against obstruction of an alley is not justified by a bill alleging a contract by which C. leased the alley to S. for 99 years, each covenanting against obstructing it, with a provision that it was merely for the benefit of the two parties to drive over, the bill further alleging only that complainant bought from S. the portion of his real estate adjoining the alley, with its appurtenances, and not showing that the alley was appurtenant to complainant's land.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, § 141.]

Bill by Reuben L. Savidge against Ella L. Merrill and wife for injunction. Preliminary injunction denied.

A. S. Applegate, for complainant.

BERGEN, V. C. The complainant presents his bill duly verified, and applies for a preliminary injunction. The application is based upon an alleged invasion of complainant's rights through the obstruction by the defendant of an alleyway over which the complainant claims he is entitled to pass and reposs without any interference. The obstructions, as stated in the bill, are the placing of a fence across the alley, and also the turning of surface waters from an old established waterway into the alley. The bill also charges that this diversion of water may injure the adjoining lands of the complainant in times of heavy rains, but as this allegation has no relation to the obstruction of the alleyway I can only consider so much of this part of the case as bears upon the question of interference with the complainant's use.

The complainant bases his right to the writ of injunction upon the following facts, viz.: In 1867 Josiah Cook and Reuben Savidge entered into a written agreement by the terms of which Cook "doth lease unto the party of the second part [Savidge] for

the term of ninety-nine years, all that certain lot," etc., describing it by metes and bounds with great particularity. This paper writing contained mutual agreements against placing obstructions on the tract "as the meaning of the said road is just to drive in and out for the benefit of both parties."

The bill further shows that after the death of Reuben Savidge the complainant purchased from his executor that portion of the testator's real estate which adjoined the leased strip or road, with its appurtenances, and under it claims the rights which were conferred on his ancestor in title by the agreement or lease, notwithstanding it was not included in the conveyance to him by any description or reference. If we grant to this agreement a construction sufficient to establish an easement in the original grantee, it can be but an easement in gross, for there is no dominant tenement to which it is attached so far as the bill of complaint shows. As described in the papers, it is not appurtenant to complainant's land, at least the bill of complaint does not make the complainant's title as clear and positive as it should be to justify a preliminary injunction. If, on the other hand, as was held by the Court of Errors and Appeals in *Black v. Del. & Rar. Canal Co.*, 24 N. J. Eq. 455-465, that for all "practical purposes, a lease for 999 years is a conveyance in fee," then the title to this strip of land would not necessarily pass as appurtenant to the adjoining property of the testator. The case made by this bill of complaint does not justify the preliminary writ asked for, but the bill will be held for final hearing, and if upon the coming in of the answer it shall appear that, in order to invoke the aid of this court, the complainant is required to establish his title at law, an opportunity to do so will be afforded him.

The present application is denied, but without prejudice.

PALEN et al. v. OCEAN CITY.

(Supreme Court of New Jersey. Jan. 26, 1906.)

1. DEDICATION—QUESTION FOR JURY.

Whether an owner dedicated a wharf to the public, *held*, under the evidence, a question for the jury.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, § 88.]

2. SAME—ABANDONMENT OF WHARF DEDICATED TO PUBLIC USE.

An owner dedicated to the public a wharf in a city. Subsequently the city adopted an ordinance which provided for a wharf master, and required him to see that vessels did not unnecessarily injure the wharf and to repair any damage thereto and collect from the owner of the vessel the damage done. It also fixed the charges for discharging or taking on cargo at the wharf. *Held*, that the ordinance did not operate as an abandonment of the public user of the wharf.

3. SAME—AUTHORITY TO DISCHARGE PUBLIC RIGHT IN WHARF—STATUTES—CONSTRUCTION.

P. L. 1897, p. 69, § 48, par. 1, providing that city councils may by ordinance vacate "any street, road, highway or alley," does not, when construed in connection with section 18, par. 7 (page 52), empowering councils to regulate streets, highways, wharves, etc., authorize a city council to discharge the public right in a wharf dedicated to the public; the word "highways" in section 48 not including a wharf.

Ejectment by Elizabeth Palen and another against the Ocean City. There was a verdict for plaintiff, and defendant obtained a rule to show cause why it should not be set aside. Rule made absolute.

Argued November term, 1904, before GUMMERE, C. J., and GARRISON and GARRISON, JJ.

Godfrey & Godfrey, for the rule. John W. Wescott and Keator & Johnson, opposed.

GUMMERE, C. J. This is an action of ejectment. The locus in quo is a wharf at the foot of Fourth street in the city of Ocean City, a seaside resort on the Atlantic Coast. It appeared from the testimony in the case that in the year 1880 the Ocean City Association, having acquired title to a large tract of land in Cape May county, bordering on one of the thoroughfares separating the mainland from the Atlantic Ocean, caused it to be plotted into streets and lots, and a map thereof made and filed in the county clerk's office. Upon this map, at the point where the street designated thereon as Fourth street terminates at the water's edge, a wharf is delineated. In 1883 the association caused another map of this property to be prepared and filed, and upon this map also the wharf at the foot of Fourth street is shown. Many lots of land were sold by these maps to purchasers, and a settlement of considerable size gradually grew up at this place. As early as 1884 the settlement became incorporated as a borough, and the present city is its successor. In 1886 the Ocean City Association conveyed to Dr. Palen a tract of land which, in terms, included the wharf situated at the foot of Fourth street. It appeared from the evidence submitted that, early in the development of this tract of land, a wharf had been constructed at the foot of Fourth street; that it had subsequently been repaired, or restored, by public subscription, and subsequently by the borough or city of Ocean City; and that it had been used, to some extent at least, by the public. It further appeared that the defendant municipality, in April, 1898, passed an ordinance entitled "An ordinance establishing the rate of wharfage and providing for the collection thereof, for Fourth street wharf in Ocean City, New Jersey," by the provisions of which the office of wharf master was created, and the incumbent charged with the duty of seeing that vessels

should not unnecessarily injure the wharf, and, in case of damage thereto of causing the same to be repaired in the name of Ocean City, and of collecting from the owner of the vessel the amount of damage done thereto. The ordinance also fixed the charges to be paid by owners or captains discharging or taking on cargo at the wharf, and imposed upon the wharf master the duty of their collection. At the close of the case the trial judge left to the jury to find (1) Whether there had been a dedication of the wharf to the public use, and (2) in case they found there had been such dedication, then whether the defendant municipality, by passing the ordinance of April, 1898, had terminated the public user of the wharf; and instructed them that, if they found that the effect of this ordinance was to put an end to the public user, then the property at once reverted to the plaintiffs, who were devisees under Dr. Palen's will. A verdict for the plaintiffs having been rendered, the defendant applied for and obtained a rule to show cause why it should not be set aside for errors occurring at the trial.

The rule to show cause should be made absolute. The question whether there had been a dedication of the wharf was properly left to the jury to determine. *Palen v. Ocean City*, 64 N. J. Law, 669, 46 Atl. 774. Assuming that there was such dedication, the question whether the ordinance of April, 1898, operated as an abandonment of the public user was not one of fact to be determined by the jury, but one of law to be determined by the court. Whether the jury concluded from the evidence that no dedication of this wharf to the public use had been shown, or whether they concluded that there had been a dedication, but that there had been an abandonment of the public use by the ordinance referred to, cannot be determined from their verdict. Inasmuch as a new trial of the case must be had for this reason, we deem it proper to point out what seems to us to be the true determination of the latter question. In the first place, there is nothing in the language of the ordinance which suggests an intention on the part of the municipal authorities to abandon the public user; its purpose is to regulate the use of the wharf, and, apparently, to provide a fund for its maintenance and repair. But if the ordinance admitted of the opposite construction, the conclusive answer is that no power is vested in the municipal authorities to discharge the public right; the easement is vested in the public, and the local authorities, as the representatives of the public, are clothed with power to do all acts necessary for the protection of the public right; but the Legislature alone has the power to release the dedicated land, and discharge the public servitude, when it has once attached. No such power exists in a municipality, unless it has been delegated to it by legislative enactment. *Hoboken*

Land & Improvement Co. v. Mayor, etc., of Hoboken, 36 N. J. Law, 540.

Counsel for the plaintiffs do not deny that this is the settled rule, but contend that such authority is found in section 48, par. 1 (page 69) of "An act relating to and providing for the government of cities in this state containing a population of less than twelve thousand inhabitants," approved March 24, 1897 (P. L. 1897, p. 46), the statute under which the defendant municipality is organized. The provision appealed to authorized the common council, "whenever in their opinion the public good requires it, by ordinance, to cause any street, road, highway or alley already laid out, to be vacated," and it is argued that the term "highway" includes a wharf within the intent and meaning of this provision. We are unable to reach this conclusion. The Legislature, by section 18, par. 7 (page 52), of the act, clothed the common council with power to regulate streets, highways, public places, bridges, wharves, and docks. The language of this paragraph makes it apparent, as it seems to us, that the Legislature, in enacting this statute for the government of cities of the class named in the title of the act, considered that a wharf was a thing distinct and apart from a highway, and did not intend that the subsequent provision authorizing the vacation of highways should clothe the municipality with power also to vacate other public places, bridges, wharves, or docks.

The rule to show cause will be made absolute.

STERLING et al. v. IVES et al.

(Supreme Court of Errors of Connecticut.
Feb. 7, 1906.)

1. WILLS—SPENDTHRIFT TRUSTS—CREATION.

Testator declared that the rents and income from his residuary estate were for the personal use and benefit of the respective legatees, prohibited anticipation or incumbrance, and provided that, if any person should make any contract by which he or she should be deprived of the personal receipt or use of any sum intended for his benefit, payment should immediately cease, in which event, the trustees were authorized to apply such portion of the income for the support of such beneficiary or his family at their discretion, etc. *Held*, that such provision was sufficient to create a spendthrift trust.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1585.]

2. SAME—DEATH OF BENEFICIARY—DISSOLUTION.

Testator bequeathed the residue of his estate to trustees, with directions to pay certain portions of the income to his widow and for the support of his children and their families. To accomplish this he created a spendthrift trust, and also declared that, in case of his widow and children and their families, additions to the income from the principal might be made by the trustees necessary to support such families according to their station, and in this respect preferred his daughter over her brothers. *Held*, that the provision so made for the family of any particular beneficiary became inopera-

tive on the dissolution of such family by the death of the beneficiary.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1632.]

3. SAME—DEATH OF BENEFICIARY LEAVING ISSUE.

Testator created a trust of the residue of his estate, and provided that on the death of either of his children the income directed to be paid for the benefit of such deceased child during his life should be paid to and for the benefit of such child's surviving issue until they arrive at the age of 21, when as they arrived at such age they and their heirs were to have in equal proportions forever so much of the principal as was devised to the use of the deceased child, etc. *Held* that, on the death of one of the children leaving issue, the income of the third of the estate designed for him and his representatives was payable to his widow, and his surviving issue until such issue respectively came of age.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1638, 1639.]

4. SAME—VESTING OF ESTATE.

On the death of such beneficiary, his children became immediately vested with their portion of the trust fund, subject only to be divested in case of death under age, as provided by another clause of the will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1515.]

5. SAME.

Testator provided that, on the death of one of his children, one-third of the income of his share of a trust fund should be payable "in like manner" for the benefit of his widow for life, and, on her decease leaving lawful issue of testator's son then living, such one-third of the income and principal was to go to such issue in the same manner as the other two-thirds had been decreed. *Held*, that the phrase "in like manner" was used to designate the mode in which the recipients were to be benefited, and not to describe such recipients.

6. SAME—BENEFICIARIES.

Testator created a trust of the residue of his estate, and provided that one-third of the income of the share of a beneficiary should be paid to his widow for life, and, on her decease leaving lawful issue of such beneficiary then living, such one-third part of the income and principal should go for the benefit of such issue, etc. *Held*, that the recipients of such remainder were the issue of the beneficiary living at the death of the widow.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1602.]

7. SAME—REDUCTION OF SHARES.

Testator created a trust of the residue of his estate, bequeathing portions of income to his children for the benefit of their families and ultimately to his grandchildren, and empowered his executors and trustees in their discretion, in case the bequests of income were insufficient for the purpose intended, to appropriate parts of the principal of a certain charitable fund in addition to such income, for the maintenance of such beneficiaries. *Held* that, on the death of one of the beneficiaries, neither the income nor the principal of his share could be reduced under such clause by appropriations in favor of the families of other beneficiaries.

8. SAME—SPENDTHRIFT TRUSTS—APPLICATION.

Where testator created a trust for the benefit of his widow, children, and a certain charity, directing that the fund should ultimately be distributed among his grandchildren, surviving their parents, such grandchildren were not subject to a spendthrift trust providing that, if "any person" conveyed his share of the income in such a way as to deprive himself of the benefit thereof, his right to such income should cease, etc.

9. SAME—SEVERANCE—TRUSTEES—POWERS.

Where testator created a trust of the residue of his estate for the benefit of his widow and a certain charity, the families of his three children, and ultimately for the benefit of his grandchildren, to be paid to them on their arrival of age, after the death of their parent, who was testator's child, the death of such parent operated as a severance of his share of the trust fund; the remainder only being subject to discretionary powers of the trustees.

10. TRUSTS—POWERS OF TRUSTEE.

Where trustees in their discretion were authorized to draw upon the principal for the purpose of present necessities of the beneficiaries in case the income to which they were entitled under the trust was insufficient therefor, amounts so appropriated should be considered as parts of the income, for which neither the recipients nor their representatives were subsequently required to account.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 394, 395.]

Appeal from Superior Court, Hartford County; Joel H. Reed, Judge.

Action by John W. Sterling and others, as trustees under the will of Lawson C. Ives, against Caroline P. Ives and others, for the construction of the will. Answers admitting the truth of the allegations of the complaint were filed by all the defendants, and Sophia I. Owen made certain additional allegations in her answer, to which the other defendants demurred. The demurrer was sustained and a judgment rendered construing the will, from which all the defendants, except Sophia I. Owen and those claiming under her, appealed. Reversed.

The testator died in 1867, leaving a large estate, real and personal. His will made certain charitable bequests and contained the following provisions as to his residuary estate: It was devised and bequeathed to trustees and to their successors as joint tenants in fee simple forever. They were to allow the widow to occupy the homestead and use its furniture during her widowhood; furnishing a home therein for her daughter Sophia, while the latter remained unmarried, she paying a reasonable compensation for her board. On the termination of this estate in the widow, Sophia was to have the furniture absolutely and the use of the homestead, so long as she desired, and the trustees deemed it expedient. The property other than the homestead and furniture was to be invested in productive property, and the following directions were given as to the disposition of the income:

"Eleventh. Whereas, I am desirous of devoting to charitable purposes a still larger portion of my estate; and whereas, it appears that the net income of said residue and remainder of my estate may be more than sufficient for the wants of my wife and children and their families: My will is and I do direct that whenever while said residue and remainder of my estate, or any part thereof, may be held in trust as herein provided, the net income of said residue and remainder shall amount to the sum of twenty-five thousand (\$25,000) or more for

any one year, and also whenever the net income of so much of said residue and remainder of my estate as may remain in the hands of said trustees undistributed, or not paid over or conveyed in fee to my devisees or legatees under the provisions of this will shall equal or exceed the ratio of twenty-five thousand dollars (\$25,000) per annum for the whole of said residue and remainder, then and in each of said events, the said trustees shall set apart as a charitable fund to be appropriated as hereinafter directed, certain portions of said net income, as follows, viz.: For each year that such net income shall amount to twenty-five thousand dollars (\$25,000) or the above-mentioned proportionate part thereof, but shall be less than thirty thousand dollars (\$30,000) or said ratable part thereof, five (5) per cent. of such net income shall be set apart for said charitable fund. For each year that such net income shall amount to thirty thousand dollars (\$30,000) or the above-mentioned proportionate part thereof, but shall be less than forty thousand dollars (\$40,000) or said ratable part thereof, said trustees shall set apart for said charitable fund ten (10) per cent. of such net income; and for each year that such net income shall amount to forty thousand dollars (\$40,000) or more, or the above-mentioned proportionate part thereof, said trustees shall set apart for said charitable fund twenty (20) per cent. of such net income. In the event of the decease of my said daughter Sophia, either during my life or after my decease without leaving issue surviving her, then I direct that so much of said income as my said daughter under the provisions hereinafter contained would have been entitled to if living, shall be annually or oftener set apart by said trustees and added to said charitable fund for the period of twenty (20) years after the decease of my said daughter in case of her surviving me; and in case of my surviving her, then for the period of twenty (20) years after my decease. And as a tribute to the memory of my two deceased daughters, my will is and I do further direct that after setting apart for said charitable fund the percentage of said net income as above directed, the net income of one-fourth ($\frac{1}{4}$) part of said residue and remainder of my estate shall be annually or oftener set apart by said trustees and added to said charitable fund for the period of twenty (20) years after my decease; the whole of said charitable fund to be disposed of by said trustees as follows, viz.: [Certain incorporated charities were then named as the beneficiaries.]

"Twelfth. From the remainder of the net income of said residue and remainder of my estate I direct that there be paid to my said wife, Mariett T. Ives, the sum of twenty-five hundred dollars (\$2500) at the end of every six months from my decease to wit: Five thousand dollars (\$5000) per annum, and at that rate for and during the entire

term of her natural life, provided she shall remain unmarried and not otherwise. In the event of her marrying again, said annuity is to be paid to her to the time of such marriage only; and upon the decease or marriage of my said wife, then and in either of said events, all payments herein directed to be made to her, and all trusts herein created for her benefit, are forthwith to cease and be determined.

"Thirteenth. My will is, and I direct that all the balance of said net income of said residue and remainder of my estate, together with said annuity to my wife from and after the time of her marriage or decease, and including also the foregoing twenty (20) years appropriations for a charitable fund, whenever and as said appropriations shall respectively cease under the foregoing provisions, be paid over by said trustees semi-annually to all my children equally, to wit: to Philo L., Walter D., and Sophia I. Ives, during the terms of their natural lives respectively, subject however to the conditions and limitations hereinafter set forth, and to the discretionary power hereinafter vested in said trustees respecting such payments.

"Fourteenth. Upon the decease of my said daughter or either or both of my said sons, leaving lawful issue then living, my will is that the income herein directed to be paid to or for the benefit of such deceased son or daughter during his or her life, be paid in like manner equally to or for the benefit of such surviving issue until they arrive at the age of twenty-one (21) years respectively; and as they respectively attain said age, I give, devise and bequeath to them respectively, their heirs and assigns, in equal portions forever, so much of the principal of my estate as is herein devised and bequeathed for the use and benefit of such deceased son or daughter: provided, that such surviving issue are to take per stirpes only and not per capita, and the shares of such as shall have attained the age of twenty-one (21) years at the time of the decease of such son or daughter, their ancestor, to be paid to them respectively immediately upon the decease of such ancestor. And in determining the respective portions so given in fee, my children are to be considered as the beneficiaries and legatees of the percentage of net income hereinbefore conditionally appropriated for a charitable fund. Always provided, however, that in case either of my sons should die leaving a widow, then my will is that one-third ($\frac{1}{3}$) part of the income herein directed to be paid to or for her deceased husband during his life, shall in like manner be paid to her during her natural life. And upon her decease, leaving lawful issue of her deceased husband (my son) then living, said one-third part ($\frac{1}{3}$) income and the principal go to for the benefit of such issue in the same manner as the other two-thirds parts ($\frac{2}{3}$) thereof. And in case of no such issue surviving her, said income and

principal to be held and disposed of by said trustees in the manner provided in the clause next following.

"Fifteenth. In case of the death of either or both of my sons during my life without leaving lawful issue surviving me, or in the event that after my decease either or both of my sons should die without leaving lawful issue then living, or in case of the death of any descendant of either of said sons while any portion of my estate is held in trust for such descendant, then and in every such case my will is that so much of my estate as is herein directed to be held for the use or benefit of any son or descendant so deceased shall, upon such decease, be thenceforth held and disposed of by said trustees in the manner and for the purposes following, to wit: said trustees to pay or not at their discretion to or for the benefit of my then surviving descendants, or such of them as said trustees may think best, the whole or any portion of the net income of such estate, so long as any of my grandchildren that may survive me shall be living under the age of twenty-one (21) years, till which time said trustees shall from time to time as the same accrues, set apart and add to said charitable fund to be disposed of as above directed, so much of said income of the estate referred to in this clause as shall not have been paid to my descendants under the above discretionary power. And at the termination of the period above limited, I authorize and empower said trustees at their discretion to distribute and pay over in fee to all or such of my descendants as they may think best and in such proportions as they may deem expedient the whole or any portion of the principal of said estate referred to in this clause. And I do give, devise, and bequeath so much of said last-mentioned principal as said trustees may not deem it best to distribute or pay over to my descendants as above, as follows, viz.: [The same charitable corporations named in the eleventh clause were then designated as the beneficiaries under the fifteenth, which concluded with the following words:] This clause however to be construed subject to the foregoing provision for the widow of a deceased son during her natural life."

"Seventeenth. In the distribution of interest among my children and their families, and in the division of the principal of my estate as herein directed, my will is that any sum or sums of money by me advanced to or paid for the benefit of any of my children and charged to them, or for which I may hold their notes, be estimated as if now forming a part of my estate, or as it is technically called, be brought into hotchpot, so that each of said children and their respective issue will be entitled to so much less interest as would accrue upon said advancements or payments to or for such child (together with interest thereon to the time of my decease) at six per cent. annual in-

terest. And upon the distribution of the principal of my estate herein given for the use of any child or his or her issue, said advancements or payments to or for said child including interest thereon to the time of my decease, are to be deducted from said principal.

"Eighteenth. In case of the decease during my life of any devisee or legatee herein named whose lawful issue shall be living at my decease, then my will is that such issue shall take at my decease the same estate and only the same estate and only the same that such issue would have taken upon the decease of such devisee or legatee had such deceased devisee or legatee survived me. And in case of the happening of any contingency whatever in consequence of which any portion of my estate would but for the provision now to be made become or be treated as intestate estate, then my will is that upon the happening of any such contingency so much of my said estate as would otherwise be treated as intestate shall go to and be held by said trustees for the benefit of my surviving children, with right of representation to the issue of such of my children as may have deceased, in the same manner as is herein provided in respect to property directly given in trust for them.

"Nineteenth. The rents, dividends, interest, and income to be paid under this will, I intend for the personal use and benefit of the respective legatees. I therefore provide that no sum or sums intended to be paid as aforesaid shall in any way be anticipated, aliened, charged, incumbered, or diverted from the use so designated. And if any person I so intend to benefit shall do any act or make any contract or conveyance, or if any proceeding shall be had in law or chancery or otherwise, by reason of which act, contract, conveyance or proceeding he or she would if such trust were to continue in his or her favor be deprived of the personal receipt or use of any sum intended for his or her benefit, then and in every such case, and immediately upon such act, contract, conveyance, or proceeding, the trust for the payment to him or her of such rents, dividends, interest, or income shall cease and be utterly void. In which event I authorize said trustees to apply the amount of such rents, dividends, interest, and income for the support of the person as to whom said trust shall have ceased as aforesaid, or of his or her family, at their discretion, but he or she not to have any legal claim therefor. And furthermore, in case said trustees should at any time have reason to suppose that any interest or income herein bequeathed is applied by any legatee or is suffered by such legatee to be applied to improper uses, or to such as in the judgment of said trustees are not conducive to the comfortable maintenance and support of such legatee or his or her family, then and in every such case, I authorize and empower said trustees at

their discretion and for such time or times as they may think best, to suspend payment to such legatee of the whole or any portion of the interest or income herein bequeathed to or for such legatee. And in this event also I authorize and request said trustees to apply the amount of such interest and income for the support of such legatee or his or her family at their discretion, he or she not to have any legal claim therefor during such suspension. My will is, however, and I direct that whenever under the provisions contained in this clause the trust in favor of any legatee or legatees shall cease, and whenever said trustees shall suspend payment of income under the authority herein given, the principal of the estate theretofore held in trust for the person or persons as to whom said trust shall have been suspended under the foregoing provisions, shall still continue to be held and managed by said trustees as before, and for the same term or terms as said estate would have been held by said trustees had this clause 'Nineteenth' not formed a part of my will. The income of such portion of my estate not expended for the person (or his or her family) as to whom the trust shall have ceased or said payments been suspended, to be invested by said trustees from time to time and added to the residue and remainder of my estate. Provided, however, that the investments of said surplus income may from time to time, at the discretion of said trustees, be by them expended for or paid over to those persons or their families who would have been entitled to the same under this will but for the provisions contained in this clause 'Nineteenth.' And in no event are said trustees or any of them to be accountable to any person or tribunal for the manner in which or the extent to which any discretionary power herein given to said trustees may be exercised by them.

"Twentieth. I hereby authorize and empower my executor alone while acting as executor, and also said trustees, the survivors and survivor of them and their successors in said trust, to sell any and all my real estate at their discretion. And if from any cause the income from my estate which I have appropriated for the support of my said wife and children and their families should at any time be insufficient in the judgment of said trustees for that purpose, then I do authorize and empower and request the said trustees from time to time to appropriate at their discretion such and so much of the principal of my estate or of the above mentioned charitable fund as in their judgment may be necessary in addition to said income for the comfortable maintenance and support of my said wife and children and their families in accordance with their station in life."

The trustees were then made self-perpetuating, and their successors were invested

with the same "rights, powers, and duties" assigned to those originally named.

A first codicil made four months later contained this clause: "Fourth. In the event that the income of my estate which is given in and by said will to my daughter Sophia should in the judgment of the trustees under said will be insufficient for the support of the said Sophia and any family she may have, according to her and their station in life, then my will is and I do authorize and direct my trustees from time to time and at their discretion, to pay over to or expend for the benefit of said Sophia and her family, if any she may have, so much as said trustees may deem best of the income if any there be which in and by the clause 'Nineteenth' of my said will is directed 'to be invested by said trustees from time to time and added to the residue and remainder of my estate.' And should said trustees under the discretionary power given them in said will deem it best to appropriate any portion of the principal of my estate for the support of my wife or any of my children or their families, then my will is that such appropriations be first made out of the 'one-fourth' ($\frac{1}{4}$) part of said residue and remainder of my estate,' of which the income is by clause 'Eleventh' of my said will set apart as a charitable fund for the period of twenty (20) years after my decease. But except as the same is needed for the support of my wife or any of my children or their families, my will is and I direct that no portion of the principal of my estate of which the income is by said clause 'Eleventh' of said will either absolutely or contingently devoted to charitable purposes for the specific term of twenty (20) years, and no portion of the income of such principal shall be paid or distributed to any of my family or descendants till the expiration of the term for which the said income is so devoted; but at and after such expiration said principal and income to be disposed of in the same manner as if said clause 11th ('Eleventh') had not formed a part of my said will."

The residuary estate was distributed to the trustees in 1877 at a valuation of over \$650,000. The testator's widow died in 1869. He left three surviving children, Philo, Walter, and Sophia. Walter died in 1893, leaving a widow born prior to the testator's decease, and three children. Philo died in September, 1904, leaving a widow born prior to the testator's decease, and four children. Sophia is married and has four children. Several of the grandchildren were minors in November, 1904, when this suit was brought. The trustees from time to time have paid over to certain of the testator's children and their families portions of the principal of the estate. Such payments were not equally divided among such children and their respective families. They have filed their accounts from time to time in the proper court of probate, which has approved

them; but it was not alleged that such approval was ever given on due notice to the parties in interest. The last account filed shows the present amount of the principal of the trust estate to be about \$433,000. In behalf of Sophia and her family an answer was filed containing averments to the following effect: When the testator made his will and codicils his two sons had, as he knew, displayed tendencies toward wasteful and profligate habits, such as gave room for much anxiety concerning their future characters and lives. On the contrary, the testator's daughter, Sophia Ives Owen, had led an exemplary life, had lived at home with her father and was held by him in particular regard and esteem, and this special regard and fondness of the testator for his said daughter is shown by the provisions of the will and codicils. Said trustees from time to time had reason to suppose, and did in fact suppose, that the interest or income bequeathed in said will to said Philo L. Ives and Walter D. Ives and to the legatees in their families was being applied by said legatees or suffered by them to be applied to improper uses, and that said trustees did from time to time suppose, upon reasons that seemed amply to them, that said interest and income was being applied by said legatees or suffered by them to be applied to uses that, in the judgment of said trustees, were not conducive to the comfortable maintenance and support of said legatees and their families; and said trustees, acting under the discretionary powers conferred by clause "Nineteenth" of said will, from time to time did suspend payments to said Philo and Walter and to the legatees in their families of portions of the interest or income bequeathed in said will to said respective legatees, and did from time to time invest portions of said suspended income and add the same to the residue and remainder of the estate. In the judgment of said trustees, the income given by the will to Sophia was insufficient at all times for her support and that of her family, according to her and their station in life, and said trustees, acting under the discretionary powers conferred upon them by clause "Fourth" of the first codicil, did from time to time duly pay over to or expend for the benefit of said Sophia and her family certain portions of the income of said estate which in and by clause "Nineteenth" of said will was invested by said trustees from time to time and added to the residue and remainder of the estate; and also, acting under the discretionary powers conferred by clause "Twenty" of the will, from time to time duly appropriated portions of the principal of said estate and paid the same over to the said Sophia and to her family, in addition to the income paid them under the terms of said will, for their comfortable maintenance and support in accordance with their station in life.

To these allegations the other defendants demurred, because they set up irrelevant matters not germane to the complaint, and not such as tended to explain any ambiguity in the will. The ruling sustaining the demurrer was not assigned as a reason of appeal by any of the appellants.

El. Henry Hyde and Thomas T. Sherman, for Anna C. Lart et al. William F. Henney, for Caroline P. Ives. Lucius F. Robinson, John T. Robinson, and Ralph O. Wells, for Emille Ives et al. Edward D. Robbins, for Sophia I. Owen et al.

BALDWIN, J. (after stating the facts). The general intent of the testator was to secure a division, first of the income, and ultimately of the principal, of his residuary estate, subject to specified reservations in favor of his widow and daughter and of certain charities, between his three children or their families in three equal shares. After his widow, his children, were the primary objects of his solicitude, and particularly with reference to their comfortable support and that of the families which each might have. To make this more sure he created, by the nineteenth clause of his will, a spendthrift trust, and by the twentieth authorized, in case of his wife and children and their families, additions to income from the principal, should the trustees think it necessary. So far as his daughter was concerned, he also gave her a certain preference over her brothers in this respect, by the directions in the first codicil. The provisions thus made for the family of any particular beneficiary became inoperative on the death of that beneficiary. The family intended was that of which he was and remained the head. His death would dissolve and destroy it. *St. John v. Dann*, 66 Conn. 401, 404, 34 Atl. 110.

The death of Walter in 1893, leaving surviving issue, brought the fourteenth clause of the will into operation as respects the third of the estate designed for him and his representatives. Thereafter the income previously payable to him or for his benefit was to be paid in like manner to or for the benefit of his widow and such surviving issue until such issue should, respectively, come of age. For this purpose and until such times, the trustees were to continue in possession of the estate. But the ultimate title to two-thirds of the share, which for convenience we may term Walter's, became vested at his death in his three surviving children, subject only to the provision for the death of any under age made in the fifteenth clause. The testator, after giving them two-thirds of the income which their father had formerly enjoyed until one of them should become of full age, had provided in respect to the principal thus: "As they respectively attain said age, I give, devise, and bequeath to them respectively, their heirs and assigns,

in equal portions forever, so much of the principal of my estate as is herein devised and bequeathed for the use and benefit of such deceased son or daughter: provided that such surviving issue are to take per stirpes only and not per capita, and the shares of such as shall have attained the age of twenty-one (21) years at the time of the decease of such son or daughter, their ancestor, to be paid to them respectively immediately upon the decease of such ancestor." Under the settled canon of construction that the law favors vested estates, this gift to them as they, respectively, came of age, being accompanied by a gift, in the case of any who should be minors, of the income meanwhile from their father's death, passed to each, on that event, a vested estate in his proportional share of two-thirds of one-third of the principal of the trust fund. *Johnson v. Edmond*, 65 Conn. 492, 499, 33 Atl. 503. Such third was obviously what the testator meant by "so much of the principal of my estate as is herein devised and bequeathed for the use and benefit of such deceased son." The postponement of the delivery of possession to any grandchild until he should be of age was intended primarily for his protection, and secondarily to keep the property in the testator's family or send it to charitable uses in case of the legatee's death when a minor.

As to the other third of Walter's share, the fourteenth clause of the will, after providing that one-third of the income payable to or for the benefit of Walter during his life, should after his death be paid, "in like manner," to his widow for life, adds these words: "And upon her decease, leaving lawful issue of her deceased husband (my son) then living, said one-third part ($\frac{1}{3}$) income and the principal to go for the benefit of such issue in the same manner as the other two-thirds parts ($\frac{2}{3}$) thereof. And in case of no such issue surviving her, said income and principal to be held and disposed of by said trustees in the manner provided in the clause next following." The phrase "in the same manner," as thus employed, designates the mode in which the recipients shall be benefited. It cannot be regarded as intended to describe who such recipients are, and thus as sending either income or principal to those in whose favor estates in two-thirds of Walter's share had already been created. The recipients intended are not left to be ascertained by inference, but are clearly designated. They are the issue of Walter who may be living at his widow's decease, and, should none such then survive, both income and principal were to go as the fifteenth clause particularly directs. The phrase "one-third ($\frac{1}{3}$) part of the income herein directed to be paid to or for her deceased husband during his life" must be interpreted with reference to the previous provisions for a severance of Walter's third upon his death. If all his

children had been then of age, and neither his wife nor the testator's widow had been living, it is plain that such a severance would have been required, for each child would have been immediately entitled to his share of the principal. Had the testator's widow been then in life, it would have been necessary and proper first to set apart, with the approval of the court of probate, a fund sufficient to produce an income which would satisfy all the provisions of the will in her favor, and to take a third of this fund for the time being out of what would otherwise be Walter's share. In like manner, Walter's widow can now be sufficiently protected by thus setting apart a third of that share to be held by the trustees for her benefit during her life; and the general intent of the will justifies and requires the adoption of that course.

Whether there are in the will any provisions which are invalid under the former statute of perpetuities we have no occasion to inquire, since no advice has been asked by the trustees with respect to that question, nor any claim in regard to it made by any of the parties in interest either in this court or in the court below. In view of these conditions, we intimate no opinion as to the validity of any provision affecting the interest of a grandchild who may die under age. From and after the death of Walter, neither the income nor the principal of his share could be reduced, under any authority given by the twentieth clause of the will, by appropriations in favor of Sophia and her family, or Philo and his family. So long as he remained in life, he or his family might have been benefited by appropriations from the trust fund at the expense of his father's other children and their families, and they at his expense and that of his family. There was thus a mutuality of burden. Each child bore his part of it, and to each it might be a source of benefit. Walter's death cut off any further possibility of such benefits either to him or to his family. This termination of all opportunity for reciprocity in this regard, the provisions for a severance of the principal of his share, and the general intent of the testator to secure equality between his children forbid a construction of the clause in question which would charge the share of any child, when once thus severed by reason of his death, with burdens in favor of any other child or of the family of any other.

We have also come to the conclusion that the nineteenth clause does not apply to the testator's grandchildren. While the language used is sufficiently general to comprehend them, it is controlled by the obvious purposes to secure which the article is drawn, and by the words of absolute gift found in the fourteenth clause. There could be no substantial danger from giving to each minor grandchild the benefit of the entire income of his share. It would naturally be disbursed ei-

ther by the trustees or by his guardian, and in case of the marriage of a granddaughter was, by the sixteenth clause, secured, so far as it might come into her hands, to her sole and separate use. Nor is it consistent with the general intent of the testator to make an equal distribution between the three stocks of descent to bring back the fruits of property once severed from the corpus of the trust to increase that corpus, even conditionally and temporarily. From the date of the severance of Walter's share, which is to be made as of the date of his death, until the death of Philo, the other two shares remained in one undivided and indivisible mass, subject to all the discretionary powers of the trustees which had existed in respect to the entire trust estate prior to the death of Walter. From and after the death of Philo, his third should have been divided and set apart, and the immediate ownership and enjoyment of two-thirds of it then passed of right to his children, if they were all then of age, to be equally divided between them; the other third of it being first set apart to be held by the trustees for the benefit of Philo's widow, for life, and then to go to his issue who may survive her, if any, in the manner already stated with reference to the fund to be set apart for the primary benefit of Walter's widow. During the life of Sophia, the discretionary power given to the trustees, by the twentieth clause of the will, to make appropriations from the principal of the third of the residuary estate remaining after the severance of Walter's third and Philo's third, to secure her comfortable maintenance and that of her family, continues in full force as respects her third. So far as respects any addition to the principal of the trust fund which may have been made under the nineteenth clause, and which remained a part of the principal at the death of Walter, it should, for the purpose of setting apart what represents his share of the principal of the estate, be considered as then fully incorporated into that principal. So far as respects any addition to the principal of the trust fund which may have been made under that clause between the death of Walter and that of Philo, and which remained part of the principal at Philo's death, it should, in like manner, as to those purposes, be considered as then fully and finally incorporated into that principal. All payments of principal made by the trustees in the exercise of their discretionary powers to any beneficiary operate as a withdrawal of the amount so paid finally and forever from the principal of the estate. Such payments the will only authorized for the purpose of securing the comfortable support of those to profit by them. All money thus appropriated was to be used up for present necessities, and not saved to enrich the possessors. They were to take it as part of their income to be spent as such, and neither they nor their representatives can be thereafter held accountable for it, any

more than for the disposition of what was received and paid to or for them as part of the regular income of the trust. Inequality of benefit, as respects the three stocks of descent, has thus resulted, but only because it was a leading object of the testator, carefully expressed, to secure to each child for life a comfortable support for himself and his family, whatever differences between the families might exist in respect to the number of persons included in each, or in the scale of expenditure corresponding to the social station in which each might be placed. Had he intended that such appropriations should, on a final reckoning, be treated as made at the expense of any particular share, to go to any particular child or his representatives, it may be safely assumed, in view of the precise directions as to advancements made in the seventeenth clause, that he would have so expressly provided.

It follows that the superior court erred in its conclusions. The material questions asked by the trustees should have been answered as follows:

1. The estate should not be kept intact and held as an entirety and the income applied, as directed by the will and codicils, so long as any of the children of the testator are alive.

3. The widow of neither son is now entitled to a specific portion of the income of the entire estate; but the widow of each is now entitled to the income of a specific portion of the principal, to be set aside for her benefit.

4. The children of Philo, all being of full age, are now entitled to a portion of the principal of the estate, namely, to two-thirds of half of what of right constituted the principal of the trust fund at his death.

6. The children of Walter, although all but one are minors, are now entitled, so far as ownership is concerned, to a portion of the principal of the estate, namely, to two-thirds of one-third of what constituted the principal of the trust fund at his death. Walter Edgar Ives became, on May 24, 1905, absolutely entitled to the possession of one-third of said portion. The others have each a vested interest in one-half of what remains of it, subject to any valid provision that may exist for the contingency of their dying under age.

8. No payments of principal heretofore made to or for the benefit of the respective children of the testator or their families, by virtue of any discretionary powers conferred upon the trustees by the will or codicils, should be counted as a part of the principal of the estate.

9. The trustees have a discretion in future to make or withhold payments of principal or income to or for the benefit of legatees to the following extent: (1) All powers given them by the nineteenth clause continue unabridged as respects Mrs. Sophia I. Owen and her family during her life, with relation to the third of the estate remaining in their

hands after Philo's share is severed. (2) All powers given them by the twentieth clause and the fourth clause of the first codicil continue unabridged as respects Mrs. Sophia I. Owen and her family, with relation to said third of the estate last above described.

10. Future payments of principal, if any, made to or for the benefit of Mrs. Sophia I. Owen or her family, by virtue of any of the discretionary powers conferred upon the trustees by the will and codicils, should not be counted as part of the principal of the estate upon any future distribution.

11. The trustees have no discretion to make any payment of principal to the widow of either son. As to the amount of income to be paid to each, they have the discretionary powers given them by the nineteenth clause of the will in respect to other legatees.

There is error, and the judgment of the superior court is reversed, and the cause remanded, with directions to render a judgment in conformity with this opinion. No costs will be taxed in this court in favor of any party. The other Judges concurred.

CARSWELL v. SWINDELL et al.

(Court of Appeals of Maryland. Jan. 9. 1906.)

1. QUIETING TITLE—ESSENTIALS OF RELIEF—POSSESSION OF PLAINTIFF.

In order to maintain a bill for the removal of a cloud from title, plaintiff must affirmatively allege and show that he is in possession of the property, and, unless the defendants are numerous, his title must be established at law or be founded on undisputed evidence of long continued possession.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, §§ 36-45, 74.]

2. SAME—PLEADING—ALLEGATIONS OF POSSESSION.

A bill for the removal of a cloud from plaintiff's title, which alleges that plaintiff entered into possession of the land, but fails to show that such possession is actual, as distinguished from merely constructive possession, is defective.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, §§ 36-45, 73, 74.]

3. SAME—TITLE OF PLAINTIFF—SUFFICIENCY OF ESTABLISHMENT AT LAW.

A decision of the Commissioner of the Land Office denying a patent, on the ground that the land sought to be patented was made land, and that as such it belonged to the riparian proprietor and was not subject to a warrant, was not a judicial determination of the legal title to the land sought to be patented, as between the applicant for the patent and the caveator, who claimed the made land by virtue of his title as prior patentee of an island to which he asserted the made land had become attached by accretion.

4. PUBLIC LANDS—PATENT—COLLATERAL ATTACK.

The effect of a patent in passing title may be questioned in a suit at law.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, §§ 324-326.]

5. INJUNCTION — PLEADINGS — IRREPARABLE INJURY—ALLEGATIONS OF FACT.

Where an allegation of irreparable injury is made in a bill to enjoin a trespass, facts

showing that apprehension of such injury is well founded must also be stated.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 223, 232.]

6. SAME.

Equity will not retain jurisdiction of a bill to enjoin a trespass, which contains no allegations of irreparable injury, nor of the insolvency of defendants, nor anything to show the inadequacy of the legal remedy.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 15-17.]

7. SAME—GROUNDS OF RELIEF—INTERFERENCE AND THREATS.

Acts of defendants in claiming and asserting title to land, in entering upon the same, denying plaintiff's title, and threatening to again enter upon the land and destroy a building thereon, are not of themselves sufficient grounds to authorize the issuance of an injunction.

Appeal from Circuit Court of Baltimore City; Thomas S. Baer, Judge.

Bill by Robert S. Carswell against Walter B. Swindell, trustee, and others. From a decree in favor of defendants, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

David M. Newbold and Thomas G. Hayes, for appellant. Alexander Preston and John C. Rose, for appellees.

PAGE, J. The appellant filed a bill in the lower court against the appellees praying for an injunction to restrain the latter from asserting any right or title to the land and accretions thereto described in the bill, and also for the purpose of obtaining a decree removing an alleged cloud on the title of the complainant to the land and accretions. The case was submitted upon bill and exhibits. The court refused the injunction, and from the decree this appeal is taken. The facts charged in the bill are as follows: In 1904 the complainant purchased certain land at public sale from David Newbold, Jr., for \$1,225, and, after final ratification of the sale, it is alleged that "the complainant entered into possession of said land, the metes and bounds of which" are described in Exhibits Nos. 1 and 2 filed with the bill. The land was originally in part, an island in the middle branch of the Patapsco river, a public navigable water within the limits of Baltimore city, and in part submerged land covered by water. The fast land forming originally said island and included in the patent hereinafter mentioned was about four or five acres, and since the 19th day of October, the date when the original patent from the state of Maryland was issued, the fast land of the said island has extended nearly to the mainland, by imperceptible accretions, forming on the shores of said island and becoming part of it. That the land purchased by the complainant was patented by the state on October 19, 1861, to one Thales A. Linthicum, who on April 19, 1873, sold and

conveyed the same to Sidney C. Long, who subsequently, in 1902, executed a mortgage thereon to one David M. Newbold and that said mortgage was subsequently foreclosed, and sold by the trustee thereunder, to the complainant. By the fifth paragraph of said bill, it is charged that the appellant "is now, and has been since he acquired his title to the said land; in possession of all the land" described in his deed from said trustee, as well as that described in the said patent, and that his predecessors in title were also in possession of said land, and it is also averred that he now has a clear legal and equitable title thereto, and that the said title was judicially passed upon by the Commissioner of the Land Office, in a caveat proceeding decided in favor of said Linthicum on November 8, 1873, and a certified copy of the proceeding in the Land Office is filed with the bill marked "Plaintiff's Exhibit No. 4." That the defendants (appellees), "under paper writings purporting to be deeds," claim and assert title to the land and its accretions, but have no title whatever to the same, yet the said assertions of title create a cloud upon the title of the appellants. The appellants filed with their bill exhibits which show that the said defendants have deeded said land, from time to time for many years, and further allege that the appellees have "entered upon said land and accretions and pulled down a portion of the fences surrounding the said land and its accretions, threatening to destroy the building on said land, and so continued on said land until the appellant compelled them to desist from their trespass and leave his said land and premises." That the appellees still deny the title and right of possession of the appellant and threaten to again forcibly enter upon the land, and the complainant "believes and avers that said defendants will immediately attempt to carry into execution said threat, if they are not immediately enjoined and restrained by this court. It further appears from the bill and exhibits that the patent of Thalia, when the same was issued, included only a little over 16 acres of land, of which there were only 4 or 5 acres of fast land, the rest being" submerged land forming the bottom of the Patapsco river; that by subsequent "accretions to shores of the original island," extending nearly to the mainland, the area has increased, until now it includes over 34 acres. Plats are filed with the bill showing the land as granted by the patents and the accretions up to the time the mortgage was given, and also up to the period when the appellant acquired his title. It also appears, from exhibits and plats filed with the bill, that the appellees and others, from whom they derived whatever rights they may have, for many years have claimed title to the said property, showing also that they claim under a deed bearing date in 1872 from James Carroll to their ancestor Charles Ranstead, and since that

time it has passed by descent or conveyances to the appellees and bought, sold, mortgaged, and partitioned by them or those claiming under them.

The general principles applicable to a bill of this nature are well settled. It is a proceeding not intended to put an end to vexatious litigation, but brought because the party fears future injury to his rights; and to maintain it the complainant must be in possession of the property; and, except when the defendants are numerous, his title, if a legal one, must have been established at law, or be founded on undisputed evidence of long continued possession. Possession in this class of cases is not a fact to be presumed, but must be affirmatively alleged and shown. *Livingston v. Hall*, 78 Md. 395, 21 Atl. 49. In *Textor v. Shipley*, 77 Md. 475, 26 Atl. 1019, this court said, it was a general rule in this class of cases that the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff. If the plaintiff is in actual possession, he cannot have "a remedy at law, and is obliged therefore to seek the aid of a court of equity. If, however, the possession is in another person, his remedy is by action of ejectment, and there is no ground for the interposition of a court of equity, for the reason he has an adequate remedy at law." See, also, *Polk v. Pendleton*, 81 Md. 118.

The bill in this case alleges that the appellee "entered into possession of said land, etc." There is nothing to show what the character of the possession is, whether an actual possession, or one merely that may exist in contemplation of law without actual personal enjoyment or occupation. 28 A. & E. Ency. of Law, p. 239. Clearly the bill is defective in not setting forth such facts as would show that the appellant was in the actual possession of the property. The decisions cited by the appellant's counsel show that, to maintain a bill *quia timet*, legal title and possession also must be shown, and not that kind of possession which the law carries by virtue of the legal title, for it may well be that one may have legal title without actual possession. 6 A. & E. Ency. of Law, 159, and cases. Nor does the bill show a legal title which has been established by law, or is founded on undisputed evidence or long continued possession. The foundation of the appellant's title is the patent of Thalia, issued in 1861, for 16 acres, and the claim is that, by imperceptible accretions, this area has been increased to 34 acres. On the side of the appellant it appears that the appellees have been claiming title to the property under a deed from James Carroll dated 6th of January, 1862, and from that date have been asserting their title by dealings with the property during all that time, in dividing it, selling and buying it, and mortgaging it, etc. It is alleged that the appel-

lees' title was judicially passed upon in favor of Linthicum, by the Commissioner of the Land Office, in a caveat proceeding in 1873. But reference to a copy of the proceedings filed with the bill does not support the allegation. These proceedings show that one Reed had applied for a patent for "Reed's Island," and its issuance was caveated by Long, upon the ground that the land sought to be patented was the same as that covered by the patent of Thalia issued in 1861. The Commissioner held that this allegation was correct—that it appeared that a large part of the land then sought to be patented was made land, that all accretions belong to the riparian proprietor and not subject to a warrant from the Land Office, etc. The Commissioner does not decide that the accretions were the property of the patentee of Thalia (or some one claiming under him), but that it belongs to the riparian proprietor, whether of the mainland or island does not appear. The effect of the decision is that, as to the accretions, they are not subject to a warrant from the Land Office. There has been no judicial determination of the appellees' legal title, and the whole question as to whom the legal title belongs is not clear, but rests upon the determination of questions of law and fact, peculiarly within the province of a court of law. The effect of a patent in passing title may be questioned in a suit of law, and hence the general rule is to issue the patent where right is doubtful. *Jones v. Badley*, 4 Md. Ch. 170. The present case is therefore within the rulings in that of *Clayton v. Shoemaker*, 67 Md. 219, 9 Atl. 636, where this court said: "Here then we are confronted with questions directly relating to the title to land, and, although in some cases where irreparable injury might result from delay a temporary injunction ought to be granted until the legal title can be determined in the proper forum, a court of equity will not pass a decree operating as a final decision of the rights of parties. To do so would be tantamount to a substitution of chancery jurisdiction for that of courts of law deciding questions directly relating to the title to real estate." *Park Ass'n v. Shartzler*, 83 Md. 18, 84 Atl. 536. The remedy at law for the case presented by the bill is plain and adequate, and, when that is so, the aid of a court of equity cannot be invoked. *Hecht v. Colquhoun*, 57 Md. 568.

The decree appealed from goes no further than to refuse the injunction prayed for: There are no allegations in the bill of irreparable injury, nor that the damage complained of is intolerable, nor that the mischief goes to the destruction of the thing. If such allegation were made, there must be also such facts stated as show that the apprehension of injury is well founded. *White v. Flannigan*, 1 Md. 543, 54 Am. Dec. 668. In that case the court said, the bill must "contain a clear statement of the facts

upon which the plaintiff relies for relief. * * * in order that it may be seen whether there is a just and proper ground for the application of so summary remedy" as that of injunction. *Lamm & Hughes v. Burrell*, 69 Md. 274, 14 Atl. 682; *Tifel v. Jenkins*, 95 Md. 667, 53 Atl. 429; *O. & O. C. Co. v. Young*, 3 Md. 490. Here the facts alleged do not show a case of irreparable injury. There is no averment of the insolvency of the appellees, nor of their inability to fully respond in damages; nor is the character of the apprehended injuries such as cannot be fully compensated for by a judgment in a court at law. Even if there were such averments, if the facts charged in the bill do not show that the appellant was committing irreparable injury, and the case presented is one for a court of law, a court of equity will not interfere. *Pfelts v. Pfelts*, 14 Md. 381.

The appellant contends that the vexatious interference by the appellee and the threats averred in the bill are "ample" grounds for the issuing of the injunction and cites to sustain this proposition the case of *Shipley v. W. Md. R. R. Co.*, 99 Md. 116, 56 Atl. 968. That was the case of a railroad company which threatened to take the property of the plaintiff in the construction of its road which had not been condemned or paid for, and it was held that such averments are a sufficient foundation for the issue of a preliminary injunction. But that ruling was based upon the well-established principle that courts will not suffer corporate bodies to take proceedings of an illegal character under the Constitution, whether irreparable or not, and that the authority of the courts to restrain in such cases from an abuse of their powers is well established. *Western Maryland R. R. Co. v. Owings*, 15 Md. 203, 74 Am. Dec. 563; *Am. Tel. & Tel. Co. v. Pearce*, 71 Md. 539, 18 Atl. 910, 7 L. R. A. 200.

There being no sufficient ground alleged in the bill, the decree appealed from will be affirmed.

Decree affirmed.

BALTIMORE & O. R. CO. et al. v. DECK.

(Court of Appeals of Maryland. Jan. 9, 1908.)

1. WITNESSES—CROSS-EXAMINATION.

Defendants, on cross-examination of plaintiff, may not ask whether he heard a certain witness give certain testimony on the former trial; he having, in his examination in chief, made no mention of such witness or the testimony on the former trial.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 949, 952.]

2. APPEAL—HARMLESS ERROR.

Any error in refusing to allow a certain question on cross-examination is harmless; the witness having later testified fully on the subject.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4200, 4201.]

8. RAILROADS—INJURIES TO TRESPASSERS—EVIDENCE.

Refusing to allow defendants, in an action against a railroad company and its servant for shooting plaintiff, to ask a witness how often he got messages that gentlemen had drawn pistols on and threatened trainmen, there being testimony that plaintiff and others who were stealing a ride on a freight train had so acted towards the trainmen, and that a message announcing it had been sent to the railroad authorities, is proper; it not appearing how the answer could be material or relevant.

4. SAME—INSTRUCTIONS—EVIDENCE TO SUPPORT.

Giving an instruction, in an action against a railroad company and its employé, who also held a commission as policeman from the state, for the shooting of plaintiff by such employé, stating the liability of defendants, if the jury found, among other things, that at the time the employé shot he was attempting to drive trespassers from the train, is erroneous; there being no evidence that he was making such attempt, but merely that he was in the act of arresting plaintiff and others, who were stealing a ride.

5. EVIDENCE—ADMISSIONS.

Testimony that after plaintiff was shot, and while he was lying on the ground, defendant's employé, in the presence of plaintiff and another, said, "Yes, if I hadn't shot * * * [him] I would have kicked his ribs in," is evidence against defendant that the employé shot plaintiff.

6. MASTER AND SERVANT—ACT IN SCOPE OF EMPLOYMENT—EVIDENCE.

Whether one who was in the employ of a railroad company as a special officer, and had a commission as police officer from the state, was acting in the scope of his employment with the company when he shot plaintiff, who was stealing a ride on the company's freight train, held a question for the jury, under all the facts and circumstances.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, § 1275.]

Appeal from Court of Common Pleas; George M. Sharp, Judge.

Action by Louis Deck against the Baltimore & Ohio Railroad Company and Charles A. Steiner. Judgment for plaintiff. Defendants appeal. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Duncan K. Brent, for appellants. Gustavus A. Korb and Myer Rosenbush, for appellee.

BURKE, J. This case is before us for the second time. The first appeal is reported in 100 Md. 168, 59 Atl. 650. On that appeal the legal principles which should control the case were established, and we do not feel called upon to restate those principles in this opinion, or to reinforce them by reference to other authorities.

In order to prove the case stated in the declaration, the plaintiff, Louis Deck, testified: That about 12 o'clock on the night of July 1, 1899, he and several companions boarded a Baltimore & Ohio freight train, and rode as far as Oella, where they stayed until about 9 o'clock on the night of July 2, 1899, when they boarded another freight

train of the Baltimore & Ohio Railroad to return to Baltimore, but, when the train reached the point where the plaintiff was injured, it slowed down, and that he got off and started to walk. That he had walked a short distance when a shot was fired, and the ball struck him in the back. He afterwards heard other shots, but that the first shot he heard hit him. That, while he was lying on the ground, a man named Will Thomas came up with a lantern, and Steiner, one of the defendants, came also, and that Steiner asked what was the matter, and that the plaintiff told him he was shot. Thereupon Steiner said: "Yes; the son of a bitch, if I hadn't shot him, I would have kicked his ribs in." That he was about 15 feet from the train when he was shot. That, as soon as the ball hit him, he dropped right down. And one of the defendants, Charles Steiner, testified that he had been in the employ of the defendant company for about 20 years in various capacities; that he was on duty as a special officer for the defendant company on the night of July 2, 1899, and was paid by that company, and received no pay from any other source than from the Baltimore & Ohio Railroad; that his duties as special officer were to protect the company's cars and property, and drive off trespassers from trains, and arrest them, and keep them off the property; that on the night in question he was at the place of shooting as a policeman of the Baltimore & Ohio Railroad Company to protect its property, and in pursuance of his duty as policeman, commissioned by the state of Maryland for the preservation of law and order. And John J. Hoffman, one of Deck's companions on the night in question, testified that, when they got near the city limits, the train slowed up and Deck got off and said he was going home; that "before the train stopped altogether some one came up and told us to get off there, that we were under arrest, and we were about to get off, and some one fired a shot"; that witness turned in the opposite direction and ran; that he had no pistol, and, as far as he knew, his companions had none; that there was no necessity for firing a revolver, because whoever the man was he could have arrested us without firing a revolver. Herkenhahn, another of Deck's companions, testified that they boarded a freight train of the defendant company at Oella on the night in question to return to Baltimore, and that, when the train got to Mt. Clare Junction, "some man ordered them off and said they were under arrest"; that, when the man ordered them off, he started to shoot at them, and they got off on the opposite side and ran; that he had no pistol and did no shooting. The plaintiff also proved by George J. Carlin that several months after the shooting Steiner told him that he had shot Deck, and by Dr. Smith he proved that Deck was seriously and permanently injured. The de-

fendants offered evidence tending to prove: That on July 2, 1899, when the freight train of the Baltimore & Ohio Railroad Company, in charge of Conductor Severn, stopped at Frederick Junction, a station 58 miles from Baltimore, two men got off of the train, Deck being one of them. That, as the train started to leave the station, the men got back on the train, and were ordered off by the conductor. That one of the men drew a pistol and held it in the face of the conductor, and said: "You son of a bitch, if you come up here, I will blow your brains out." That the men afterwards got off of the train. That the plaintiff was next seen at Bartholows, a station seven miles from Frederick Junction, and was then standing on the ground alongside of a freight train in charge of Conductor Willhide. That at Gaithersburg, a station 30 miles from Baltimore, a number of men were found standing on the bumpers of the cars, and were ordered off by Conductor Willhide. That the men told the conductor "to move on, or he would be filled full of lead," and one of the men pushed the witness Schroeder in the back with a pistol, and told him to move on. That Willhide sent a telegraphic message from Gaithersburg to the railroad authorities in Baltimore that tramps had taken charge of the train, and to send relief. That in response to this message Steiner and Higginbotham were sent to the scene of trouble. They met Willhide's train near Sextonville, and the account given by the defendants' witnesses as to the circumstances attending the shooting differ in many important particulars from that adduced in support of the plaintiff's case. The defendants' evidence tends to prove that, when the officers reached the train upon which the men were riding, Higginbotham went to the north side of the train and Steiner to the south; that Steiner attempted to put the men under arrest, and notified them that they were under arrest; that thereupon they pulled their pistols, jumped from the train to the ground, and began to shoot; that they fired a number of shots, and appeared to be shooting at Steiner; that, as soon as they ceased shooting, Higginbotham, who was four or five feet from the men, attempted to arrest them, when Deck jumped in front of him, and was shot in the back by one of the men in the crowd; that the shot which struck Deck was the last one fired; that after being shot Deck staggered across the west-bound track and fell; that immediately afterwards Steiner came over to where the plaintiff was lying, and asked Higginbotham if he "had got any of them"; that it was at this point that the alleged declaration of Steiner, mentioned in plaintiff's evidence, was made. There is an agreement in the record to the effect that the defendant Steiner was an employé of the Baltimore & Ohio Railroad Company on the night the plaintiff was shot, in the capacity

of detective, or special officer; that he was on duty as such employé for said company on that night; and that, among other duties of said Steiner's employment, it was his duty to drive trespassers off the trains. These facts, which are the important and controlling ones in the record, are all that need be stated in order to enable us to pass upon the main questions presented upon this appeal.

During the trial four exceptions were taken by the defendants to the ruling of the court upon questions of evidence. We will first consider these exceptions. The defendants' counsel, on cross-examination, asked the plaintiff this question: "Did you hear him [Thomas] in that case, at that trial, he being your own witness, testify that Steiner had not said: 'If I hadn't shot the son of a bitch, I would have kicked his ribs in?'" The court refused to allow this question to be answered. This constitutes the defendants' first exception. The witness had made no mention of Thomas, or the testimony in the former trial in his examination in chief, and we see no reason why the defendants should have been permitted to cross-examine him as to what had been testified to by another witness in the former case. Thomas was present in court, and was afterwards called as a witness, both for the plaintiff and defendants, and testified to the facts sought to be elicited by the question to which the plaintiff's counsel had objected.

The defendants' second exception was abandoned. The defendants' third exception was taken to the refusal of the court to allow the counsel for defendants to ask the witness Steiner, on cross-examination, if he had not been called to the scene of the trouble, because of the notification of riotous and disorderly proceedings. If it be assumed that the trial court erred in this respect, it does not appear that the defendants were injured thereby, as the witness Steiner and others, at a later stage of the trial, testified fully as to the exact circumstances under which Steiner was called to the relief of Conductor Willhide.

The defendants' counsel proposed to ask the witness Andre the following question: "How often do you get messages announcing that gentlemen have drawn pistols upon and threatened trainmen?" The court refused to allow the question to be answered, and this constitutes the defendants' fourth exception. We are unable to see how the answer to this question could be material, or relevant to the issues involved. We therefore find no reversible errors in the rulings of the lower court upon questions of evidence.

The defendants' fifth exception presents for consideration the ruling of the court upon the prayers, and upon the special exceptions interposed by the defendants to the granting of the plaintiff's prayers. By the first prayer of the plaintiff, which was granted, the jury were instructed that if they

find that the plaintiff was walking on or near the tracks of the defendant company on or about the night of July 2, 1899, as testified to, and if they further find that the defendant Steiner was in the employ of said defendant body corporate as a detective or special officer, and that while said Steiner was acting within the scope of his authority and in the course of his employment, if the jury so find, said Steiner attempted or was in the act of driving trespassers from a train belonging to the defendant body corporate, said Steiner recklessly and wantonly fired a pistol toward the plaintiff, then their verdict must be for the plaintiff. To the granting of this prayer two special exceptions were filed—one by the defendants jointly, and one by the Baltimore & Ohio Railroad Company—both of which were overruled. The first exception asserted that there had been no evidence offered legally sufficient to show either that Steiner attempted or was in the act of driving off trespassers from a train belonging to the defendant body corporate, or that said Steiner recklessly or wantonly fired a pistol towards the plaintiff. The other exception is to both prayers of the plaintiff, and asserts that "there is no evidence in the case legally sufficient to show, as against the Baltimore & Ohio Railroad Company, that the shot by which Deck was hurt was fired by defendant Steiner."

We are not able to find in this record any evidence to support the hypothesis that on the occasion when the plaintiff was injured Steiner attempted or was in the act of driving trespassers from a train of the defendant company. In this respect the case is widely different from the one presented on the former appeal of *Deck v. Baltimore & Ohio Railroad Company*. In that case the defendants showed that Steiner was simply driving trespassers from the train. In this case it appears by every witness, both for the plaintiff and for the defendants, who has spoken upon the subject, that Steiner was in the act of arresting the men on the train for a breach of the criminal law of the state at the time the plaintiff was injured. By the plaintiff's own evidence it appears that he and his companions were guilty of a criminal act, and, if the testimony of the defendants' witnesses be true, they were a band of reckless and desperate lawbreakers. Steiner was a state officer, appointed by the governor under the law, and held a commission from the state. He was also an employé of the defendant company, but whether he was acting as an employé of the company at the time the injury was inflicted, or as a commissioned officer of the state in the exercise of the powers of his office in attempting to arrest, without warrant, the men on the train, who were confessedly vio-

lators of the criminal law of the state, were questions which should have been submitted to the decision of the jury. From what we have said it is manifest that the prayer clearly misstated the real act and purpose of Steiner, as shown by the evidence. The legal consequence which would follow from his acts done solely in one capacity would be quite different from that which would result from acts done in the other. We are, therefore, of opinion that the court committed an error in granting the plaintiff's first prayer, because there was no evidence in the case legally sufficient to support the hypothesis that Steiner, at the time the injury was inflicted, was attempting or was in the act of driving off trespassers from the defendant company's train.

We find no error in granting the plaintiff's second prayer. It is one that has been repeatedly approved by this court, and under the facts, as declared by the record, is free from objection.

The first prayer of the Baltimore & Ohio Railroad Company was properly refused. The admissibility of the alleged declaration of Steiner, stated in the prayer, to bind the railroad company, was considered and passed upon by this court on the former appeal. The court, in considering the prayer of the railroad company, granted by the court below at the conclusion of the plaintiff's case, by which the jury was directed to find their verdict for the defendant company, Fowler, J., in delivering the opinion in that case, propounds this question: "Was there any evidence in the case legally sufficient to prove that the defendant Steiner did the shooting complained of?" He was then inquiring whether or not there was any evidence legally sufficient to be submitted to the jury to show, as against the Baltimore & Ohio Railroad Company, that Steiner did the shooting. In answer to that question the court distinctly decided that the evidence of the plaintiff that Steiner said, in the presence of Thomas, after the plaintiff was shot, and while he was lying upon the ground: "Yes; if I hadn't shot the son of a bitch, I would have kicked his ribs in"—was evidence to be considered by the jury against the defendant company that Steiner had shot the plaintiff.

There was no error in refusing the defendants' third prayer, because the question whether Steiner was acting in the scope of his employment as an employé of the Baltimore & Ohio Railroad Company at the time the plaintiff was shot was a question for the jury to pass upon, under all the facts and circumstances of the case.

For error in granting the plaintiff's first prayer, the judgment must be reversed.

Judgment reversed, and new trial awarded, with costs to the appellants.

EIRLEY v. EIRLEY et al.

(Court of Appeals of Maryland. Jan. 9, 1906.)

1. LIMITATION OF ACTIONS—SUSPENSION OF STATUTE—EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST DECEDENT.

Under the express provisions of Code Pub. Gen. Laws, art. 57, § 7, whenever any person dies indebted and his interest in real estate is liable to be proceeded against for the payment of his debts by reason of the insufficiency of his personal estate, the operation of limitations is suspended in relation to the heirs and devisees of the debtor for the period of 18 months from the death of the decedent.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 431-438.]

2. SAME—DOMESTIC SERVICES—CONTRACT FOR PAYMENT—SUFFICIENCY OF EVIDENCE.

Evidence held to show that domestic services rendered by plaintiff to defendant's ancestor were rendered under promise, and with the expectation of payment, and that plaintiff was accordingly entitled to recover therefor.

Appeal from Circuit Court, Washington County, in Equity; M. L. Keedy, Judge.

Bill by Mary E. Eirley against Elmer E. Eirley and others. From a decree dismissing the bill, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Palmer Tennant, for appellant. Roger T. Edmonds, for appellees.

BRISCOE, J. On the 2d day of September 1904, the appellant filed a creditors' bill in the circuit court for Washington county against the appellees, who are heirs at law of one William H. Eirley, late of that county, deceased, to obtain a sale of certain real estate for the purpose of paying his debts. The bill avers that the intestate was, in his lifetime, indebted to the appellant in the sum of \$2,094, "for personal attention in nursing, preparing meals, washing, mending clothes, room rent, etc., from April 1, 1893, to July 31, 1899, and from October 1, 1899 to May 24, 1900, at \$300 per year." It further charges, that the intestate possessed no personal property at the time of his death but owned certain real estate, situate in Hagerstown, Md., subject to liens by way of mortgages, one for the sum of \$200 and another for \$100. The prayer of the bill, in addition to the one for general relief, is that the real estate or so much thereof as may be necessary for the purpose be sold for the payment of the appellant's claim. On the 23d of September, 1904, the appellees, the heirs at law, answered the bill wherein they deny the indebtedness as claimed by the plaintiff, and aver that if any existed, it was fully satisfied and discharged by payment in the lifetime of the intestate. They also rely upon and claim the benefit of the statute of limitations as a bar to the plaintiff's claim. The other matters charged in the bill are admitted by the answer to be true. The appellee Welsh, the assignee of the two mortgages against the property also answered the bill, and as-

serted the priority of her liens, in case of a sale of the property, but did not admit or deny the contentions of the plaintiff as alleged in the bill. To the answer, the plaintiff replied, "a new promise," to the bar of the statute of limitations, and joined issue on the other defenses made by the answer. The case was heard on bill, answer, and proof, and from a decree of the circuit court for Washington county passed on the 25th day of April 1905, dismissing the plaintiff's bill, this appeal has been taken.

The plea of limitations interposed by the appellees in the case, cannot we think be allowed to prevail to defeat that part of the appellant's claim, revived by the new promise, made in the lifetime of the debtor. Mr. Eirley died on May 24, 1900, and the bill in this case was filed on the 2d day of September, 1904; that is four years and three months after his death. This being a proceeding in equity against the real estate of a debtor for the payment of his debts by reason of the insufficiency of the personalty, the operation of the statute of limitations is suspended in relation to the heirs for the period of 18 months from the death of the decedent; that is the statute is suspended in favor of the creditor as against the heir and devisees for the period named. Code Pub. Gen. Laws, art. 57, § 7; *Shepherd v. Bevans*, 4 Md. Ch. 408; *Thompson v. Dorsey*, 4 Md. Ch. 149; *Simms v. Lloyd*, 58 Md. 477. The appellant's claim as set out in the record appears to be for personal attention, "in nursing, preparing meals, washing, mending, etc.," from April 1, 1893, to May 24, 1900, a period of 6 years and 11 months. The proof, we think, is sufficient to establish the appellant's claim for services rendered from the year 1896 to 1900, but the remaining portion thereof will be denied.

The undisputed testimony shows that William H. Eirley lived with and was cared for by the appellant from March, 1896, to the date of his death. The witness Margaret A. Rose testified, the intestate said, in her presence as to the services since 1896, "she should be well paid, there wasn't a child that did as much for him as she did." The witness Brogunier testified as to a conversation held with him as late as April, 1900, as follows: "Q. In what way did she attend to him? A. Washing, mending, and everything that he needed. Q. Did he take his meals with her? A. Yes, sir, while I was there. Q. Did he board there and room there? A. Yes, sir. Q. Had a room there? A. Yes, sir, he stayed there. Q. Did you ever have any conversation with him about Mrs. Eirley? A. Yes, sir, I did. Q. What conversation did you have with him? A. He sat down and talked to me when he had nothing to do, and was telling me that it was too hard on Ellie (that's what he always called her); he said it was too much work for her to do, and he said he would pay her and pay her well for it. Q. Did he or not ever talk to

you about the services that were rendered by her to him? A. Yes, sir. Q. What did he say? A. He said if it would not be for Ellie he would not live with Charlie, he said he would not stay there with him. He said she would not lose anything by it, he intended to pay and pay her well for it." William Hose testified in answer to the question: "Q. Did you or not ever have any conversation with Mr. William H. Eirley regarding Mrs. Eirley, and the services rendered by her to him? A. Yes, sir. Well, I don't know as I could hardly just tell exactly word for word, we had a talk about Mrs. Eirley taking such good care of him, and in fact he stated that he hardly knew what he would do if it would not be for her as she had taken very good care of him. He told me that he expected to, or intended to, or was going to pay her. I do not remember just exactly what were the words that were used." There was other testimony to the effect that the services were rendered, that the intestate promised from time to time "to pay and to pay her well," and that the appellant expected to charge and to be paid for such services.

In view of this proof, we think it is clear that the appellant is entitled to recover for the services rendered from 1896 to 1900, at the rate of \$25 per month. The law bearing upon a case of this kind, has been settled and determined by numerous decisions of this court, and we need not discuss it here. *Gill v. Donovan*, 96 Md. 518, 54 Atl. 117; *Gill v. Staylor*, 93 Md. 453, 49 Atl. 650; *Hamilton v. Thirston*, 93 Md. 213, 48 Atl. 709.

It follows that the decree of the court below will be reversed, and cause remanded for further proceedings, in accordance with this opinion.

Decree reversed, and cause remanded, with costs.

STAKE v. MOBLEY et al.

(Court of Appeals of Maryland. Dec. 7, 1905.)

1. CONVERSION—WILLS—CONSTRUCTION.

Testator bequeathed a pecuniary legacy to his grandchild, and the balance of his estate he bequeathed unto his children or heirs, share and share alike, and appointed certain executors, with power to sell and convey all his property, real and personal. His estate consisted largely of real estate. The personal property was insufficient to pay his debts, and the pecuniary legacy and the remaining real estate was not susceptible of division in kind among his eight children. *Held*, that the will operated as a conversion of the real estate into personalty.

2. CONVERSION BY WILL—MORTGAGE BY HEIRS.

Where a will operated to convert testator's real estate, therein devised to his heirs, into personalty as of the date of the testator's death, a subsequent mortgage executed by one of the heirs on all her right, title, and interest in and to certain of such real estate created no lien thereon.

Appeal from Circuit Court, Washington County, in Equity; M. L. Keedy, Judge.

Bill by William A. Armstrong against Harry H. Mobley and Mary E. Stake, as executrix of the will of Edward Stake, deceased. From a judgment in favor of plaintiff, defendant Mary E. Stake as executrix appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, JONES, SCHMUCKER, and BURKE, JJ.

Charles A. Little, for appellant. J. O. Snyder, for appellee.

BOYD, J. The principal question in this case is whether or not the provisions of the last will and testament of Joseph Hoover worked an equitable conversion of all his realty into personalty at the time of his death. He died in 1887, leaving surviving him eight children. On the 28th of August, 1888, Virginia T. Mobley, one of his daughters, and her husband, Harry H. Mobley, executed a mortgage to the late Judge Edward Stake to secure the sum of \$512 borrowed from him, in which they "do grant unto the said Edward Stake all right, title, interest and estate in and to the following described property situate in Hagerstown, Maryland, known as the 'Hoover House,' etc. She died in 1891, intestate, leaving her husband and one child, Cecelia M. Mobley, surviving her. On May 31, 1905, William H. Armstrong filed a bill in equity in the circuit court for Washington county, in which he alleged that he had purchased from the executors of Joseph Hoover the property known as the "Hoover House," and that the final account of the executors had been stated in the orphans' court of that county, whereby they distributed the proceeds of the sale of property purchased by him, distributing to Cecelia M. Mobley the share of her mother, although not yet paid to her, and ignored the mortgage to Edward Stake. The bill alleges that the mortgage was a lien on that share, and was a cloud upon the plaintiff's title, and prays the court to construe the will, to direct the executors as to the proper and legal manner of distribution of the estate, and that his title to the property may be relieved of the cloud resting upon it by reason of the mortgage. The cause was heard on an agreed statement of facts and a decree was passed which declared: (1) that the will operated as an equitable conversion of the real estate left by Joseph Hoover into personalty, at the time of his death, and (2) that the mortgage to Edward Stake did not constitute a lien upon the property and was of no effect or validity as a mortgage lien upon said property, or any portion thereof. From that decree, the executrix of Edward Stake appealed.

As the will is short, we will copy it as

It appears in the record, omitting only the formal beginning and conclusion. It is as follows:

"First. After my debts and funeral charges rf paid I bequeth as follows.

"Item. I give and bequeth to my Grandchild Edman Canan five hundre dollars to be used for to educate hin and the bal of my esstate I divide shar and shar alike unto my children or my hairs.

"And lastly I do hereby constitute and appoint my two sons George D. and Elder Hoover to be ny sole Executors with full power to sell and cony all ny property real persunal and mixed wich I may die posed of of this ny last wil and testament."

It is dated September 28, 1886, and was duly executed. As it is the duty of the court to endeavor to ascertain from the will the intention of a testator, it is always unfortunate when one is drawn as this is; but we must construe it as we find it. There is but little conflict between the authorities as to the general principles applicable to an equitable conversion by will, but the difficulty is in their application to particular cases. When a testator manifests a clear and unmistakable intention that real property belonging to his estate shall be sold and converted into money, it is in equity generally treated as so converted at the time of his death, in the absence of some provision or expression in the will which contemplates a postponement of the time of conversion. The general rule "that lands devised to be sold are thereby turned into money, and construed in equity as personal estate," was recognized by our predecessors many years ago. *Hurt v. Fisher*, 1 Har. & G. 88. And in *Thomas v. Wood*, 1 Md. Ch. 296, the chancellor said: "In the eye of a court of equity the will of the testator had converted the real into personal estate, and the actual conversion by a sale could not be necessary to give validity to rights founded upon the equitable principle." That case has often been cited with approval by this court. There is generally little room for controversy when there are mandatory words directing the sale or giving the power of sale in imperative terms, as an absolute imperative direction to sell real property at all events will ordinarily work an immediate conversion. We use the words "generally," "ordinarily," etc., advisedly in stating these rules as there may be exceptions owing to peculiar conditions, such, for example, when land is devised to be sold and the proceeds of sale are directed to be paid upon a trust which is void, the land is not thereby converted into money, or when the purpose for which conversion is directed fails or is no longer necessary, as illustrated by the cases of *Rizer v. Perry*, 58 Md. 112, *Cronise v. Hardt*, 47 Md. 433, *Orrick v. Boehm*, 49 Md. 72, and others that might be cited.

In this will there is no express direction

to sell, and the appellant contends that the intention of the testator to convert the realty into personalty cannot be gathered from the will, and that brings us to the real question to be determined. The agreed statement shows that the debts, funeral expenses, costs of administration, and the legacy to the grandchild far exceeded the personal estate of the testator, and that, in order to pay them, it was necessary to sell a part of the real estate. One lot was sold by the executors in 1887 for \$300, another in that year for \$3,510. After the sale of those properties the debts, funeral expenses, costs, and legacy were paid in full and a balance of \$59.10 distributed. The sale of the "Hoover House" was not made until recently, 17 or 18 years after the death of the testator. There was, then, no necessity to sell it in order to pay the debts, etc., and the question is whether the will manifested a clear and unequivocal intention of the testator to have all his real estate sold and converted into money, for any purpose. It would be going quite far to lay much stress on the expression used by the testator "I bequeth as follows," for we cannot fail to see that whoever drew the will was not learned in the law, and hence it would not be an altogether fair inference that the testator necessarily meant by that term to treat all of his estate as personalty. But the fact remains that he did use a term that ordinarily refers to personal property, and hence it at least does not conflict with any other part of the will that might seem to treat the estate as personalty. The testator left eight children and his property consisted of less than a thousand dollars of personalty, and the three parcels of real estate—the two previously sold and the "Hoover House." We do not find in the record what the latter sold for, but it was evidently worth much more than either of the others. The testator knew that some part of his real estate would have to be sold to pay his debts, funeral expenses, and the legacy, and he also knew that the real estate could not be divided into eight parts. He could, of course, have left his real estate to his eight children as tenants in common, but he said (disregarding the spelling in the will) "and the balance of my estate I divide share and share alike unto my children or their heirs." "To divide is to separate and bestow in shares; to part an entire thing; to make partition of among a number." 9 Am. & Eng. Ency. of Law, 678. He evidently did not mean to simply give the balance of his estate to his children as tenants in common, but expressed his intention of dividing it so that each one would have his share, or, to follow the above definition, "to separate and bestow in shares" or "to make partition of" it among his children. If that was all, his intention might be said to be still in doubt. But he gave his executors (again correcting the spelling) "full power to sell and convey all my property, real, personal and mixed which I may die possessed of"—

not power to sell a part or so much as was necessary to pay his debts, etc., but all of it. Why give them power to sell all of it, if not for the purpose declared in the item just preceding that clause—so as to divide it between his children? It would seem, therefore, that the only way to carry out the intention of the testator was to sell all his real and personal property, pay his debts, funeral charges, costs of administration, other expenses, and the legacy, and then divide the balance between his children. It may be suggested that he meant "devise," instead of "divide"; but, if he did, he did not say so, and it would be substituting a word which would have an entirely different effect from the one he used, without any reason shown in the will for doing so. He did not use the word "devise" any place in his will, although he did use "bequeth"; and, if we substituted that word, it would make the testator devise his real estate to his children in one clause of the will, and in the one immediately following it authorize his executors to sell it. Unless we do make the substitution suggested above, which we do not feel justified in doing, there is no devise of the remaining real estate, as such. But, when we take the whole will into consideration, we see what seems to us to be a clear manifestation of the testator's intention—that the executors should sell all the real estate, and divide the proceeds between his children after the payment of debts, etc.

In *Paisley v. Holzshu*, 83 Md. 325, 34 Atl. 832, where it was held that land had been converted into money under the provisions of a deed of trust, this court said of the grantor: "He also mentions the payment of certain gifts, and then directs that the balance remaining shall be divided into seven equal shares. To execute his wishes, and accomplish his poorly expressed purposes as contained in said deed, would be a legal impossibility without a conversion." That is strikingly applicable to this case. In 2 Am. & Eng. Dec. in Eq. 86, in the notes to *Ingersoll's Estate*, there is an excellent discussion of the subject of equitable conversion by will, and a large number of authorities are cited, including many of our own decisions. After discussing this subject under various heads, and speaking of a discretionary power of sale, it is said (on page 90): "The discretion, however, to prevent conversion, must be as to the fact of sale, so that it is optional with the executor or trustee whether he will sell or not. If a sale is contemplated at all events, there will be a conversion, though the time and the manner of sale are left entirely to the pleasure of the executor." And, after citing authorities for that, the annotator adds: "And, if a will contains only a discretionary power of sale, but its provisions cannot be carried out without a sale, the direction to sell will be held to be absolute, and will work an out and out con-

version of the realty, at the time of the testator's death." So, in 9 Cyc. 832, it is said: "The intention to convert may be implied, as where a testator authorized his executors to sell his real estate, and it is apparent from the general provisions of the will that he intended such estate to be sold, although the power of sale is not in terms imperative." And this court in *Paisley v. Holzshu*, supra, quoted with approval from 3 Pomeroy's Eq. Jur. § 1160, where the principle is thus stated: "It is not essential, however, that the direction should be express in order to be imperative. It may be necessarily implied. * * * In fact, the whole result depends upon the intention. If by express language, or by a reasonable construction of all its terms, the instrument shows an intention that the original form of the property shall be changed, then a conversion necessarily takes place." In 7 Am. & Eng. Ency. of Law 466, after having stated that the question of conversion is to be determined from the intention of the testator as manifested by the provisions in the will, it is said: "Such intention may be shown by either (1) a positive direction for a conversion; or (2) an absolute necessity to sell in order to carry out the provisions of the will, the conversion arising on the theory that the testator must have intended that everything essential to his scheme should be done; or (3) such a blending of the real and personal estate by the testator in his will as clearly to show that he intended to create a fund out of both real and personal estate and to bequeath the fund as money."

It seems clear from these authorities that when in order to carry out the intention of the testator, as shown by the provisions of the will, it is necessary to sell real estate, a conversion takes place, although the testator only gave the executor a power of sale and did not in express terms direct it, for "the necessity of a conversion of realty into personalty to accomplish the purposes expressed is equivalent to an imperative direction to convert, and effects an equitable conversion." 9 Cyc. 833. When there is an imperative direction to sell, unless the time is qualified in some way, the conversion takes place as from the death of the testator, as is well settled by the authorities, and it must be likewise so when the provisions are such as to be equivalent to an imperative direction to sell. We do not understand the cases of this state, such as *Cronise v. Hardt*, 47 Md. 433, *Orrick v. Boehm*, 49 Md. 72, *Keller v. Harper*, 64 Md. 74, 1 Atl. 65, and *Kennedy v. Dickey*, 99 Md. 295, 57 Atl. 621, to stand in the way of applying these doctrines to this case. In so far as they may in any wise appear to do so, it is because of the difference between the provisions of these wills and that of *Joseph Hoover*. Having determined that his intention was that the executors should sell all his property, real and person-

al, in order to divide the balance (after the payment of his debts, etc.), and that it was necessary to do so in order to carry out his intention, the power of sale under those circumstances is necessarily equivalent to an imperative direction, and must be governed by the principles of law in reference to conversion that would have been applicable if there had been an express direction to sell.

It is to be regretted that this conclusion makes the mortgage of Judge Stake invalid as a lien on Mrs. Mobley's interest in the "Hoover House," but the case of *Early v. Dorsett*, 45 Md. 462, is decisive of the question. As shown above, this mortgage simply granted "all right, title, interest and estate in and to the following described property," etc. In *Early v. Dorsett* a decree was passed for the sale of real estate devised by a will, for the purpose of distribution amongst the devisees. Mr. Sasscer, one of the devisees, purchased the property and the sale was ratified, and before he had paid the purchase money in full or had obtained a deed from the trustee he mortgaged the land to *Early*. He afterwards made default, and a resale was made at the purchaser's risk. In passing on the question, after referring to the law in this state that, when such a sale was ratified and the purchaser had complied with the terms of sale as provided by the decree, a mutation from realty to personalty was complete, it was held that Sasscer's share of the net proceeds of the original sale as one of the distributees was at the time the mortgage was executed a mere chose in action, and not an interest in land, and that it did not pass by the mortgage, and was "simply a conveyance by way of mortgage of all his right, title and interest in the land, which he had purchased under the decree." Judge Miller said the court had examined it to see if it contained any terms capable of effecting an assignment of such share, but found nothing in it "which can operate as a conveyance or assignment of the mortgagor's interest in these proceeds." The language of this mortgage is similar to that in *Early v. Dorsett*.

As this bill was filed by a purchaser from the executors to remove the cloud on his title, and by our decision his title is relieved, it is not necessary, and would not in our opinion be proper, to determine whether the executrix of Judge Stake could have any relief in a direct proceeding, instituted for the purpose, against this fund, or whether it was necessary to take out letters of administration on the estate of Mrs. Mobley (inasmuch as she entered into the covenant to pay the mortgage and was on the note, and at least to that extent was in debt) in order to pass her share to her husband and daughter. Such inquiries would involve the consideration of the statute of limitations and other questions which cannot properly now be

determined, and would not be relevant to the issues raised by this bill and the answers. We only refer to them in order that it may be distinctly understood that we do not mean by this decision of the questions which are before us in any way preclude the executrix of Judge Stake from any proceeding that may be open to her to reach this fund, if that be possible.

Decree affirmed; the appellant to pay the costs.

GENDRON v. ST. PIERRE.

(Supreme Court of New Hampshire. Hillsborough. Dec. 5, 1905.)

1. SLANDER—PLEADING.

A declaration for slander alleged in the inducement that plaintiff had always properly treated and maintained his wife, and alleged that defendant wrongfully stated that when he first visited the woman (meaning plaintiff's wife) defendant became suspicious of insurance fraud, which suspicions were not lessened by the apparent indifference "of the woman's husband and sister with reference to her condition," etc., and that plaintiff's wife died because of his culpable neglect of her in her sickness, etc., *Held*, that the declaration was not defective for failure to allege that plaintiff had the exclusive care of his wife and, except in the innuendoes, that the plaintiff's negligence caused her death.

2. SAME.

Where, in an action for slander, in stating defendant's belief that plaintiff's wife died because of his neglect, the alleged slanderous words expressly implied the existence of the marital relation between plaintiff and the woman referred to, and that the wife was sick and needed medical care, maintenance, and nursing, which were absolutely necessary to preserve her life, and want of them caused her death, the allegation that the words were uttered and "published of and concerning the plaintiff" constituted a sufficient allegation that the words were spoken concerning plaintiff in his marital relation to the sick woman, and with reference to the performance of the legal duties he owed to her by reason of such relation.

3. SAME—STATEMENTS OF OPINION.

Where defendant's statements naturally conveyed the impression that the death of plaintiff's wife was caused or hastened by his criminal negligence, they were not rendered harmless because defendant stated the slanderous words in the form of an opinion only.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 100-102.]

4. SAME — INNUENDOES — EXTENSION OF MEANING.

Where, in an action for slander, the declaration alleged in the inducement that plaintiff had always properly cared for his wife prior to her death, and that defendant had wrongfully stated concerning plaintiff that the wife appeared to be sadly neglected, that he at once became suspicious of insurance fraud, etc., and stated "I think the woman (meaning the plaintiff's wife) was neglected in order that her family might get her insurance" (meaning that she, plaintiff's wife, was culpably neglected in her sickness by plaintiff, so that she, the plaintiff's wife, might die, and he, the plaintiff, might receive the insurance upon her life, etc.), the innuendo so alleged was not objectionable as extending the sense of the words spoken.

5. NEW TRIAL—SUCCESSIVE APPLICATIONS.

The denial of a motion to set aside a verdict and the omission of the defendant to except to such ruling concludes him from making a subsequent motion in the trial court on the same grounds, except on an application for a rehearing by reason of accident, mistake, or misfortune.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 14.]

6. TRIAL — INSUFFICIENCY OF EVIDENCE — MOTION FOR NONSUIT—WAIVER.

Defendant waives his right to object to the insufficiency of the evidence to support the declaration by submitting the case to the court on its merits, without making a motion for a nonsuit or for an order of judgment in his favor.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 981-985.]

7. SLANDER—WORDS SLANDEROUS PER SE—IMPLIED MALICE.

Where slanderous words are used in such a sense as to impute a crime, malice will be implied.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 111.]

8. SAME—DAMAGES—MALICE.

In an action for slander, consisting of words slanderous per se, the amount of damages to which plaintiff is entitled depends in part on the effect of the malice on plaintiff's mind.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 351.]

9. SAME—EXCESSIVENESS.

Where defendant spoke slanderous words of and concerning plaintiff, imputing to him criminal neglect of his wife contributing to her death, a verdict in plaintiff's favor for \$50 was not excessive.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 353, 354.]

Transferred from Superior Court; Chamberlin, Judge.

Action by Jules Gendron against Servule St. Pierre for slander. A verdict was rendered in favor of plaintiff in the superior court for \$50, and the case was transferred for the hearing of defendant's exceptions. Overruled.

The original writ contained two counts. The second count (see 72 N. H. 400, 56 Atl. 915) was struck out by amendment. The first count, as amended since the former transfer of the case, is in substance as follows: In a plea of the case, for that, whereas, the plaintiff is a good, true, and just citizen of said state, and from the time of his birth has always behaved and governed himself as such, and during all that time has never been guilty, nor justly suspected of having been guilty, of cheating, deceit, fraud, or any crime whatsoever; and whereas, said plaintiff, on the 29th day of October, 1900, at said Manchester, was an honest and law-abiding citizen of said Manchester, and has always maintained himself by industrious attention to his business, and supported and maintained his family and treated his wife kindly, giving her of his money and attention all within his power, nevertheless the defendant, not being ignorant of the premises, but fraudulently, maliciously, and wickedly

contriving to injure, blacken, and defame the plaintiff in his good name and reputation, and to expose him to pains and penalties prescribed by law, did on, etc., at, etc., in presence of divers good citizens, etc., utter and publish the following false, scandalous, and malicious words of and concerning the plaintiff, to wit: "When I first visited the woman [meaning the wife of said plaintiff] she appeared to be sadly neglected, and I at once became suspicious of insurance fraud. My suspicions were not lessened by the apparent indifference of the woman's husband and sister with reference to her condition. I learned that the magnetic healer who had been treating her had been discharged on recommendation of a priest, who said that the medicines should be thrown away. I examined the remedies the magnetic healer had been using, and was surprised to find that they were all right. I believe that if their use had been continued, the woman [meaning the plaintiff's wife] might have recovered. As it was, she [meaning the plaintiff's wife] went three days without any medical attendance [meaning she was willfully neglected by said plaintiff]. Then I was called. I was told that there was an insurance on the woman's [meaning the plaintiff's wife's] life. Mr. Gadbois came to me yesterday, and I refused to sign the death certificate. The woman's [meaning the plaintiff's wife's] body had been removed from the Orange street house to her home on Church street. I did not know until I investigated whether the woman I had treated was dead, or whether it was some other. Furthermore, I was suspicious with regard to the insurance. I think the woman [meaning the plaintiff's wife] was neglected in order that her family might get her insurance [meaning that she, the plaintiff's wife, was culpably neglected in her sickness by the plaintiff, so that she, the plaintiff's wife, might die, and he, the plaintiff, might receive the insurance upon her life]." The declaration further alleges that by reason of the publication of these words the plaintiff was brought into great infamy and contempt among his fellow-citizens, and has suffered great anxiety of mind and been exposed to pains and penalties prescribed by law. The defendant's demurrer to the declaration was overruled, subject to exception. The defendant's petition for a new trial on account of newly discovered evidence was denied February 21, 1905, after a hearing. At this hearing the defendant's motion to set aside the verdict, because it was against the evidence and because the damages were excessive, and his request that all the testimony be transferred, were denied. It was found by the court that the defendant waived his right to make said motions by not making them at the close of the plaintiff's testimony, or at the close of all the testimony. April 29th the defendant filed a motion to set aside the verdict because (1) upon the

evidence, as matter of law, the defendant was not guilty of slander of the plaintiff; (2) the verdict was contrary to the law and the evidence; (3) it is wholly unsupported by the evidence; (4) the evidence, as matter of law, did not sustain the allegations of the declaration; (5) the damages assessed were contrary to the law; and (6) they were wholly contrary to the evidence. This motion was denied, subject to exception. The defendant then requested that the evidence relating to the charge of slander and the damages be made a part of the case. The request was denied, and the defendant excepted.

Andrews & Andrews, for plaintiff. Branch & Branch, and John P. Bartlett, for defendant.

CHASE, J. The plaintiff, by his declaration, places his right of action wholly on the ground that the alleged slanderous words per se imputed to him the commission of the crime of killing his wife by his criminal negligence in omitting to perform a duty to her which the law imposed upon him. No question is made that a husband who can supply his wife with the necessities of life, and neglects to do so while she is living with him and is incapable of caring for herself by reason of sickness or other cause, is guilty of the crime of murder or manslaughter, according to the nature and degree of the negligence in respect to premeditation, willfulness, recklessness, and culpability, if her death is caused or hastened by such neglect. *Buch v. Company*, 69 N. H. 260, 261, 44 Atl. 809, 76 Am. St. Rep. 163; *State v. Smith*, 65 Me. 257; *Lewis v. Georgia*, 72 Ga. 164, 53 Am. Rep. 835; *Territory v. Manton*, 8 Mont. 95, 19 Pac. 387; *Regina v. Marriott*, 8 C. & P. 425, 34 Eng. C. L. 816; *Regina v. Plummer*, 1 C. & K. 600, 47 Eng. C. L. 600; *Regina v. Nicholls*, 18 Cox C. C. 75; 2 Bish. Cr. L. §§ 659, 686; P. S. c. 278, §§ 1-3. The demurrer raises the question whether the declaration sufficiently sets forth an imputation to the plaintiff of the commission of such crime.

The defendant says the declaration is defective because it does not set forth that the plaintiff had the exclusive care of his wife, and does not allege, except in the innuendoes, that the plaintiff's negligence caused her death. It is stated in the inducement of the declaration that the plaintiff "has always * * * supported and maintained his family, and treated his wife kindly, giving her of his money and attention all within his power." This necessarily implies the existence of the relation of husband and wife between him and the woman referred to in the alleged slanderous words, an appreciation by him of the legal duty that pertains to that relationship, and an attempt on his part to fulfill the duty. It states facts showing that the duty was not removed or suspended for any cause, but still rested upon the plaintiff, and that he had the care of

his wife, so far as his marital duty required him to assume such care. The alleged slanderous words also expressly state or necessarily imply the existence of the marital relation between the plaintiff—"woman's husband"—and the woman referred to, the legal duty arising from the relation, and that the wife was sick and needed medical care, medicines, and nursing, in fact, that these were absolutely necessary to preserve her life, and the want of them caused her death. The allegation of the declaration that the words were uttered and published "of and concerning the plaintiff," in connection with the other allegation above quoted and the words themselves, show that the words were spoken of and concerning the plaintiff in his marital relation to the sick woman and the performance of the legal duties he owed the woman by reason of that relation. Characterizing the plaintiff's conduct toward his wife as "apparent indifference with reference to her condition"—indifference of such kind and degree as to induce a suspicion of fraud depending for its consummation upon her death—accompanied with the statement that the woman "appeared to be sadly neglected," is an emphatic, though indirect, statement that he was culpably negligent in the performance of his legal duty to her. It falls little, if any, short of charging the husband with deliberate and premeditated negligence with a view of causing or hastening the wife's death. It was not necessary that the plaintiff should have the exclusive care of his wife to render him guilty of the crime, if he himself was criminally negligent. The fact that the wife's sister, the priest, or some other person was also equally guilty, would not relieve the plaintiff from responsibility for his own negligence.

Another objection made to the declaration is that the slanderous words alleged in it are but an expression of a suspicion or opinion that the plaintiff committed the crime referred to; that they do not definitely charge the plaintiff with the crime. According to the defendant's alleged statements, his suspicion relating to insurance fraud was not the cause of his thinking that the wife was neglected. On the other hand, the neglect of her was the cause of his suspicion. He noticed when he first visited the woman that "she appeared to be sadly neglected," and he attributed the motive for this neglect to insurance fraud. He further stated, in substance, that there was neglect in omitting for three days to administer to her the remedies that had been prescribed by the magnetic healer. If this omission was due to the advice of the priest, the fact would not necessarily show that the omission was not negligence of a culpable nature. He further asserted his belief that if the use of the remedies had been continued, the woman might have recovered. He refused to sign a death certificate. These statements, taken together, naturally convey

the impression that the wife's death was caused or hastened by criminal negligence. But he seems to have summed up the whole matter in the definite statement: "I think the woman was neglected in order that her family might get the insurance." The definiteness and injurious effect of this statement are not taken away or materially modified by the introductory words, "I think." The expression, "I think A. murdered B.," is quite likely to have the same effect upon the hearers that the expression, "A. murdered B.," would have. If it be regarded as an expression of an opinion, it nevertheless imputes the crime to the plaintiff; and the imputation is supported and made more effective in this case by the fact that the defendant was called as the medical attendant of the wife. At least, a jury might find, from a consideration of the words in the light of the circumstances alleged, that the defendant meant by his statements absolutely to impute to the plaintiff the commission of a felony. *Moore v. Butler*, 48 N. H. 161; *Tozer v. Mashford*, 6 Exch. 539; *Simmons v. Mitchell*, 6 App. Cas. 156.

The defendant further says that the innuendo which follows the words "I think," etc., extends the sense of the words. The innuendo is: "Meaning that she, the plaintiff's wife, was culpably neglected in her sickness by the plaintiff, so that she, the plaintiff's wife, might die, and he, the plaintiff, might receive the insurance upon her life." When the facts recited in the inducement of the declaration, above referred to, and the other statements of the defendant are considered, it appears that the words to which the innuendo applies may have been used in the sense therein stated. As before stated, a jury might find that the defendant meant that the woman was neglected by her husband in order that she might die, and he or his family—it is immaterial which—might obtain the insurance which the defendant supposed was outstanding upon her life. The jury might think that describing such neglect as "culpable" limited, rather than enlarged the idea expressed by the word without qualification. The innuendo does not appear to exceed its proper office. *Harris v. Burley*, 8 N. H. 256. "It is immaterial whether the words spoken impute an offense to the plaintiff in a direct manner, or indirectly by such hints or modes of expression as are likely to convey the intended meaning to the persons to whom the words are addressed." *Sturtevant v. Root*, 27 N. H. 69, 72; *Tenney v. Clement*, 10 N. H. 52; *Symonds v. Carter*, 32 N. H. 458. The defendant's words appear to have been of this character; and the declaration, though somewhat inartificially framed, contains sufficient recitals, allegations, and innuendoes, if proved, to render the defendant liable in an action for slander. *Robinson v. Keyser*, 22 N. H. 323. The demurrer was properly overruled.

There was no exception to the denials of

the petition, motion, and request made prior to April 29th, and consequently there is no question of law before the court with respect to those matters. The ground of the defendant's motion of April 29th to set aside the verdict is stated in several forms, but, in substance, it is that, upon the whole evidence, the verdict is "against the evidence" and so contrary to law, as to both the defendant's guilt and the damages. It is but a repetition of the previous motion to set aside the verdict. The denial of the first motion and the omission of the defendant to except to it concludes him upon the question presented by the motion, unless, upon an application to the superior court for a rehearing, he shows that he is entitled to it by reason of accident, mistake, or misfortune. If the defendant desired to raise questions of law upon the denial of the motion, he should have done so at that time. Furthermore, the defendant waived his right to object, on account of the insufficiency of the evidence to support the declaration, by his submission of the case to the court upon its merits, without making a motion for a nonsuit, or for an order of judgment in his favor. *Elwell v. Roper*, 72 N. H. 585, 58 Atl. 507. Non constat that the plaintiff might not have been able and been allowed to introduce evidence to supply the deficiency if such motions had been made. The declaration alleges that the slanderous words mentioned in it were false, and were spoken of and concerning the plaintiff maliciously. If the words were used in a manner and sense to impute a crime, they imply malice; and the amount of the damages to which the plaintiff is entitled depends in part upon the effect of the malice upon the plaintiff's mind. *Symonds v. Carter*, 32 N. H. 458; *Friel v. Plumer*, 69 N. H. 498, 43 Atl. 618, 76 Am. St. Rep. 190. It does not appear, as matter of law, that \$50 would be excessive damages, even if there was no evidence of malice other than the publishing of the words, if they were found to be used in the sense above mentioned.

Exceptions overruled. All concurred.

IN RE OPINION OF THE JUSTICES.

(Supreme Court of New Hampshire. Jan. 2, 1906.)

1. NOTARIES—PUBLIC OFFICERS.

Notaries public are governmental officers. [Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Notaries, § 1.]

2. OFFICERS—ELIGIBILITY—WOMEN.

Since, under the common law, women are disabled from holding public office, they are disqualified from appointment as notaries public.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Officers, §§ 24, 25.]

Opinion of the justices as to whether a woman can be properly appointed a notary public. Question answered in the negative.

To His Excellency the Governor and the Honorable Council :

"Notaries public shall be appointed by the Governor, with advice of the council." Pub. St. 1901, c. 18, § 1. The question submitted, under date of September 25, 1905, whether a woman is qualified to fill the office of notary public in this state, therefore, involves the power of the executive to appoint such a person notary public, and is, in that aspect, one which it is our constitutional duty to answer, because it is a question of law which the Governor and council may be called upon to determine in the performance of the duties of their office. Opinion of the Justices, 67 N. H. 600, 601, 43 Atl. 1074. As the question is framed, however, it relates to the personal competency to hold the position of a class, individuals among whom, it may be presumed, may desire such an appointment.

Conceiving that there might be such persons, and considering the possibility that such an application for appointment might be the occasion of your request, and not understanding that there was need of an immediate reply, we have delayed returning our answer in order to afford any persons who might desire it an opportunity to be heard before us. We were inclined to this course because the conclusions reached by this court in 1890 upon the application of a woman to be admitted to practice as an attorney seemed to us conclusive upon the present question, and we desired, if possible, to have the aid of counsel if the question were to be reopened. We have not been favored with any argument upon the law, and it does not seem necessary to do more than to state the conclusions then reached after a most exhaustive examination of the authorities. It was then held that at common law, in the absence of enabling legislation, a woman cannot hold a public governmental office. "By our common law, women do not vote in town-meeting. The reason is that voting is an exercise of governmental power. For the same reason, and by the same law, they do not hold public office." Ricker's Petition, 66 N. H. 207, 254, 29 Atl. 559, 583, 24 L. R. A. 740. In that case a distinction is taken between public and private office and between office and employment, and the conclusion reached, contrary to authorities in other jurisdictions cited in the case, that, although an attorney at law is an officer of the court, his employment is not a public governmental office to which the common-law disability of women attaches. Although authorities to the contrary of the latter proposition may be found, there seems to be little, if any, controversy over the main proposition that at common law women are disabled to take part in governmental action, and that to enable them to do so affirmative legislation is necessary. Note, 38 L. R. A. 215. Whether the progress of the age requires that this, as well as other disabilities of the common law with which

women have been burdened, should be removed, is not a question for either the executive or the judicial departments of the government. The sole question here is whether a public notary, or notary public, is a public officer exercising some part, however small, of governmental power, executive, legislative, or judicial.

"An office, as defined by Blackstone, is a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, whether public, as those of magistrates, or private, as bailiffs, receivers, and the like. 2 Bl. Com. 36. And it is laid down 'that a public officer is one who has some duty to perform concerning the public; and he is not the less a public officer when his duty is confined to narrow limits, because it is the duty, and the nature of that duty, which makes him a public officer, and not the extent of his authority.' 7 Bac. Abr. 280; Carth. 479. And we apprehend that it may be stated as universally true that where an employment or duty is a continuing one, which is defined by rules prescribed by law, and not by contract, such a charge or employment is an office, and the person who performs it is an officer." *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169, 172; *Ricker's Petition*, 66 N. H. 207, 232, 29 Atl. 559, 572, 24 L. R. A. 740. "An office is a public station or employment, conferred by the appointment of government. The term embraces the idea of tenure, duration, emolument, and duties." *United States v. Hartwell*, 6 Wall. 385, 393, 18 L. Ed. 830. "The term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office; and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments, and sometimes to another, still it is a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state." Opinion of the Justices, 3 Greenl. 481, 482; *High, Ex. Rem.* § 625. See note. 72 Am. Dec. 179-189.

Tested by these rules, the position or place of notary public is clearly a public office. The appointment is made by the government for a fixed term, and the duties and powers of the place are prescribed by law. Every notary public has, in addition to the usual powers of the office, the powers of a justice of the peace in relation to depositions and the acknowledgment of deeds and other instruments and the administering of oaths. Pub. St. 1901, c. 18, §§ 1, 2. The notary's certificate of protest under his official seal is evidence of the facts stated in the protest and of the notice given to the drawers or indorsers. *Id.* § 3. His records are public

records, which, when he dies or becomes insane, the law requires to be deposited in the archives of the state. The office is of very ancient origin, and has been here recognized as public from a very early day. The *Cutt Code* (1679-80) provided for the punishment of any "notary or keeper of public records," for the destruction or alteration of "any such record or writing of concernment committed to his keeping and trust," and provided, among other punishments, that "such corrupt officer shall lose his office." 1 N. H. Prov. Laws (Batch. Ed.) p. 19. In 1802 the powers of notaries were enlarged by giving to them certain powers of justices of the peace, and provision was made for the preservation of their records in the office of the Secretary of State (Laws [Ed. 1805] p. 96); while in 1829 it was provided that "all public notaries * * * shall hold their office subject to be removed by the Senate upon an impeachment, or by the Governor with the consent of the council, on the address of both houses of the Legislature and shall be under oath for the faithful performance of the duties of the office" (Laws [Ed. 1830] p. 536, tit. 118). No ground is perceived upon which it can be urged that in this jurisdiction the place of a notary is merely a public employment or a private office; and the distinction under which Mrs. Ricker was admitted to practice as an attorney will not permit women to hold the office of public notaries.

That a notary public holds a public office is the holding of the authorities elsewhere. "That a notary public is a public officer, I do not think to be open to serious doubt. He is one of the 'public officers of this state' concerning whom chapter 5 of the Revised Statutes treats, and he is therein placed 'in the class of judicial officers.' The office of a notary public must be filled by appointment of the Governor of the state, with the consent of the Senate. The appointee, before he enters upon the duties of his office, is required to take and file an oath. * * * His term of office is fixed by law. * * * All their powers are defined by law, and their acts within their legitimate sphere have force and solemnity, because having the express authorization and sanction of statute. The very designation of 'notary public' indicates a relation which the incumbent of the office sustains to the body politic. It is impossible to regard him as other than a public officer." *People v. Rathbone*, 145 N. Y. 434, 437, 40 N. E. 395, 396, 28 L. R. A. 384. For other authorities to the same effect, see *Commonwealth v. Haines*, 97 Pa. 223, 39 Am. Rep. 805; *Smith v. Meador*, 74 Ga. 416, 58 Am. Rep. 438; *Kirksey v. Bates*, 7 Port. (Ala.) 529, 31 Am. Dec. 722; *Governor v. Gordon*, 15 Ala. 72; *Teutonia, etc., Co. v. Turrell*, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419; *State v. Clark*, 21 Nev. 333, 31 Pac. 545, 18 L. R. A. 313, 37 Am.

St. Rep. 517; *Britton v. Niccolls*, 104 U. S. 757, 766, 26 L. Ed. 917; *Mech. Pub. Off.* § 103. In Massachusetts the court advised the Governor and council that a woman could not hold the office of notary without legislative action (*Opinion of the Justices*, 150 Mass. 586, 23 N. E. 850, 6 L. R. A. 842), and subsequently advised the House of Representatives that the Legislature could not authorize such appointments because the matter is regulated by the Constitution of the state. *Opinion of the Justices*, 165 Mass. 599, 43 N. E. 927, 32 L. R. A. 350.

Notaries are not mentioned by name in our Constitution. We have not been able to find any statute authorizing their appointment until the General Statutes of 1867 (Gen. St. c. 16, § 1), though the fact of their appointment is recognized by various acts, to some of which reference has been made. Whether authority to make the appointment is properly derived from the statute or the Constitution is not material upon the present question. Considering it to be derived from the statute of 1867, in the existing state of the law an intent to authorize the appointment of women to the office cannot be inferred in the absence of express language indicating that intent, such as was used in chapter 8, p. 18, Laws 1872, by which female citizens were authorized to hold office in school districts and as school committee in cities and towns. See Gen. Laws 1878, c. 87, § 10; Laws 1879, p. 370, c. 57, § 19; *Ricker's Petition*, 66 N. H. 207, 230, 29 Atl. 559, 24 L. R. A. 740.

Because by our common law women are disabled from holding public office, and because the place of notary public is a public governmental office, and because we are unable to find any evidence of legislative purpose or intention to change the common law of this state in this respect, if such power exists, a point not considered, we are compelled to answer in the negative the question submitted.

FRANK N. PARSONS.
WM. M. CHASE.
REUBEN E. WALKER.
GEORGE H. BINGHAM.
JOHN E. YOUNG.

WESTMINSTER NAT. BANK v. NEW ENGLAND ELECTRICAL WORKS et al.
(Supreme Court of New Hampshire. Grafton. Jan. 2, 1906.)

1. CORPORATIONS — TRANSFERS OF STOCK — CONSUMMATION OF TRANSFER.

The ownership of stock passes from the seller to the buyer by force of the contract of sale and as soon as such contract is fully consummated; but as between the buyer and the corporation, or interested third parties without notice, the buyer does not ordinarily acquire all the rights of a stockholder until the transfer is entered on the corporate records.

2. SAME—TRANSFER OF TITLE—ESTOPPEL TO DENY.

Where a stock certificate recites that the person to whom it is issued is the owner of certain shares of fully paid and nonassessable stock, the corporation is estopped to deny the title of an innocent transferee from the stockholder who has given value for the stock on the faith of the certificate, on the ground that, by the laws of the state creating the corporation, the corporation is prohibited from issuing stock until fully paid and the stockholder has paid nothing for his stock.

3. BANKS AND BANKING—NATIONAL BANKS—POWERS—ACQUISITION OF STOCK.

A national bank, which in the ordinary course of business receives stock as collateral security for a loan, may protect itself from loss by taking the stock in payment of the loan.

4. APPEAL—PRESERVATION OF ERROR—NECESSITY OF EXCEPTION.

Where a party was regularly made a defendant to an action at law, and an amendment changing the action to one in equity was allowed, without defendant's taking any exception, defendant could not claim, after the transfer of the cause to the Supreme Court, that he was not as fully a party defendant as when he appeared in the action at law.

5. CORPORATIONS—FOREIGN CORPORATIONS—RIGHT TO SUE.

The courts will entertain jurisdiction at the suit of a foreign corporation.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2563-2567, 2595-2600.]

6. SAME—RIGHTS OF STOCKHOLDERS—TRANSFER OF STOCK.

Where stock is valid in the hands of a transferee on the ground of estoppel against the corporation, notwithstanding its invalidity in the hands of the transferor, the transferee has the right to have the stock transferred to him on the books of the corporation, although the law of the state creating the corporation (Civ. Code S. C. 1902, § 1894) provides that no transfer shall be valid, except as between the parties, until the same shall have been regularly entered upon the books of the corporation.

7. SAME—ENFORCEMENT OF RIGHT—FOREIGN CORPORATIONS.

The right of a transferee of stock in a corporation to have the same transferred on the books of the corporation is a contractual right, the enforcement of which does not involve an interference with the internal affairs of the corporation, and which consequently may be asserted through the courts of another state than that creating the corporation.

8. SAME — REFUSAL TO TRANSFER STOCK — REMEDIES OF TRANSFEE.

A transferee of corporate stock is not confined to an action for damages for the refusal of the corporation to transfer the stock to him on its books, but may require the corporation, by bill for specific performance, to transfer the stock to him, especially where the real and prospective value of the stock depends on the future development and management of the corporate enterprise.

9. SAME — ACTIONS TO COMPEL TRANSFER — LACHES.

A transferee of stock in a corporation is not guilty of laches as a matter of law in delaying suit to compel the corporation to transfer the stock to him on its books, where it does not conclusively appear that his delay has been unreasonable or that the corporation has been in any way prejudiced thereby.

10. EVIDENCE — ADMISSIONS — CORPORATE OFFICERS — CONCLUSIVENESS ON CORPORATION.

There is no presumption of law that a vice president and director of a bank is, by reason of his official relation to the bank, authorized to bind the bank by his admissions.

Transferred from Superior Court; Pike, Judge.

Bill in equity by the Westminster National Bank against the New England Electrical Works and others. There was an order in favor of plaintiff, to which defendants excepted, and the case was transferred from the superior court. Exceptions overruled.

The suit was begun as an action at law, but was afterwards amended by the filing of this bill, the object of which is to compel the issuance of a certificate of stock to plaintiff. Some of the stockholders of the electrical works were also made defendants. The plaintiff corporation is located and does business in Massachusetts. The electrical works was incorporated under the laws of South Carolina, but has its principal place of business in this state. About the time of the formation of the corporation a regularly signed certificate for 350 shares of the stock of the defendant corporation was issued to one Bibber, for which he paid nothing. In June, 1899, Bibber pledged this certificate to the plaintiffs as collateral security for a loan, and they held it as such security until February 25, 1901, when, by an arrangement between Bibber and the plaintiffs, he formally transferred the certificate to them in part payment of the loan. In these transactions the plaintiffs acted in good faith, having no knowledge of any defect or infirmity in the issuance of the stock.

May 1, 1902, the plaintiffs notified the defendant corporation that they owned the Bibber certificate, and asked for information in regard to the company, and on July 13, 1903, they requested the electrical works to transfer the certificate to their name, but the request was not granted. The certificate stated that the shares were fully paid and nonassessable, and that they were transferable only upon the books of the corporation. By the Code of South Carolina (Civ. Code, 1902, § 1894) it is provided that "no stock shall be issued by any corporation until fully paid; * * * and no transfers of stock shall be valid except as between the parties thereto, until the same shall have been regularly entered upon the books of the corporation." The business of the electrical works has not been thoroughly developed, and its future is problematical. The plaintiffs believe that the stock will ultimately be much more valuable than it now is. January 3, 1903, certain stockholders of the defendant corporation began proceedings in the Supreme Court of New York against Bibber, the Westminster National Bank, and the electrical works, and obtained an order

restraining Bibber from transferring his certificate of stock, and restraining the electrical works from making any transfers thereof on the books of the corporation. The plaintiff bank was not served with process in that suit and did not appear, although it received information of the pendency thereof. The defendants offered testimony of what one Greenwood, a director and vice president of the bank, had said in regard to the way the bank received the stock. The evidence was excluded upon the ground that it did not appear that Greenwood had authority to make admissions against the bank, and the defendants excepted. The court ordered the electrical works, upon presentment of the Bibber certificate properly indorsed, to issue to the plaintiffs a new certificate for the same number of shares, unless the New York judgment is a legal bar to such an order. To this order the defendants excepted.

Henry F. Hollis, for plaintiff. Ben S. Webb and George F. Morris, for defendants.

WALKER, J. No question is made that, as against Bibber, the bank became the owner of the stock in February, 1901, when Bibber transferred and assigned to it his certificate. He did all it was possible for him to do to vest the absolute title to the stock in his vendee. "It seems too clear for argument that the ownership of the shares passes from the seller to the buyer by force of the contract of sale, and not by operation of law; and, if that be so, the buyer's title, so far as the seller is concerned, attaches the moment this contract is fully consummated between them." *Scripture v. Soapstone Co.*, 50 N. H. 571, 585; *Meredith Village Savings Bank v. Marshall*, 68 N. H. 417, 44 Atl. 526. But, so far as the corporation and interested third parties without notice are concerned, the vendee ordinarily does not acquire all the rights of a stockholder until the transfer is entered on the corporate records. The right to become such a stockholder after an assignment of the certificate is a valuable right, constituting in a very material sense a part of the consideration for the vendee's purchase. Without such a right enforceable in the courts of law, the sale of stocks would be seriously hampered, resulting in much commercial and industrial inconvenience and embarrassment.

The bank, when it purchased the Bibber stock, was entitled to believe that by complying with certain reasonable regulations it would be recognized as, and in fact become, a stockholder in the corporation, possessing all the rights of other stockholders. Bibber's certificate which he assigned to the bank contained the solemn statement of the corporation, by its authorized officers and agents, that Bibber was the owner of 350 shares of its stock, and that the stock was fully paid and nonassessable. The principal reason now assigned by the corporation

for refusing to register the transfer to the bank and to issue to it a new certificate is that Bibber paid nothing for the stock, and that under the laws of South Carolina he was not for that reason the owner of the stock represented by his certificate. If that conclusion of law is correct so far as Bibber is concerned, and if, while he held the certificate, he could not legally act as a stockholder or claim to be the owner of the stock, it would be most inequitable to hold that his vendee, having no notice of any infirmity in his title, and relying upon the unequivocal assertion of the corporation contained in the certificate that he was the owner of the stock represented thereby, should be deemed to be in the same position with reference to the corporation that Bibber occupied. Under such circumstances the most obvious principles of equity and justice require that the corporation should be estopped from denying the title of the innocent vendee who has given value for the stock. "The reason arises from the nature of a share certificate, which, as already stated, is a continuing affirmation of the ownership of the specified amount of stock by the person designated therein, or his assignee, until it is withdrawn in some manner recognized by law; and a purchaser in good faith has a right to rely thereon and to claim the benefit of an estoppel in his favor as against the corporation." 2 *Thomp. Corp.* § 2590. "If the certificates state upon their face that the shares have been fully paid up, the corporation will be estopped from denying the truth of this representation, and cannot charge the purchaser and transferee with further liability, although the shares have never in fact been paid up." 1 *Mor. Corp.* § 306; 2 *Cook, Corp.* § 416 *Scripture v. Soapstone Co.*, supra; *Boston & Albany R. R. v. Richardson*, 135 Mass. 473; *Holbrook v. Zinc Co.*, 57 N. Y. 610; *State v. McIver*, 2 S. C. 25; *Fraser v. Charleston*, 11 S. C. 486; *Moore v. Bank*, 111 U. S. 156, 165, 4 Sup. Ct. 345, 28 L. Ed. 385. As no suggestion is made that the certificate was not regular in form and properly executed by the officers of the corporation, or that the corporation lacked the power to issue the stock for any purpose, it is not important to inquire whether the stock was legally and regularly issued to, or acquired by, Bibber. The corporation and the stockholders whom it represents are estopped to interpose that defense in this suit; and, unless some other reason exists for its refusal to permit the record of the transfer to be made on its books and to recognize the bank as a stockholder, it would seem that the bank has established its right.

The fact that since the plaintiff is a national bank it has no authority or power to invest its funds in the stock of other corporations does not demonstrate its inability, or want of corporate power, to become a stockholder in another corporation upon receiving the stock in payment of a legitimate

claim against the former owner of it. "In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good, or reduce, an anticipated loss. Such a transaction would not amount to a dealing in stocks." *First Nat'l Bank v. Bank*, 92 U. S. 122, 128, 23 L. Ed. 679. In *California Bank v. Kennedy*, 167 U. S. 362, 368, 17 Sup. Ct. 831, 833, 42 L. Ed. 198, the court say: "No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that as incidental to the power to loan money on personal security, a bank may in the usual course of doing such business accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. *National Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448." See, also, *Concord First Nat. Bank v. Hawkins*, 147 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007. The plaintiff bank, having in the ordinary course of business received the stock as collateral security for a loan to Bibber, afterward sought to protect itself from loss by becoming the owner of the stock. It enforced its lien on the security, and thus became the owner thereof. So far as appears from the case, it was not dealing in stocks as a primary business; but, as incidental to its general business of loaning money, it acquired Bibber's title to the stock, as, upon the authorities, it had a right to do. How long it may hold the stock under the national banking laws it is unnecessary to inquire. The fact of the good faith of the transaction, so far as material, was established by the finding of the superior court, to which no exception was taken.

As the plaintiff's right to relief, either legal or equitable, seems to be clear, it becomes necessary to consider whether the superior court had jurisdiction of the subject-matter of the suit. No claim is made that the defendant was not regularly a party at the beginning of the litigation. Hence it thereby became amenable to such orders as justice might require. Justice required the allowance of the amendment by which the action at law became an action in equity. To the ruling allowing the amendment the defendants took no exception; and they cannot now claim that they are not as fully parties defendant as they were when they appeared in the action at law. Nor is the position tenable that the court will not entertain jurisdiction in behalf of a foreign corporation. *Kidd v. Traction Co.*, 72 N. H. 273, 283, 56 Atl. 465, 66 L. R. A. 574. Both parties are properly in court. But it is argued that, as the defendant corporation was chartered under the laws of another

state, this court has no power to grant the relief sought, because it relates to the internal affairs of the corporation, which it is the peculiar and exclusive province of the courts of the incorporating state to supervise and regulate. It may be conceded that the courts of one state either have not the power, or deem it injudicious to exercise the power, of determining rights dependent upon the essentially internal management of the affairs of a corporation chartered by the laws of another state. The forum of the latter state, it is held, affords the most appropriate place for such litigation, principally for the reason that ordinarily it alone possesses power adequate for the enforcement of all orders and decrees that justice may require. 6 *Thomp. Corp.* § 7904. While there is not entire unanimity in the cases as to the correct definition of the expression "internal affairs" (*Beale, For. Corp.* § 307; *Clark & Marsh. Priv. Corp.* §§ 864, 865), it cannot be controverted that a foreign corporation, legally made a defendant in an action upon a contract which it had apparent authority to make, cannot escape liability thereon upon the mere ground that it is a foreign corporation. In such a case it enjoys no immunity or privilege not possessed by domestic corporations or individuals. If it has legally bound itself by a contract with a plaintiff who sues in his own right, and not as a stockholder or director of the corporation, the jurisdiction of the court to pronounce judgment against it cannot be questioned. The determination of its liability involves its external legal relations to one not in any way officially connected with it. If, having the power to do so, it issues its promissory note or bond, which is regularly transferred to the plaintiff in the ordinary course of business, it cannot escape liability in the courts of another state where it is properly made a defendant, though the construction of the contract may involve a consideration of the statutes and decisions of the state of its incorporation. *Limerick Nat. Bank v. Howard*, 71 N. H. 13, 51 Atl. 641, 93 Am. St. Rep. 489. The question relates, not to its internal management or affairs, but to its obligations to others arising from the prosecution of its legitimate business; and ordinarily those obligations are enforceable wherever the corporation can be made a party to the action. 19 *Cyc.* 1238.

"In the exercise of these functions, any crimes committed, penalties, fines, or forfeitures incurred in violation of our laws, or any contractual liability to a citizen incurred, may be redressed in our courts, and in such case the jurisdiction does not depend on whether the corporation is doing business generally in this state, but the jurisdiction attaches in the one case to enforce a public law of the state against the offender, and in the other to enforce a contract, and in any case falling under either of these classes

it is wholly immaterial from what foreign state or government the company derives its chartered powers, or to what extent it is doing business in this state. But where the act complained of affects the complainant only in his relation as a shareholder or officer of the corporation, and no public right is involved, then the controversy must be said to relate to the internal affairs of the company; and in case of a foreign corporation the great weight of authority is opposed to the jurisdiction of the court of equity." *Bradbury v. Mining Co.*, 113 Ill. App. 600, 608. See, also, *March v. Railroad*, 43 N. H. 515; *Kansas, etc., Co. v. Company*, 135 Mass. 34, 46 Am. Rep. 439; *Madden v. Company*, 181 Pa. 617, 622, 37 Atl. 817, 38 L. R. A. 638; *North Star Mining Co. v. Field*, 64 Md. 151, 20 Atl. 1039; *Gulford v. Telegraph Co.*, 59 Minn. 332, 61 N. W. 324, 50 Am. St. Rep. 407.

The plaintiff is not a stockholder of the defendant corporation in the full and proper sense of that term. When it became the owner of the stock, it occupied the position of a stranger to the corporation; and what it now seeks is the enforcement of the obligation then incurred, if at all, of the corporation to recognize it as a stockholder. As the corporation is estopped to urge as against the bank that the stock was not legally issued, it must be treated as valid stock when the bank became the owner of it. The case, then, stands as though the stock was valid and binding on the corporation in the hands of Bibber when he sold it to the bank. In that aspect, the plaintiff acquired a right by the transaction to have the stock transferred on the books of the corporation, so that it would possess as against the corporation and as against the world all the privileges of a stockholder, which it is conceded are valuable. 1 *Cook, Corp.* § 442. The right to a transfer of the stock on the books of the corporation was one of the rights acquired by the bank at the time of the sale. The corporation had in effect agreed to make such transfer upon the presentation of the former certificate by a bona fide vendee and a demand for such transfer. In order to make its stock conveniently salable, and thus enhance its value as an investment, it represented to all who might desire to purchase its stock, and to all stockholders who might wish to sell their stock, that it would invest the purchasers thereof with all the rights of stockholders by making a record on its books of the fact of each sale as made. Having made such representations and assumed such obligations, it would be highly inequitable for it to repudiate the same to the prejudice of innocent purchasers of its stock.

In this respect the law of South Carolina is not peculiar. The statute of that state, providing that "no transfers of stock shall be valid except as between the parties thereto, until the same shall have been regularly

entered upon the books of the corporation." (Civ. Code 1902, § 1894), was not intended to limit the power of a corporation to agree with a bona fide purchaser of its stock to enter the transfer on its books upon demand and notice, when no legal reason exists for its refusal. Such a construction of the statute would render stock issued by corporations of that state of little value as investments in commercial dealings. For some purposes, and as against parties having prior claims or liens on the stock, an unrecorded transfer may be invalid, and is so regarded in South Carolina. *State Bank v. Cox*, 11 Rich. Eq. 344, 78 Am. Dec. 458; *State v. McIver*, 2 S. C. 25; *Parker v. Bank*, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888; *Eldred v. Land Co.*, 55 S. C. 78, 32 S. E. 758, 897; *White v. Bank*, 66 S. C. 491, 494, 45 S. E. 94, 97 Am. St. Rep. 808. This statutory provision, if not complied with, does not prevent a valid sale for some purposes, or justify the corporation in captiously refusing to allow an entry on its books which shall make the sale valid for all purposes, or which shall amount merely to a performance of its agreement to permit such record. *Clark & Marsh. Priv. Corp.* §§ 585, 586; *Scripture v. Soapstone Co.*, *supra*. This limitation is effective only so far as its enforcement is supported by reasons of commercial utility and fairness. To authorize the issuance of stock, and to declare the validity of its sale, even as against the corporation, to depend upon the caprice of the corporate officers in recording or refusing to record the transfer, would be an unreasonable construction of the purpose of the Legislature in empowering the corporation to place its stock upon the market and to make it salable. It would, in effect, authorize the corporation to repudiate its contractual obligations. The defendant was not disqualified to bind itself to permit the record of the transfer of the Bibber stock to the plaintiff.

The plaintiff's right to a transfer, therefore, depends on the contract of the corporation. The bank is merely seeking the enforcement of a contractual obligation. It is not attempting in this proceeding to interfere with the essentially internal affairs of the corporation. It asks merely that the corporation—a party to the suit—shall recognize it as a stockholder by virtue of its representation to the bank at the time of the sale that it would do so. The court is not asked to determine what the rights of a stockholder may be in this foreign corporation, or to exercise a discretion in behalf of the plaintiff in regard to the corporate management of the defendant. The relief sought is merely the enforcement of a contractual right which accrued to the plaintiff when it bought the stock of Bibber. It then impliedly promised that it would permit the transfer. *Clark & Marsh. Priv. Corp.* § 603; *Pinkerton v. Railroad*, 42 N. H. 424; *Bond v. Iron Co.*, 99 Mass. 505, 97 Am. Dec. 49. "A

certificate of stock is not necessary to the complete ownership of the stock. * * * But the corporation is bound upon demand to issue a certificate of stock to one who is entitled to it; and, if it refuses, the stockholder may bring a suit in equity to compel its issuance, or he may sue it in an action at law for damages." 1 Cook, Corp. 24.

It is further argued in behalf of the defendants that the New York judgment against Bibber bound the plaintiff, in other words, that the plaintiff, although not in fact a party to that suit, is concluded thereby, because according to the books of the bank Bibber alone was the owner of the stock in controversy, and because the sale of the stock, under the statutes of South Carolina, vested no title in the bank. But the last reason, in view of the foregoing discussion, is not supported by reason or authority. The entire title which Bibber had to the stock passed to the bank at the time of the sale, February 25, 1901. May 1, 1902, the bank notified the defendant corporation that it was the owner of the Bibber stock, so that the defendant corporation was apprised of the claim of ownership by the bank long before January 3, 1903, when the New York suit was instituted. The bank's title to the stock for all purposes, then, depended upon the mere formality of a record, since, as above suggested, the corporation had no legal ground for objecting to the record. Under such circumstances at least it cannot be said that the bank had no legal title to the stock in January, 1903, as against the corporation; and since Bibber was not only not the owner of the stock at that time, but was not in any sense the agent or representative of the bank—the true owner—in that litigation, the binding effect of the New York judgment upon the plaintiff is not apparent. The effect of the defendants' contention is to deprive the plaintiff of valuable vested rights by a judgment against a third party in a suit to which it was not a party, either directly or indirectly. It is unnecessary to cite authorities to show that such a result cannot be sustained. *Holbrook v. Zinc Co.*, 57 N. Y. 616.

It is also contended that the plaintiff is not entitled to a decree for specific performance, since he has a plain and adequate remedy at law. In view of the authorities to the contrary, that proposition does not demand extended discussion. "It is contrary to the overwhelming weight of authority. An action for damages does not always afford an adequate remedy for the refusal of a corporation to recognize a person as a stockholder; and it is well settled, therefore, that if a corporation wrongfully refuses to recognize and register a valid transfer of stock, and issue a new certificate to the transferee, he may maintain a bill in equity to compel it to do so." *Clark & Marsh. Priv. Corp.* § 605; 1 Cook, Corp. § 24. It

is to be observed that this is not a proceeding to compel a vendor of stock to assign and deliver his certificate to the vendee under a contract of sale (*Eckstein v. Downing*, 64 N. H. 248, 9 Atl. 626, 10 Am. Rep. 404), but to compel the corporation to perform a merely clerical act for the benefit of a vendee who has already purchased and now holds the certificate. To deny him relief by specific performance, upon the ground that he could recover damages at law, would be, in effect, to compel him to sell what he already owns at such a price as a jury might think it was worth. And especially ought a court of equity to decree specific performance, when, as in this case, the real and prospective value of the stock depends upon the future development and management of the corporate enterprise.

So far as the claim that the plaintiff is guilty of laches in not bringing its suit sooner presents a question of fact, it has been found untenable by the superior court; and so far as a question of law is involved it is sufficient to say that it does not conclusively appear that the plaintiff's delay in this respect was unreasonable, or that the defendants have been prejudiced thereby in any respect. *Douglass v. Railroad*, 72 N. H. 26, 31, 54 Atl. 883.

The exception to the exclusion of the testimony of the witness relating to an admission made by Greenwood, a director of the bank, who was also its vice president, is unavailing. The ruling of the court was based upon the fact that it did not appear that the official of the bank was authorized to bind the bank by the proffered admission. Since there is no presumption of law that his official relation to the bank furnished or proved such authority (*Low v. Railroad*, 45 N. H. 370, 381; *Wait v. Association*, 66 N. H. 581; 23 Atl. 77, 14 L. R. A. 356, 49 Am. St. Rep. 630; *New Boston Fire Ins. Co. v. Upton*, 67 N. H. 469, 36 Atl. 366), the exception presents no error.

Exceptions overruled. All concurred.

BICKNALL v. BICKNALL

(Supreme Court of Rhode Island. Jan. 12, 1906.)

FRAUDS, STATUTE OF—ANSWERING FOR DEFAULT OF ANOTHER—NOVATION.

Where a mortgagee, who had given a loan on security falsely represented to be a first mortgage, and had brought an action for the deceit, discontinued the action on the oral promise of the mortgagor's father to pay the debt, but did not release the mortgage nor the debt of the mortgagee, but only the claim for the deceit, there was no such novation as to render the promise of the mortgagor's father binding under the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 48.]

Assumpsit by Mary E. Bicknall against Frank J. Bicknall. Judgment for plaintiff.

and defendant petitions for a new trial. Granted.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, and JOHNSON, JJ.

James A. Williams, for plaintiff. Christopher M. Lee and Job S. Carpenter, for defendant.

DUBOIS, J. This is an action of the case wherein the plaintiff declares that she brought her action of deceit to recover the sum of \$1,000 damage against Edward J. Bicknall, the father of the defendant, and that the defendant, before the return day of the writ in said action, assumed to pay the plaintiff the said sum in consideration that she would discontinue and abandon her said suit against his father. She further avers that she agreed to discontinue, and did abandon, said suit upon the promise of the defendant to pay said sum; and, furthermore, that she released said Edward J. Bicknall from all claims and demands which she had against him, and accepted the promise of the defendant in lieu of her claim against his father. To this the defendant pleads, first, the general issue, and, secondly, *actio non*, because he says that the promise declared on is a special promise to answer for the debt, etc., of another, which must be in writing; to which the plaintiff replies *precludi non*, because the promise declared on was not a special promise to answer for the debt, etc., of a person other than the defendant, but was a direct and unequivocal assumption of the said debt, by the said defendant, as and for his own debt, in consideration of her forbearance to prosecute her suit against his father. After verdict for the plaintiff, the defendant filed his petition for a new trial, upon the following grounds: First, because the verdict was contrary to law and against the evidence and the weight thereof; second, because the court erred in refusing to charge the jury as requested by the defendant, which refusal so to do was excepted to by the defendant; third, because the defendant did not have a full, fair, and impartial trial.

The question that arises for determination in this case is whether a completed contract of novation has been proved by the plaintiff; for such a novation is universally held not to be within the statute of frauds. 21 Am. & Eng. Ency. L. 675. Novation is the substitution of a new obligation for an old one, which is thereby extinguished. Bouv. Law Dict. Since novation is the extinguishment of one obligation and the foundation of another, it requires the assent of all the parties to both the old and the new obligations; for, unless all the parties to the old assent, it cannot be extinguished, and, unless all the parties to the new assent, it cannot be created. Id.; Am. & Eng. Ency. L. 666. "A man cannot, of his own will, pay another man's debt without his consent and thereby

convert himself into a creditor." Durnford v. Messiter, 5 M. & S. 446.

It appears from the testimony of the plaintiff that on the 20th day of August, 1895, she loaned to Edward J. Bicknall the sum of \$1,000 and took from him his promissory note, and as security therefore a mortgage upon certain real estate, which mortgage said mortgagor stated was a first mortgage, but that she subsequently ascertained that it was a second mortgage upon the property thereby incumbered; that, after ascertaining the fact concerning the actual position of her mortgage as to priority, she began suit against Edward J. Bicknall to recover damages for the deceit practiced by him upon her in obtaining the money from her upon the second mortgage, which he had pretended to be the first, and discontinued this suit upon the defendant's promise to pay her \$1,000 in consideration of such discontinuance. The mortgage was introduced in evidence, and an inspection of it reveals the fact that it was recorded March 16, 1899, at 4:48 o'clock p.m., nearly three years and seven months after its execution. No explanation was asked or offered in relation to this delay, and perhaps none was necessary, as between the parties the mortgage was valid and binding without it; but it is a circumstance that may be considered for what it is worth in such a case. If she relied so much upon her security, and would not have loaned the money to her relative without his giving her a first mortgage upon his property, would she not have protected herself still further by recording the mortgage as soon as she received it—to prevent others from obtaining priority through her delay?

The plaintiff further testified: "I dropped the suit against the father," and "I dropped the claim against Edward J. Bicknall"; and, also, in cross-examination, as follows: "This mortgage is dated the 20th day of August, 1895?" "Yes, sir." "And interest was paid upon it to what time?" "1900." "And was there any interest paid upon it after that date?" "No, sir." "And there was a promissory note accompanied this mortgage?" "It is." "You have got that?" "I have." "You never returned that to Edward J. Bicknall?" "No, sir." "Did you ever give him any receipt for the claim which you had against him (Edward J.)?" "Receipt for the claim? I have receipted when he has paid me the interest, every time." "Did you ever give him any formal discharge of your claim?" "No, sir." "Did you not discharge this mortgage of record?" "No, sir." "Is that mortgage still outstanding on this real estate on Logan avenue?" "It is." "And the estate is still subject to that mortgage?" "Yes, sir." "And an incumbrance upon that estate at the present time?" "Yes, sir." "And this is still outstanding as a valid mortgage against that real estate?" "I suppose so."

Even if we concede, for the purposes

of this consideration, that the extinguishment may be mentally as well as physically accomplished, a proposition not involved in the determination of this case, what evidence is there that the old obligation, consisting of the note and mortgage of Edward J. Bicknall, was extinguished? A fair interpretation of the testimony of the plaintiff is that she dropped her claim for deceit against Edward J. Bicknall, but that she held the note and mortgage as outstanding and valid against the real estate; that she did not surrender or attempt or intend to surrender them; and so far as appears in evidence, they constitute a subsisting obligation capable of enforcement by foreclosure. In other words, she released a claim she may have had against the body of Edward J. Bicknall, but did not part with her claim against his real estate. The extinguishment must be complete and total, not partial or equivocal, to serve the purposes of novation. Even if Edward J. Bicknall can be said to have been a party to the transaction, through the agency of the defendant, who testified that he acted as his attorney in the matter, the plaintiff fails to sustain the burden of proof that there was a novation as she claims. The verdict therefore was against the evidence, and, as the testimony of the plaintiff precludes the possibility of proof of novation, verdict should have been directed for the defendant.

Case remanded to the superior court, with direction to enter judgment for the defendant.

GREENOUGH, Atty. Gen., v. SCHOOL COMMITTEE OF PAWTUCKET.

(Supreme Court of Rhode Island. Jan. 5, 1906.)

CERTIORARI — To SCHOOL COMMITTEE — CHANGE OF TEXT-BOOKS.

Certiorari does not lie to review the action of a school committee in changing the text-books; the committee's selection of text-books being an administrative or legislative duty, and only judicial action being reviewable by the writ.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, § 37.]

Application by William B. Greenough, Attorney General, for writ of certiorari to the school committee of Pawtucket. Denied.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Hugh J. Carroll, for petitioner. Barney & Lee, for respondents.

DOUGLAS, C. J. This is a petition for a writ of certiorari to review the action of the school committee of Pawtucket in voting "to change certain of the text-books heretofore for a long time used in the public schools of said city," and "to purchase certain new text-books to take the place of those so as aforesaid heretofore used." We are of the

opinion that certiorari does not lie in such a case. The selection of text-books by the school committee is an administrative or legislative duty, not in any sense a judicial one. While, like most administrative duties, it involves the use of judgment and discretion, it is not a judicial determination of rights or contested issues such as constitutes a judgment of court.

The exact question before us was decided in *People v. Oakland Board of Education*, 54 Cal. 375, where the court held that the action of the board in adopting a series of readers for the public schools in lieu of a series previously in use was an exercise of legislative, not of judicial, power, and could not be reviewed by certiorari. The court quote with approval the language of Mr. Justice Field in the *Sinking Fund Cases*, 99 U. S. 761, 25 L. Ed. 496, as follows: "The distinction between a judicial and legislative act is well defined. The one determines what the law is and what the rights of the parties are with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation or of property as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions." This, in our opinion, is a clear and just statement of the rule which applies to the case at bar, and the deductions of the California court are logical and convincing. The votes of the committee determined no contested rights, but directed future action on the principle of policy or expediency. This action was legislative, not judicial.

It is well settled that in this state the common-law limitations of certiorari prevail which confine it to the review of the judicial action of inferior courts or of public officers or bodies exercising under the law judicial or quasi judicial functions. *Dexter v. Town Council of Cumberland*, 17 R. I. 222, 21 Atl. 347; *Lonsdale Company v. License Commissioners*, 18 R. I. 5, 25 Atl. 655; *State v. Board of Aldermen of Newport*, 18 R. I. 381, 28 Atl. 347; *Smith v. Town Council of Burrillville*, 19 R. I. 61, 31 Atl. 578.

The petition must be dismissed.

CAPPELLI v. WOOD (McDERMOTT, Garnishee).

(Supreme Court of Rhode Island. Dec. 22, 1905.)

GARNISHMENT—PROPERTY SUBJECT—VERDICT BEFORE JUDGMENT.

A verdict upon which no judgment has been entered is not a subject for garnishment.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, § 7.]

Action by Antonio Cappelletti against Henry M. Wood, in which Susan A. McDermott was served as garnishee. On agreed statement of

facts, certified by court below. Judgment for plaintiff and discharging the garnishee.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Simon S. Lapham, Jr., for plaintiff. Albert D. Bean, for defendant.

JOHNSON, J. Assumpsit. Heard on certification from the district court of the Sixth judicial district upon an agreed statement of facts, as follows:

"The defendant, Henry M. Wood, on the 13th day of October, A. D. 1905, obtained a verdict of a jury in the superior court, Providence county, in the case of Henry M. Wood v. Susan A. McDermott, for the sum of \$150. On the 14th day of October, A. D. 1905, after verdict and before judgment in the case of Wood v. McDermott, the plaintiff in this case sued out of the district court of the Sixth judicial district a writ of attachment, and said Susan A. McDermott was duly served with a copy of said writ as garnishee of said Henry M. Wood. That said Susan A. McDermott duly filed her garnishee's affidavit which is a part of the record hereof. That execution in case of Wood v. McDermott has been stayed. That said case of Cappelli v. Wood is now pending in the district court of the Sixth judicial district in said state on a written motion to discharge the garnishee made by the defendant Wood. That the defendant Wood in case Cappelli v. Wood does not dispute the amount of the claim of said Cappelli, and that judgment shall be entered for the plaintiff for \$246 and costs, and this court shall consider the validity of the attachment only."

The garnishee's affidavit referred to in said statement is as follows:

"Providence—Sc.: District Court of the Sixth Judicial District. Antonio Cappelli v. Henry M. Wood. In the above-entitled case, I, Susan A. McDermott, of the city and county of Providence and state of Rhode Island, the garnishee therein named, make affidavit and say that at the time of the service of the writ of garnishment in said case the defendant in said suit, Henry M. Wood, had received a verdict in the superior court for the county of Providence for the sum of one hundred and fifty dollars (\$150), and that said decision has now become a judgment, and that execution thereon has been stayed by order of the presiding justice of the superior court. Susan A. McDermott.

"Subscribed and sworn to before me, in Providence, this 25th day of October, A. D. 1905.

"Henry A. Palmer, Notary Public."

Service of the trustee process in this case having been made after verdict and before the entry of judgment in the case of Wood v. McDermott, the question raised for consideration is: Can the garnishee be charged? In

Foster v. Dudley, 30 N. H. 463-465, the court says: "If the trustee suit be commenced while the debtor trustee has yet an opportunity to ask for delay, and to plead a recovery against him, if one should be had, he may be charged as trustee if no other objection appears." This statement of the law was approved by this court in Smith v. Carroll, 17 R. I. 125-127, 21 Atl. 343, 12 L. R. A. 301. In Thayer v. Pratt, 47 N. H. 470, where, as in Foster v. Dudley, supra, the attempted garnishment was after verdict and before judgment, the court says: "Our statute must be construed in reference to existing remedies, and we are aware of no practice that will justify setting aside a verdict that has been fairly and properly rendered to let in a defence arising afterwards."

These cases state the law correctly, as far as they go. They hold, substantially, that a verdict cannot be made the subject of garnishment, because, after verdict, the opportunity to plead the garnishment has passed. There is a further reason, which appears to us to be equally conclusive. Garnishment is a proceeding in the nature of an involuntary suit by the defendant against the garnishee for the benefit of the plaintiff. The person sought to be garnished must be one against whom the defendant has a present right of action. In this case the defendant had no such right of action against the garnishee at the time of the service of the trustee process. He had simply a verdict, on which the entry of judgment was necessary to give him a right of action. No matter how long a verdict remained on the records of the court, no action could be brought upon it. In such case garnishment therefore fails, not only because after verdict the time to plead the garnishment has passed, but because the verdict itself is entirely lacking in the essentials of a subject of garnishment.

The attempted garnishment was invalid, and the garnishee cannot be charged.

Case remanded to the district court of the Sixth judicial district, with direction to enter judgment for the plaintiff in accordance with the agreement of the parties.

SHARTENBERG & ROBINSON v. ELLBEY.

(Supreme Court of Rhode Island. Dec. 15, 1905.)

1. DEEDS—CONSTRUCTION—INTENT OF PARTIES.

Deeds must be so construed as to effectuate, if possible and consistent with settled rules of law, the intention of the parties as gathered from a fair consideration of the entire instrument and the language employed therein.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 231.]

2. SAME—INARTIFICIAL DEEDS.

A liberal construction is to be given to deeds inartificially and untechnically drawn.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 234.]

8. SAME—SURROUNDING CIRCUMSTANCES.

Where the language used in a deed is susceptible of more than one interpretation, the court will look at the circumstances existing at the time of the transaction, such as the situation of the parties, etc.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 239.]

4. LANDLORD AND TENANT — CONSTRUCTION OF LEASE—RENTAL.

Plaintiffs leased to defendant floor space in their store, to be used for the sale of soda water and confectionery. The lease provided that the receipts taken in by defendant should be turned over to plaintiffs, that defendant guaranteed that the gross receipts from his business should amount to at least \$10,000 per annum, that he agreed to pay plaintiffs 20 per cent. on the difference between the actual receipts and \$10,000, should such receipts be less than that sum, and that plaintiffs should retain 20 per cent. of the gross receipts turned over by defendant as full compensation under the lease. *Held*, that the lease in effect provided for an annual rental of \$2,000, the same to be paid by the retention of 20 per cent. of the gross receipts, and by the payment by defendant of any further sum which should be necessary to make up the sum of \$2,000.

Ejectment by Jacob Shartenberg and another, copartners as Shartenberg & Robinson, against Thomas Ellbey. There was a verdict for plaintiffs, and defendant petitioned for a new trial. Denied.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

John J. Fitzgerald, for plaintiffs. Terrence M. O'Reilly, for defendant.

DUBOIS, J. This is an action of trespass and ejectment brought to recover possession of the premises described in a lease from the plaintiffs to the defendant upon the ground that the defendant suffered the stipulated rent for the same to be and remain due and in arrears for the period of 15 days.

The lease is of the tenor following:

"We, Jacob Shartenberg and Harry Robinson, copartners as Shartenberg and Robinson, of Pawtucket, R. I., hereby lease to Thomas Ellbey, doing business as the Imperial Confectionery Company, a space upon the ground floor in that part of our store in said Pawtucket known as the Weeden Building and near the entrance of said building, measuring about twenty feet in length and of a width extending to the outer edge of the counter, and also suitable space in their basement, to be used for the sale of soda water and confectionary for the term of five years from July 1, 1904, and subject to the following terms and conditions.

"(1) The said Ellbey shall furnish all his own stock, materials and implements, including soda fountain.

"(2) Said Ellbey shall hire and pay all his own help, such help to conform to all rules and regulations the same as other employees in the store.

"(3) All the receipts taken in by said Ellbey shall be turned over to said Sharten-

berg and Robinson as the same are received.

"(4) Said Ellbey guarantees that the gross receipts from said business shall amount to at least \$10,000 per annum, and he agrees to pay to said Shartenberg and Robinson 20 per cent. on the difference between the actual receipts and \$10,000, should such gross receipts be less than \$10,000.

"(5) Said Shartenberg and Robinson shall retain 20 per cent. of the gross receipts turned over by the said Ellbey as full compensation under this lease.

"(6) The said Ellbey agrees that he will not assign this lease or any interest therein without the written consent of said Shartenberg and Robinson.

"And the said Shartenberg and Robinson agree with the said Ellbey:

"(7) That they will properly light and heat said premises and furnish necessary toilet conveniences.

"(8) That they will keep an accurate account of the gross amounts received by them from said Ellbey, and will upon each Monday turn over to said Ellbey, or his representative, 80 per cent. of the gross receipts of the previous week.

"(9) That they will from time to time during the continuance of said lease advertise the business of said Ellbey to such an extent as they deem advisable.

"(10) That they will not compete with said Ellbey in the sale of soda or confectionery.

"This lease and the agreements herein contained to be binding upon the parties hereto and their respective heirs, executors and administrators.

"Executed in duplicate this seventeenth day of June, A. D. 1904.

"Shartenberg & Robinson.

"Thomas Ellbey.

"Witness: Louis S. Law."

After verdict for the plaintiffs in the superior court the defendant duly prosecuted to this court his bill of exceptions, based on the following grounds: "(1) That the court erred in ruling that the guaranty of receipts in the fourth clause of the lease of the plaintiffs to the defendant, and which is the foundation of this action, must be construed to mean that the receipts mentioned in the fifth clause of the lease shall be \$10,000. "(2) That the court erred in refusing the motion made by the defendant to direct a verdict for said defendant, on the ruling that the deficiency existing under the fourth clause of said lease was rent, and was due at the end of one year. "(3) That the court erred in its charge to the jury that the deficiency claimed by the plaintiffs was due and payable July 1, 1905, and, that if any portion of the said deficiency remained unpaid, it was the duty of the jury to find a verdict for the plaintiffs."

The decision of these questions obviously depends upon the proper interpretation of

the lease. As stated by Ames, C. J., in *Deblois v. Earle*, 7 R. I. 26, at page 29: "The cardinal rule in the interpretation of all instruments * * * is 'to read the writing,' and, taking its language in connection with the relative position and general purpose of the parties, to gather from it, if you can, their intent in the questionable particular." The object in construing a deed is to ascertain the intention of the parties, and it is well settled that deeds must be construed so as to effectuate, if possible, that intention when consistent with settled rules of law, and where the expressions in the deed do not positively forbid it or render it impossible. 13 Cyc. 601. The intent must primarily be gathered from a fair consideration of the entire instrument and the language employed therein, and should be consistent with its terms, including its scope and the subject-matter.

A liberal construction is to be given to deeds inartificially and untechnically drawn. 13 Cyc. 604. Whenever the language used is susceptible of more than one interpretation, the court will look at the circumstances existing at the time of the transaction, such as the situation of the parties, etc. *Waterman v. Andrews*, 14 R. I. at page 595. An inspection of the instrument in question discloses the fact that the lease is very inartificially drawn, and therefore entitled to a liberal construction for the purpose of ascertaining and effectuating the intention of the parties. Considering the situation of the parties at the time of its execution as disclosed by the lease, we find the plaintiffs in possession of a desirable shop or store wherein the defendant was anxious to obtain space for the establishment of his business. It is evident that he was satisfied that he could succeed there, for he "guarantees" that the gross receipts from his business shall amount to at least \$10,000 per annum, and agrees to pay to the plaintiffs 20 per cent. on the deficiency in case the gross receipts shall fall below that sum. Although the word "rent" is not used in the instrument, it is provided by clause 5 that the plaintiff shall retain 20 per cent. of the gross receipts turned over by the defendant as full compensation under the lease; and rent is the compensation, either in money, provisions, chattels, or labor, received by the owner of the soil from the occupant thereof. *Bouv. Law Dict.* The word "guarantees" in clause 4 is not used in a technical sense. Guaranty is an undertaking to answer for another's liability and collateral thereto. It is a secondary, and not a primary, obligation. *Bouv. Law Dict.* As used in the lease, it expresses the defendant's confident estimate that the gross receipts from the business will amount to at least \$10,000 per annum, and his willingness to maintain his faith in his judgment by allowing that sum to be used as a basis upon which his minimum

rent shall be computed, and he supports it by his agreement to pay to the plaintiffs 20 per cent. of the deficiency, in case there should be any, between the actual and estimated gross receipts. A fair interpretation of clauses 4 and 5 is that the rent is to be at least \$2,000 per annum—that is, 20 per cent. of \$10,000; that it is to be paid by the retention of 20 per cent. of the gross receipts, if they shall amount to or exceed \$10,000 per annum; that, if they do not, the rent is to be partially paid by retaining 20 per cent. of the gross receipts each week as the same are received, under clauses 5 and 8, and by the payment of the balance by the defendant, under the provisions of clause 4, at the end of the year, the time when the deficit could be ascertained. The words "20 per cent. of the gross receipts turned over by the said Ellbey," in clause 5, do not exclusively apply to actual receipts, but include the 20 per cent. of estimated gross receipts which, in clause 4, the defendant agrees to pay. The literal expressions in clause 5 must yield to the manifest intent of the entire instrument. Therefore the plaintiffs have not received full compensation, or rent, under the provisions of clause 5 of the lease, if the amount found to be due under clause 4 therefor remains unpaid.

As there was a deficiency in the actual gross receipts, which became due and payable July 1, 1905, and remained unpaid for more than 15 days, and as this action was brought there afterwards, the suit was properly brought, and as the rulings of the judge presiding at the trial were in conformity with the law hereinbefore expressed, the same must be sustained, and the exceptions thereto are overruled. Case remitted to the superior court, with direction to enter judgment on the verdict.

SANDERS et al. v. MAMOLEN.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

WILLS—CONSTRUCTION—ESTATE DEvised.

Testatrix devised four-sevenths of her estate to a daughter, with a provision that no part of it should be disposed of until after the death of her daughter, but that it should be rented or leased and the sum realized be divided according to the provisions of her will; and by her codicil she provided that, if it became necessary to sell the real estate, her daughter should be entitled to receive her portion annually until the death of her husband, after which she was to receive the full amount of her share. *Held* that, after the death of the daughter's husband, there was an absolute right in the daughter or her assignee to receive the proceeds of the sale of the real estate, and that the title was in her in fee simple under the codicil.

Appeal from Court of Common Pleas, Allegheny County.

Action by Elizabeth J. Sanders and Alice B. Valentine against Peter Mamolen. Judgment for plaintiffs, and defendant appeals. Affirmed.

Testatrix by her will directed as follows:

"I order that all my just debts, funeral expenses and charges of proving this, my will, be in the first place fully paid and satisfied, and after payment thereof and every part thereof, I give and bequeath to my daughter, Sarah A. Davis, four-sevenths of the residue, and to my son, John Ingraham, now residing in Tarentum, Allegheny county, three-sevenths of the remainder. The property devised by this will consists of one house and lot in the village of Tarentum, Allegheny county, Pennsylvania, and I do further will and direct that no part or parcel of said property be sold or disposed of until after the death or demise of my daughter, Sarah A. Davis, but that it be rented or leased, and the sum realized to be divided according to the above provisions. My reason for making the above provision is that my daughter, Sarah A. Davis, remained at home long after she became of age, giving me the benefit of her labor and is now providing a home for me."

A codicil to the will was as follows:

"I, Nancy Ingraham, the testator in the above will and testament, do make the following provisions, viz.: That if it becomes necessary to dispose of or sell my real estate prior to or after my death, my daughter, Sarah A. Davis, shall be entitled to and is hereby authorized to lift and receive her portion annually until the death of her husband, William Davis, after which she is to receive the full amount of her share. But if she should die before her husband, the remainder of her portion, if any, to be paid to her children, if of age; but if not of age, it shall be paid to their guardian, to be given to them when they arrive at the full age of twenty-one years."

The plaintiffs in the case stated claimed title from Sarah A. Davis. The defendant agreed to purchase the property for \$2,500. The court entered judgment for plaintiffs for \$2,500. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

R. A. Kennedy, for appellant. Nelson McVicar, for appellees.

PER CURIAM. The testatrix devised four-sevenths of her estate to her daughter, but provided "that no part or parcel of said property be sold or disposed of until after the death or demise of my daughter, Sarah A. Davis, but that it be rented or leased and the sum realized to be divided according to the above provisions." On this branch of the case the learned judge below well says: "As a restriction of alienation on the grant of a fee is against the general rule of law, it must be construed strictly, and it requires no very strict construction of the will in question to read it as not being a restriction upon Sarah A. Davis herself,

but only a direction of the testatrix to her executors. It will be observed that the testatrix puts her personal property and the land in question into a common fund for the payment of her debts, and then directs, not that her daughter shall not sell, but that the property shall not be sold till after her daughter's death, and in the codicil directs that, if it becomes necessary to sell it, then her daughter shall have a certain share. We think there can be little question that the testatrix did not intend that her daughter, who was the principal object of her bounty, as she says, should not sell, but that the land should not be sold for the purpose of the will unless it was necessary."

But, in addition to this, the testatrix by a codicil provided: "That if it becomes necessary to dispose of or sell my real estate prior to or after my death, my daughter, Sarah A. Davis, shall be entitled to and is hereby authorized to lift and receive her portion annually until the death of her husband, William Davis, after which she is to receive the full amount of her share." William Davis, the husband, is now dead, and it thus appears that there is a power of sale, with an absolute right in Sarah Davis or her assignee to receive the proceeds. The title is good under the codicil without regard to the previous provisions of the will. Judgment affirmed.

MORRIS et al. v. McCUTCHEON.

ARMSTRONG v. SAME.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

SPECIFIC PERFORMANCE — CONTRACTS ENFORCEABLE.

An agreement on the part of a solvent person to pledge all his estate to a trustee to secure certain named creditors will be enforced in equity.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 212.]

Appeals from Court of Common Pleas, Allegheny County.

Bills by Joseph C. Morris and Richard R. Brown, trading as Morris & Brown, and by John D. Armstrong, surviving partner of Lathrop R. Bacon & Co., against James H. McCutcheon and others. Suits were tried together, and from decrees for plaintiffs, defendants appeal. Affirmed.

The following is the opinion of Rodgers, J., in the court below:

"(1) On May 9, 1901, James H. McCutcheon, one of the defendants, was indebted to plaintiffs in the sum of \$118,676.78, being the balance due on settlement of the accounts at the close of business upon said date for certain shares of capital stock in various corporations bought and sold by plaintiffs in their capacity as stockbrokers of said James H. McCutcheon, who was, and had been for some time prior thereto, plaintiffs' customer.

"(2) One transaction between plaintiffs and James H. McCutcheon included the purchase of 500 shares of the common stock of the Northern Pacific Railroad Company by plaintiffs on May 9, 1901, which said stock was purchased upon the order of said McCutcheon, and in the purchase thereof said plaintiffs acted as agents and brokers with fidelity and care and without negligence. Two hundred of said shares were purchased for \$450 per share, 100 shares at \$500 per share, and 200 shares at \$400 per share, and the purchase price for all of said shares was paid by plaintiffs to the sellers thereof. The aforesaid transaction embraced a part of the dealings between the parties referred to in the first finding of fact.

"(3) Plaintiffs on the same day bought or sold about 1,800 shares of other stocks for James H. McCutcheon, which said purchases or sales were apparently satisfactory.

"(4) Plaintiffs on May 7 and May 8, 1901, contracted to pay, as agents and brokers for said McCutcheon, the sum of \$8,400, borrowing premium charges on said Northern Pacific stock, in accordance with the rules and custom of the market, and said payments were rendered necessary by reason of said McCutcheon's orders and directions to plaintiffs to carry deliveries of the stock over, and not to buy it in 'to cover' on said days. Such premiums were contracted in good faith and without negligence by plaintiffs, and were paid by them; the same being included in the indebtedness account referred to in the first finding herein.

"(5) Upon the evening of May 9, 1901, after the indebtedness referred to in the first finding herein had been incurred and the account closed, the agreement, Exhibit A, attached to plaintiffs' bill, was prepared, signed, and sealed by all the parties to this bill; said James H. McCutcheon and plaintiffs being represented by counsel, said agreement being executed in the presence of said counsel, having been prepared by counsel representing said James H. McCutcheon, and after having been so executed, was deposited with McCutcheon's counsel, with the understanding that he should be the custodian of it for John L. McCutcheon, who was one of the beneficiary parties to the agreement and trustee under it to carry out its provisions.

"(6) Said agreement above referred to was executed after demand made by plaintiffs that their said indebtedness be paid to them forthwith.

"(7) There was neither fraud, accident, nor mistake in the execution of said agreement.

"(8) The said agreement is as follows, to wit:

"Exhibit A.

"Pittsburg, May 9, 1901. Whereas, James H. McCutcheon is indebted approximately to Lathrop R. Bacon & Co. \$70,000, and to

Morris & Brown approximately \$114,000, and to John L. McCutcheon \$15,000, and desires to secure such indebtedness: Now it is agreed that said James H. McCutcheon shall pledge all his estate, real and personal, for the payment of said indebtedness, but that priority shall be given sixty-eight per cent. thereof; that is to say, notes shall be given payable to Lathrop R. Bacon & Co. for say \$47,600 (four of \$10,000 and one of \$7,600), payable four months after date, and notes shall be given to Morris & Brown for \$77,520 (seven notes of \$10,000 each and one of \$7,520 at four months), indorsed by John L. McCutcheon and Thomas G. McCutcheon. The pledge shall be primarily liable for these notes and a note to John L. McCutcheon for \$11,880; subject to this primary liability the pledge shall be security for the residue of the indebtedness of said James H. McCutcheon to said Lathrop R. Bacon & Co., Morris & Brown, and John L. McCutcheon in the proportion of their respective claims. For said residue said James H. McCutcheon shall give his notes to the respective parties at four months. Discounts shall be paid by said James H. McCutcheon on all notes or renewals. The maker shall have the right to renew any and all notes given by him hereunder from time to time, and as often as he shall reduce the principal of any note ten per centum, and in case of such renewals all parties hereto shall be bound to indorse according to their position on the original notes.

"Pledge or mortgage to be made to John L. McCutcheon as trustee under the provisions hereof. Pledge to be for one year. Right in trustee to foreclose after any default on thirty days' notice to all parties in interest.

"Witness the hands and seals of said parties, May 9, 1901.

"Morris & Brown. [Seal.]

"J. L. McCutcheon. [Seal.]

"Jas. H. McCutcheon. [Seal.]

"Thomas G. McCutcheon. [Seal.]

"Lathrop R. Bacon & Co. [Seal.]"

"(9) The eight notes to Morris & Brown, aggregating \$77,520, and the five notes to L. R. Bacon & Co., aggregating \$47,600, all indorsed to John L. McCutcheon and Thomas G. McCutcheon, were given on May 10, 1901, to Morris & Brown and Bacon & Co., respectively, being drawn at four months, and otherwise in accordance with the terms of the agreement set forth in the above finding; but James H. McCutcheon has failed to deliver his notes for the balance due plaintiffs. The notes which were given were designated as provided for in said agreement, and the discounts thereon were paid by James H. McCutcheon, and thus said plaintiffs have indulged and given time to James H. McCutcheon to pay said indebtedness as provided in the agreement.

"(10) Of the indorsed notes to Morris & Brown there are still unpaid and outstanding

\$50,000 in the form of renewals dated September 10, 1901, and payable on demand. At the request of James H. McCutcheon, John L. McCutcheon, and Thomas G. McCutcheon, the said \$50,000 notes are held by John L. McCutcheon, and Morris & Brown are liable as first indorsers thereon; the said John L. McCutcheon being subsequent indorser.

"(11) James H. McCutcheon was, on May 9, 1901, the owner of a large amount of real estate in the county of Allegheny and state of Pennsylvania, and also a large amount of personalty, and still is the owner of the realty, to wit, real estate situate on Fifth avenue, Twenty-Second ward, Pittsburg, and real estate situate on Center avenue, Thirteenth Ward, Pittsburg, and that he is still the owner of personal property.

"(12) Said James H. McCutcheon refuses to execute and deliver the pledge of his real and personal property, as provided in the agreement found in the exhibit set forth in finding No. 8, and in the refusal to perform said agreement he is acting upon the counsel and advice of John L. McCutcheon, one of the defendants hereto.

"(13) The said James H. McCutcheon acknowledged the indebtedness to plaintiffs of approximately \$114,000, and to L. R. Bacon & Co. of \$70,000, and to John L. McCutcheon of \$15,000, as shown in the agreement heretofore found, and agreed therein to pledge all his estate, real and personal, for the payment of said indebtedness, with the agreement that priority should be given to 68 per cent. thereof, namely, as far as plaintiffs hereto were concerned to \$77,520, covered by the notes above set out, which were indorsed by John L. and Thomas G. McCutcheon, and as to L. R. Bacon & Co. to \$47,600, notes likewise indorsed, and as to John L. McCutcheon to \$11,880. After this primary liability, the pledge was to be security for the residue of the indebtedness of the said James H. McCutcheon to plaintiffs and Bacon & Co. and J. L. McCutcheon in proportion to their claims; but the maker was to have the right to renew the notes given by him from time to time and as often as he reduced the principal of any note 10 per cent., in which case of renewal all parties were to be bound to indorse according to their positions on the original notes. The pledge or mortgage was to be made to John L. McCutcheon as trustee and was to be for one year, with the right to the trustee to foreclose after any default on 30 days' notice to all parties in interest.

"(14) James H. McCutcheon does not now demand or claim the right to have the notes renewed, and more than one year has elapsed from the time when such pledge or mortgage should have been given under the terms of the contract.

"The transactions involved in the dealings between Morris & Brown and James H. McCutcheon, concerning the Northern Pacific Railroad Company common stock, were made

in good faith, with the intention on the part of both McCutcheon and plaintiffs to make actual delivery of the stock, and as agents of said McCutcheon plaintiffs had made contracts with other persons for delivery of such stock. These transactions were not gambling transactions.

"Conclusions of Law.

"(1) That James H. McCutcheon is indebted to Morris & Brown on the account, as embraced in the findings of fact hereto, in the sum of \$86,156.78, of which said sum \$50,000 is due and payable with interest from September 10, 1901, and the balance of said sum, \$36,156.78, is due and payable with interest from May 9, 1901.

"(2) That James H. McCutcheon should pay unto John L. McCutcheon, the holder of the notes representing the sum of \$50,000, the debt and interest thereon, or procure for plaintiffs full acquittance thereof, and in addition thereto should pay to plaintiffs the sum of \$36,156.78, with interest from May 9, 1901, or, failing therein, should execute and deliver unto John L. McCutcheon a pledge in writing of all the real and personal estate by him owned on May 9, 1901, in compliance and performance of the terms of the agreement set forth in the eighth finding of fact, being the agreement marked Exhibit A.

"(3) That John L. McCutcheon accept the pledge provided for in said agreement, and perform the duties of trustee thereunder, or, upon his refusal so to do, that a proper pledgee or trustee be appointed in his stead.

"(4) That this court has jurisdiction to compel the specific performance of the agreement found to exist between the parties, being Exhibit A, attached to the bill of complaint."

Argued before FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. S. Ferguson and E. G. Ferguson, for appellant. William M. Hall, Joseph A. Langfitt, Clarence Burleigh, William Kaufman, and H. W. McIntosh, for appellees.

PER CURIAM. These cases differ but slightly in their facts, and involve the same questions of law, and were argued together. The findings of fact are fully warranted by the testimony, and we are not convinced of error in the conclusions of law.

The decrees are affirmed, at the cost of the appellants.

TRAU et al. v. SLOAN et al.
(Supreme Court of Pennsylvania. Jan. 2, 1906.)

SPECIFIC PERFORMANCE—CONTRACT BY UNAUTHORIZED AGENT.

A contract for the sale of real estate, signed by a purported agent of the vendor, will not be enforced, where the court finds as a fact that the person signing the contract was not an authorized agent of the owner for the purpose of making such contract.

Appeal from Court of Common Pleas, Allegheny County.

Bill by Gus Trau and Phillip Loevner against William L. Sloan and others. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Edward Steuer and G. K. Wright, for appellants. George H. Quail and J. V. Dunlevy, for appellees.

MESTREZAT, J. This is a bill for the specific performance of a written contract for the sale of real estate. The controlling question in the case is whether L. A. Clark & Co. were authorized by William L. Sloan, the owner of the property, to enter into the agreement with the plaintiffs, who were the purchasers. The learned trial judge found as a fact and as a conclusion of law that Clark & Co. were not authorized to act as the agents of Sloan in the sale of the property. We have examined with care the testimony in the case and fully agree with these findings. Before Sloan left the city of Pittsburgh for California, in February, 1905, he placed all his business matters, including the sale of this property, in the hands of his son Earl. As found by the trial court, this fact was communicated to Clark & Co. by both Mr. Sloan and his son. Zinn, Clark & Co.'s representative, called on Mr. Sloan immediately prior to his leaving on his Western trip and asked him if he would sell the property in dispute. Sloan told him he would sell, but that he was about leaving for California to get a rest, and would be gone till April. Sloan then gave Zinn the net price he would accept for the property, and told him that his son would be in Pittsburgh during his absence, that all the dealings would have to be done through him, that his son would sign any papers and make any agreements that were to be made, and that he would keep Sloan posted as to any negotiations which might take place looking to a sale of the property. Zinn acted for Clark & Co. in selling the property to the plaintiffs; but at every step in the negotiations he consulted Earl Sloan, and recognized him as the agent and person authorized to act for his father in consummating a sale. There is no evidence that would warrant a finding that Clark & Co. were Sloan's agents to negotiate a sale of the property. The plaintiffs rely upon the telegrams in evidence for such authority; but, when read in the light of the admitted facts, known and understood by all the parties interested in the transaction, they confer no agency on Clark & Co. to enter into a written contract of sale, but, on the contrary, in the language of the learned judge's findings, they "were intended only to express to Clark & Co. the willingness of Sloan to sell the lands for \$38,000 and that a commission of \$500 would be paid."

The plaintiffs having failed to establish the authority of Clark & Co., as Sloan's agents, to enter into the written contract which they ask the court to enforce against Sloan, the court below was clearly right in refusing a decree for specific performance.

The decree is affirmed.

LINDBERG v. NATIONAL TUBE CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

MASTER AND SERVANT—INJURY TO EMPLOYE—DEFECTIVE APPLIANCES.

Where an employé sued to recover for injuries caused by a defective crane, near which he had been working for over three months, and the defect was visible and must have been known to plaintiff, and defendant was not notified thereof, plaintiff could not recover; no person having directed him to work in the position in which he was injured.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 574-600.]

Appeal from Court of Common Pleas, Allegheny County.

Action by Charles F. Lindberg against the National Tube Company. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

Evans, J., filed the following opinion in the court below:

"Plaintiff's evidence showed that he was in the employ of the defendant company as a rougher at the rolls. Near where the plaintiff worked was situated a hydraulic crane, which was used for lifting and moving the rolls when they were taken out for cleaning or repairs. A socket in which the upright of the crane revolved had become worn in such a way that, when the boom approached the position where the plaintiff worked, the upright of the crane leaned in that direction, which caused the boom to move around automatically for nearly one-half of its circuit, and it would vibrate back and forward until it finally settled at the lowest point, or directly opposite the direction in which the upright, the mast, leaned. The crane had been in this condition for some three or four months, during which time and long prior thereto the plaintiff had worked in the immediate vicinity of the crane. The boom of the crane, in passing over the space through which it moved when moving automatically, by reason of the defect causing the inclination of the mast, passed over the spot where the plaintiff worked, and at the time in question, loaded with a roll just taken from the mill, it struck the hand of the plaintiff, which had hold of some instrument with which he was working, and crushed it. The plaintiff testified that he did not know of this defect in the crane causing it to move through considerable space automatically in the neighborhood of where he worked. A motion for nonsuit was al-

lowed, on the ground of contributory negligence on the part of the plaintiff.

"As we said above, the plaintiff testified that he did not know of the existence of this defect in the crane; but it was open and apparent to any person who opened his eyes that that defect was there. The crane was in regular use. Other workmen called by the plaintiff saw this defect, saw that the crane moved without force being applied to it; and assuming that the plaintiff did not know, as he testified that he did not know, he must have closed his eyes to what was apparent in the immediate vicinity of his work. If he did not know it, he ought to have known it, because a workman may not shut his eyes to apparent danger, and go on for months working in the vicinity of a dangerous machine, which is liable at any time to pass over the spot where he is working and strike him, and yet hold his employer liable for any injury occasioned by such a danger. The duty of the employer here was not to furnish safe tools with which to work, because the plaintiff was not injured in working with this crane, but it was to furnish a safe place in which to work; and with the slightest care upon plaintiff's part he could have known for three months prior to the date of this accident that the position in which he was working was a dangerous one. He closed his eyes to that fact. There is no evidence that he or anybody else ever notified the employer of this danger, or that any person ever directed him particularly to work in that position, knowing it to be a dangerous one.

"The motion to take off the nonsuit is refused."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Rody P. Marshall and Thomas M. Marshall, for appellant. W. B. Rodgers and Thos. Ewing, for appellee.

PER CURIAM. Judgment affirmed, on the opinion of the court below.

In re PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Jan. 2. 1906.)

1. RAILROADS — MUNICIPAL REGULATION — SAFETY GATES.

Under Act 1851 (P. L. 820) relating to boroughs, and authorizing by section 2 the borough authorities to make such laws, ordinances, and regulations as they shall deem necessary, and in the twenty-fifth clause of the section setting forth the powers expressly conferred, has no power to require a railroad company, at the latter's expense, to maintain and operate safety gates at street crossings in the borough, and an ordinance requiring such action on the part of the railroad company is void.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 752-754.]

2. SAME—GRADE CROSSINGS.

A railroad company must adopt adequate means to give notice of approaching trains at grade crossings, but what particular means shall be employed to protect the public when using streets and highways at railroad crossings is left to the company operating the road; reasonable care in view of all the circumstances being demanded by law.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 752-755.]

Appeal from Superior Court.

In the matter of the Pennsylvania Railroad Company. From a judgment of the Superior Court, affirming an order dismissing petition to declare void an ordinance of the borough of North Braddock, the railroad company appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

M. W. Acheson, Jr., for appellant. William Yost, for appellee.

BROWN, J. The question raised on this appeal is as to the power of the borough of North Braddock to pass an ordinance, approved April 7, 1904, entitled "Ordinance No. 133, requiring the Pennsylvania Railroad Company to erect and maintain and operate safety gates at the point where the tracks of said railroad company cross Fourth street in the borough of North Braddock and imposing a penalty for any failure to comply with the provisions hereof." By the first section of the ordinance the appellant is required within 60 days from its approval to erect, maintain, and operate safety gates at the point designated in the title, for the warning and protection of those traveling upon Fourth street. By the second section a penalty is provided for failure to comply with the requirement of the first.

It is to be first observed, as is very properly stated by counsel for appellant, that the question is not (a) whether the borough may itself erect and maintain gates; (b) nor whether a given crossing ought to be protected by gates; (c) nor whether in a given case a railroad company might be found guilty of negligence in failing to have gates; (d) nor whether the law ought to compel railroad companies to maintain gates. It is as to the power of a borough to require a railroad company to do a particular thing, which, in the judgment of the borough, the company ought to do at a particular point for the safety of the public in connection with the operation of its road. In the present case the question is as to the power of this borough to require the Pennsylvania Railroad Company to adopt what it regards as proper means for the protection of the public at a designated point crossed by the tracks of the company. It is not pretended that the tracks are not lawfully on the street, nor that the railroad company has not the right to run its cars over them.

In the operation of its road and in the running of its cars the judgment of the board of directors of a railroad company, in the absence of statutory provision, is supreme and exclusive. The public safety imperatively requires that there be no division of this great responsibility with others, not even with municipalities through whose limits railroads may run; for division of it would be the shifting of it in every case of accountability for failure to properly operate the road or run the cars. But, while this is true, corresponding duties of the highest order are imposed exclusively upon those having the control and management of railroads. One of these is to adopt and use suitable and adequate means to give notice of approaching trains at grade crossings, which are always more or less dangerous, and the failure to perform this duty is negligence, for the consequences of which those are responsible upon whom the duty is imposed. What particular means, however, shall be employed to protect the public when using streets or highways at railroad crossings is left to the company operating the road, the law merely demanding and requiring reasonable care in view of all the circumstances. There is no common-law duty on the part of the company to station a flagman or erect gates at a crossing; but the failure of the company to do so is to be considered with other facts in every given case in determining whether the company was negligent. Among our cases announcing this rule are *Philadelphia & Reading R. R. Co. v. Killips*, 88 Pa. 405; *Lehigh Valley R. R. Co. v. Brandtmaier*, 113 Pa. 610, 6 Atl. 238; *Seifred v. Penna. R. R. Co.*, 206 Pa. 399, 55 Atl. 1061.

What is attempted by the appellee in the present case? Having no voice in the operation of the appellant's road, it undertakes to do what the common law itself does not do. It assumes to declare how the railroad shall perform a public duty at a particular point, and would substitute its judgment for that of the board of directors as to what kind of protection shall be afforded at the grade crossing, but with no corresponding responsibility resting on it for the inadequacy of the means which it declares must be adopted. If it has power to require the appellant to erect safety gates, it has the power to require the adoption, from time to time, of such other means as in its judgment ought to be adopted by the company for the protection of the public at street crossings. The power for which it contends would be practically unlimited. That the appellee is attempting to substitute municipal control for that of the railroad company itself at a particular point, by declaring just how the duty of the company must be there performed, is too plain for discussion. If the borough, in its judgment, ought itself to adopt means for the protection of the traveling

public at this or any other point within the municipal limits, there is nothing to prevent it from doing so; but before it can interfere, as it would by this ordinance, with the railroad company in its performance of its duty to protect the public at the crossing, it must show authority from the Legislature to do so, expressly or impliedly conferred. The power which it would exercise may be a desirable one, but courts cannot recognize it unless it exists.

Municipal corporations possess and can exercise such powers only as are granted in express words, or are necessarily or fairly implied in or incident to those expressly granted, or those which are indispensable to the declared objects and purposes of the municipality. 1 *Dillon on Municipal Corp.* (4th Ed.) § 89; 20 *Am. & Eng. Ency. of Law* (2d Ed.) p. 1139. Doubt as to corporate power is resolved against its existence, and this is no less true of a municipality than of a private corporation; for the source of the power of each is the same. Answer may be made to this that a municipality, as the representative of the state, has imparted to it inherent police power. This is true, and it is contended that the appellee is but exercising such power; but the distinction is overlooked that it is not itself, at the expense of the public, undertaking to exercise control over the streets and to protect the public at the railroad crossing, but is attempting to require some one else to do so at its own expense. It has undoubted power to do the former, if it will; but to do the latter, through the ordinance which it has passed, authority to enact the same must appear. The use of the street in crossing it is a public use of it by the railroad company having a legislative right to so use it on an equality with any natural person, except as such right may be limited in the grant of it, and the attempted interference with this right must fail, unless the borough can point to its power to so interfere, expressly or impliedly existing.

Among the express powers conferred upon boroughs by the act of 1851 (P. L. 320), the one sought to be exercised here does not appear. By the first clause of the second section of that act borough authorities are empowered generally "to make such laws, ordinances, by-laws, and regulations, not inconsistent with the laws of this commonwealth, as they shall deem necessary for the good order and government of the borough." In the succeeding 25 clauses of the same section are found the powers expressly conferred, but the power to pass this ordinance is not one of them. In *Borough of Millerstown v. Bell et al.*, 123 Pa. 151, 16 Atl. 612, this court, through Paxson, J., said: "The general powers referred to in the first section must be confined to the particular subjects referred to in the succeeding sections." With-out now committing ourselves to this, it is

clear that the good order and government of a borough referred to in the first clause are not involved in the ordinance. The good order of a borough can be preserved and it can be properly governed, no matter how many railroads cross its streets by legislative permission, and no matter how fast cars may run over them. We assume this is the clause designated by the Superior Court as the "general welfare clause"—"broad enough," in the opinion of that court, "to cover the municipal legislation complained of." For the reason just given we cannot concur in this.

The case of *Commonwealth v. Philadelphia, Harrisburg & Pittsburg Railroad Co.*, 23 Pa. Super. Ct. 205, was relied upon by the Superior Court as authority to sustain the action of the lower court. In that case the Superior Court held that the three following cases were authority for the power of a borough to pass such an ordinance as is now under consideration: *Penna. R. R. Co. v. Duquesne Borough*, 46 Pa. 223; *Township of Newlin v. Davis*, 77 Pa. 317; and *Pennsylvania Railroad Co. v. Irwin*, 85 Pa. 336. An examination of these cases does not justify reference to them as authority for the power claimed by the appellee. In the first, the railroad company, which had become the owner of the canal, succeeded to the duty of maintaining a bridge over it. Having failed to perform that duty, it was held that the borough authorities, as the proper public officers to look after the public highways, had the right to repair the bridge and to recover the expense of doing so from the railroad company. In the second, the action was against a township for injuries resulting from a defective bridge. All that was decided was that it was the duty of the township to properly maintain it. In the third, the railroad company changed the location of a public road, necessitating the building of a bridge, and it was simply decided that, the company having failed to rebuild and repair the bridge, the township could recover the cost of doing so from the company. A fourth case, cited by the Superior Court in *Commonwealth v. Philadelphia, Harrisburg & Pittsburg Railroad Co.*, is *Pennsylvania Co. v. Watson*,* 81 Pa. 293. The reference was intended to be to another case reported in the same volume—*Pennsylvania Co. v. James*,* 81 Pa. 194—in which there appears the language quoted in the opinion of the Superior Court as to the police powers of boroughs. But, turning to the charge of the court below, as found on page 198, it appears that power had been conferred by the Legislature to pass the ordinance which was under consideration. The Legislature might, of course, have done so here, but it has not. By the act of March 7, 1901 (P. L. 20), cities of the second class are authorized to enact ordinances requiring the erection of safety gates and the placing of flagmen at the intersection of railroads with public streets; and by the act of May 23,

1889 (P. L. 277), the same authority is conferred upon cities of the third class.

As the borough of North Braddock had no power to pass the ordinance complained of, it is declared to be invalid, and the order of the Superior Court, affirming the order of the court below sustaining it, is reversed; the costs below, and on both appeals, to be paid by the appellee.

MCGUNNEGLE v. PITTSBURG & L. E. R. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. EMINENT DOMAIN — PETITION — AMENDMENT.

Where plaintiff in condemnation proceedings obtained a judgment, it will not be reversed because of the refusal to permit the petition to be amended by striking therefrom a description of land below a low-water mark in a river, where it was not asked for until after 23 witnesses for plaintiff had been examined as to value without objection, and the court instructed the jury that they could allow compensation only for land which plaintiff owned and which did not extend below low-water mark.

2. NAVIGABLE WATERS—OBSTRUCTIONS.

An owner of land abutting on a navigable river cannot place any structure or filling between high and low water mark, which would obstruct the river for navigation.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, §§ 61-72.]

3. APPEAL—HARMLESS ERROR.

Where, in condemnation proceedings, the jury is distinctly instructed that the effect of fillings beyond low-water mark cannot be considered in determining values, remarks by witnesses as to the effect of such fillings are not ground for reversal.

Appeal from Court of Common Pleas, Allegheny County.

Action by Maria L. McGunnegle against the Pittsburg & Lake Erie Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

At the trial defendant made the following motion: "Mr. Smith: I desire to present this morning an amendment in the bond case at No. 314, February term, 1903, and in this proceeding, which is as follows: And now, to wit, October 24, 1904, comes the Pittsburg & Lake Erie Railroad Company by its counsel, and moves the court to amend the description of the land to be condemned by striking out the words 'together with all the land lying between the harbor line and the low-water line of the Ohio river.' (Mr. Ferguson: That is objected to as too late. It is specially objected that the railroad company having elected to condemn and having filed its bond, it is now too late to abandon the condemnation, either in whole or in part. Motion refused. To which ruling counsel for defendant request an exception. Exception allowed, and bill sealed.)"

D. K. McGunnegle, a witness for the plaintiff, was asked this question: "Q. Do you

know where the low-water line of the Ohio river was in front of your mother's property, before the Davis Island dam was constructed, with reference to the harbor line? Mr. Smith: What do you propose to prove? Mr. Ferguson: We propose to prove, in connection with the petition of the railroad, filed in this case, defining what it condemned, that the low-water line of the Ohio river, in front of the property of the plaintiff, was between the harbor line, as shown on the petition, and Brunot Island. (Objected to as incompetent and irrelevant, for the reason that, under the laws of this state, "pool full," being the stage of the water when the water is just abreast of Davis Island dam, is, for the purposes of this case and for any other purpose, low-water line. Counsel for the defendant desire to state also that in this proceeding it is not the intention, or it was not the anticipation, that any rights whatever could be possibly acquired under this proceeding beyond the harbor line; the intention being merely to take whatever title Mrs. McGunnegle had under the grants from the commonwealth and the meane conveyors. The Court: Objection overruled. To which ruling of the court counsel for defendant except. Exception allowed, and bill sealed.) Mr. Ferguson: Q. How is that, Mr. McGunnegle? The low-water line is outside of the harbor line through our property."

J. W. Mayes, a witness for the plaintiff, was asked this question: "Q. If that land had been filled up out to the harbor line, would you put the value at \$100,000, or what would you put it at? (Objected to. The Court: Objection overruled. To which ruling of the court counsel for defendant except. Exception allowed, and bill sealed.) A. No; if that was filled up, I would add considerable to the price of that land, at least one-third."

At the request of counsel for the defendant, the court stated the following for the record: Addressing counsel for defendant, the court asked whether he would guaranty that this company (the defendant) would not fill beyond "pool full" line. This remark was made during the argument of counsel; counsel for plaintiff arguing that the railroad company, as the successor of the plaintiff, had a right to build to the harbor line, and counsel for the railroad company arguing that they had not. Now, counsel for defendant move the court to withdraw a juror and continue the case. Motion refused.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Edwin W. Smith, for appellant. J. S. Ferguson and E. G. Ferguson, for appellee.

BROWN, J. On February 25, 1903, the Pittsburg & Lake Erie Railroad Company filed its bond to secure to Mrs. Maria L. McGunnegle compensation for land which it had

appropriated for railroad purposes. It is located in the borough of Esplen, Allegheny county, and is minutely described by metes and bounds in the petitions for the approval of the bond and appointment of viewers. The quantity is given as 6.757 acres, "together with all the land lying between the harbor line and the low-water line of the Ohio river." Harbor line is a line established by the Secretary of War, in pursuance of an act of Congress, and beyond it "no piers, wharves, bulkheads, or other works shall be extended, or deposits made, except under such regulations as may be prescribed from time to time by him." This line is at from 50 to 300 feet from low water, which in this case is "pool full." "Pool full," indicating low water, is "the surface of the water when it lies just even with the crest of the Davis Island dam when it is up." This is the definition given by H. C. Gould, an assistant engineer in the service of the United States, and is conceded all around to be correct. The absolute title of Mrs. McGunnegle extended from the land already occupied by the railroad company only to high water, and in the space intervening between that line and low water, or pool full, she had but a qualified fee; her right there being subject to the public right of navigation. *Lehigh Valley Railroad Co. v. Trone*, 28 Pa. 206; *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 47 Atl. 745, 58 L. R. A. 206, 80 Am. St. Rep. 850. Beyond the low-water line the title remained in the commonwealth, and the appellee had therefore no right or ownership whatever between it and harbor line, the space which the appellant distinctly stated it would take in the condemnation proceedings.

On appeal from the award of the viewers, the question of the amount of compensation to which the appellee was entitled was submitted to a jury, and the four errors specified are alleged to have been committed on the trial before that body. The case was called on Monday, October 20, 1904, and on that and the following day 23 of the 25 witnesses called by the plaintiff were examined. Each one called as to the amount of damages sustained was examined, without objection by the defendant, as to the value of the land, which, in its petitions for the approval of its bond and the appointment of viewers, it said it would take amounting to 6.757 acres, "together with all the land lying between the harbor line and the low-water line of the Ohio river." Some of these witnesses fixed the damages of valuing the land by the acre, and there was testimony as to the quantity between harbor line and pool full, and between pool full and high-water mark. On the third day of the trial, and just before the plaintiff closed, the defendant moved to amend the description of the land to be condemned by striking out the words "together with all the land lying between the harbor line and the low-water line of the Ohio river."

This was objected to as being too late, and a special objection was made that the railroad company, having elected to condemn and having filed its bond, could not abandon the condemnation, either in whole or in part. The amendment was refused, and two more witnesses were then called by the plaintiff, who also testified, without objection, as to the value of the land taken, including the space between pool full and harbor line.

The first assignment relates to the refusal of the court to allow the amendment asked for by the appellant. It is urged that it should have been allowed, because, as Mrs. McGunnele admittedly did not own the land lying beyond low water towards the river, the railroad company was not taking it from her, and her right to compensation was limited to her ownership, extending only to pool full or low water. The reason for refusing the amendment is not given by the learned trial judge, and we need not conjecture what it may have been, for the refusal could have done no possible harm to the defendant, in view of the clear, distinct, and correct instructions given to the jury that they could allow compensation to the plaintiff only for the land which she owned, and which did not extend beyond low-water mark. If the amendment had been allowed, the defendant could not have asked for more from the court than was said by the learned trial judge in support of its theory as to what land it could take. We might allow the amendment here, and, if so, there would be nothing in the record, so far as the quantity of land taken is concerned, of which the appellant could make any complaint; and the jury were most definitely instructed that for such quantity only could they allow compensation. In the general charge the learned and careful trial judge said: "The land is situated in the borough of Esplen, fronting on the Ohio river between the old right of way of the defendant company and low-water mark of the Ohio river. * * * We have had testimony here showing not only the location of this property, but the location of what is called the harbor line, which, for the purposes of this case, I instruct you, is outside of the property taken by the railroad company; that is, it is towards the channel of the river. The property line, for the purposes of this case, is low-water mark, as established by the line you have heard called 'pool full' in the course of the trial. That is to be taken as the low-water line for the purposes of this case, and the property taken and appropriated by the railroad company is the property lying between the old right of way of the railroad company and low-water line." Nine points were submitted by the defendant, and each of them was affirmed. Five of them were as follows: "Third. That under the laws of this state the plaintiff has an absolute title in fee only to the high-water mark, with a qualified title between high and low water

mark, subject to the right of navigation. Fourth. That for the purposes of this case, the low-water mark is the line of the water at 'pool full,' which is the line of the water when it is just at the crest of the Davis Island dam. Fifth. That the owner of the land has no right to put any structures or filling into the river beyond low-water line. Sixth. That no owner of land has the right to put any structures or filling between high-water line and low-water line that would be an obstruction to the use of that part of the river for navigation." "Eighth. That the verdict of the jury cannot be based upon any use of the land which would contemplate a filling of the river to the so-called harbor line under the testimony in this case." And in the ninth the defendant stated its whole case in asking for the instruction "that the verdict of the jury in this case cannot be more than the value of the plaintiff's land, computed to low-water mark, at the time of the taking, less the value of any use that the plaintiff may make of it not inconsistent with its use for railroad purposes." As already stated, the case went on without a single objection made by the defendant to the testimony of any witness as to what damages had been sustained by the plaintiff for taking the land, which, in its proceeding to condemn, it alleged extended to harbor line, and all of which it said it would take; but in the end the limit of the plaintiff's land to be taken by the defendant was definitely fixed by the court at "pool full," or low water, and the case was submitted to the jury just as the defendant asked that it be submitted. As a basis for their verdict, there was ample testimony as to the value of the land which the defendant could and does take. The refusal to allow the amendment could not, therefore, have harmed the appellant. Even if it had been allowed, the case would have been submitted just as it was submitted, by affirming every point presented by the defendant. Of the correctness of the general charge there could be and is no complaint. The first assignment is dismissed.

By the second assignment error is alleged in allowing D. K. McGunnele to testify as to where the low-water line was in front of his mother's property before the Davis Island dam was constructed. This testimony probably ought to have been rejected, for the line of low water before the construction of the dam was not the question before the jury; but the admission was harmless, in view of the instructions contained, not only in the general charge, but in the specific answer to defendant's fourth point: "That for the purposes of this case, the low-water mark is the line of the water at pool full which is the line of the water when it is just at the crest of the Davis Island dam." And so of the third assignment, complaining of the admission of the testimony of J. W. Mayes, that if the land had been filled up out to the harbor

line he would add to the price of the land at least one-third, for in the answer to defendant's eighth point the jury were told that the verdict could not be based upon any use of the land which contemplated a filling of the river to the harbor line. The same instruction was contained in the answer to the fifth point.

It does not appear just when the trial judge made the remark complained of in the fourth assignment. It was made during the argument of counsel, which may have been a running discussion between them during the trial, in which the court intervened and made the remark attributed to it; but, whenever made, the defendant was not harmed by it, even if the jury heard it, for they were told that neither the defendant nor any one else could fill beyond low water. The correct instructions went further in stating that an owner of land fronting on a navigable river has no right to put any structures or filling, even between high-water line and low-water line, that would be an obstruction to the use of that part of the river for navigation.

The assignments are all dismissed, and the judgment is affirmed.

IN RE FAY'S ESTATE.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)
SPECIFIC PERFORMANCE — ORAL CONTRACT — POSSESSION BY VENDEE.

Where plaintiff's testate purchased at a definite price and on specified terms land sufficiently described and valuable as a quarry under a parol contract, and paid part of the price, and quarried stone the value of which cannot be reasonably ascertained, specific performance of the contract will be decreed.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 120, 196.]

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of John Fay, deceased. From a decree for specific performance, Mary Fay, executrix, appeals. Affirmed.

Miller, J., filed an opinion in the court below which was in part as follows:

"On or about said 26th day of August, 1901, John Fay, now deceased, he having died on October 21, 1903, entered into a parol agreement with Booth & Flinn, Limited, for the purchase of a property known as the 'Crescent Street Property,' consisting of 26 lots, for the sum or price of \$3,250, payable as follows: \$250 in cash, and the balance with interest in equal monthly installments of \$75, including the payment of taxes thereon. No time was fixed for the delivery of the deed. In pursuance of this agreement, Fay on the following day paid Booth & Flinn, Limited, \$250, the agreed cash payment, and entered into immediate possession of the land, which is underlaid with a vein of stone, and continuously mined, quarried, and took away large quantities of building stone therefrom;

said occupancy and quarrying operation continuing until the time of his death. During this period Fay paid on account of the principal \$773.41, on account of interest \$257.37. He is charged with the taxes thereon paid by Booth & Flinn, Limited, amounting to \$187.43, which charge under the contract, with the balance of the purchase money and the interest thereon, is due. The land was known and spoken of by Fay and the vendor as the 'Crescent Street Property.' It fronted on that street, which at this place is now the Grant Boulevard; a portion thereof having been acquired by the city of Pittsburg in the construction of said boulevard. It was so occupied and used at the time the contract was entered into. Booth & Flinn, Limited, did not at that time and do not now have any other land on that street or in that vicinity. The land had a special value as a stone quarry, and as such has depreciated to the extent of a large amount of stone removed therefrom by Fay. The quantity of stone removed, and the market value thereof, cannot now be readily ascertained; the property being left in a rough, caved-in, and excavated condition. Booth & Flinn, Limited, have not occupied or exercised any control over said lands since the date of the said contract, except the payment of taxes.

"The prerequisites of the relief asked for by the petitioners; in respect to the contract, the parties, the consideration, and the subject-matter, have been established by full, satisfactory, and indubitable proof. The 'Crescent Street Property,' consisting of 26 lots, and being all that the Booth & Flinn, Limited, had on that street, or in that vicinity, is a sufficient identification, when coupled with the fact that Fay went into possession and used the same until the time of his death. During that time he knew or was bound to know the dimensions of the property he purchased, and the extent, if any, to which a part of it had been used or taken for the Grant Boulevard. To show the subject of the contract with reasonable certainty is sufficient. 'It is not necessary [Burns v. Sutherland, 7 Pa. 103] that lines of separation should be actually run upon the ground, if from the agreement of the parties, and the distinct subsequent possession of the vendee, it is possible to ascertain the boundaries and quantity of the land sold, or * * * the proof must be such as to direct how the surveyor may run it off from the rest of the vendor's land.' Mr. Justice Clark, in *Anderson v. Brinser*, 129 Pa. 376, 11 Atl. 809, 18 Atl. 520, 6 L. R. A. 205, says, 'a designation by lot number is available.' Here, as in *Henry v. Black*, 210 Pa. 245, 59 Atl. 1070, 105 Am. St. Rep. 802, 'the ground properly appurtenant can be ascertained by measurement to a certainty.' For the purposes of this case the land as described in the petition clearly contains all the 'Crescent Street Property' contracted for by Fay.

"By the act of April 28, 1899 (P. L. 157),

which is an enlargement and amendment of the former acts relating to specific performance of decedent's contract, this court is empowered to decree the specific performance of contracts according to the true intent and meaning thereof, *inter alia*, 'whenever any parol contract shall have been entered into by any person for the conveyance of real estate within this commonwealth, and the purchaser shall have died without fully executing such contract, * * * and such parol contract may have been so far executed by possession, by improvements, or by partial payments of the purchase money that it would be against equity to rescind the same.' This contract was executed in part both by the delivery and taking of possession, by partial payments and receipts of purchase money. From the date this agreement was entered into and the first payment made, and possession thereof taken by Fay in the active mining, quarrying, and taking away of stone, and so continued until his death, Booth & Flinn, Limited, ceased to have any control over or rights therein, except as to the receipt of the purchase money. They could not sell it, or otherwise dispose of it, or deliver possession thereof to any one else, without incurring the penalty of a breach of contract.

"But to take this case out of the statute of frauds and perjuries it is not enough that the essential of contract, parties, consideration, subject-matter, and part performance, be clearly and indubitably proven; but it must be shown that it would be unjust to rescind the contract (*Moore v. Small*, 19 Pa 461), and also that the party aggrieved could not be compensated in damages (*Derr v. Ackerman*, 182 Pa. 591, 88 Atl. 475). Unjust, however, to whom? Manifestly there can be no preference. The living vendors and the heirs of a deceased vendee are entitled to equal justice. As between these two, Fay got all he contracted for. If he failed to pay the installments of consideration as agreed upon, his default was either assented to, or overlooked by the vendor; but the latter did all the contract called for, and in pursuance thereof gave up possession and permitted the vendee to depreciate the value thereof to the extent of the value of the stone removed, which value the vendee received and converted to his own use. It would be unjust and inequitable to the vendor to rescind the contract, while its enforcement is not an injustice to the vendee's lega-

tees and heirs, as it gives them what their ancestor bargained for. The offer of the vendees to compensate the vendors in damages is not practical in the ascertainment thereof. Fay's purpose in acquiring this land was to mine and quarry the stone taken therefrom. That was his business; but what quantity was taken, where it was delivered, and what price was received therefor, is a matter of conjecture. The evidences to ascertain the thickness and dimensions of the portion of the vein removed are not reasonably ascertainable. They would at best result in a mere guess.

"This is not the case of *Miller v. Zufall*, 113 Pa. 317, 6 Atl. 350. The turning point there was whether a contract in fact existed; Chief Justice Mercur, speaking for the court, saying: 'Great doubt exists as to there having been any specific and material contract between Stutzman and the defendant for the sale and purchase of land, or whether there was a mere permission to cut an uncertain quantity of timber therefrom, or negotiations in regard to some sale at a future time.' If the loss arising out of a breach of parol contract can be compensated in damages, the case ordinarily is not taken out of the statute of frauds and perjuries; but says Mr. Justice Sterrett in *Jamison v. Dimock*, 95 Pa. 52: 'While this may be true as to parol gifts of land, * * * it is not correct as applied to a case like the present, which is claimed to be a parol sale for a money consideration fully paid according to the contract, possession taken and continuously held in pursuance thereof. There was no error, therefore, in refusing to hold that a parol contract of sale cannot be specifically enforced unless the vendee can show that he has made improvements for which he cannot be compensated in damages. There are undoubtedly cases in which the equities of vendees rest upon other equally available grounds.'

"The facts found and the conclusions of law reached indicate that specific performance of this contract should be enforced, and it will be so decreed."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Charles W. Jones, for appellant. Richard W. Martin and John S. Weller, for appellee.

PER CURIAM. Decree affirmed, on the opinion of the court below.

UNITED STATES, to Use of SAYRE & FISHER CO., v. GRIEFEN et al.
(Supreme Court of New Jersey. Feb. 28, 1906.)

JUDGMENT—JOINT DEFENDANTS—JUDGMENT AGAINST ONE.

Gen. St. p. 2336, § 2, is valid so far as authorizing plaintiff to proceed to judgment against one of two joint debtors on his being properly brought into court, though invalid so far as authorizing judgment against the defendant not so brought in.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 415-421.]

Action by the United States of America, to use of the Sayre & Fisher Company, against Richard A. Griefen and another. Judgment for plaintiff on demurrer to a plea in abatement.

Argued November term, 1905, before GUMMERE, C. J., and HENDRICKSON and PITNEY, JJ.

J. Kearny Rice, for plaintiff. Alan H. Strong, for defendant.

GUMMERE, C. J. This action is brought upon a bond made by the two defendants to the United States of America, by the terms of which they are jointly bound. Summons was issued against both of the defendants, and returned served as to the United States Fidelity & Guaranty Company, and not found as to the defendants Griefen.

The plea demurred to is filed by the United States Fidelity and Guaranty Company, and avers that the defendant Griefen, was not, at the time of the commencement of the action, or at any time since, a citizen or resident of the state of New Jersey, or in anywise subject to its laws or jurisdiction; that the only service of process in this action was by the sheriff of the county of Mercer, to whom the summons was directed, giving and delivering to one Johnston, deputy commissioner of banks and insurance, at the office of the commissioner of banks and insurance, at the State House, in Trenton, a true copy of said summons, personally, together with \$2 for the service fee; that no writ, or process to answer to the plaintiff, has been at any time, or in any manner, served upon Griefen, or upon any person authorized to accept service for him; that he has not, either in person or by attorney, appeared in this case; and because the said Griefen is a nonresident of the state, and has not been served with process, or appeared in the case, or in any manner been brought into court to answer to the plaintiff, the defendant the United States Fidelity & Guaranty Company prays judgment of the writ and declaration, and that the same be quashed.

The facts set out in this plea do not entitle the defendant to the judgment for which he prays. It has already been held by this court, on a motion to set aside the service of the summons upon the Fidelity & Guaranty Company, that service upon the deputy commissioner was legal service upon that defend-

ant. *United States v. Griefen*, 70 N. J. Law, 123, 56 Atl. 120. Nor is the fact that the defendant Griefen is a nonresident of the state, and has not been served with process, any bar to the action, as was pointed out in another opinion in this case delivered by this court upon a demurrer filed by the Fidelity & Guaranty Company to the plaintiff's declaration (60 Atl. 513). When one of two joint debtors is properly brought into court, the plaintiff is entitled to proceed to judgment against both the joint debtors, by virtue of the provisions of section 2 of the act concerning obligations. Gen. St. p. 2336. That section also declares that if judgment shall pass for the plaintiff, he shall have his judgment and execution against such of the defendants as are brought into court, and also against the other joint debtor or debtors named in the process, in the same manner as if they had been all brought into court by virtue of the said process. So far as this latter provision authorizes the entering of judgment, and the suing out execution against such of the joint debtors as have not been brought into court, it has, perhaps, been nullified by the fourteenth amendment of the federal Constitution, which provides that no state shall deprive any person of life, liberty, or property, without due process of law; the effect of that provision being, as declared by the Supreme Court of the United States in *Pennoy v. Neff*, 95 U. S. 714, 24 L. Ed. 565, to render a personal judgment devoid of any validity, either within or without the territory of the state in which it is given, if rendered in an action upon a money demand, against a nonresident, who has not been legally brought into court; but so far as the statute authorizes the plaintiff to proceed to judgment against such of the joint debtors as have been legally served with process, it still remains a valid enactment.

The plaintiff is entitled to judgment on the demurrer.

VALLASTER v. ATLANTIC CITY R. CO.

(Supreme Court of New Jersey. Feb. 28, 1906.)

RAILROADS—FIRES SET BY LOCOMOTIVES—SPARK ARRESTERS.

A railroad company is not liable for a fire set by sparks from a locomotive, simply because the kind of spark arrester on such locomotive was not as good as that used on some of its other locomotives; both having been in common use and approved by experience, and it, after the exercise of due care and skill, having adopted both, convinced that they were equally good, and uncertain which was the better.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1668-1672.]

Action by Roxanna Vallaster against the Atlantic City Railroad Company. Verdict for plaintiff. Defendant's rule to show cause made absolute.

Argued February term, 1905, before GUMMERE, C. J., and FORT, GARRETSON, and PITNEY, JJ.

Thompson & Cole, for the rule. George A. Bourgeois, opposed.

GUMMERE, C. J. This suit was brought to recover the loss sustained by the plaintiff in the destruction of her property by fire, alleged to have been communicated from sparks thrown by one of the locomotive engines of the defendant company. The defense was that the engine from which the sparks escaped was equipped with a spark arrester of approved pattern, in general use, and that it was in good order on the day when the plaintiff's property was burned.

It appeared in evidence that the defendant used two kinds of spark arresters upon its engines; one, designated the "three piece netting," upon engines of the compound type (those which use their steam twice); and the other designated the "four piece netting," or "box screen," upon its engines of the simple type (that is, those which use their steam once). The engine from which it was claimed the fire had been communicated was a compound engine equipped with a "three piece netting" spark arrester. It was testified to, by an expert witness called on behalf of the defendant company, that there was very little, if any, difference in the effectiveness of these two spark arresters, in preventing the escape of fire; and that he knew of no better mechanism for the prevention of the escape of sparks from an engine of the compound type than the "three piece netting." Upon the cross-examination of this witness it was shown that the great majority of the engines of the defendant company were equipped with the "four piece netting"; but on his redirect examination he explained the reason for this condition by stating that the use of the compound engine was being abandoned by the defendant company, and that most of them had been converted into the simple type of engine. No testimony was submitted by the plaintiff upon the relative merits of these two kinds of spark arresters. The trial judge, in his charge to the jury, after referring to the evidence as to the use of these two varieties of spark arresters by the defendants, proceeded as follows: "The argument (on behalf of the plaintiff) is that the box screen must be a better spark arrester, because it is used on the single engines, where greater care is required on account of the greater danger; and it is argued further that the box screen must be better than this three-fold wire screen, because they have discarded, as it is stated, the three-fold screen, and are using more of the box screens. That is met on the part of the railroad company, as I recollect the testimony, by evidence that they have been gradually discarding the compound engines upon which this three-fold screen was used, and adopting the single engine. Now, you see from that evidence the question for you to decide is whether this three-fold screen was the best practical

means to prevent the communication of fire through this locomotive. If it was, that is the end of the case, and your verdict must be for the defendant; if it was not, then your verdict would be for the plaintiff."

On this instruction the jury found in favor of the plaintiff. The only conclusion to be drawn from their verdict is that they understood from the charge of the court that, if they should conclude from the evidence that the "box screen" was a better appliance for preventing the escape of sparks than the "three piece netting," they must find the defendant liable for the damage done to the plaintiff's property; and that they so concluded. But such a measure of liability was repudiated by this court in the case of *Hoff v. West Jersey Railroad Co.*, 45 N. J. Law, 201, upon a similar finding of fact, as will appear from the following extract from the opinion in that case: "It may be that the spark arrester, to the insufficiency of which the fire was attributed, was not as good as certain others which the defendant had in use, and yet it does not thereby follow that the defendant is responsible for the damages occasioned by this fire. Both kinds of screen in question appear to have been in common use, and if, after the exercise of due care and skill, the defendant had adopted them both, in the conviction that they were equally good, or that it was uncertain which was the better, an error in a careful judgment of that kind would not have made the defendant liable for the consequences of such error. The law does not give immunity in these matters only on the ground that in the selection of its instruments an infallible judgment shall be exercised. There is no breach of duty on the part of the company, if, in the choice of such an instrument as the one in question, it selects one which is in common use, and which has been approved by experience."

The jury having been erroneously instructed as to the test to be applied by them in determining the question of the defendant's responsibility for the burning of the plaintiff's premises, the rule to show cause must be made absolute.

BURGESSER v. WENDEL.

(Supreme Court of New Jersey. Feb. 26, 1906.)

1. CONTRACT—CONSIDERATION.

A change of residence at another's request is a valid consideration for a promise to pay money.

2. FRAUDS, STATUTE OF—MEMORANDUM—NECESSITY.

A promise to pay a certain sum weekly as long as the promisee resides in a certain place does not require a memorandum under the statute of frauds.

(Syllabus by the Court.)

Appeal from District Court of Newark.
Action by Mary Burgesser against Au-

gustine W. Wendel. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued November term, 1905, before DIXON, GARRISON, and SWAYZE, JJ.

Edward Kenny, for appellant. Charles M. Myers, for respondent.

SWAYZE, J. The district court found that the plaintiff had resided with the defendant prior to his marriage; that upon that event, he provided another house for her, and promised to pay her a certain sum (afterwards fixed at \$10) weekly as long as she should continue to reside in the new house; that she was still residing in the house; and that the defendant had failed to pay the weekly allowance for 10 weeks. He rendered judgment in favor of the plaintiff for \$80.

It is now argued on behalf of the defendant that the facts, as found, do not warrant the judgment, because they fail to show a consideration, and because, to state the point in the language of the appellant's brief, "there was no agreement in this case as contemplated by the statute of frauds, because there was simply a voluntary payment without consideration." Before the trial court, this objection was stated to be that the contract was not to be performed within one year. We think the case shows an agreement, and not a mere voluntary payment. There was an arrangement between the parties for a change of the plaintiff's residence, and upon this arrangement she acted. If this were not so, the point was not made in the trial court, and cannot now be considered. *O'Donnell v. Weller* (N. J. Sup.) 59 Atl. 1055. There was a legal consideration for the defendant's promise. The change of the plaintiff's residence may have been a benefit to the defendant, or a detriment to the plaintiff, or both. That contracts of this character do not require a memorandum in writing under the fifth section of our statute of frauds has been decided by this court. *Eiseman v. Schneider*, 60 N. J. Law, 291, 37 Atl. 623.

We find no errors, and the judgment must be affirmed, with costs.

HARRIS v. ATLANTIC CITY.

(Supreme Court of New Jersey. Feb. 20, 1906.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY.

The ordinance of Atlantic City, approved April 11, 1905, forbidding any person to hire, or offer for hire, rolling chairs on the Board Walk along the ocean in front of the city, is valid.

2. SAME—CONSTRUCTION—"TO HIRE."

The verb "to hire" is employed in that ordinance in its secondary sense, meaning to grant the temporary use for compensation.

3. CRIMINAL LAW—CERTIORARI—REVIEW—EVIDENCE.

On a certiorari to review a conviction in a municipal court for the violation of an ordinance, the Supreme Court will not disturb the decision of the lower court upon a question of fact when it is supported by legal evidence.

(Syllabus by the Court.)

Certiorari by Harry Harris against Atlantic City to review two ordinances of the city. Affirmed.

Argued November term, 1905, before GARRISON, SWAYZE, and DIXON, JJ.

J. J. Crandall, for prosecutor. Harry Wootton, for the city.

DIXON, J. The prosecutor has sued out two writs of certiorari; one bringing up an ordinance of Atlantic City, approved April 11, 1905, to regulate the use of the Board Walk along the ocean in front of the city, the other bringing up the conviction of the prosecutor for violation of the ordinance. The ordinance provides that no person or corporation shall on the Board Walk exhibit, rent, hire, sell, or exchange, or offer for rent, hire, sale or exchange, any goods, wares, merchandise, tickets of admission, commodity, rolling chair, or other vehicle for carrying passengers.

The reasons assigned by the prosecutor for setting aside this ordinance are that the ordinance is not authorized by statute, that the power of the city council is limited to the licensing of persons to use the Board Walk in certain modes and to the prohibition of such use by persons not so licensed, and that the restrictions of the ordinance are an invasion of private right and are unreasonable. The statutory authority to regulate the use of the Board Walk is conferred by section 11 of the act of April 6, 1889 (P. L. p. 214), under which the Walk was constructed, and also by paragraph 6, section 14, of the act of April 3, 1902 (P. L. p. 284), under which Atlantic City is now governed. The Legislature has fixed no express limitation upon this general power to regulate, and the only limitation which the courts can impose is that it shall not be exercised unreasonably. *Penn. R. R. Co. v. Jersey City*, 47 N. J. Law, 286; *Trenton Horse R. R. Co. v. Trenton*, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410; *Cape May R. R. Co. v. Cape May*, 59 N. J. Law, 396, 36 Atl. 696, 36 L. R. A. 653.

We must, therefore, consider whether the ordinance under review transgresses this limitation. The primary object to be subserved under the act of 1889, above cited, in laying out and constructing "public walks along the beach or ocean front," was evidently to secure pleasant promenades for pedestrians, and we perceive nothing unreasonable in an ordinance forbidding the use of such walks for traffic which may interfere with that object. *Commonwealth v. Ellis*, 158 Mass. 555, 63 N. E. 651. The hiring of chairs upon the Board Walk may certainly cause such interference. The design indicated by this restriction is that rolling chairs shall not be allowed on the Board Walk, except when they are in actual use by passengers or are going to some place off the walk where they may be kept for hire. To this extent, at least, the ordinance is

reasonable, and so far only does it now concern the prosecutor. It will be time enough to consider its other provisions when their enforcement is attempted. *Penn. R. R. Co. v. Jersey City*, 47 N. J. Law, 286. The ordinance does not in any sense invade private right, for the right to use these public places is altogether public and is confined to such uses as do not violate law. We consider the ordinance in the particular above mentioned valid.

The reasons assigned by the prosecutor for contesting the legality of his conviction under this ordinance are in effect that the evidence before the recorder did not warrant the conclusion that the prosecutor had offered his rolling chair for hire upon the Board Walk, and that as his rolling chair had been licensed under another ordinance of the city he had a right so to offer it. Although the primary meaning of the verb "to hire" is to procure the temporary use of an article for compensation, its secondary meaning is to grant such a use, and we think this latter meaning is that intended in the ordinance. Such signification is clearly shown in the clause which forbids any person to offer a rolling chair for hire. Only a person possessing the chair can make such an offer. The evidence that the defendant offered on the Board Walk thus to hire his rolling chair was certainly meager and was contradicted, but its effect was a matter to be determined by the trial judge, and we have no power to review his decision on that question of fact; there being sufficient evidence to support his conclusion. *Coles v. Blythe*, 69 N. J. Law, 666, 55 Atl. 816. The fact that the rolling chair was licensed did not relieve the prosecutor from the prohibitions contained in this ordinance. So far as we are informed, the license merely authorizes the use of such chairs on the Board Walk for carrying passengers. It did not permit that they should be either hired or offered for hire. All the proceedings brought up by these writs should be affirmed, with costs.

The opinion in this case applies to the writs sued out against the city by Solomon Abrams, Abe Adovitz, Moses Effron, Frederick Lieb, and Carrington Rose, and the like judgment must be entered in those cases.

MORWITZ v. ATLANTIC CITY.

(Supreme Court of New Jersey. Feb. 26, 1906.)
MUNICIPAL CORPORATIONS — ORDINANCES —
RIGHT TO QUESTION VALIDITY.

A municipal ordinance which is not entirely void cannot be questioned on certiorari by a person who is not shown to be affected by any of its provisions.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 255, 257.]

(Syllabus by the Court.)

Certiorari by Bernard Morwitz to review an ordinance of Atlantic City. Dismissed.

Argued November term, 1905, before GAR-RISON, SWAYZE, and DIXON, JJ.

J. J. Crandall, for prosecutor. Harry Wootton, for the city.

DIXON, J. This certiorari brings up for review an ordinance of Atlantic City, approved July 17, 1905, regulating the use of rolling chairs and invalid chairs for carrying passengers on the Board Walk along the ocean in front of the city. The ordinance contains provisions limiting the size of such chairs, requiring their hubs to be covered, prescribing the speed at which, and the parts of the walk in which, they may be propelled, and forbidding their propulsion by persons under 18 years of age. It also ordains that such chairs must be licensed under the mercantile license ordinances of the city.

The reasons assigned for setting aside this ordinance are that the city had no power to prohibit the use of invalid chairs upon the Board Walk or to limit their size. What was said in the case of *Harris v. Atlantic City* (decided at the present term) 62 Atl. 995, makes it plain that we consider the city empowered to prescribe and enforce at least some of the provisions of this ordinance. We cannot adjudge it to be wholly invalid. Which, if any, of its features affects the prosecutor, the case in hand does not show, and until he is so affected he has no standing to question an ordinance that is not entirely void. *Penn. R. R. Co. v. Jersey City*, 47 N. J. Law, 286.

This certiorari should be dismissed, with costs.

OAKLEY et ux. v. EMMONS et al.

(Supreme Court of New Jersey. Feb. 26, 1906.)

1. HUSBAND AND WIFE—ACTIONS—JOINDER.

If the husband sues with his wife, when she neither must nor may be joined, the error is fatal. The result is the same, although the meritorious consideration passed from the wife, unless it also appear that there was an express contract to pay the wife.

2. NEW TRIAL—VERDICT—THEORY OF CASE.

A verdict otherwise liable to reversal cannot be maintained upon a theory of the law contrary to that upon which the case was submitted to the jury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 20.]

3. SAME—INSUFFICIENCY OF EVIDENCE.

The verdict in this case must have been based upon the finding of an express contract with the wife. The case failing to show evidence sufficient to sustain such finding, the rule to show cause is made absolute, and a new trial is granted.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 135-149.]

(Syllabus by the Court.)

Action by Armitage T. Oakley and Annie K., his wife, against John P. Emmons and others. Rule to show cause made absolute.

Argued November term, 1905, before GUM-MERE, C. J., and PITNEY and HENDRICKSON, JJ.

Isaac P. Runyon, for the rule. Williams S. Angelman, opposed.

HENDRICKSON, J. The defendants below seek to set aside the verdict recovered against them at the Union circuit. The plaintiffs sue, as husband and wife, in assumption, the executors of Ellen Gill, deceased, to recover for services rendered to her in her lifetime and during a period of about 10 years preceding her death. She was a widow and lived during this period in a small house in Plainfield, one of three adjoining houses owned by her, one of which was occupied by the plaintiffs as her tenants. The suit was brought on the common counts; the bill of particulars declaring the action was brought to recover the value of services rendered to Mrs. Gill in her lifetime by the plaintiffs. The pleas were generally issued and statute of limitations. The trial resulted in a verdict for the plaintiffs of \$3,000.

Among the reasons for a new trial is the refusal to nonsuit or to direct a verdict for the defendants. The defendants invoke the principle declared by the Court of Errors in *Garretson v. Appleton*, 58 N. J. Law, 386, 37 Atl. 150, that if the husband sues with his wife, when she neither must or may be joined in, error is fatal, and that, although the meritorious consideration passed from the wife, she may not join in the action unless there is also an express contract with her; citing, also, *Peterson v. Christianson*, 68 N. J. Law, 392, 56 Atl. 288, to the effect that a husband should sue alone for the support in his own household of a third person, though the service consisted largely of the personal attendance of the wife, and contends that there is no evidence showing an express contract with the wife.

The plaintiffs reply in part that, even assuming the fact of misjoinder, the defendant could not now avail himself of this advantage; he having failed to give notice of misjoinder, as required by the practice act. *Peterson v. Christianson*, supra; *Murray v. Pfeiffer*, 70 N. J. Law, 768, 59 Atl. 147. We need not now determine what would be the precise effect of the failure to give the statutory notice as applied to the facts in this case upon the question of misjoinder, for we could not maintain the verdict if otherwise liable to reversal upon a theory of the law contrary to that upon which the case was submitted to the jury. *Sensfelder v. Stokes*, 69 N. J. Law, 86, 54 Atl. 517. Whether it was essential to the plaintiffs' recovery or not in the present case to prove an express promise by the deceased to pay the wife the trial judge so held and so expressly charged the jury.

In this attitude of the case the question is, does the evidence sustain the finding which the verdict must involve that there was an express contract by the deceased to pay Mrs. Oakley for the services? We think it does not. No one is produced who heard the con-

tract or heard any statement by the deceased that such contract existed. The evidence consisted largely of detailed conversations by the testatrix with third parties, to the effect that she highly appreciated the services and attentions of the plaintiffs, and that she intended to compensate the plaintiffs for these services, saying in one or two instances that she would see that they had a home and would remember them in her will. The evidence tended to prove that the services were not gratuitous and might properly support a suit upon an implied promise to pay for the services rendered, but fail to prove the express contract alleged.

We also think that under the proofs the verdict was excessive. The evidence tended to show that until the last three years of her life the testatrix was generally about and able to care for herself, and that in the last three years she had servants to help her much of the time, and that the plaintiffs' services consisted mainly in taking to her a meal occasionally and going for a doctor a few times when needed. The evidence as to how many meals were served and as to how many times Mr. Oakley went for the doctor was exceedingly vague, and there was no attempt to prove the value of the services rendered. It was of undoubted value to the deceased to have an electric bell which she had connecting her room with plaintiff's house so that she might at any hour of the day or night call the plaintiffs if she needed anything, which she occasionally used, but still the verdict was clearly excessive.

So that upon both these grounds the rule must be made absolute, and a new trial granted.

McMANUS v. BOARD OF POLICE COM'RS OF CITY OF NEWARK.

(Supreme Court of New Jersey. Feb. 26, 1906.)
MUNICIPAL CORPORATIONS—POLICE COMMISSIONERS—QUORUM.

Three members of the board of police commissioners of the city of Newark constitute a quorum of the board, and their united action is valid.

(Syllabus by the Court.)

Application by Philip McManus for writ of certiorari to review a dismissal by the police commissioners of the city of Newark. Denied.

Argued November term, 1905, before GARRETSON, REED, and FORT, JJ.

Frank E. Bradner, for applicant. Malcolm MacLear, for defendant.

FORT, J. The applicant for the writ of certiorari in this case was dismissed from the police force of the city of Newark by the board of police commissioners after charges and hearing.

It is first alleged that the notice of the hearing was too short, and that the applicant

did not have reasonable time and opportunity to prepare and present his defense. We do not think the facts before us justify such a finding. He had a fair trial. Nor can we agree with the suggestion that the regulation of the police department providing that a member of the police force may be dismissed for entering any building while in uniform, except when in the discharge of duty, is an unreasonable one.

The only matter seriously contended for on this application is that, under the act creating the board of police commissioners of the city of Newark, it is required that all the members shall be present to constitute a legal meeting of the board. It is a sufficient answer to this to say that the statute does not say so. The board is constituted of four members. P. L. 1885, p. 326. It is true that the act does not define how many shall constitute a quorum, but we can see no reason why the usual parliamentary rule should not apply and three make a quorum. Whether a majority of a quorum can act and remove a policeman it is not necessary to determine. It will be time enough to decide that question when it arises. If all the members were present, the concurring action of any three would certainly be sufficient to do any act authorized to be done by the board; and, as no question is raised, on this application, that less than three voted to dismiss the applicant, the legality of his dismissal cannot be questioned.

The writ applied for is denied.

RUPPERT v. ZANG.

(Supreme Court of New Jersey. Feb. 28, 1906.)

1. CHATTEL MORTGAGE—LIEN—PRIORITIES.

Where a mortgagee permits the mortgagor of chattels to retain and use them, authority is impliedly conferred upon the mortgagor to have necessary repairs done upon the chattels; and the lien of an artificer for repairs done under employment by the mortgagor will have priority over the lien of the mortgage, although the latter be duly recorded.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 236.]

2. APPEAL—REVIEW.

Upon appeal, this court will not reverse a judgment of the district court that is based upon its conclusion upon a mixed question of law and fact, if the conclusion is legally inferable from the facts proven.

(Syllabus by the Court.)

Appeal from District Court of Jersey City.

Action by Jacob Ruppert against John Zang. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued November term, 1904, before FORT and PITNEY, JJ.

William S. Stuhr, for appellant. Weller & Lichtenstein, for appellee.

PITNEY, J. This was an action of replevin, in which the district court rendered judgment in favor of the defendant. The subject

of the action was a wagon, detained by the defendant under claim of an artificer's lien.

The facts are as follows: In July, 1903, the wagon was owned by one Hintze, who carried on a beer bottling business. He gave a chattel mortgage upon the wagon to the plaintiff, Ruppert. The mortgage was promptly recorded. The mortgagor was permitted to retain possession of the wagon, and continued to use it in his business. In September, 1903, it was greatly in need of repair, and was of very little value in its then condition. Hintze, the mortgagor, thereupon took it to the defendant to be repaired, without the knowledge or express consent of the mortgagee. The defendant did certain repair work, for which his charges amounted to \$40.15, and he then turned the wagon over to a painter. In the agreed state of facts, it is set forth that it is "the custom of blacksmiths in such cases to attend to the painting." At the time of delivery to the painter, the defendant instructed him not to deliver the wagon to Hintze, since he claimed a lien upon it for the repairs. From the recital concerning the custom of blacksmiths to attend to the painting, and from the averment that the defendant gave instructions to the painter, we infer that the defendant was a blacksmith, and that it was a part of his employment under Hintze to procure the painting to be done necessary to complete the repairs. Indeed, it is tacitly admitted in the brief of counsel for the appellant that the man who did the painting was employed to do it by the defendant, and not by Hintze or by the plaintiff. It appears, however, from the statement of facts, that when the painter had finished his work, the plaintiff gave to him a check for his bill, and he delivered the wagon to Hintze without the knowledge or consent of Zang, the defendant. The wagon was then worth between \$125 and \$150, and presumably had been much enhanced in value by the work done upon it by Zang. Thereafter, the wagon was in use by Hintze until December 22, 1903, when by virtue of a power of sale contained in the plaintiff's mortgage, one Wise, as his agent, took possession of it, and advertised it for sale, leaving it, however, with Hintze as care-taker until the day of sale, which was set for December 28th. Meanwhile, on December 26th, the wagon again became broken, and Hintze delivered it once more to Zang for repairs, without the knowledge or express consent of the plaintiff, or of his agent, Wise. Zang knew nothing of the proceedings taken towards the sale of the wagon under the mortgage. He did further repairs upon it, for which also he claims an artificer's lien. The sale was held on December 28th, as appointed, at which time the plaintiff purchased the wagon; it being then in the possession of the defendant. Upon refusal by the defendant of the plaintiff's demand for its possession, the present action was brought. The trial court held that the lien of the de

fendant had priority over that of the mortgage, and on this ground rendered judgment in favor of the defendant.

The determination of the question of priority in favor of the defendant is a finding upon a mixed question of law and fact. Upon this appeal, limited in scope to questions of law, this court will not reverse a judgment that is based upon such a conclusion, if the conclusion is legally inferable from the facts proven. *Burr v. Adams Express Co.*, 71 N. J. Law, 263, 58 Atl. 609. In *White v. Smith*, 44 N. J. Law, 105, 43 Am. Rep. 347, where a wife was the owner of a wagon, which she allowed her husband to use in his business, and the wagon was taken by the husband to a wheelwright for necessary repairs, this court held the wheelwright entitled to a lien for his reasonable charges, and denied the wife's right to reclaim the wagon without paying the charges. The decision was based upon the implied authority conferred by the wife upon the husband to have repairs made such as were necessary to keep it in a condition to be useful for the purpose for which it was designed to be used. Manifestly, the like reasoning applied with at least equal force where a mortgagee permits a mortgagor to retain and use a mortgaged chattel. Indeed, the decision in *White v. Smith*, was rested by this court largely upon the reasoning and authority of the leading English case of *Williams v. Ailsup*, 10 C. B. (N. S.) 417, 30 L. J. C. P. 332, 8 Jur. (N. S.) 57, which case arose between the mortgagee of a steamboat and a shipwright to whom the vessel had been delivered by the mortgagor for necessary repairs. The priority of the lien for repairs was affirmed, on the ground of the implied authority of the mortgagor to have necessary repairs done upon the vessel on the ordinary terms. The distinction between the common-law lien for repairs, and a statutory or conventional lien for agistment or the like, was pointed out by this court in *Sullivan v. Clifton*, 55 N. J. Law, 324, 26 Atl. 964, 20 L. R. A. 719, 39 Am. St. Rep. 652.

From the facts that appear in the present case, the trial court might legitimately infer that Hintze had authority from the plaintiff to have the repairs done, notwithstanding the particular repairs in question were done without the knowledge or consent of the plaintiff. The absence of such consent does not necessarily negative implied general authority. The fact that the plaintiff's mortgage was duly recorded, and he, for that reason, entitled to priority over creditors of the mortgagor, does not preclude the acquisition of a lien by the defendant that has priority over the mortgage. Defendant's lien arises from the act of the plaintiff himself, in conferring authority upon Hintze to have the repairs done. It is argued that the lien for the September repairs was waived by defendant, owing to his giving up possession of the wagon. If he had delivered

the wagon to the painter as a person independently employed by Hintze, his own services being completed, the defendant would perhaps have waived the lien. But, as already remarked, the state of the case does not show this, and, on the contrary, is open to the inference that the painting repairs were a part of what was to be done by Zang under his employment by Hintze. We must assume that the trial court drew this inference. Taking it, therefore, that the painter was the employé of the defendant, and not of Hintze, the act of the defendant in turning the wagon over to the painter (his own agent) was not a waiver of his lien. On the contrary, the case clearly shows that at the time the defendant expressly asserted his lien by instructing the painter not to deliver the wagon to Hintze. This being so, the action of the plaintiff, Ruppert, in paying the painter for his services and thereby procuring delivery of the wagon to Hintze without the knowledge or consent of Zang, the defendant, was a virtual fraud upon the latter, and cannot be held to have destroyed his lien, and he was entitled to reassert that lien whenever he could peaceably gain possession of the wagon.

The judgment under review will be affirmed, with costs.

ATLANTIC CITY v. ABBOTT.

(Supreme Court of New Jersey. Feb. 26, 1906.)

MUNICIPAL CORPORATIONS—ORDINANCES—REMOVAL OF GARBAGE.

A city ordinance which limits the use of the public streets for the collection and disposition of offal, garbage, or refuse matter, that may become dangerous to the public health, to the duly authorized contractor of the city, is valid as an exercise of police power, if passed in good faith to safeguard the public health.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Municipal Corporations, § 1341.]

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of William M. Abbott, to review a conviction for the violation of an ordinance of Atlantic City. Affirmed.

Argued November term, 1905, before DIXON, GARRISON, and SWAYZE, JJ.

Harry Wootton, for Atlantic City. Bourgeois & Sooy, for the prosecutor.

SWAYZE, J. The prosecutor was convicted of the violation of an ordinance of Atlantic City which prohibited any one except the duly authorized contractor of Atlantic City from using the streets for the purpose of collecting or disposition of offal, garbage, or refuse matter that might become dangerous to the public health. The ordinance contained regulations as to the time of removal of garbage, and its conveyance to the disposal plant of the contractor, or such other place within the city limits as might be designated by the sani-

tary committee. It prescribed the character of the conveyance to be used, and provided that no garbage should be spilled or left on the ground, and that the conveyances should not be filled above a certain level, and should be kept covered, cleansed, and disinfected so that they might not become dangerous to the public health. The prosecutor was not the duly authorized contractor of the city, and the evidence justified his conviction of a violation of the ordinance.

The city is authorized by section 14 of the act of 1902 (P. L. 1902, p. 284) to provide for the collection and disposition of offal, garbage, wastes, and all refuse matter which may become dangerous to the public health. The ordinance in question is clearly an attempt to exercise this power, and the question discussed at the argument and in the briefs is whether it is a reasonable exercise of power in view of the provisions of our state and federal Constitutions. It is said to be unreasonable because it limits the right of removal to the duly authorized contractor, and the place of disposition to the city limits, and to be in violation of the Constitution because it deprives the owner of the garbage of his property without compensation.

The disposition of garbage is a matter of prime importance to the public health, and justifies careful inspection and regulation on the part of the public authorities, in order to secure its prompt removal and disposition at seasonable hours, and under such conditions that the danger of scattering offensive matter in the streets may be reduced to a minimum. These objects can be more readily secured if the matter is under the exclusive control of the city. The time and frequency of collection, the method of conveyance, and the method and place of final disposition of the refuse, are all important, and proper control can only be secured by close and careful inspection, which becomes more and more difficult as the number of places and persons to be watched increases. It is not sufficient that the method of collecting and carting should be harmless, and involve no menace to health by the use of the streets. It is necessary, also, that the refuse should be finally disposed of in such a way that the public authorities may be assured that it will be innocuous. To accomplish that purpose, they may adopt any reasonable plan of disposition, provided they act in good faith for the protection of the public health, and not in an arbitrary manner. We see no reason in the present case to doubt that the ordinance was passed in good faith, and, although it creates an exclusive right, we cannot say that this is not the result of an attempt to safeguard the public health by means which are reasonable and bear a real and substantial relation to the end to be accomplished—the final disposition of the refuse matter.

In *Nicoulin v. Lowery*, 49 N. J. Law, 391, 8 Atl. 513, the charge was that the defendant

in the nighttime carted, carried, and took into and within the limits of the township a load of night soil. It was said that the complaint, although it used the words of the ordinance, was defective in not charging facts to show an offense within the spirit and meaning of the law; but all that the case really decided was that the defendant ought to have taken an appeal to the court of common pleas, and that for his failure to do so the certiorari ought to be dismissed. The remark that the ordinance would be held unreasonable if its penalties were sought to be enforced against any one making a use of the public streets which was harmless in fact was obiter, and was accompanied by the statement that it might be adjudged reasonable when applied to another state of facts; citing *Pennsylvania R. R. Co. v. Jersey City*, 47 N. J. Law, 286. In the present case the defendant was in the employ of one Steelman, who resided at Bargaintown and raised hogs. The inference is, and it is so said in the prosecutor's brief, that he was collecting garbage and conveying it to Bargaintown to feed his hogs. In view of the importance to public health of a populous city like Atlantic City attending to the final disposition of garbage, we think this ordinance cannot be held unreasonable for limiting the final disposition to the territorial limits of the municipality, at least as applied to the state of facts presented by the case.

It is argued, further, that the ordinance takes private property without compensation, because it deprives the owners of the garbage of the privilege of selling it and the purchasers of the privilege of using it. The defendant is neither owner nor purchaser, but only an employé of the purchaser. Whether he is in a position to raise this objection need not be considered, since we think the ordinance is not objectionable as taking private property without compensation. In *City of Passaic v. Paterson Bill Posting Co.*, 71 N. J. Law, 75, 58 Atl. 343, Mr. Justice Van Syckel said: "The true rule to be extracted from the cases, and the one abundantly supported by them, is that, when statutes are obviously intended to provide for the public safety and the ordinances prescribed under them are reasonable and in compliance with their purposes, both the statutes and the ordinances are lawful and must be given due effect." This statement of the law was approved by the Court of Errors and Appeals. 62 Atl. 268. We have already stated our reasons for holding the regulation now in question reasonably necessary. This view is supported by the authorities. *Weller v. Snover*, 42 N. J. Law, 841; *Shivers v. Newton*, 45 N. J. Law, 469. *Newark & South Orange Horse Car Railway Co. v. Hunt*, 50 N. J. Law, 308, 12 Atl. 697, are cases in which the taking of private property was sustained as an exercise of the police power. More immediately in point are two cases decided since the argument of the present case by the Su-

preme Court of the United States. *California Reduction Co. v. Sanitary Reduction Works of San Francisco* (November 27, 1905) 199 U. S. 306, 26 Sup. Ct. 100, 50 L. Ed. —. *Gardner v. Michigan* (November 27, 1905) 199 U. S. 325, 26 Sup. Ct. 106, 50 L. Ed. —. In the first case the city ordinances gave the contractor an exclusive right to cremate the garbage, and required that it should be delivered at the crematory at the expense of the person conveying it. In the second case the court considered the validity of an ordinance of Detroit very similar to the ordinance of Atlantic City now in question. In both cases, the ordinances were sustained as a valid exercise of the police power.

The conviction should be affirmed, with costs.

PERRY v. MARTIN.

(Supreme Court of New Jersey. Feb. 26, 1906.)

COSTS — COMMITMENT TO REFORMATORY — HOLDING BEYOND TERM FOR PAYMENT.

A person committed to the New Jersey Reformatory, under a sentence authorized by the act for the management of that institution, approved March 21, 1901 (P. L. 1901, p. 231), cannot be held therein beyond the maximum term of imprisonment, which the statute fixes as the penalty for the crime for which he was convicted. He cannot be held beyond such period under such a sentence until the costs are paid.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 1202.]

(Syllabus by the Court.)

Petition of William E. Perry for writ of habeas corpus to Joseph W. Martin, superintendent of the New Jersey Reformatory. Order of discharge granted.

Argued November term, 1905, before GARRETSON, REED, and FORT, JJ.

Henry Marelli, for petitioner. Edward D. Duffield, for respondent.

FORT, J. William Perry, the son of the petitioner, is confined in the New Jersey Reformatory under a sentence for larceny. The record of the sentence as certified is this: "The said defendant being placed at the bar for sentence, the court do order and adjudge that the said defendant do be confined in the New Jersey Reformatory as provided by law." This sentence was imposed December 20, 1901. Shortly after such sentence Perry was taken to the reformatory where he remained until May 24, 1904, when he was released on parole. He broke his parole on June 11, 1904, and was rearrested and brought back to the reformatory March 4, 1905, where he has since remained.

Larceny by our crimes act is made a misdemeanor for which the maximum penalty by way of imprisonment is three years. P. L. 1898, p. 854, § 218. The only act providing for commitments to the reformatory is that of March 21, 1901 (P. L. 1901, p. 231). The

act approved March 28, 1895, was repealed by the act approved March 21, 1901 (P. L. 1901, p. 238). By the act of March 21, 1901 (P. L. p. 236, § 9), it is enacted as follows: "The courts in sentencing to the reformatory shall not fix or limit the duration of sentence, but it shall not in any case exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced, and may be terminated by the managers of the reformatory as herein provided." P. L. 1901, p. 236, § 9. The sentence imposed in this case, above quoted from the record, seems to be in strict conformity with this act. The fact that Perry has served the full three years is not questioned, but it is claimed that the authorities at the reformatory may hold him until the costs are paid. There is no authority for this under sentence imposed under the act of March 21, 1901, *supra*. Persons sentenced under that act can only be held for the maximum term provided by law for the offense of which they were convicted. The maximum term here means the term of imprisonment specifically specified in the statute. Upon sentences under the act of March 21, 1901, there is no authority for a judgment that the prisoner be held for the maximum term fixed by statute and until the costs are paid. The judgment of the court simply is that "the defendant be confined in the New Jersey Reformatory as provided by law," and the statute says that the term of confinement shall not in any case exceed the maximum term provided by law. That means the maximum term of imprisonment authorized to be imposed by the statute, and named in the statute as the penalty for the offense. We cannot import into these plain words of the statute an additional term to cover the working out of costs if there be costs remaining unpaid.

There was also a further contention in this case that the prisoner could be held, because the indictment under which he was convicted contained two counts, one for larceny and the other for receiving, and that there was a general verdict of guilty; and, hence, under it, the court could have sentenced the defendant to three years' imprisonment on each count and made the one sentence to begin after the other had terminated. The contention being that under the reformatory act the limit of the duration of the sentence to the reformatory is "the maximum term provided by law for the crime for which the prisoner is convicted," and that the maximum in this case could be six years. This would be a strained construction. Penal statutes are to be construed strictly. Conceding that it is within the power of the court to impose consecutive sentences, still that will not authorize the managers of this institution to hold the defendant as if such sentences had been imposed or because the court might have done so if the defendant had been sentenced to some other institution and a definite term fixed in the sentence by the court. Where it

is not a part of the judgment of the court that one sentence shall begin after the other terminates, all sentences, even on separate convictions, run concurrently. To make it possible for one sentence to begin after another ends there must be a judgment of a court. But, if this were not so, still upon the indictment in this case a sentence could not have been imposed upon each count. The facts before us show, it is true, that the indictment contained one count for larceny and another for receiving, but the proof in the case was that the defendant stole the articles in question. The same person cannot be both thief and the receiver in a criminal sense. In order to constitute the crime of receiving stolen goods, knowing them to have been stolen, there must be a thief and a receiver. The statute never contemplated that the thief could be guilty of receiving stolen goods from himself.

On the return there appears to be no justification for the further detention of William Perry, and an order will be made for his discharge.

STOKES et al. v. HARDY.

(Supreme Court of New Jersey. Feb. 26, 1906.)

1. CERTIORARI—REMAND—PROCEDURE BELOW.

When the record of a cause removed from the common pleas to the Supreme Court by certiorari has been actually remitted by the Supreme Court to the common pleas for further proceedings, the latter court has authority to proceed therein, even though the formal order to remit has not been filed with its clerk.

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS—FILING.

The file mark of the clerk of the court will not countervail a recital by the court itself as to the filing of the paper upon which the order containing the recital is based.

(Syllabus by the Court.)

Certiorari by Thomas Stokes and others against Albert Hardy, to review an order discharging defendant as an insolvent debtor. Affirmed.

Argued November term, 1905, before GARRISON, SWAYZE, and DIXON, JJ.

Freeman Woodbridge, for prosecutor.

DIXON, J. The certiorari in this case brings up an order of the Middlesex common pleas made April 25, 1905, discharging the defendant as an insolvent debtor under the proceedings of that court which had been reviewed by the Court of Errors in Stokes v. Hardy, 60 Atl. 403. The proceedings then before the Court of Errors were those leading up to and including an order for the discharge of the debtor, and the remittitur which came to the common pleas from the Supreme Court in pursuance of the judgment of the Court of Errors declared that all of those proceedings should be affirmed, except

so much as discharged the defendant from imprisonment, and directed that so much of said order should be reversed and the record remitted to the common pleas to be proceeded on according to law. According to that judgment, as explained by the opinion of the court in 60 Atl. 404, the only illegality in the proceedings of the common pleas was in discharging the debtor before he had made due assignment of his property. The affirmance of the other proceedings required such discharge to be ordered when due assignment was made.

In view of this remittitur the first nine reasons and the fourteenth reason now presented for the reversal of the present order are precluded by the judgment of the court of last resort. The tenth reason assigned for reversal is that the remittitur had not been filed in the court of common pleas when the order for discharge was made. The only evidence of this is the file mark of the clerk of the common pleas. The order of the court recites that the record had been previously remitted from the Supreme Court to the common pleas, and this record was sufficient to enable the common pleas to proceed, even though the remittitur itself had not been filed with its clerk. The eleventh reason is that the order for the debtor's discharge was not filed within the time required by law or the rules of the court. We know of no law or rule of the common pleas to support this reason. The twelfth reason is that the assignment executed by the debtor was not filed with the clerk before the making of the order for his discharge. The insolvent debtors' act (Gen. St. p. 1728, § 11) directs that, on making the assignment and filing it in the clerk's office, the court may by writing under their hands and seals direct the discharge of the debtor. No such writing appears in the present case. But the Court of Errors in the opinion above mentioned seems to have regarded an order to discharge entered in the minutes as the legal equivalent. The order now before us recites that the assignment had been previously filed by the clerk, and we cannot regard the file mark of the clerk as countervailing this declaration of the court itself. That mark is not essential to the filing, which is complete when the paper is properly deposited with the clerk (Hunter v. Caldwell, 10 Q. & B. 69), and the file mark is only presumptive evidence of the date of filing (8 Enc. Pl. & Pr. 927). The thirteenth reason is because the affidavit of the assignee to the assignment was taken before the attorney of the debtor. Section 22 of the insolvent debtors' act requires this oath to be taken immediately after the assignment is made, but it is not an essential preliminary to the order for discharge.

We find no sufficient reason for the reversal of the order, and it is affirmed, with costs.

GOTTLLOB et ux. v. NORTH JERSEY ST. RY. CO.

(Supreme Court of New Jersey. Feb. 26, 1906.)

CARRIERS — INJURY TO PASSENGER — QUESTION FOR JURY.

When it is reasonably inferable from the facts proven in the cause that the passenger was injured through some act or omission of the carrier's servant, which might have been prevented by the exercise of a high degree of care, there the question of the carrier's negligence is for the jury.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1315-1325.]

(Syllabus by the Court.)

Appeal from District Court of Newark.

Action by Henry J. Gottlob and wife against the North Jersey Street Railway Company. Judgment for defendant, and plaintiffs appeal. Reversed.

Argued November term, 1905, before GARRETTSON, REED, and FORT, JJ.

Joseph A. Beecher, for appellants. Hobart Tuttle, for appellee.

FORT, J. In this case there was a direction by the trial court of a verdict for the defendant. In this we think there was error. The agreed case, certified by the court, shows that the appellants were passengers on an open trolley car of the defendants. That as this car approached the west side of Market street in Newark, coming southerly on Washington street, it stopped at the cross-walk for passengers to board or alight. That persons got on the car as it stopped, or was coming to a stop. That the plaintiff Ellen N. Gottlob, after the bell had been given to stop, arose and placed herself by the side of the car, and took hold of the uprights, to await the stopping of the car, to alight. The plaintiff's proof showed that while in this position, and, either before the car fully stopped or after it had stopped, and before she had alighted, or even stepped to the running board for that purpose, the car was suddenly started with a lurch or jerk, or with such force as to release her hold, and throw her clear of the car to the stone pavement, whereby she was injured. Testimony as to the lurch or jerk, or great force in the movement of the car, was made by several passengers who stated they were thrown from their feet and back into their seats, and the hat of one passenger on the platform was lifted from his head and thrown to the street. The defense was that the car did stop at the crossing, and that two passengers boarded the car and that the motorman then started the car at a moderate speed, and that it was moving at the time Mrs. Gottlob got off, and that the car was not stopped until it reached the other crossing where it again stopped; and that there was no lurch or jerk of the car. There is nothing in the state of the case certified to show that the motorman got a

bell to start the car after the two passengers boarded it at the crossing at which Mrs. Gottlob intended to get off. Where the conductor was or what he was doing does not appear. This seems significant.

On this state of facts a motion to direct a verdict for the defendant was made and granted. The district court placed the granting of this motion on the case of *Faul v. North Jersey Street Railway Company*, 70 N. J. Law, 795, 59 Atl. 148. But that case does not sustain the court in our view. This case is rather within the principle stated in *Whalen v. Consolidated Traction Company*, 61 N. J. Law, 606, 40 Atl. 645, 41 L. R. A. 836, 68 Am. St. Rep. 723, so far as the defendant is concerned. In view of the fact that the car was signalled to stop, and that Mrs. Gottlob and others were preparing to alight, and that the car was started after it stopped and after two persons had boarded it, as the defendant's evidence showed, and of the further fact that it would appear that the motorman started the car before the passengers, indicating a purpose to alight, had opportunity to do so, and apparently without the conductor giving any bell for the car to start, we think the negligence of the defendant's servants in operating the car was for the jury, as was also the contributory negligence of Mrs. Gottlob in what she did in preparing to alight.

The judgment of the district court is reversed, and a new trial granted.

MAYOR, ETC., OF CITY OF NEWARK v. NORTH JERSEY ST. RY. CO.

(Supreme Court of New Jersey. Feb. 26, 1906.)

MANDAMUS—STREET RAILROADS—TRANSFERS TO PASSENGERS.

A writ of mandamus should not issue at the instance of a municipal corporation to compel a street railway company to give transfers to its passengers within the municipality, when the obligations of the company to do so arises wholly from its assent to certain municipal ordinances which, of themselves, have no legislative force.

(Syllabus by the Court.)

Application by the mayor and council of the city of Newark for writ of mandamus against the North Jersey Street Railway Company. Rule discharged.

Argued November term, 1905, before GARRISON, SWAYZE, and DIXON, JJ.

Malcolm MacLear, for plaintiff. Frank Bergen, for defendant.

DIXON, J. The city of Newark has a rule requiring the North Jersey Street Railway Company to show cause why a mandamus should not issue to compel the company to give transfers to its passengers within the city under certain circumstances in which the company denies its obligation to do so, and this rule is now before us for consideration.

The claim of the city is based upon its construction of the municipal ordinances. We have not been able to find that these ordinances possess any legislative force with regard to the matter now in dispute, viz., the fare which the company may collect for transportation. Their efficacy is derived wholly from the assent of the company thereto, given as a condition on which certain privileges were granted by the city. These ordinances and the assent constituted a contract. *Jersey City v. J. C. & B. Ry. Co.*, 70 N. J. Law, 360, 57 Atl. 445. The benefits of this contract are to be enjoyed, not by the city in its corporate capacity, but by the individual passenger within the city limits. The rights thus created are essentially private, and their denial may be made the subject of a private action. *Prac. Act* (P. L. 1903, p. 537) § 28. *Mandamus* is not the appropriate remedy for enforcing private rights growing out of contract. *Rosenfield v. Einstein*, 46 N. J. Law, 479, and authorities there cited. The case of *Wilbur v. Trenton Pass. Ry. Co.*, 57 N. J. Law, 212, 31 Atl. 238, was quite different. There the defendant, having the right to place railway tracks in the borough streets, had laid rails which were unfit and impaired the use of the streets for general purposes. A *mandamus* was awarded to compel the defendant to remove those rails and to substitute such as were suitable. The writ was warranted on the principle that the defendant was bound by the common law not to obstruct the highway and to exercise its privilege in a proper manner. *Fielders v. North Jersey St. Ry. Co.*, 68 N. J. Law, 343, 346, 53 Atl. 404, 54 Atl. 822, 59 L. R. A. 455, 96 Am. St. Rep. 552. The duty was independent of contract.

The present rule must be discharged.

**TREEFTZ v. BOARD OF EXCISE COM'RS
OF CITY OF LAMBERT-
VILLE et al.**

(Supreme Court of New Jersey. Feb. 26, 1906.)
**INTOXICATING LIQUORS — TRANSFER OF LI-
CENSE—VALIDITY.**

A resolution of a board of excise commissioners transferring a liquor license to one of its members who was present and voted for the resolution is voidable upon *certiorari*.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of David Treeftz, against the board of excise commissioners of the city of Lambertville and Eugene M. Beaumont to review a resolution of the board. Resolution set aside.

Argued February term, 1906, before GARRISON, GARRETSON, and SWAYZE, JJ.

John H. Backes, for the prosecutor.

GARRISON, J. This writ brings up a resolution of the board of excise commissioners of the city of Lambertville transferring a liquor license to the defendant Eugene M. Beaumont, one of the members of the board.

At the meeting at which the resolution was adopted five members of the board were present and voted upon the resolution, three for and two against its adoption; the transferee being one of the three. This statement is sufficient to condemn the resolution, which, inasmuch as it did not lay down a general rule, but, on the contrary, granted a special privilege, was in its nature judicial as distinguished from legislative. *Traction Co. v. Board of Public Works*, 56 N. J. Law, 431, 29 Atl. 163.

In the case cited an ordinance of a municipal board was set aside because one of its voting members was a stockholder in the corporation to which a special privilege was granted by the ordinance, although the vote of such member was not needed to pass the ordinance. A fortiori must the same result follow when the voting member is the person actually benefited by a resolution to the adoption of which his vote was necessary.

The resolution is set aside, with costs.

CORISH v. NORTH JERSEY ST. RY. CO.
(Supreme Court of New Jersey. Feb. 26, 1906.)
DAMAGES—PERSONAL INJURIES—MITIGATION.

In actions for personal injuries damages are not mitigated by insurance paid to the plaintiff under a contract to which the tortfeasor was a stranger.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 113.]

(Syllabus by the Court.)

Action by John J. Corish against the North Jersey Street Railway Company. Verdict for plaintiff. Rule to show cause why the verdict should not be set aside as inadequate. Rule made absolute.

Argued November term, 1905, before DIXON, GARRISON, and SWAYZE, JJ.

Louis Hood, for the rule. Hobart Tuttle, opposed.

GARRISON, J. By this rule to show cause the plaintiff seeks to set aside a verdict recovered by him upon the ground that the damages are inadequate. The action was for personal injuries. The verdict was for \$250. The jury was instructed that the testimony showed that, in expenses and earnings, the plaintiff had lost \$390 as a result of his injuries. The charge then proceeded as follows:

"But his injury produced some benefit to him; that is, he got a chance to call on the insurance company to pay him \$8 a week, which was their contract in case he should receive harm, or meet with an accident while at work, I suppose. At any rate, he got \$88 from the insurance company; so that he lost actually in the neighborhood of \$310. From \$300 to \$325, between those figures, is the amount he is actually out, by reason of this accident, so far as expenditures and loss of earnings are concerned."

This instruction, by which the jury was permitted to give to the defendant the benefit of the plaintiff's insurance, was erroneous.

The fund out of which such payments were made was created in part by the plaintiff's contributions made under a contract with strangers to the defendant and the tort-feasor was no more entitled to be credited with the sums repaid to the plaintiff under such contracts, than it would be to his withdrawal of his accumulations in a savings bank.

The principle is settled for this court by the opinion in *Weber v. Morris & Essex Railroad Company*, 36 N. J. Law, 213, where Chief Justice Beasley says: "A person committing a tort cannot set up in mitigation of damages that somebody else, with whom he has no connection, has either in whole or in part indemnified the party injured."

The rule to show cause is made absolute.

MORRIS v. CITY OF NEWARK.

(Supreme Court of New Jersey. March 5, 1906.)

1. STATUTES—VALIDITY—DETERMINATION.

Whether a public law is invalid, upon the ground that it was approved by the Governor after final adjournment of the Legislature, is not to be decided upon the stipulation of parties as to the facts upon which such claim of invalidity is based.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 53.]

2. EMINENT DOMAIN — TAKING LAND FOR STREETS—STATUTORY PROVISIONS.

The act of March 24, 1892 (P. L. p. 255), providing for permanent commissioners of assessment in cities of the first class, applies to an assessment of damages for the taking of land for a public street in the city of Newark, and is not rendered inapplicable to that city by the passage of the general condemnation act of 1900 (P. L. p. 79); the charter of the city of Newark bringing that municipality within the exception contained in the 17th section (page 86) of the later statute.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Benjamin Morris, to review an assessment for the taking of lands for a public street by the city of Newark. Affirmed.

Argued November term, 1905, before DIXON, GARRISON, and SWAYZE, JJ.

Pitney & Hardin, for prosecutor. Malcolm MacLear, for defendant.

GARRISON, J. This writ brings up an assessment of the damages sustained by the prosecutor by reason of the taking of his lands for a public street by the city of Newark. The assessment was made by the persons appointed by the mayor of said city to constitute the permanent commissioners of assessment provided for by the act of March 24, 1892 (P. L. p. 255).

This statute the prosecutor claims was not enacted in accordance with the requirements of the Constitution touching the approval of bills, for the reason that the bill in this case received the approval of the Governor after

the final adjournment of the Legislature. The contention is that the Constitution of this state confers no power upon the Governor after the final adjournment of the Legislature to approve bills left in his hands, and hence that such approval does not make them laws.

The great importance of this question justifies the extended consideration given to it by counsel who have treated it as presented for judicial determination by the fourth reason filed by the prosecutor for the reversal of this assessment supported by a stipulation as to an agreed state of facts.

The reason and stipulation thus referred to undoubtedly present the constitutional question; but a preliminary inquiry is whether upon such a stipulation which is a mere admission of the parties this court will adjudge that a public statute, *prima facie* one of the laws of the state, was not enacted in compliance with the Constitution, to the end that such statute may be declared to be invalid. To this inquiry the case of *Freeholders of Passaic v. Stevenson*, 46 N. J. Law, 173, affords a conclusive answer.

The question in that case was whether the public notice of the intention to apply for the passage of a special law had been given in compliance with the requirements of the Constitution. In the opinion delivered for the Court of Errors and Appeals Mr. Justice Van Syckel said: "The publication of an act in the pamphlet laws is *prima facie* evidence that legal notice was given. The only counter evidence in this case is the admission of the parties that no notice was given. Courts cannot act upon such admissions in determining the constitutionality of statutes."

The statement of this judicial rule by the court of last resort effectually disposes of the present controversy so far as the constitutionality of this enactment is concerned. This result renders it unnecessary to consider the larger question as to the conclusive effect of the enrollment of a statute passed upon in *Pangborn v. Young*, 32 N. J. Law, 29, and the other cases that have since followed it.

With respect to the questions of statutory construction presented by the reasons, the prosecutor contends in the first place that the word "assessment," in the title of the act of 1892, means ascertainment of benefits only, and hence is not broad enough to support the enactment authorizing the assessment of damages as well as benefits. We see no reason why this purely arbitrary distinction should be made for the purpose of frustrating the plain object of the act.

A further contention is that the act of March 24, 1892, has been repealed by the general condemnation act of 1900 (page 79) and is not saved as to the city of Newark by the seventeenth section (page 86) of that act, which excepts from the practice prescribed by it the taking of land for a public improvement where the award for damages is authorized by statute to be offset by benefits. Two points are made in support of

this contention: (1) That it is the practice only, and not the procedure, that is excepted by this section; and (2) that the present assessment is for damages alone. As to the first point, we think "practice" was used by the Legislature as synonymous with procedure, and hence includes the tribunal as well as the conduct of matters before it. As to the other point, our conclusion is that the exception deals with statutory classes and not with individual cases, and hence is satisfied by the statutory authority to offset benefits against damages contained in the charter of the defendant. *Manufacturers' Land & Improvement Company v. Camden* (N. J. Sup.) 59 Atl. 1.

It is, however, further claimed that the seventeenth section of the general condemnation act of 1900 is itself unconstitutional, in that the classification upon which its proviso rests, namely, the authority to offset benefits against damages, is not based upon identical provisions to this end in the charters of the several cities that constitute the excepted group. This contention is not tenable. The end to which the several charter provisions tend is identical, namely, the authority to offset benefits against damages, which is the substantial feature of the classification; hence, if the proviso of the seventeenth section exclude no city whose charter contains this grant, it is general both in form and effect, notwithstanding the details of procedure by which this end is attained may be variant.

Finding no illegality in this assessment for any of the reasons urged, the report of the commissioners is in all respects affirmed, with costs.

KING v. MORRIS.

(Supreme Court of New Jersey. Feb. 28, 1906.)

1. PLEADING — DEMURRER — MISJOINDER OF CAUSES.

A general demurrer to a declaration containing a count in replevin and counts in trover, for misjoinder of causes of action, is good.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 503.]

2. SAME—ABANDONMENT OF COUNT.

After a general demurrer to a declaration for misjoinder, the plaintiff cannot obviate the objection by abandoning one of the counts.

3. REPLEVIN—PLEADING—COUNT IN TROVER.

It is not permissible to declare in trover, where the action is in replevin.

(Syllabus by the Court.)

Error to Circuit Court, Camden County.

Action by Charles S. King against Artemisia Morris. Judgment for plaintiff, and defendant brings error. Reversed.

Argued November term, 1905, before DIXON, GARRISON, and SWAYZE, JJ.

George M. Bacon and G. Dore Cogswell, for plaintiff in error. Wilson, Carr & Stackhouse, for defendant in error.

SWAYZE, J. This was an action of replevin. After issue joined, the plaintiff ap-

plied for and was granted leave to amend by inserting counts in trover. To the whole declaration as amended the defendant demurred for misjoinder of causes of action. The plaintiff thereupon gave notice of a motion to strike out the demurrer as irregular and defective, and so framed as to prejudice, embarrass, and delay a fair trial of the action. The demurrer was stricken out, the defendant excepted, and the order was entered on the record, and error is now assigned pursuant to section 110 of the practice act (P. L. 1903, p. 569).

The order was erroneous. There was a misjoinder of causes of action. The object of a suit in replevin is to recover the specific property; of a suit in trover, to recover damages for the conversion. The pleas and the subsequent proceedings are altogether different. Such an objection is available upon a demurrer to the whole declaration. *Green v. Morris & Essex R. R. Co.*, 24 N. J. Law, 486; *American Linen Thread Co. v. Sheldon*, 31 N. J. Law, 420; *Dale Manufacturing Co. v. Grant*, 34 N. J. Law, 138; *McDermott v. Morris Canal & Banking Co.*, 38 N. J. Law, 53; *Wilkins v. Standard Oil Co.*, 71 N. J. Law, 399, 59 Atl. 14. An attempt was made to cure this difficulty at the trial by abandoning the count in replevin. It was too late after a demurrer for misjoinder. 1 Chitty on Pleading (14th Am. Ed.) 206; *Drummond v. Dorant*, 4 Term Reports, 360. The insuperable difficulty in the way of the plaintiff was that his action was in replevin. It would be incongruous to seek to recover in the same suit the specific property and also damages for conversion, satisfaction of which would pass the title to the defendant. *Singer Manufacturing Co. v. Skillman*, 52 N. J. Law, 263, 19 Atl. 260. The seventeenth rule of this court expressly excepts the action of replevin from those actions *ex delicto* which are now styled "actions of tort." In an action of replevin, counts in trover would be bad on demurrer. The New Jersey cases in point are cited in *Wilkins v. Standard Oil Co.*, 71 N. J. Law, 399, 59 Atl. 14.

The judgment must be reversed, and judgment should be entered for the defendant upon the demurrer, unless this court allows the plaintiff to amend.

STATE v. GOLDSTEIN.

(Supreme Court of New Jersey. Feb. 28, 1906.)

1. OBSCENITY—INDECENT EXPOSURE—PUBLIC PLACE—EVIDENCE—SUFFICIENCY.

On a trial for indecent exposure, the evidence showed that the exposure was made in a store of accused in the presence of a girl 15 years old, who had gone there to purchase goods. In the front part of the store there were plate glass windows about three feet above the sidewalk. Double doors made largely of glass opened from the store into the street. *Held*, that the store was as a matter of law a public place.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Obscenity, § 3.]

2. CRIMINAL LAW—EVIDENCE—COMPARISON OF HANDWRITING—COMPETENCY OF WITNESS.

A witness who has had correspondence with another concerning business transactions is competent to give his opinion on the issue of the genuineness of a writing alleged to have been written by the latter, though he never saw the latter write.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1055, 1066; vol. 20, Cent. Dig. Evidence, §§ 2210, 2211.]

Error to Court of Quarter Sessions, Morris County.

Max Goldstein was convicted of indecently exposing his person in a public place, and he brings error. Affirmed.

Argued February term, 1905, before GUMMERE, C. J., and FORT, GARRETSON, and PITNEY, JJ.

Willard W. Cutler, for plaintiff in error.
Charles A. Rathbun, for the State.

GUMMERE, C. J. The defendant was indicted for and convicted of the crime of indecently exposing his person in a public place. The exposure was made in the grocery store of the defendant in the town of Butler, on the 29th day of August, 1903, in the presence of one L. B., a girl about 15 years old, who had gone there to purchase goods. It appeared from testimony submitted on the part of the defendant that, in the front of the store, were two plate glass windows, 4 feet and 10 inches in width, and 6 feet in height, and a third one 3 feet 6 inches in width and 6 feet in height, and that the bottom of each of these three windows was about 8 feet above the sidewalk. It further appeared that there were double doors opening from the store into the street; that the lower part of those doors, to a point about three feet above the sidewalk, was made of wood, and that the remaining portions thereof were of glass.

According to the law of this offense, the place where it is committed is a public one, if the exposure be such that it is likely to be seen by a number of casual observers. *Van Houten v. State*, 46 N. J. Law, 17, 50 Am. Rep. 397. That a store to which the public is invited for the purpose of trading, and the interior of which may readily be seen by people passing by along the street, is such a place, seems to us not a matter of doubt; and consequently an instruction by the court to the jury to that effect is not erroneous. *Van Houten v. State*, supra. The assignment of error, therefore, which is based upon the assumption that the trial judge should have left it to the jury to determine whether or not the place where the exposure was alleged to have been made was a public one, must fail.

The defendant, being called as a witness in his own behalf, denied having committed the offense charged against him, and, for the purpose of substantiating that denial, testified that, during the latter part of August, 1903, and particularly on the 29th day of that month, he was engaged in moving his business from

a store occupied by him in a building in Butler, belonging to the Noble estate, into the store in which the indecent exposure was said to have taken place; and that during all of that time, whether he was at the one place or the other, he was never alone, some of his employes being always present at each of the two stores. In order to break the force of this testimony the prosecutor of the pleas, on cross-examination of the defendant, exhibited to him a letter addressed to the executor of the Noble estate, and signed "Max Goldstein," the body of which contained a statement that his (Goldstein's) tenancy had expired on the first of August, and referred to the fact that a check was inclosed in settlement of the rent due to that date, and asked him if the signature to the letter was not in his handwriting. The defendant denied that it was, or that the letter had been written by his authority. After the close of the defendant's case the state called Mr. Hinchman, the executor of the Noble estate, as a witness, and he testified that the defendant had been a tenant of the estate for nearly three years, and that during all of that period a business correspondence had been carried on between himself and the defendant; letters passing between them at least as frequently as once a month on the average. The letter which had been exhibited to the defendant, being then shown the witness, he expressed the opinion that it was in the latter's handwriting. Counsel for the defendant interposed an objection to the witness being permitted to express an opinion as to the authenticity of the letter, on the ground that his testimony failed to show that he had ever seen the defendant write, or that he knew that the letters which he had received during Goldstein's tenancy were written by him; and error is assigned upon the overruling of the objection. Except for the fact that counsel has earnestly contended before us that this testimony was improperly admitted, we should consider the assignment so frivolous as not to be entitled to specific mention. A reference to any text-book in which this subject is discussed will disclose that it is universally admitted that a witness, who has a proper knowledge of a party's handwriting, may declare his belief in regard to the genuineness of a writing which is in question; and that such knowledge may be acquired, not only by having seen him write, but also by having had correspondence with him concerning business or other matters transacted between them. In *West v. State*, 22 N. J. Law, 212, the rule is thus tersely stated: "To prove handwriting, in general, a witness must know it by having seen the person write, or by having corresponded with him."

Two other errors are assigned, one of which challenges the legality of a question asked of the defendant on his cross-examination, with relation to the date of the last payment of rent made by him to the Noble

estate, and the other of which is directed at the refusal of the trial court to quash the indictment because, as alleged, it failed to aver that the offense charged against the defendant was committed in a public place. These assignments were not strongly pressed before us upon the argument as affording ground for reversal, and our examination of the case leads us to the conclusion that the question objected to was properly admitted, and that the indictment sufficiently avers that the exposure of his person by the defendant was made in a public place.

The conviction under review should be affirmed.

STATE v. NEWMAN.

(Supreme Court of New Jersey. Feb. 26, 1906.)

CRIMINAL LAW—EVIDENCE—HEARSAY—SIMILAR OFFENSES.

The defendant was convicted of embezzlement as a chosen freeholder in selling second-hand bridge plank to one Mahler for the sum of \$4.50 and applying the proceeds to his own use. The defense offered was that there was no sale and no money paid, but a permission to take only. The state proved that Mahler bought the plank for an organized club, and called as a witness the secretary and treasurer of the club, who was permitted to testify, over objection, to a conversation with Mahler to the effect that Mahler had paid for the plank and had received a credit for the price upon his dues as a member of the club. The defendant was not present at the conversation nor connected by any proof with the transaction testified about. *Held*, on review, that the evidence admitted was hearsay and irrelevant, and its admission was error. The admission of the evidence of one Purdy that he had on another occasion bought plank from the defendant and out of the same lot, over objection, was also error.

(Syllabus by the Court.)

Error to Court of Quarter Sessions, Passaic County.

Charles H. Newman was convicted of embezzlement, and brings error. Reversed.

Argued November term, 1905, before GUMMERE, C. J., and PITNEY and HENDRICKSON, JJ.

Wood McKee, Munson Force, and Michael Dunn, for plaintiff in error. Eugene Emley, for the State.

HENDRICKSON, J. The defendant below was convicted at the Passaic sessions upon an indictment charging him with embezzlement as a public officer, to wit, a member of the board of chosen freeholders of the county of Passaic, and brings error. The particulars of the charge are that, having in his care and custody as such member 18 oak plank of the value of \$5, the property of said board, the defendant fraudulently took and embezzled the same to his own use with intent to cheat and defraud the said board, etc.

One of the errors complained of was the admission of illegal evidence. The state called as a witness one Mahler, who testified that he

bought these plank of the defendant and paid him \$4.50 for the same, and further proved that the defendant had not accounted or paid to the county any part of the money thus alleged to have been received by him. Mahler further testified for the state that he purchased the plank for the purpose of repairing the piazza of the clubhouse of the Mohawk Outing Club, of which he was a member, and in order to further support the allegation of sale by the defendant and the latter's receipt of the money therefor, the state called one Schmitt as a witness, who testified that he was a member of the club and its secretary and treasurer, and he was permitted to testify, over objection, to a conversation of the witness with Mahler with regard to the payment for the plank; that Mahler had paid out for the plank \$4.85 and was credited by the club with that amount as a credit upon the dues Mahler was owing to the club. These declarations involved transactions which took place in the absence of the defendant, and which were in no way binding upon him. The evidence was objected to by the defendant, and insisted upon by the state as corroborative proof, and admitted by the court. The entire record of the trial is before us under the certificate of the trial judge made pursuant to section 136 of the criminal procedure act (P. L. 1898, p. 915), and the plaintiff in error has specified this admission of testimony objected to as one of the causes relied upon by him for reversal in accordance with the provisions of the act; so that, although an exception was not sealed at the trial, this alleged error is properly before us for review. We think the admission of this evidence was erroneous. These declarations of Mahler recited by the witness involved transactions which occurred, if at all, in the absence of the defendant, and without any authority or consent of his, so far as the proofs show. The testimony objected to was hearsay in character and irrelevant. The defendant had testified that these plank were old ones left from the replanking of Beatty's Bridge, which had been done by order of the board; that he had given Mahler the liberty of taking them, saying to him that he (the defendant) did not want them; that he did not sell them to Mahler, and had received no money for them. It seems to us that under these circumstances the admission of this evidence objected to was injurious to the defendant. And the rule is that when the court of review can see that the error complained of may have harmed the plaintiff in error, it is the court's duty to reverse. *Bell v. Samuels*, 60 N. J. Law, 370, 37 Atl. 613; *Ruckman v. Bergholz*, 37 N. J. Law, 437-441; *State v. Hendrick et al.*, 70 N. J. Law, 41, 56 Atl. 247.

Another error specified as a ground of reversal grew out of the admission, over objection, of the evidence of a witness called

by the state whose name was Purdy. The defendant was asked, on his cross-examination, whether he remembered a man named Purdy coming to get some of the plank, and he answered, "He never came to me in his life to get any." Purdy was then called by the state in rebuttal, and was permitted to testify that he got two loads of the plank, and that he got it from Mr. Newman. He was then asked, "Did you buy it from him?" and he answered that he did. This testimony was admitted over objection, and it seems to us was clearly incompetent. In the case of *Bullock v. State*, 65 N. J. Law, 574, 47 Atl. 62, 86 Am. St. Rep. 668, the Court of Errors declares that on the trial of the accused for a crime it is not competent to prove that he committed other crimes of a like nature, for the purpose of showing that the accused would be more likely to commit the crime charged in the indictment. It is not relevant to show that the defendant has committed other similar crimes that are not connected in any way with the one in question. In the *Bullock Case* the defendant had testified on cross-examination that he had never had any previous trouble with any person whatever, whereupon the state called a man named Campbell to contradict this story, and prove the occurrence of an assault upon him by the defendant. The admission of Campbell's testimony was held to be error, and for that reason the conviction was set aside.

I have examined the other grounds for reversal discussed in the brief of counsel for plaintiff in error, but find nothing of merit in them; but upon the grounds already stated the judgment below must be reversed and a *venire de novo* issued.

SPENCER et ux. v. HAINES.

(Supreme Court of New Jersey. Feb. 26, 1906.)

TRIAL—VENIRE DE NOVO—DEFECTIVE VERDICT.

A jury returned a single sum as damages, when the declaration contained a claim by a husband in his own right, added to a claim of the husband and wife for an injury to the wife. *Held* that, because the sum found cannot be applied to either claim or apportioned between them, the court, on application of the plaintiff, on the return of the *postea* will award a writ of *venire de novo*.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 802.]

(Syllabus by the Court.)

Action by George H. Spencer and wife against Newlin Haines. Verdict for plaintiffs. Motion for *venire de novo* granted.

Argued at November term, 1905, before FORT, GARRETSON, and REED, JJ.

John J. Crandall, for the motion. James Buchanan, opposed.

REED, J. This motion is made on the coming in of the *postea*, and the insistence by the counsel for the plaintiff is that the

verdict is so imperfect that no judgment can be entered upon it. From the *postea* it appears that the action was brought to recover damages arising from an injury to one Lizzie Spencer, a married woman, which injury was caused by a machine in the laundry of the defendant. The counsel for the plaintiff, taking advantage of the provisions of section 21 of the practice act (P. L. 1903, p. 540), added to the claim of the wife, in which the husband joined, a claim of the husband for loss of services by his wife resulting from her injury. The jury returned as damages, by reason of the injuries sustained by the said Lizzie Spencer, a verdict for \$500.

It is perceived that there was no assessment of damages for the claim of the husband and wife, and then a distinct assessment for the claim of the husband alone. There is no basis by which the sum assessed can be appropriated to one or the other of these claims, nor is there any standard presented by the *postea* by which the sum found can be apportioned between the two claims. It is at once apparent that it is impossible to enter a legal judgment upon this verdict, under the pleadings. The only course to be taken to rectify the situation is to have a new trial. The object of the plaintiff is to obtain this object by the issuance of a *venire de novo*. He could have accomplished this after a judgment entered in the language of the verdict by writ of error. The appellate court, after the reversal of the judgment entered upon this imperfect verdict, could have directed a *venire de novo*. 2 Tidd's Prac. 933; *Hooper v. Shepherd*, 2 Strange, 1089; *Grant v. Astle*, Doug. 722; *Miller v. Frits*, 1 Ld. Raym. 324; *Graham & Waterman on New Trials*, p. 36. The plaintiff could have accomplished his purpose, also, by a rule to show cause why the verdict should not be set aside and a new trial granted. *Redfern v. Smith*, 2 Bing. 262. Plaintiff could also probably have accomplished his purpose by a motion in arrest of judgment. This motion is usually made on behalf of a defendant, and section 163 of the practice act (page 581) applies only to parties against whom a verdict has passed; but I see no reason why it cannot be made at the instance of the plaintiff, where none or a judgment injurious to his interest can be entered on an imperfect verdict ostensibly in his favor. But the plaintiff was not confined to either of these methods of procedure.

Mr. Stephen, after stating the rule that a period of four days elapses after a trial before judgment can be actually obtained, remarks that during this period the unsuccessful party, to avoid the effect of the verdict, may move the court to grant a new trial, or to arrest the judgment, or to give judgment non obstante verdicto, or to award a repleader, or to award a *venire facias de novo*. This writ, he says, will be awarded where the jury has been improperly chosen, or have given an uncertain, ambiguous, or

defective verdict. The consequences and object of a venire de novo are, of course, to obtain a new trial; and accordingly this proceeding is in substance the same as a motion for a new trial. Where, however, the unsuccessful party objects to the verdict in respect to some irregularity or error in the practical course of proceedings, rather than upon the merits, the form of the application is a motion for a venire de novo, and not for a new trial. Stephen on Pleading, 93, 100. The most frequent instance of the allowance of this writ is where a special verdict is so imperfect, by reason of the failure to find some fact, that no judgment can be entered upon the verdict. *Bouvier v. Balt. & New York R. R. Co.*, 65 N. J. Law, 313-328, 47 Atl. 772. It is, however, not confined to imperfect special verdicts, but is issued when a general verdict is so uncertain or ambiguous that a legal judgment cannot be entered. The most frequent instances of the issuance of the writ after general verdicts to be found in the English Reports are where entire damages have been assessed upon a declaration containing several counts, some good and some bad, and evidence has been introduced which would support an assessment of damages under the defective as well as good counts. "In such a case," says Mr. Tidd, "the only remedy is by awarding a venire de novo, because it would be impossible for the judge to say on which of the counts the jury had found the damages, or how they had apportioned them." 2 Tidd's Prac. 894. Such a general verdict on such a declaration would be good in this state. Practice Act (P. L. 1908, p. 581) § 161. This fact, however, does not diminish the precedential force of this method of dealing with defective verdicts by the British courts. The function of a venire facias de novo is stated in *Witham v. Lewis*, 1 Wils. 48. The cases where a trial de novo can be awarded are cited by Mr. Stephen at page 100 of his work on Pleading. Distinction between granting this writ and the granting of a new trial is the subject of remark in *Graham & Waterman on New Trials*, p. 36.

The writ will be awarded.

STATE (BRANSFIELD Prosecutor), v. COLLINS.

(Supreme Court of Rhode Island. Jan. 3, 1906.)

1. INTOXICATING LIQUORS—PROSECUTIONS—JURISDICTION.

Gen. Laws 1896, c. 92, prohibits the maintenance of a liquor nuisance, and section 2 provides that the district court shall have criminal jurisdiction of a justice of the peace, whose jurisdiction to try offenses only exists where the penalty prescribed does not exceed a fine of \$500; and Court and Practice Act 1905, p. 44, c. 10, § 150, provides that with reference to other offenses the district court shall have jurisdiction only to cause the defendant to be apprehended, examined, bailed, or committed to jail, according to law, to answer before the superior court. *Held* that, the maintenance

of a liquor nuisance being an offense for which the penalty may exceed a fine of \$500, the district court had no jurisdiction to try the same.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 216.]

2. CRIMINAL LAW—CONSTITUTIONAL QUESTIONS—POWER TO CERTIFY.

Court and Practice Act 1905, p. 135, c. 27, § 475, provides that, whenever the constitutionality of any act shall be brought in question in the trial of a criminal cause in any court, the decision of the question shall be reserved and the trial of the case in other respects shall proceed as if the statute were constitutional; and if the defendant shall be found guilty sentence shall be stayed, and the constitutional question raised, together with a record of the case and a transcript of the testimony, or so much as pertains to the constitutional question, shall be certified to the Supreme Court for decision. *Held*, that such section only authorized the certification of a constitutional question by a court having jurisdiction to "try and determine" the prosecution, so that, where a district court had only power to adjudge a defendant charged with maintaining a liquor nuisance "probably guilty" and transmit the case to the superior court, as provided by Court and Practice Act 1905, p. 51, c. 10, § 172, it had no power in such prosecution to transmit a constitutional question to the Supreme Court.

Prosecution by the state, on complaint of Cornelius Bransfield, against Albert B. Collins for maintaining a liquor nuisance. Heard on motion of complainant that the case, certified to the Supreme Court on a constitutional question by a district court, be remanded to the district court. Granted.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Thomas H. Peabody and Harry B. Agard, for the State. Clarence A. Aldrich and John W. Sweeney, for defendant.

PARKHURST, J. This is a criminal case, wherein the defendant was brought before the district court of the Third judicial district, charged with keeping and maintaining a liquor nuisance in violation of certain of the provisions of chapter 92 of the General Laws of 1896. Upon arraignment the defendant pleaded not guilty, and after one continuance the court proceeded with the examination of the case. It appears from the transcript of evidence offered by the complainant during the examination, and now before this court, that the defendant was, during the time covered by the complaint, engaged in business as a retail druggist at the place alleged in the complaint to be a nuisance, and that on a certain day during the time covered by the complaint a search warrant was executed at the place in question, and a large quantity of intoxicating liquors of various kinds was seized under said warrant, a part of them in the drug store, part in the back room, and part in the stable on the premises. The complainant also offered other evidence in support of the several allegations of the complaint, making a prima facie case in support of the charge alleged, showing

the existence of a back room, connected with the drug store, having the appearance of a barroom, with beer, glasses, liquors, ice chest, etc.; also evidence as to selling and drinking liquors on the premises. Evidence was also introduced as to the notoriously intemperate character of persons frequenting the place, and as to the notorious character of the place.

At the conclusion of the complainant's evidence the following motion was offered by the defendant: "It appearing in the above-entitled case that the respondent was during all the time covered by the complaint in this case a retail druggist and apothecary, and now during the trial of said case the respondent raises the constitutionality of section 1 of chapter 1223 of the Public Laws passed at the January session A. D. 1905, entitled 'An act in amendment of and in addition to chapter 102 of the General Laws, entitled "Of the suppression of intemperance,"' and the respondent avers that said section 1 of chapter 1223 is unconstitutional and void because it conflicts with section 10 of article 1 of the Constitution of this state, and with section 1 of article 14 of the amendments to the Constitution of the United States, and moves that if the respondent shall be found probably guilty that said constitutional question, together with a record of the case and a transcript of the testimony, or so much thereof as pertains to the constitutional question, shall be certified and transmitted forthwith to the Supreme Court for decision." After argument upon this motion, the defendant was adjudged probably guilty. The defendant's motion was then granted by the court and the following record of the case was made: "Arraigned Oct. 27, 1905. Pled not guilty. Continued to Nov. 10, 1905. Required to give recognizance in the sum of \$1,000, with surety. Surety, Gurdon B. Hiscox, of Westerly. Nov. 13, 1905. On examination adjudged probably guilty, and the constitutionality of section 52 of chapter 102 of the General Laws, as amended by chapter 1223 of the Public Laws, making the finding of any liquors enumerated in said section, so amended, upon the premises of any retail druggist or apothecary, in quantities exceeding one half gallon, evidence that the same is kept for sale, having been raised by the respondent, it is ordered that the constitutional question thus raised, together with a record of the case and a transcript of the evidence, be certified and transmitted to the Supreme Court for decision."

Upon the record, papers, transcript, etc., in the case being certified to this court by the justice of the court below, the complainant filed in this court the following motion: "In the above-entitled case the complainant moves that said case be remanded to the district court of the Third judicial district, with directions to said court to proceed with said case in the same manner as if a constitutional question had not been raised by the

respondent, and the complainant so moves, because he says: (1) That the offense with which the respondent is charged in the above-entitled case, namely, keeping and maintaining a common nuisance in violation of the provisions of chapter 92 of the General Laws of this state, is an offense which is not within the jurisdiction of the district court of the Third judicial district to try and determine. (2) That section 475 of chapter 27 of the court and practice act, under and by virtue of the provisions of which it was moved to certify the above-entitled case to this court, and under and by virtue of the provisions of which said case was certified to this court, does not extend to or apply to a criminal case wherein the offense charged is beyond the jurisdiction of the court before which the same is pending to try and determine, and consequently said case was improperly and unlawfully certified to this court. (3) That the respondent in the above-entitled case was adjudged probably guilty of the offense charged in the complaint, by the justice of the district court of the Third judicial district, as appears by the record in said case, and it thereupon became the duty of said justice forthwith to certify the complaint in the above-entitled case and all papers connected therewith to the clerk of the superior court for the county of Washington, in accordance with the requirements of section 172 of chapter 10 of the court and practice act. (4) That all the evidence offered by the complainant and received by the court (claimed by the respondent to raise a constitutional question under the provisions of section 52 of chapter 102 of the General Laws as amended by section 1 of chapter 1223 of the Public Laws) in the trial in the case below would have been competent, relevant, and proper in proof of the offense alleged in the complaint aside from the provisions of section 52 of chapter 102 of the General Laws, as amended by section 1 of chapter 1223 of the Public Laws. (5) That the fact of the constitutionality or unconstitutionality of section 52 of chapter 102 of the General Laws as amended by section 1 of chapter 1223 of the Public Laws can not affect the present case, because all the evidence submitted by the complainant in the trial of the case is competent evidence, under said chapter 92 of the General Laws and at common law, in support of the charge contained in the complaint. (6) That the complainant could not, and cannot, obtain for any of the evidence submitted by him in support of the nuisance charge the probative force to which the same would be entitled in a prosecution under the provisions of section 52 of chapter 102 of the General Laws as amended by section 1 of chapter 1223 of the Public Laws, and the court below would have been in error to have attached the presumption therein created to the evidence submitted."

The offense charged in the complaint, namely, keeping and maintaining a liquor nul-

sance in violation of the provisions of chapter 92 of the General Laws, is one beyond the jurisdiction of the district court to try and determine, as the penalty prescribed may exceed a fine of \$500, the limit of the justice's jurisdiction. Gen. Laws 1896, c. 92, § 2; Court and Practice Act 1905, p. 44, c. 10, § 150. The district court therefore had jurisdiction, in this case, only to cause the defendant "to be apprehended, examined, bailed, or committed to jail, according to law, to answer * * * before the superior court." Court and Practice Act 1905, p. 44, c. 10, § 151. The question now before this court is whether the district court had the power to certify and transmit the constitutional question raised to this court, under the provisions of Court and Practice Act 1905, p. 135, c. 27, § 475, as it has assumed to do, or whether it should have certified and transmitted the complaint and all papers connected therewith to the clerk of the superior court for the county of Washington, under the provisions of Court and Practice Act, c. 10, § 172, as follows: "Whenever a district court upon a criminal complaint shall adjudge a defendant in any criminal complaint probably guilty of an offense, said complaint and all papers connected therewith shall forthwith be certified and be transmitted to the clerk of the superior court for the county in which said district court is established."

The provisions of Court and Practice Act, § 475, under which the district court assumed to certify and transmit, are as follows: "Whenever the constitutionality of any act of the General Assembly shall be brought in question in the trial of a criminal cause in any court, the decision of the question shall be reserved and the trial of the case in other respects shall proceed as if the statute were constitutional; and if the defendant shall be found guilty, sentence shall be stayed, and the constitutional question raised, together with a record of the case, and a transcript of the testimony, or so much thereof as pertains to the constitutional question, shall be certified and transmitted forthwith to the Supreme Court for decision." It will be noted that section 172, above quoted, does not contain any exception, but is peremptory in its terms. If it had been intended that the proceedings should be suspended, after the court had adjudged the defendant "probably guilty," it would have been easy to say so. Again, it will be noted that section 475 uses the word "trial," and provides that if the defendant is "found guilty, sentence shall be stayed" and the constitutional question shall be certified, etc. We think the word "trial" is used advisedly in this section, and is intended to have its technical meaning, viz.: "The examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a case for the purpose of determining such issue." Bouv. Law Dict. The distinction between "examination" and a "trial" has been well set forth

in *State v. Bergman*, 37 Minn. 407, 34 N. W. 737. In that case Gilfillan, C. J., says (page 408 of 37 Minn., and page 737 of 34 N. W.): "The question in the case is, do these provisions apply to an examination by a justice of the peace, under chapter 106 [Gen. St. 1878], of a person accused of crime? Such an examination is, of course, a proceeding; and if there were nothing else but that word and the word 'action' to indicate the cases in which a transfer can be demanded, the right would apply to such examination. But the words, 'at any time before the trial commences,' and 'proceed to hear and determine the same,' show that the proceeding must be one in which there is to be a trial before the justice, and which on such trial he is to determine. The word 'trial,' which means the judicial hearing upon the issues in a cause for the purpose of determining it, cannot properly be applied to such an examination, which is a mere preliminary inquiry to ascertain if the evidence is such that the accused ought to be put upon trial for the offense charged. The issue being the guilt or innocence of the accused, it is not affected by the result of the examination. If he is discharged, new proceedings may be at once commenced against him for the same offense; if he is held, that fact can have no influence on the issue of his guilt when he is put on his trial to have it determined. The justice neither tries nor determines the issue in the proceeding. And we are satisfied that section 20 [c. 65, Gen. St. 1878] refers only to actions or proceedings that he does try and determine. In an analogous case the Supreme Court of Wisconsin decided as we do. See *Duffies v. State*, 7 Wis. 672. Order reversed." And the same distinction has been observed in *Withers v. State*, 36 Ala. 264; *Com. v. Harris*, 8 Gray, 470; *Com. v. Boyle*, 14 Gray, 3; *Com. v. Hamilton*, 129 Mass. 479; *Com. v. Sullivan*, 156 Mass. 487, 489, 31 N. E. 647; *Waldo v. Spencer*, 4 Conn. 71, 78; and is recognized by all the leading authorities on criminal proceedings.

Again, a careful examination of the court and practice act shows that this same distinction is clearly maintained, throughout the act, wherever it touches the question of the power of the district court either "to try and determine" or to apprehend, examine, bail, or commit to jail to answer before the superior court. See Court and Practice Act 1905, pp. 44, 47, 49, 50, c. 10, §§ 150, 151, 160, 165, 166, 167. Again, the words, "If the defendant shall be found guilty, sentence shall be stayed," etc., are not appropriate to the proceedings in a case which is not within the jurisdiction of the district court "to try and determine." The defendant can only be "found guilty" and "sentenced" by a court having power "to try and determine"; and it is evident that the finding, "adjudged probably guilty," in this case, is not equivalent to the words "found guilty" in the statute, so as to operate as the requisite condition precedent

to the certification of a constitutional question to this court. It is apparent, therefore, that Court and Practice Act, § 475, authorizes a district court to certify to this court a constitutional question only in the case of an offense within its jurisdiction "to try and determine," and only in such a case when it has found the defendant "guilty," and that in a case not within its jurisdiction "to try and determine" such a question cannot be certified by the district court, under section 475.

The court and practice act does, in our opinion, substantially change the practice of the courts in this matter in a criminal case from the practice established by Gen. Laws 1896, c. 250, §§ 1 and 2, which are as follows:

"Section 1. If, in any cause or proceeding, civil or criminal, pending before any court, the constitutionality of any act of the General Assembly shall be brought in question, the court shall rule the act to be constitutional, and in writing note the question and sufficient of the evidence to explain the same, and such note and evidence shall form part of the record; and thereafter shall go on and try the cause as though such question had not been raised: Provided, that if the constitutionality of any such act shall be brought in question in any civil cause or proceeding so pending, but before the trial or hearing thereof shall have begun, the parties to such cause or proceeding may concur in stating such question in the form of a special case, and the statement thereof shall form part of the record; but said cause or proceeding shall not be assigned for trial or hearing in the court in which the same then is, until said question shall have been determined, and said question shall, by the clerk of said court, be at once certified to the appellate division for its decision of said question, subject to the same procedure thereafter as is provided in this chapter as to such questions.

"Sec. 2. If verdict or decision be rendered in the cause against the party raising the constitutional question, judgment shall be stayed, and the clerk of the court shall, after the period of five days from the day on which such verdict or decision was rendered, certify and transmit the record of the cause to the appellate division of the Supreme Court, for its decision of such constitutional question.

A similar practice was authorized under Pub. St. 1882, c. 220, §§ 1, 2, as follows:

"Section 1. If in any cause or proceeding, civil or criminal, pending before any court other than the Supreme Court, the constitutionality of any act of the General Assembly shall be brought into question, such court shall rule such act to be constitutional and go on and try the cause as though such question had not been raised.

"Sec. 2. If judgment be rendered in the cause against the party raising the constitutional question, the court shall forthwith certify the cause to the Supreme Court for their decision of the constitutional question,

if in session, and if not in session, then to the session thereof next to be holden in any county of the state by adjournment or at a regular term."

Under these statutes, in a criminal case which was not within the jurisdiction of the district court "to try and determine," it was competent for the district court, after "decision" (chapter 250 § 2, Gen. Laws 1896) or "judgment" (chapter 220, § 2, Pub. St. 1882) "against the party raising the constitutional question," to certify the cause for decision of the constitutional question; and this was so held, under the statute of 1882, in *State v. Brown & Sharpe Mfg. Co.*, 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856, on the ground that the word "judgment," used in chapter 220, § 2, Pub. St. 1882, was broad enough to include the finding of a district court "adjudging" the defendant "probably guilty." The changes in the statutes, which are apparent upon a comparison of the sections heretofore quoted and discussed, leave no doubt in our minds that the Legislature intended to change the practice, and that it is so changed as we have set forth.

The cause is remanded to the district court of the Third judicial district, with directions that the complaint and all papers connected therewith be forthwith certified and transmitted to the clerk of the superior court for the county of Washington, pursuant to the provisions of chapter 10 of the court and practice act, and particularly of section 172 of said chapter.

STATE v. McMANUS.

(Supreme Court of Vermont. Washington.
Feb. 16, 1906.)

FORGERY — INVALID INSTRUMENTS — LIQUOR PRESCRIPTIONS.

Acts 1904, p. 135, No. 115, § 22, authorizes licensees to sell intoxicating liquors for medicinal purposes, and section 24 (page 137) provides that a licensee shall sell only on the written prescription of a legally qualified physician, which shall state, among other things, that it "is given and necessary for medicinal use." *Held*, that a prescription containing no statement that the liquor prescribed was necessary for medicinal use was invalid on its face, so that the alteration thereof would not constitute forgery at common law.

Exceptions from Washington County Court; John W. Rowell, Judge.

Barney McManus was informed against for forgery, consisting of the alteration of a physician's prescription for whisky. From a pro forma decree overruling a demurrer to the information, he brings exceptions. Reversed.

Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, HASELTON, POWERS, and MILES, JJ.

S. Hollister Jackson, State's Atty., for the State. Senter & Senter, for respondent.

MUNSON, J. The information charges the respondent with committing the crime of

forgery, by altering a physician's prescription for whisky. The alteration alleged is the change of "one" to "four" in the designation of the quantity. It is not claimed that the alteration of such an instrument is forgery under our statute. The question is whether the information is good at common law. Section 22, No. 115, p. 135, Acts 1904, authorizes licensees to sell intoxicating liquors of any kind for medicinal purposes. Section 24 (page 137) of the act provides that such licenses shall be issued only to retail druggists and apothecaries who are registered pharmacists, and provides, further, that the holder of such a license shall sell only upon the written prescription of a legally qualified physician, which shall state, among other things, that it "is given and is necessary for medicinal use."

The respondent urges that the instrument alleged to have been altered was so defective that its alteration would not be forgery. Of the several defects claimed we shall notice but one, as to which there is no room for argument. The prescription in question contains no statement that the liquor prescribed is necessary for medicinal use. It therein fails to comply with the statute in a very essential particular. The paper is invalid upon its face, and could not be relied upon as authority for a sale. This has been held in respect to similar provisions in other states. *State v. Tetrick*, 34 W. Va. 137, 11 S. E. 1002; *State v. Nixdorf*, 46 Mo. App. 494. It has been long and uniformly held that a paper that is invalid on its face will not sustain a charge of forgery at common law. The writing must be such that, if genuine, it would be apparently of some legal efficacy. It is not to be presumed that any one could be deceived or defrauded by a document that is void on its face. 2 Bish. New Cr. Law, §§ 523, 524 (3), 538; *State v. Briggs*, 34 Vt. 501; *People v. Shall*, 9 Cow. 778.

Pro forma judgment reversed, demurrer sustained, information quashed, and respondent discharged.

HOWARD & BROWN v. GAMMON et al. (FRENCH, Intervener).

(Supreme Court of Vermont. Windham.
Feb. 16, 1906.)

JUSTICES OF THE PEACE — GARNISHMENT — JUDGMENT FOR CLAIMANT—APPEAL.

Plaintiff in a trustee suit is entitled to appeal from a justice's judgment sustaining a claimant's title to the credits disclosed by the trustee and discharging such trustee, the amount in issue between plaintiff and the claimant being in excess of \$20, though the suit is not appealable as between plaintiff and defendant.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 482.]

Exceptions from Windham County Court; Seneca Haselton, Judge.

Action by Howard & Brown against H. P. Gammon and another, in which Valeria

P. French intervened as claimant of the disclosed property. From a justice's judgment in favor of claimant, plaintiff appealed, and from an order overruling claimant's motion to dismiss the appeal, she brings exceptions. Affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, START, WATSON, POWERS, and MILES, JJ.

A. H. Humphrey and Stickney, Sargent & Skeels, for plaintiff. Sanford E. Emery and Davis & Davis, for claimant.

ROWELL, C. J. The question is whether the plaintiff in a trustee suit can appeal from the judgment of a justice sustaining the claimant's title to the credits disclosed by the trustee and discharging the trustee, although the suit is not appealable as between the plaintiff and the defendant; the amount in issue between the plaintiff and the claimant exceeding \$20. That a trustee can appeal when the amount in issue between him and the defendant exceeds \$20, although the action is not appealable as between the plaintiff and the defendant, has been decided. *Church v. French*, 54 Vt. 420; *American Express Co. v. Gray*, 62 Vt. 421, 20 Atl. 276. It is said in the *Church Case* that it was undoubtedly the intention of the statute to place trustees upon perfect equality with the principal parties in respect of appeals; that if, in that case, suit had been brought by the defendant against the trustee directly, the trustee would have had a right to appeal; and that when compelled to litigate the same matter as trustee he should have the same right, and that a proper construction of the statute gave it to him. It is said in the *Express Company Case* that the contention that the only question was whether the amount in controversy between the plaintiff and the defendant exceeded \$20 could not be acceded to without overruling the *Church Case*, which the court was not disposed to do. It is said in *Van Buskirk v. Martin*, 28 Vt. 726, that it was the purpose and intention of the act allowing trustees to appeal in respect to their liability to put them on the same ground as the other parties to the suit, and that the act would have been "a very one-sided affair" had it extended the right of appeal to the trustee and denied it to the plaintiff, who litigated the question with the trustee.

The claimant can appeal, because, as to the merits of his title, he is a party to the suit, within the meaning of the statute allowing an appeal by "either party." *Hutchinson v. Bigelow*, 23 Vt. 504. In the case at bar the claimant could have appealed, had the judgment been against her, because the amount in issue between her and the plaintiff exceeded \$20, as that amount was the amount of the plaintiff's judgment, there being funds enough in the trustee's hands to pay that judgment in full; and, as said of the act allowing a trustee to appeal, so it

may be said of the statute allowing a claimant to appeal, it would be a very one-sided affair to extend the right of appeal to the claimant and deny it to the plaintiff, the party contending against the claimant's title. Nor can the plaintiff's right of appeal be tested by the right as between the principal parties, any more than the trustee's right can be thus tested. The intent of the statute is to put the claimant and the plaintiff on perfect equality in regard to appealing from a judgment respecting the claimant's title, and the test is the right of appeal as between them, and that right is mutual. If one can appeal, the other can. This is the only fair construction of the statute. It would take clear language to warrant a different construction.

Judgment affirmed.

BUSHEY v. NORTHROP.

(Supreme Court of Vermont. Franklin. Feb. 16, 1906.)

1. APPEAL—MISCONDUCT OF COUNSEL—ARGUMENT—REVERSIBLE ERROR.

In an action for services, it appeared that defendant gave plaintiff, who could not read, a check for \$5, on which was written, "Balance in full to date." Plaintiff cashed the check and testified that the balance due him was \$36, and that some time later defendant drew a check for \$18 and offered it to plaintiff in full settlement, which plaintiff refused to receive. Defendant testified that he called plaintiff's attention to what was written on the \$5 check, and told him that, if he accepted it, it would be in full settlement of his claim, and that no check was afterwards offered. *Held*, that a question asked of the jury by plaintiff's counsel in argument, "What is the feeling toward an intelligent man who takes advantage of a poor man's ignorance?" though erroneous, as based on an assumption of defendant's misconduct, was not reversible error.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4135.]

2. TRIAL—ARGUMENT OF COUNSEL—EVIDENCE.

Where, before trial, plaintiff gave defendant notice to produce the stubs of all checks drawn by him between certain dates and all of the checks then in his possession, but defendant refused to produce the stub books and all books except three, claiming the books were lost, plaintiff's counsel was justified in arguing that defendant had failed to produce papers that were or ought to have been in his possession, and that it might be inferred therefrom that there was something wrong in the transaction.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 299.]

Exceptions from Franklin County Court; James M. Tyler, Judge.

Assumpsit for labor by Louis Bushey against P. B. B. Northrop. Verdict and judgment for plaintiff, and defendant brings exceptions. Affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

C. G. Austin & Sons, for plaintiff. Hogan & Hogan, for defendant.

MUNSON, J. The only questions presented are two concerning the argument, but

these require some statement of the case. It appears that plaintiff quit defendant's employment before his time was out, and went to defendant for his pay, and that some claim of damages was made; that defendant finally gave plaintiff a check for \$5, on which was written, "Balance in full to date"; and that plaintiff got the check cashed. Plaintiff testified that the balance due him on his wages was \$36; that defendant gave him the \$5 check towards his services, and agreed to pay the balance when his time was out; that he could not read, and was not told by defendant, and did not know, what was written on the check; that some time later he applied to defendant for the balance of his wages, and that defendant then drew a check for \$18 and offered it to him in full settlement; and that he refused to accept it. Defendant testified that he called plaintiff's attention to what was written on the \$5 check, and told him that if he took the check it would be in full settlement of his claim; and that no check was afterwards drawn or offered.

In his argument to the jury plaintiff's counsel asked, "What is the feeling towards an intelligent man who takes advantage of a poor man's ignorance?" and spoke of defendant's conduct as contemptible. This was a characterization of the defendant upon an assumption of his misconduct, rather than an argument of the evidence to prove the misconduct; but the case presented by the plaintiff's testimony justified some severity of remark, and it can hardly be held that the mistake indicated was reversible error.

Before the trial plaintiff gave defendant notice to produce the stubs of all checks drawn by him between certain dates, and all of the checks that were in his possession. The exceptions say that defendant did not comply with this notice, except to produce the \$5 check and two previous checks cashed by plaintiff, and that he claimed his stub books were lost. Plaintiff's counsel argued that defendant had failed to produce papers that were or ought to have been in his possession, and that it might be inferred from this that there was something wrong in the transaction. The case afforded a sufficient basis for the argument.

Judgment affirmed.

COLSTON v. BEAN.

(Supreme Court of Vermont. Windsor. Feb. 1, 1906.)

FRAUD — ACTION — EVIDENCE — BURDEN OF PROOF.

Where, in an action for defendant's fraud in selling plaintiff chattels as free from incumbrance when they were mortgaged, the defense was an agreement with the mortgagee whereby defendant had a right to sell and that plaintiff bought with knowledge of the mortgage, the burden was upon plaintiff to prove the fraud by a preponderance of the evidence.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 46, 47.]

Exceptions from Windsor County Court; John H. Watson, Judge.

Action by J. F. Colston against W. W. Bean. From a judgment in favor of defendant, plaintiff brings exceptions. Affirmed. See 58 Atl. 795.

Argued before ROWELL, C. J., and TYLER, MUNSON, HASELTON, and POWERS, JJ.

Jos. C. Enright and Edward R. Buck, for plaintiff. J. D. Denison, for defendant.

TYLER, J. Action: Case, for the defendant's alleged fraud in a sale to the plaintiff of certain wagons as free from incumbrance, when they were incumbered by a mortgage to W. H. Dubois. Defense: That an agreement with Dubois the defendant had a right to sell the wagons; also that the plaintiff bought them with knowledge of the mortgage. The court instructed the jury that, as the plaintiff had alleged fraud in the sale, the burden as upon him to prove it by a preponderance of the evidence. The plaintiff contends that this was error; that, as the defendant had attempted to justify the sale upon the ground of the mortgagee's permission, the burden was upon him to prove such permission.

When the defendant had introduced evidence tending to prove the fact of permission, the burden was upon the plaintiff to overcome this evidence by a greater weight of his evidence in order to establish his claim of fraud. The record of the trial is not before us, but presumably the plaintiff proved the allegations in his declaration, and, resting there, was entitled to a verdict. The defendant did not set up an affirmative defense, but sought to relieve the case of the element of fraud claimed by the plaintiff to exist. Fraud is not presumed, but must be proved. Therefore the plaintiff was bound to maintain the affirmative of the issue tendered in his declaration. It is the rule that the obligation of proving a fact rests upon the party who substantially asserts the affirmative of the issue. 1 Greenl. Ev. 74; Bosworth v. Bancroft, 74 Vt. 451, 52 Atl. 1050. The burden of proof, in the sense of the duty of producing evidence, may pass from one party to the other as a case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim upon which the plaintiff's case rests, is upon him throughout the trial. See Thayer's Treatise on Ev. c. 9; 1 Greenl. Ev. c. 3; 5 Am. & Eng. Ency. 22.

Judgment affirmed.

STATE v. WATERMAN.

(Supreme Court of Vermont. Essex. Feb. 2, 1906.)

CRIMINAL LAW—PLEA IN ABATEMENT—SUFFICIENCY.

Under V. S. 1127, providing that a person drawn as juror from a town containing more than 200 inhabitants shall be disqualified from

serving again for two years, a plea in abatement filed at the October term, alleging that on a date before the March term a certain juror was summoned as juror, and attended, qualified, and acted as such through the term, "without this, that said [juror] was during said last-mentioned session of said court summoned as a petit juror to serve at said session of court," was demurrable, because not showing that the juror was not drawn as a special or struck juror; the allegation that he was "drawn" not being sufficient for this purpose, in view of sections 1134, 1137, speaking of a struck jury as "drawn," and calling it a "special jury."

Exceptions from Essex County Court; George M. Powers, Judge.

Robert Waterman was indicted for murder. A demurrer to a plea in abatement was sustained, defendant excepted, and the case was certified to the Supreme Court. Affirmed.

Argued before ROWELL, C. J., and TYLER, WATSON, and HASELTON, JJ.

Clark C. Fitts, Atty. Gen., and Harry Blodgett, for the State. Harland B. Howe, for respondent.

ROWELL, C. J. This is an indictment for murder. The statute provides that "each person drawn by the sheriff or his deputy to serve as grand or petit juror from a town containing more than 200 inhabitants, shall be disqualified from again serving as juror for two years from such drawing." V. S. 1127. Relying on this statute, the prisoner pleads in abatement that Burt L. Blodgett, one of the grand jurors who participated in finding and presenting said indictment, was drawn within two years to serve as a petit juror from the town of Lemington, which contained more than 200 inhabitants. The sufficiency of this plea is challenged by demurrer. It alleges, in substance, as inducement, that on the 12th day of March, A. D. 1904, and before the session of the March term, 1904, of the Essex county court, said Blodgett was drawn and summoned to serve as petit juror at said session of said court, and did then and there attend as such juror, and qualified, acted, and served as such through said term, "without this, that said Blodgett was, during said last-mentioned session of said court, summoned as a petit juror to serve at said session of said court."

A plea in abatement must not only fully answer what is necessary to be answered, but must also anticipate and exclude all supposable matter that would, if alleged on the other side, defeat it. Tested by this rule the plea is bad, because the absque hoc does not perform its office by curing the argumentativeness of the inducement by negating that Blodgett was drawn as a special or struck juror; for to such a juror the statute relied upon does not apply. It is not enough to negate that Blodgett was summoned during said session, for a struck jury is to be summoned before the term, the same as an ordinary petit jury, except talesmen summoned to fill the panel. The argument that struck jurors are not drawn, but

are selected and listed by the assistant judges and the county clerk, acting as commissioners, that there is no such thing in our law as a special juror, and that therefore it is sufficient to negate that Blodgett was summoned during the term, is not well founded; for the statute speaks of and regards a struck jury as "drawn," and calls it a "special jury," and its individual members "special jurors." V. S. 1134, 1137.

There are other objections made to this plea, but they need not be considered. The other pleas are waived.

Affirmed and remanded.

STATE v. PAIGE.

(Supreme Court of Vermont. Caledonia. Feb. 1, 1906.)

1. INTOXICATING LIQUORS—ILLEGAL SALE—INFORMATION — NEGATING EXCEPTIONS IN STATUTE.

Under Acts 1902, p. 98, No. 90, § 21, prohibiting the exposing or keeping for sale of intoxicating liquor except as authorized by the act, but declaring that the act shall not apply to certain sales of cider and native wine, an information for violation of the statute need not state that the liquor sold was not of the kind specified in the exception.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 245-248.]

2. SAME—DESCRIPTION OF OFFENSE.

An information under Acts 1902, p. 92, No. 90, forbidding the exposing or keeping for sale of intoxicating liquor except in accordance with the provisions of the act, need not show how the liquor was kept or exposed further than by following the language of the statute.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 251.]

3. SAME—DESCRIPTION OF LIQUOR.

Neither is it necessary to specify the kinds of liquor kept or exposed.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 231, 251.]

4. CONSTITUTIONAL LAW—DETERMINATION OF CONSTITUTIONAL QUESTION—NECESSITY.

Inasmuch as the provisions of Acts 1902, p. 92, No. 90, authorizing searches and seizures in connection with prosecutions for the illegal sale of liquor, are not so connected with the remainder of the act as to render it unconstitutional as a whole, even though the search and seizure provisions should be conceded to be so, one who is prosecuted under the act, but has not been affected by the provisions as to searches and seizures, cannot question the constitutionality of the search and seizure clauses.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 39.]

Exceptions from Caledonia County Court; James M. Tyler, Judge.

Harry Paige was indicted for keeping and exposing intoxicating liquor for sale contrary to the provisions of the statute. Demurrer to the indictment was overruled, and defendant excepts. Judgment affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, START, HASELTON, and POWERS, JJ.

Frank D. Thompson, State's Atty., and David E. Porter, for the State. M. M. Gordon and J. P. Lamson, for respondent.

POWERS, J. An information in two counts for keeping and exposing intoxicating liquor for sale contrary to the provisions of No. 90, p. 92, Acts of 1902. A demurrer thereto assigning ten causes, of which only those hereinafter considered are relied upon in the respondent's brief.

The first clause of section 21 of the act of 1902 prohibits the exposing or keeping for sale intoxicating liquor except as authorized in the act. The second clause of the same section provides that the act shall not apply to certain sales of cider and native wines, or to the furnishing liquor in one's own dwelling unless under the circumstances specified. The respondent claims that the information is fatally defective, in that it does not show by proper averment that the liquor referred to therein was not of the kinds specified in the second clause of the section to which the prohibition does not apply. Such averment was unnecessary. It is only when the exception in a penal statute is so incorporated with the enactment as to constitute a material part of the definition or description of the offense that it need be negated in the information; otherwise, it is matter of defense merely. To illustrate: In an indictment under a peddler's license act which excepted from its operation goods manufactured in this state, it was held, in *State v. Hodgdon*, 41 Vt. 139, that it was not necessary to aver that the goods peddled were not manufactured in this state. Under a statute prohibiting the killing of deer, the third section of which provided that it should not apply to deer partially or wholly domesticated, it was held, in *State v. Norton*, 45 Vt. 253, that it was unnecessary to aver that the deer referred to was not domesticated. In a prosecution for bigamy, under a statute one section of which provided that it should not apply to certain persons therein specified, it was held unnecessary, in *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754, to negative the exception by averment. In a prosecution under V. S. 711, which requires children between certain ages to be sent to the public schools unless they belong to the classes therein specified, it was held, in *State v. McCaffrey*, 69 Vt. 85, 37 Atl. 234, to be unnecessary to negative the exceptions in the statute. The same result was reached in *State v. Bevins*, 70 Vt. 574, 41 Atl. 655, where the question is sufficiently discussed. If further authorities were required, reference might be had to *Becker v. State*, 8 Ohio St. 391, Com. v. Hart, 11 Cush. 130, and Com. v. Gagne (Mass.) 26 N. E. 449, 10 L. R. A. 442, wherein this very question was decided.

The respondent insists that the information should show how, where, and what kinds of liquors were kept or exposed for sale. It was not necessary to show how it was kept or exposed, for the statute which creates the offense fully defines it in clear and unmistakable terms, and the charge here is in the terms of the statute. Nothing more is re-

quired. *State v. Jones*, 33 Vt. 443; *State v. Cook*, 38 Vt. 437; *State v. Hodgson*, 66 Vt., at page 150, 28 Atl. 1089. The information does show where the liquor was kept and exposed—at Hardwick, in the county of Caledonia. This averment is sufficient. *State v. Sutor*, 78 Vt. —, 63 Atl. 182. It was unnecessary to specify the kinds of liquor kept or exposed. *State v. Reynolds*, 47 Vt. 297.

The respondent attacks the constitutionality of the act on the ground that the search and seizure clauses thereof in no wise provide for a notice and hearing before forfeiture, and so deprive a person of his property without due process. But the respondent, not being affected by the search and seizure clauses, is not in a position to challenge their constitutionality (*State v. Scampini*, 77 Vt. 92, 59 Atl. 201), unless those clauses are of such a character that their invalidity would vitiate the whole act. For, as was recently pointed out in the *Scampini* Case, and again in *State v. Abraham*, 78 Vt. 53, 61 Atl. 766, it is only when the invalid provision is so interwoven with the other provisions of the enactment as to constitute an essential element of its scheme, and is one without which the act would be incomplete and unenforceable according to the legislative intent, that it vitiates the whole. These clauses are not of that character, and can be rejected without marring the legal symmetry of what remains. This was so held in *State ex rel. Potter v. Snow*, 3 R. I. 64. So we decline to pass upon the constitutionality of the provisions complained of, since the respondent could gain nothing thereby, and hence is not in a position to raise the question.

Judgment affirmed, and cause remanded.

STATE v. WEBBER.

(Supreme Court of Vermont. Caledonia.
March 2, 1906.)

1. PERJURY—INDICTMENT—SUFFICIENCY.

An indictment for perjury in the form prescribed by V. S. 5417, form 49, is not demurrable for failing to allege that defendant was sworn by a person legally qualified to administer the oath, as the allegation that defendant committed the crime of perjury implies an oath legally administered.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Perjury, § 77.]

2. INDICTMENT — SUFFICIENCY — STATUTORY FORMS—CONSTITUTIONALITY.

The legislature may prescribe the form of indictments, providing it does not contravene the constitutional provisions.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 90.]

3. SAME — CONSTITUTIONAL REQUIREMENTS — SETTING OUT CAUSE AND NATURE OF ACCUSATION.

An indictment for perjury alleged to have been committed before the grand jury, and which does not specify the subject-matter of the investigation then being pursued by the grand jury, is violative of Const. art. 10, guarantying to an accused the right to demand the cause and nature of the accusation against him.

Exceptions from Caledonia County Court: Loveland Munson, Judge.

Henry Webber was indicted for perjury. A demurrer to the indictment was overruled, and defendant brings exceptions. Demurrer sustained.

Argued before ROWELL, C. J., and TYLER, WATSON, HASELTON, and POWERS, JJ.

Frank D. Thompson, State's Atty., and David E. Porter, for the State. Taylor & Dutton, for respondent.

POWERS, J. This is an indictment in two counts charging the respondent with perjury before the grand jury of Caledonia county at its June session, 1905. The indictment and each count thereof is demurred to: and we are called upon to determine the sufficiency of the statutory form (V. S. 5417, form 49), in conformity to which this indictment is drawn.

The first ground of demurrer urged by the respondent is that neither count contains a sufficient allegation that the respondent was sworn before the grand jury by a person legally qualified to administer the oath. The first count is entirely silent on this subject. The second alleges that the respondent was "sworn by and before said grand jury to tell the whole truth," etc. Each count alleges that the respondent "committed the crime of perjury," and under the decision in *State v. Camley*, 67 Vt. 322, 31 Atl. 840, this is all that is required in respect of the respondent's being sworn. A direct averment that he was sworn is not necessary, since the term "perjury," *ex vi termini*, implies an oath lawfully administered. *State v. Corson*, 59 Me. 137; *State v. Peters*, 107 N. C. 876, 12 S. E. 74; *State v. Gates*, 107 N. C. at page 834, 12 S. E. at page 320. And this is so, whether the crime charged is common-law perjury or statutory false swearing; for in this respect they are essentially the same.

It is further urged that the indictment is fatally defective because neither count specified the subject-matter of the investigation then being pursued by the grand jury. On this point the *Camley* Case is not authority, for the question was not there involved; and, as was pointed out in *State v. Rowell*, 70 Vt. 405, 41 Atl. 430, that decision went no farther than to cover certain elements of the crime itself. The respondent insists that the indictment here and the form prescribed by the statute are insufficient to meet the requirements of the Constitution, and that therefore the Legislature had no authority to establish its sufficiency. The Legislature may simplify and mold the form of indictments at pleasure, provided in so doing it does not contravene the constitutional provisions and leaves enough to meet the constitutional requirements. *State v. Comstock*, 27 Vt. 553. But this power of the Legislature is thus limited, and if, as claim-

d by the respondent, this indictment does not sufficiently apprise him of the cause and nature of the accusation brought against him, as required by article 10 of the Constitution of the state, it is fatally defective, notwithstanding the Legislature has declared that such an indictment shall be sufficient. Is it necessary, then, in order to meet this requirement and to sufficiently inform the respondent of the cause and nature of the charge, to specify the matter then under consideration by the grand jury? We think it is. The highest degree of certainty is not required, but the charge must be set forth with such accuracy of circumstance as will apprise him with reasonable certainty of the nature of the same, that he may intelligently prepare to meet it, and, if convicted, successfully plead his conviction in a subsequent prosecution therefor. This must not be left to conjecture or inference. It must appear by positive averment. In no other way can a respondent get the full benefit of this salutary provision of the Constitution. It is strongly intimated, though not decided, in *Commonwealth v. Pickering*, 8 Grat. (Va.) 628, 56 Am. Dec. 158, that in charging perjury committed before a grand jury the particular inquiry then before that jury must be set out in the indictment; and it is expressly held in *Commonwealth v. Taylor*, 96 Ky. 394, 29 S. W. 138, that such allegation is necessary to fully apprise the accused of the nature of the charge against him.

The pro forma judgment is reversed, the demurrer sustained, the indictment adjudged insufficient and quashed, and the respondent let go without day.

MIXER v. HERRICK et al.

(Supreme Court of Vermont. Windham. Feb. 2, 1906.)

1. MUNICIPAL CORPORATIONS—STREETS—DEFECTS—LIABILITY OF ABUTTING OWNER.

Where a hole in a sidewalk in front of defendants' property was made with the consent of the municipal authorities having power to grant such consent, defendants were liable for injuries sustained by a defect in the covering thereof only on proof of negligence.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Municipal Corporations, § 1692.]

2. SAME—COMPLAINT—NOTICE.

Where, in an action for injuries to a pedestrian by the alleged defective covering of a hole in a sidewalk in front of defendants' property, the declaration charged that defendants for a long time prior thereto had owned the adjoining premises and that a hole in the sidewalk had been used by them, their agents and tenants, as a means of entering the basement of the building, that the hole had been covered by an iron grate which had not been safely protected, in that the pins on which the grate rested were so short that the grate would slip therefrom and fall into the hole, such allegations were sufficient to charge defendants with notice of the defect.

Exceptions from Windham County Court; George M. Powers, Judge.

Action by Roy H. Mixer, by his next friend, against J. Newton Herrick and others. From an order overruling a demurrer to the complaint, defendants bring exceptions. Affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, and HASELTON, JJ.

Frank E. Barber, for plaintiff. F. D. E. Stowe and Waterman & Martin, for defendants.

WATSON, J. This case is here on demurrer to the declaration, which is in two counts. The declaration is based upon the negligence of the defendants in permitting the hole in the sidewalk in front of their block, and used by them in connection with it on the easterly line of Main street in the East Village of Brattleboro, to be and continue to be insufficiently and defectively covered. It contains no allegation that the existence of the hole was unlawful, or that it constituted an unauthorized obstruction of the sidewalk, and hence a wrong or a nuisance. There is a distinction between an action for injuries suffered by reason of a positive wrong committed by some other person, and an action for injuries sustained by reason of such person's negligence, and this is of the latter kind. *Dickinson v. Mayor*, etc., 92 N. Y. 584; *Clifford v. Dam*, 81 N. Y. 52. The general rule is that any unauthorized obstruction or excavation in a public street impairing its safety constitutes a public nuisance, and subjects the person creating or maintaining it not only to indictment, but also to liability in a civil action by any person who, without fault on his part, suffers special injury therefrom, and no question of negligence on the part of the wrongdoer can arise; his act being wrongful. But, when an obstruction or excavation is made with the consent of municipal authorities having power to grant it, as we assume it was in this case, the rule of liability is less severe and rests upon the ordinary principles of negligence. *Dill. Mun. Corp.* §§ 699, 700, 1032; *Baggage v. Powers*, 130 N. Y. 281, 29 N. E. 132, 14 L. R. A. 393; *Jorgensen v. Squires*, 144 N. Y. 280, 39 N. E. 373; *Calder v. Smalley*, 66 Iowa, 219, 23 N. W. 638, 55 Am. Rep. 270. Whether by neglect the obstruction or excavation made with such consent may become a nuisance there is no occasion to inquire. The case of *Buchanan v. Town of Barre*, 66 Vt. 129, 28 Atl. 878, 23 L. R. A. 488, 44 Am. St. Rep. 829, relied upon by the defendant, is not in conflict with this doctrine. There the plaintiff sought to recover for injuries received by slipping and falling on the sidewalk in the village of Barre, in consequence of its slippery condition, at a point two to four feet from the steps of the town hall or opera house, when going there to attend an entertainment given by an opera company. It was held that the plaintiff could not recover, since (1) there was no statutory liability on

the part of the town or village, and (2) there was no liability consequent on the fact that the defendant owned the opera house and rented it on the occasion in question to the opera company, receiving rent therefor; for, considered as a private individual, the defendant had no control of the sidewalk which was a part of the public street, owed no duty to the plaintiff in respect to its condition, and consequently was under no liability for its defects.

It is urged that the declaration contains no allegation that the defendants had notice or knowledge of the defect complained of, which it is argued is necessary to render them liable in this action. Assuming, but not deciding, that it must appear from the declaration that the defendants did have such notice or knowledge, yet the second count is sufficient. It is there alleged that the defendants, at the time in question and for a long time prior thereto, owned, possessed, and occupied the premises and building described therein, and that there was, and had been for a long time prior thereto, a certain hole in the sidewalk, etc., the same being used by the defendants, their agents and tenants, as a means of entering the basement of said building with merchandise and other articles of personal property. It is averred that the hole was three feet by three feet and about four feet deep; that it then was, and for a long time had been, covered by an iron grate, when not in use by the defendants, their agents or tenants, for the purposes aforesaid. The alleged negligence of the defendants consisted in their failure to keep the hole safely protected and securely covered, in that the iron pins on which the grate rested were so short, and the grate was so small, that the latter would slide and slip from the iron pins and fall into the hole. This defect, if it existed, was patent, and we think the allegations of the defendants' occupancy of the premises and of their use of the hole sufficiently show that they had notice of the condition of the grate and of the pins which supported it. It thus appearing that the defendants had such notice, an express averment thereof was unnecessary. Gould's Pl. Ch. 111, § 8. The second count shows a cause of action, and is sufficient.

Since the demurrer is to the declaration, and one count is sufficient, the demurrer must be overruled.

Judgment affirmed, and cause remanded.

MANLEY v. VERMONT MUT. FIRE INS. CO.

(Supreme Court of Vermont. Windham. Feb. 2, 1906.)

1. ACCORD AND SATISFACTION — UNEXECUTED ACCORD.

An unexecuted accord is no bar to an action on the original undertaking.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Accord and Satisfaction, § 116.]

2. SAME—PROMISE—ACCEPTANCE.

A fire loss was adjusted, payment to be made according to insurer's rules. No dispute having arisen, defendant mailed a notice that its directors had allowed the sum stated, and inclosed a receipt informing plaintiff that the company's check would be forwarded on the return of such receipt. No proof of tender of such check having been made, plaintiff subsequently filed additional proofs of loss, purporting to cover articles not included in the original proofs and omitted by mistake, after which a tender of the amount called for by the original proof of loss, with interest and costs, was made. Held that, defendant's promise to pay the loss as originally proved not having been accepted in satisfaction, the agreement amounted to a mere executory accord, which was no satisfaction.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Accord and Satisfaction, § 116.]

Exceptions from Windham County Court; John H. Watson, Judge.

Action by Prucius W. Manley against the Vermont Mutual Fire Insurance Company. From a judgment for defendant for costs after tender, plaintiff brings exceptions. Reversed.

Argued before ROWELL, C. J., and TYLER, MUNSON, START, HASELTON, and POWERS, JJ.

F. D. E. Stowe, for plaintiff. E. L. Waterman, J. L. Martin, and E. W. Gibson, for defendant.

POWERS, J. The plaintiff took out a fire insurance policy in the defendant company, covering certain property in Dummerston. On the 13th day of July, 1902, during the life of the policy, the property was totally destroyed by fire. The next day the plaintiff gave the company's agent at Brattleboro notice of the fire, and, with the assistance of the defendant's regular adjuster, who happened to be in the vicinity, made out, on blanks furnished by the adjuster, a sworn proof of loss in due form showing, among other things, four items of damage, aggregating, according to the plaintiff's valuation, \$500.37, to which was appended the following statement, signed by the plaintiff: "It is hereby agreed that if the said company [defendant] allow the sum of \$500.37 on this claim it shall be accepted by the undersigned as a full, final adjustment of the same. Payment to be made agreeable to the rules and regulations, and in accordance with the act of incorporation and by-laws of said company. The amount allowed to be cancelled from the policy." No question, controversy or dispute arose between the adjuster and the plaintiff as to the company's liability for the loss, or the amount of damage suffered by the plaintiff as shown by the proof of loss, nor has the company since questioned its liability for that amount. On the 4th day of August, 1902, the defendant mailed to the plaintiff a notice that the directors had allowed the sum stated, inclosing a receipt in full for him to execute and return, and informing him that the company's check would be forwarded to him upon the return of such re-

ceipt properly executed, which notice was received by the plaintiff in due course of mail. It was claimed at the trial below by the defendant's counsel that this receipt was signed by the plaintiff and returned to the company, agreeably to such notice, and as this was not denied and was apparently treated by the court as a concession of fact, we so regard it, though no evidence concerning the receipt was received.

It was alleged in the defendant's notice of special matter, filed with the general issue, that on the 8th day of September, 1902, the defendant mailed to the plaintiff its check for the amount called for by the proof of loss, which the plaintiff claimed was never received by him, and that on the 17th day of October, 1902, the defendant executed another check for the same amount and offered it to the plaintiff, with interest from the date the loss became payable, which the plaintiff declined. Allusion was made to these checks by the defendant's counsel in the trial below, but the plaintiff's counsel expressly denied that the check was ever tendered to the plaintiff, and no proof was made concerning either of them, so we do not regard them as in the case. On the 27th day of December, 1902, the plaintiff filed with the company an additional proof of loss purporting to cover articles of personal property not included in the original proof and omitted therefrom by mistake. Payment of this loss became due according to the rules and charter of the company, October 14, 1902. This suit was brought January 17, 1903, and on August 6, 1903, a tender of the amount called for by the original proof of loss, with interest and costs to that date, was duly made by the defendant, and the same kept good as required by law. On these facts, the trial court held the agreement of July 14th, above recited, to be binding upon the plaintiff, and ordered a verdict for the defendant to recover its costs accruing after the tender.

It is a familiar rule that an unexecuted accord is no bar to an action on the original undertaking. *Bryant v. Gale*, 5 Vt. 416; *Rising v. Cummings*, 47 Vt. 345; *Welch v. Miller*, 70 Vt. 108, 39 Atl. 749; *Gowing v. Thomas*, 67 N. H. 390, 40 Atl. 184. The agreement here relied upon is an accord executory, unless the plaintiff accepted the defendant's promise to pay (treating the notice of August 4th as such) in satisfaction of his claim. For, while the general rule is as just stated, that the accord must be executed in order to discharge the obligation, it is equally well settled that when the creditor accepts the mere promise of his debtor to perform some act in the future in satisfaction of the debt, the mere promise itself, without performance, is sufficient to extinguish the debt. *Hard v. Burton*, 62 Vt. 322, 20 Atl. 269; *Gowing v. Thomas*, supra; note to *Harrison v. Henderson* (Kan.) 100 Am. St. Rep., at page 433. To have this effect, however, the new promise

must be one legally binding, operating to extinguish the existing claim, which can be enforced in substitution therefor. An essential element of such an agreement—like any other contract—is a legally sufficient consideration. But, if one promises to do what he is already legally bound to do, the promise is nude. It creates no new duty and cannot support an action; nor does it afford a consideration for a promise by the other party. *Wheeler v. Wheeler*, 11 Vt. 60; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370. See, also, *Chase v. Soule*, 76 Vt., at bottom of page 357, 57 Atl., at page 755. Of this character is the agreement in question. As the matter stood at the time it was entered into, the defendant owed the plaintiff \$500.37, the sum specified therein, payable in 90 days thereafter. So the plaintiff agreed to accept just what he was bound to accept, and the company agreed to pay just what it was bound to pay, both at the time and in the manner specified in the original contract. Neither yielded anything. Neither gained anything. The new agreement resulted in no advantage to the one or detriment to the other. It was not a compromise as was the case in *Insurance Co. v. Chesnut*, 50 Ill. 111, 99 Am. Dec. 492; for there was no disagreement, and hence there was nothing to compromise. *Insurance Co. v. Sweetser*, 116 Ind. 370, 19 N. E. 159.

The adjustment agreement was without consideration, and revocable, by either party to it, at any time before full performance. It was a mere accord without satisfaction, and does not bar an action on the policy. *Vining v. Insurance Co.*, 89 Mo. App. 311; *Giboney v. Insurance Co.*, 48 Mo. App. 185. The question here decided was not considered in *Powers v. Insurance Co.*, 68 Vt. 390, 35 Atl. 331. That case was argued and determined without allusion to the validity of the partial adjustment.

Judgment reversed, and cause remanded.

JOHNSON v. BOSTON & M. R. R.
(Supreme Court of Vermont. Windsor. Feb. 2, 1906.)

1. MASTER AND SERVANT—INJURIES TO BRAKEMAN—LOW BRIDGES—ASSUMED RISK.

Plaintiff, a brakeman on defendant's railroad, as his train approached a low bridge of which he had knowledge, lay face downward, prone on the car on which he was riding, that he might pass under the bridge in safety. He was surrounded, however, by a cloud of smoke and steam so dense that it cut off his view of objects about him, and, being choked by the smoke, he raised his head to catch his breath, and came in violent contact either with the bridge or ice hanging therefrom, and was injured. Plaintiff had knowledge that the engine drawing the train had been leaking steam in unusual quantities ever since the train was started, and that defendant's engines generally were in bad condition in that respect at the time of the accident. Held, that plaintiff assumed the risk and was not entitled to recover.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, § 590.]

2. SAME—PROXIMATE CAUSE.

In an action for injuries to a brakeman while passing under a low bridge, plaintiff's testimony that he thought that he was struck by ice on the bridge, in the absence of anything else in the record to show whether plaintiff's opinion was well-founded, was insufficient to establish that the presence of ice was the cause of the accident, or that the presence of such ice as might have been on the bridge at the time was unusual.

3. SAME—NEGLIGENCE—FELLOW SERVANTS.

A railroad fireman is a fellow servant of a brakeman on the same train, precluding the brakeman from recovering for injuries sustained by the fireman's negligence in throwing fresh coal into the boiler, contrary to custom, when the train was on a downgrade and while the brakemen were required to be on top of the cars, thereby causing a dense volume of smoke and gas to be emitted, etc.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 501, 504.]

Exceptions from Windsor County Court; Loveland Munson, Judge.

Action by Samuel Johnson against the Boston & Maine Railroad. A verdict was directed in favor of defendant. Judgment was rendered thereon, and plaintiff brings exceptions. Affirmed.

Argued before ROWELL, C. J., and TYLER, START, WATSON, HASELTON, and POWERS, JJ.

R. E. Stevens and Frank Plumley, for plaintiff. Hemton & Stickney, for defendant.

POWERS, J. The plaintiff seeks damages for injuries sustained in the defendant's service at Lebanon, N. H., on January 2, 1902. At that time he was, and for more than 11 years prior thereto had been, employed by the defendant as a freight brakeman, running usually between Concord, N. H., and White River Junction, Vt. During all that time there had been maintained at Lebanon an overhead bridge spanning the defendant's track, so low as to endanger one passing under it on the top of a freight car and compel him either to descend between the cars or lie flat upon the car to escape its perils. On the day named the plaintiff's train reached Lebanon between 8 and 9 o'clock in the evening. It was a moonlight night, and freezing. From Lebanon toward White River Junction the defendant's road is descending, and agreeably to the defendant's rule the plaintiff was at his post on top of the fourth car from the engine as the train left the station at Lebanon and approached this dangerous bridge. The plaintiff knew all about the bridge and its dangers, and being then mindful of its perils, in conformity with a custom which he had observed during the entire period of his employment on the road, as the train approached the bridge, he lay face downward prone upon the car, that he might pass under in safety. He was surrounded with a cloud of smoke and steam so dense as to completely envelop him and cut off his view of objects about him, and, being choked by the smoke, steam, and gas from the engine, he raised his head to catch

breath, and came into violent contact with the bridge itself, or the ice depending therefrom, and was severely injured. A verdict was directed for the defendant in the court below, and to that direction the plaintiff excepted.

This accident happened in New Hampshire, but we need not pause to consider whether we are to apply the law of that state or our own; for upon the questions raised by this record their decisions are in entire accord with ours. The law of the case is found in the rule, variously stated in the different cases, but, so far as applicable here, amounting to this: The servant assumes, not only the risks ordinarily incident to his employment, but such unusual and extraordinary risks as he knows and comprehends. *Carpenter's Adm'r v. Railroad Co.*, 73 Vt. 336, 50 Atl. 1099; *Morrisette v. Railroad Co.*, 74 Vt. 232, 52 Atl. 520; *Kilpatrick v. Railroad Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887; *Leazott v. Railroad (N. H.)* 45 Atl. 1084; *Burnham v. Railroad (N. H.)* 44 Atl. 750. So it is that a servant, when in the course of his employment a special and obvious risk is presented to him—one not ordinarily incident to the business—may, as a rule, decline to accept it; but, if he choose to encounter it, he assumes it. And this is so, though the risk arises from the negligent performance of the master's duties. *Tibbot v. Sims (Pa.)* 62 Atl. 107; *Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425. This case, then, so far as the dangers arising from the low bridge are concerned, comes within the decisions in *Carbine's Adm'r v. Railroad*, 61 Vt. 348, 17 Atl. 491, *Allen v. Railroad*, 69 N. H. 271, 39 Atl. 978, and many such cases. For the plaintiff knew all about the bridge and the dangers arising from it, and by continuing in the service had assumed these as among those incident to his employment. Indeed, this proposition is not seriously questioned; but the plaintiff insists that he was at the time of the accident subjected to an unusual and extraordinary hazard, in that the engine hauling this train was defective, and leaked steam in extraordinary volume; that this was a condition which ought not to have existed, and would not have existed but for the negligence of the defendant, and consequently was not a danger assumed by him; and that this condition was a proximate cause of the injury, and affords a legal basis for a recovery. And so it does, unless, as we have seen, the condition and its dangers were known to and voluntarily incurred by him. That the condition of this locomotive was as plaintiff claims, and that such condition resulted from the negligence of the defendant, is not denied. But the record shows that its condition had been the same in respect to leaking steam in unusual quantities all the way from Concord. Not only that, but it appears that the engines generally on the defendant's road were in bad condition in the respect indicated at the

me of this accident. All this was known to the plaintiff. The risk of being blinded and choked by the usual volume of smoke and steam necessarily emitted from the locomotive while passing under the low ridge was one of the ordinary hazards of the service. *Hardy v. Railroad*, 68 N. H. 36, 41 Atl. 179. The increased danger arising from an engine leaking unusual quantities of steam was as obvious to the plaintiff as to the defendant; and it must be held that the plaintiff, by continuing in the service with full knowledge, assumed the increased hazard—that of passing under a dangerously low bridge while enveloped in an unusual cloud of steam emitted from a leaky engine.

It is further insisted by the plaintiff that there was evidence in the case tending to show that the plaintiff was struck by the ice depending from the bridge, and that this affords evidence of the defendant's negligence sufficient to sustain a recovery. The only evidence on this subject was the statement of the plaintiff to the effect that he thought that he was struck by the ice on the bridge, and here is nothing in the record to show whether this opinion was well-founded or otherwise. Nor is there anything in the record tending to show that the condition in this respect at the time of the accident was unusual. For aught that appears, it was usual for ice to form on the bridge as it had that night. It was incumbent on the plaintiff to show this—to show an unusual condition—nor the ordinary condition in this respect was, like the others, covered by his assumption of risk. Nor would the negligence of the fireman, if any, in throwing into the boiler fresh coal on a downgrade while the brakemen had to be on top of the cars, contrary to the custom of the fireman, thereby causing a dense volume of smoke and gas to be emitted, avail the plaintiff. For this would be the negligence of a fellow servant, not shown to have been incompetent, which could not form the basis of a recovery.

Judgment affirmed.

WALTER A. WOOD REAPING & MOWING MACH. CO. v. ASCHER.

(Court of Appeals of Maryland. Feb. 13, 1906.)

GUARANTY—CONSTRUCTION.

Where one guarantees the payment of a note, and not merely its collectibility, he is liable when it is not paid at maturity, without a showing that the payee exhausted his remedies against the principal or that the principal was insolvent.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guaranty, §§ 87-90.]

Appeal from Circuit Court, Kent County; Edwin H. Brown, Judge.

Action by the Walter A. Wood Reaping & Mowing Machine Company against Marcus J. Ascher. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and BRIS-

COE, BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Hope H. Barroll and James P. Gorter, for appellant.

SCHMUCKER, J. The appellant corporation sued the appellee in the circuit court for Kent county upon his written guaranty of the payment of the promissory note of C. R. Atkinson. The defendant pleaded the general issue. At the trial of the case before the court without a jury the plaintiff's prayer was rejected, and the defendant's prayer, asserting the want of legally sufficient evidence to entitle the plaintiff to recover, was granted. A verdict and judgment were entered for the defendant, and the plaintiff appealed.

The note was in the following form: "\$100. Chestertown, September 1, 1901. On or before the first day of September, 1902, I, _____, of Chestertown post office, Kent county, Md., for value received, promise to pay to the order of the Walter A. Wood Mowing & Reaping Machine Co. one hundred dollars, payable at Chestertown National Bank, Chestertown, Md., with interest at legal per cent. per annum from September 1, 1901, until paid. C. R. Atkinson." On the back of this note was written the following guaranty: "For value received I hereby guaranty the payment of the within note. Demand for payment, protest, and notice of protest waived. Marcus J. Ascher." The signatures to the note and the guaranty were admitted, and there was evidence tending to show that the note had been given by its maker in part payment for a mowing machine sold to him by Ascher as the plaintiff's agent.

The only bill of exceptions in the record is to the rulings of the circuit court upon the prayers. The plaintiff offered one prayer, which asked the court to rule as matter of law that if it appeared from the evidence that the note in question was executed by Atkinson and the guaranty thereon was executed by Ascher, and the note was then passed to the plaintiff in part payment for the machine, and that no portion of the note was ever paid, then the verdict must be for the plaintiff for the amount of the note and interest, less any credits thereon to which Atkinson appeared to be entitled. This prayer the court rejected, and granted the one of the defendant, asserting that there was no legally sufficient evidence to entitle the plaintiff to recover. We have not the benefit of any expression by the learned judge below of the views which led to his action upon these prayers, nor do we find in the record any sufficient support for that action. No brief was filed in this court on behalf of the appellee, and the case was submitted to us by both parties without argument. It is stated, however, in the brief filed by the appellant, that the judge who heard the case was of the opinion that the

guaranty sued on was a conditional one, and that therefore the plaintiff's case was defective, because it had offered no evidence tending to show either the exhaustion by it of its remedies against the maker of the note before suing the guarantor or the insolvency of the maker.

If such was the view of the case entertained by the judge of the circuit court, he fell into an error. The guaranty is in terms predicated upon no contingency, nor is it merely one of the collectibility of the note. It is a distinct and unequivocal guaranty of the payment of that obligation. Such a guaranty is uniformly treated by the leading text-books as an absolute one. 2 Randolph on Com. Paper (2d Ed.) c. 28, par. 850; Daniel on Negotiable Instruments (5th Ed.) p. 799; Brandt on Suretyship and Guaranty, vol. 1, § 220; Stearns on Suretyship, § 61; 14 A. & E. Encycl. of Law, p. 1142, where it is said upon the authority of many cases that "the most usual form of absolute guaranty is that of payment." In *Townsend v. Cowles*, 31 Ala. 429, the court held the words, "I guaranty the payment of the within," indorsed on a promissory note and signed by the defendant, to constitute an absolute engagement to pay the debt when due on default of the maker, and permitted the holder of the note to recover from the guarantor without proof of having attempted to recover of the maker. In *Hungerford v. O'Brien*, 37 Minn. 307, 34 N. W. 161, it was held that the indorsement on a note of the words, "For value I hereby guaranty the payment of the within note to Cassie Hungerford or bearer," constituted an absolute guaranty. The court in that case said: "The nature of the obligation of the guarantor is affected by the character of the principal contract to which the guaranty relates. The note expresses the absolute obligation of the maker to pay the sum named at the specified date of maturity or before. The guaranty of the payment of the within note imported an undertaking, without condition, that in the event of the note not being paid according to its terms—that is, at maturity—the guarantor should be responsible. The nonpayment of the note at maturity made absolute the liability of the guarantor, and an action might at once have been maintained against him without notice or demand. Such was the effect of the unqualified guaranty of the payment of an obligation which was in itself absolute and perfect and certain as respects the sum to be paid and the time when payment should be made, all of which was known to the guarantor and appears upon the face of the contract. The liability of the guarantor thus becoming absolute by nonpayment of the note, the neglect of the holder to pursue such remedies as he might have against the maker (the guarantor not having required him to act) would not discharge the already fixed and absolute obligation of the guarantor, nor would neglect to notify the guarantor of the non-

payment have such effect." The same doctrine has been asserted or recognized by this court in *Heyman v. Dooley*, 77 Md. 165, 168, 26 Atl. 117, 20 L. R. A. 257, *Emerson v. C. Aultman & Co.*, 69 Md. 135, 14 Atl. 671, and *Mitchell v. McCleary*, 42 Md. 377.

The judgment appealed from must be reversed, and the case remanded for a new trial.

Judgment reversed, with costs, and new trial awarded.

PRESTON, Building Inspector, v. LIKES, BERWANGER & CO.

(Court of Appeals of Maryland. Feb. 13, 1906.)

1. MUNICIPAL CORPORATIONS — OFFICERS — GRANT OF FRANCHISE TO USE STREET.

Baltimore City Charter (Acts 1898, p. 290, c. 123), § 37, as amended by Acts 1900, p. 117, c. 109, requiring grants of franchises to use streets to be by ordinance referred to the board of estimates, provided that the right to use them for bay windows, hitching posts, areaways, steps, planting trees, storm doors, drains and drainpipes, stands, or other such temporary or similar uses may be granted by the board of estimates, supersedes a prior ordinance requiring permits for the erection of awnings from the inspector of buildings, so that the right to maintain such an awning can only be granted by the board of estimates.

2. SAME.

An application for a permit to erect in a street an awning with an iron frame and covered with iron and luxfer prisms is not within an ordinance authorizing the inspector of buildings to grant a permit to erect an awning covered with wood, iron, tin, or canvass.

Appeal from Court of Common Pleas; Henry Stockbridge, Judge.

Suit by Likes, Berwanger & Co. against Edward D. Preston, inspector of buildings. From a decree awarding a writ of mandamus directed to the inspector of buildings, he appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

S. H. Lanchheimer, for appellant. Wm. Pinkney Whyte, for appellee.

BRISCOE, J. The appellees are the lessees of certain property, known as Nos. 8, 10, and 12, East Baltimore street, in the city of Baltimore, and are engaged in the business of merchant tailors and men's furnishing goods in a building newly erected thereon. On July 12, 1905, they made application to E. D. Preston, building inspector of Baltimore, for a permit to erect an awning over the show windows of the building to protect the goods therein in front of the building, the size to be 10 feet wide by 55 feet long, the rails to be of iron and to be approximately 12 feet above the pavement, to be covered with iron and luxfer prisms, in accordance with Ordinance 116 of the mayor and council of Baltimore, approved July 18, 1895. By the first section of this ordinance

it is provided that "it shall not be lawful for any person to erect an awning without first obtaining a permit from the inspector of buildings, for which the applicant shall pay the sum of four (\$4) dollars. The awning may be covered with wood, iron, tin, or canvass, and the rails of all awnings shall be at least 8 feet above the pavement." The inspector of buildings declined to issue a permit for the reasons stated in his answer, as follows: First, that under section 37 of the new charter of Baltimore city no right to use the street for the purpose named in the petition can be granted until the application has been considered by the board of estimates. Second, the board has the discretion to grant or refuse the application in any given case; that the application of the petitioners was considered by the board of estimates and refused, because to grant it in the form presented would have meant an undue obstruction to the principal business street of Baltimore city, and the existence of such a structure would be dangerous to life, would impede firemen in case of fire, and by the breaking of glass or some portion thereof pedestrians might be injured and thereby liability imposed upon the city; that the board has uniformly refused to permit structures of the kind on Baltimore street, but has granted applications for the erection of rolling awnings, and is willing to grant such an application to the petitioners. At the trial of the case below a writ of mandamus was directed, requiring the inspector of buildings to issue a permit for the erection of the awning as set out in the petition, and from this order an appeal has been taken.

The first and controlling question to be determined by us is whether Ordinance No. 116 of 1895, or section 37 of the new charter (Acts 1898, p. 290, c. 123, as amended by Acts 1900, p. 117, c. 109), controls, in the granting of a permit for the erection of awnings in the city of Baltimore similar to the one here in controversy. It is conceded that, if the right to erect awnings is to be controlled by Ordinance No. 116, then it was the duty of the inspector of buildings to issue the permits upon compliance with the terms of the ordinance. But, on the other hand, if their erection or construction was within the powers conferred by section 37 of the city charter as amended by the act of 1900, then the petition filed in this case should have been dismissed, because the right to so use the street had not been passed upon by the board of estimates nor authorized by a municipal ordinance. By chapter 109, p. 117, Acts 1900, the Legislature repealed section 37 of the new charter of Baltimore (Acts 1898, p. 290, c. 123) and re-enacted the same with amendments. The section as amended is in part as follows: "Before any grant shall be made by the mayor and city council of Baltimore of the franchise or right to use any street, avenue, alley or highway or

the grant of the franchise or right for the use of any public property mentioned in section 7 of this article, the proposed specific grant, with the exception hereafter in this section made, shall be embodied in the form of an ordinance with all the terms and conditions required by the provisions of this article. * * * The ordinance shall after having been introduced in either branch of the city council, and after the first reading, be referred forthwith, by the branch in which the same is offered, to the board of estimates. The board of estimates shall make diligent inquiry as to the money value of the franchise or right proposed to be granted and the adequacy of the proposed compensation to be paid therefor to the city as offered in the ordinance and the propriety of the terms and conditions of the ordinance. The provisions of this section shall apply to the renewal or extension of any franchise or right relating to the use of any of the public property mentioned in section 7 of this article now existing, or which may hereafter be granted to any person or body corporate, provided, that the right to use the streets, avenues, alleys, or other public property by any person or body corporate for bow or bay windows, hitching post, areaways, steps, planting trees, storm doors, drains and drain-pipes, stands, or other such temporary or similar uses, may be granted by the board of estimates for such an amount of money and upon such terms and conditions as the board may consider right and proper. Before the board shall grant any such right, the person or body corporate seeking the same shall file before the board, in writing, an application for such use, and in the application the use desired shall be stated, and what the applicant is willing to pay for the same must be given, and such person or body corporate shall only enjoy such use on the payment of the amount of money named by the board, and on the terms and conditions the board shall prescribe in writing, and no ordinance or advertisement shall be necessary or made in such cases as are named in the proviso of this section."

It will be thus observed that the appellee's right to the relief sought by this proceeding is based upon Ordinance No. 116, approved July 18, 1895, while the appellant rests his contention upon section 37 of the new charter, as amended by the subsequent act of 1900 (Acts 1900, p. 117, c. 109). As this involves a construction of those acts, we will proceed to consider them, in so far as they are applicable to this case. There can be no question that the erection of an awning similar to the one here described involves a right to use the street, and cannot be obtained except by a compliance with the provisions of law. By the new charter (Acts 1898, p. 290, c. 123, § 37) application for a franchise or right to use the streets shall be embodied in the form of an ordinance, and after its introduction in either branch of the city council be re-

ferred to the board of estimates for its consideration according to the terms of the charter. Subsequently, by Acts 1900, p. 117, c. 109, this section of the charter was amended, and it was provided as to certain minor privileges that the right to use the streets, avenues, alleys, or other public property by any person or body corporate for bow or bay windows, hitching posts, areaways, steps, planting of trees, storm doors, drain and drainpipes, stands, or such other temporary or similar uses, may be granted by the board of estimates without an ordinance, upon terms and conditions prescribed by the act. The acts of 1898 and 1900 are subsequent to Ordinance 116, approved July 18, 1895, and while the word "awnings" is not specifically mentioned in Acts of 1900, p. 116, c. 109, we think they are manifestly included and comprehended within the meaning of the terms "or similar uses," and must be controlled by section 37 of the city charter, as amended by the act of 1900. The erection of an awning or structure like the one in dispute is clearly as much a use of the street as a bow or bay window, and is therefore covered by the term "or similar uses," set forth in the act just referred to. The obvious intent and purpose of the new charter, as disclosed by an examination of its provisions was to prevent the grant of a franchise or right to use the streets without "full municipal superintendence, regulation and control" and after a careful consideration by the board of estimates. By section 10 of the new charter (Acts 1898, p. 273, c. 123), as amended by Acts 1900, p. 117, it is distinctly provided that before any grant of the franchise or right to use any highway, avenue, street, lane, or alley, or other public property, either on, above, or below the surface of the same, shall be made, the proposed specific grant, except as provided in the proviso to section 37 of this article, shall be embodied in the form of a brief advertisement prepared by the board of estimates, and all the provisions of section 37 of this article shall be complied with. And in Acts 1900, p. 116, c. 109, it is provided, in reference to the minor privileges, that they may be granted by the board of estimates only upon such terms and conditions as the board may consider right and proper. It is quite clear that the provisions of the charter as to the erection of awnings could not be enforced or carried out if the provisions of Ordinance No. 116 should be held to be in force and a subsistence ordinance.

But, apart from this, it will be seen that the application of the appellees here does not fall within the terms of the ordinance relied on. By the express provisions of this ordinance it applies to an awning covered with wood, iron, tin, or canvass, and the rails of all awnings shall be at least eight feet above the pavement. According to the application for the permit and the proof in the case, the awning applied for is to be an

iron frame with glass, and "covered with iron and luxfer prisms." So, without discussing the other questions raised on the record, we are of the opinion, for the reasons stated, that this case falls within the terms of section 37 of the city charter as amended by Acts 1900, p. 117, c. 109, and that, inasmuch as the provisions of the act have not been complied with, the order appealed from must be reversed, and the bill dismissed.

Order reversed, and bill dismissed, with costs.

DECOLA v. COWAN et al.

(Court of Appeals of Maryland. Jan. 9, 1906.)

1. NEGLIGENCE—DANGEROUS PREMISES—INJURIES—ACTIONS—SUFFICIENCY OF EVIDENCE—SUBMISSION TO JURY.

In an action for injuries to a pedestrian from the fall of a brick from a building which defendants were constructing, evidence held sufficient to take the case to the jury.

2. SAME—LIABILITY—INDEPENDENT CONTRACTORS—EVIDENCE.

In an action for injuries to a pedestrian on a public street, caused by the fall of a brick from a building being erected by defendant, evidence held to require the submission to the jury of the question whether or not the defendant contractor having charge of the erection of the building, in employing a codefendant to lay the bricks, gave the latter complete control of the erection of the walls of the building and of the persons employed by him to do the bricklaying.

Appeal from Superior Court of Baltimore City; Danl Girard Wright, Judge.

Action by Frances Decola against John Cowan and others. Judgment for defendants, and plaintiff appeals. Reversed.

Argued before MCSHERBY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

R. R. Boardman, for appellant. Carroll T. Bond and Thomas Ireland Elliott, for appellees.

SCHMUCKER, J. The appellant sued the appellees in the superior court of Baltimore city to recover damages for an injury claimed to have been caused by a brick falling upon her from a house in course of erection as she was walking on the pavement in front of it. The case was taken from the jury by the court below by granting the prayers to that effect, offered at the close of the plaintiff's testimony, by the defendants Cowan and Berndt. The North Baltimore Construction Company of Baltimore city was originally included among the defendants as the owner of the house from which the brick is alleged to have fallen and that company appeared to the action and filed a plea of non cul., on which issue was joined, but no further notice is taken of it in the record or on the briefs. As there was no evidence tending to make that company liable for the injury complained of, we assume that the suit as to it was abandoned.

The amended declaration, on which the

case was tried below, alleges that while the three defendants were together engaged in erecting the building in question the plaintiff was passing along the sidewalk in front of it, using due care and caution, when "a brick or large substance fell or was thrown from the building, being so erected as aforesaid by said defendants, by the carelessness and want of due care of the said defendants, their servants and agents," and struck her on the head and seriously injured her. There is evidence in the record tending to show the following facts: In the year 1901 the defendant Cowan, who was a carpenter and builder, was engaged in erecting a four-story brick apartment house, on a lot of ground at or near the northwest corner of North and Maryland avenues in Baltimore city, under an independent contract with the owner of the lot. Cowan furnished all bricks and mortar required for the building, and employed his codefendant Berndt to lay the bricks at a fixed rate per thousand, and Berndt employed such additional bricklayers as were requisite to enable him to do the work. Cowan testified that he paid Berndt the stipulated price per thousand for laying the bricks, and that Berndt paid the bricklayers who did the work, and that he (Cowan) had nothing to do with the laying of the bricks, other than to see that they were properly laid. Goucher Tase, who was employed by Cowan as "foreman of the job" of erecting the building and had charge of the job, testified that he gave directions about the height, thickness, etc., of the walls to Berndt when he was there, and to his foreman when he was not there, but that Berndt directed the bricklayers "as to the manner of doing their work, in the manner of laying bricks." Tase further testified that he had often seen Berndt pay the bricklayers, but that he had also on one or more occasions seen Cowan pay them.

In the latter part of August, 1901, when the walls of the building had reached about the third story, while the plaintiff and her daughter were walking on the sidewalk of Maryland avenue in front of the south end of the building, something fell upon the head of the mother with such violence that it fractured her skull and inflicted serious injury upon her. She was rendered unconscious by the blow and could give no account of the details of the accident. Oscar E. Ross, who happened at that time to be sitting on a porch on the opposite side of the street, testified: "I saw her hit on the head with a brick. I do not know where it came from. It came out of the air some place in the neighborhood. It was close to that building. I could not see it come off that wall, but I saw her walking along the pavement on the side of that wall. I could not say that I saw the brick come down, but I saw the brick at the time it hit her, and I also saw the brick picked up by somebody. As far as I could see I am almost positive that it

was a brick that hit her." He further said that he had been sitting on the porch looking at the workmen laying brick on the wall, and after the accident he noticed that they went to the other end of the building. Rosie Decola, the daughter, testified that as they were walking along the pavement, within two or three feet of the wall, she heard a brick fall, and turned around and saw her mother lying on the ground with a brick alongside of her. The brick and the mother's head were both bloody, and there was blood on the ground. Tase, the foreman of the defendant Cowan, also testified that he was on the street at the northeast corner of the building when the accident occurred, and had his attention called to it by the cry of the injured woman, and that just before the accident there were bricklayers working on the front wall, but that he did not notice them at the time of the accident. There was also the testimony of several physicians touching the nature and extent of the plaintiff's injury.

With this evidence before it the court below erred in taking the case from the jury. The fact of the accident and the resulting injury to the plaintiff were clearly proven. There was also evidence from which the jury, if they believed it, might have found that she was injured by a brick falling from the wall which was being erected under the management of the defendants or their servants. It is true no brick was followed by an eyewitness in its flight from the wall down to the head of the plaintiff, who was passing underneath it; but she was struck on the top of the head, and the witness Ross testified that he saw the brick when it struck her. Her daughter, who was walking by her side, testified that she heard her mother struck, and saw the bloody brick lying by her head on the pavement after she fell down. Bricks, when handled with due care in constructing a wall, do not ordinarily fall to the ground. The erection of walls of brick houses abutting on the sidewalks of public streets is constantly in progress in every city and large town. As was said by the court in *Scott v. London Dock Co.*, 3 H. & C. 696: "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." In *Byrne v. Boadle*, 2 H. & C. 722, a barrel of flour fell from an upper window of the defendant's warehouse and injured the plaintiff who was passing on the public street in front of it. A witness saw the plaintiff struck upon the shoulder by the barrel but did not see it until it struck him. Another witness testified: "I saw a barrel falling, I don't know how, but from defendant's." The evidence was held to be sufficient to go to the jury, the court (*Pollock, C. B.*) saying, at page 727: "Suppose in this

case the barrel had rolled out of the warehouse and fallen on the plaintiff; how could he ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would beyond all doubt afford prima facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling on him, I think the accident alone would be prima facie evidence of negligence." In the present case the evidence to which we have already alluded was sufficient to call upon the defendants for an explanation of the falling of the brick.

The question next presents itself whether there was any evidence legally sufficient to go to the jury to hold the defendant Cowan, who contracted to erect the whole building and employed Berndt to lay the bricks, liable for the accident. In *Bonaparte v. Wiseman*, 89 Md. 21, 42 Atl. 919, 44 L. R. A. 482, we said: "The question of the extent to which the employment of an independent contractor to do work which is placed entirely under his control will relieve the employer from liability for injuries resulting to third persons has been much discussed by the courts. The general principle, broadly stated, is that when the work is done by a competent contractor under an agreement which gives him complete control of the work and of the persons employed by him to do it, such persons will be his servants and not those of the employer, and the latter will not be liable for injuries caused by the negligence of the workmen, because they are not his servants and are not under his control." In *Deford v. State, to Use of Keyser*, 30 Md. 179, our predecessors carefully considered the authorities bearing upon the subject of the liability of the employer of a contractor for injuries resulting from the negligence of the latter's servants. It is there said in the court's opinion: "The greatest difficulty, however, in these cases, is in determining upon the facts who is to be regarded as the master of the wrongdoer. This, of course, depends mainly upon the terms and character of the contract of employment. * * * The terms and manner of employment were, of course, matters of fact for the jury; it being for the court to declare the legal relation that existed between the parties upon any given state of facts."

The evidence in the present case as to the terms and character of the contract of employment of Berndt by Cowan is so conflicting as to present a material issue of fact. No written or verbal contract was proven definitely giving to Berndt complete control of the erection of the walls of the building

and of the persons employed by him to do the bricklaying. Berndt himself was not called to the stand, and Cowan's testimony on that subject was: "I had bricklayers to build the walls. Mr. Berndt employed the bricklayers. I employed him to do that work, and he employed the bricklayers. I do not know whether there was a written contract or not. Mostly we get estimate from a bricklayer or subcontractor. We seldom make a written contract such as this you have submitted here a while ago [referring to his own contract to erect the building]. We take his estimate. * * * The estimate would state that he would lay the bricks for so much per thousand. This is a contract." He further testified, as we have already said, that Berndt controlled the manner and method of laying the bricks and he (the witness) had nothing to do with laying them, except to see that they were properly laid. This evidence, taken in connection with that of Cowan's foreman, Tase, presents the question of fact for the jury whether Cowan, in employing Berndt to lay the bricks, gave him complete control of the erection of the walls of the building and of the persons employed by him to do the bricklaying.

The defendant should have been required to proceed with their testimony, if they had any which they desired to submit, and the case should then have been given to the jury, with proper instructions as to the law governing it upon a specified state of facts to be found by them. The judgment for the defendants will be reversed, and the case remanded for a new trial.

Judgment reversed, with costs, and case remanded for a new trial.

HAYS v. CRETIN.

(Court of Appeals of Maryland. Jan. 22, 1906.)

1. MORTGAGES—REDEMPTION—RIGHT OF DOWER.

A widow who has joined in a mortgage in release of dower may redeem, though there has been no legal assignment of dower, and though the husband has made a second mortgage in which the wife did not join.

2. SAME—CONDITIONS PRECEDENT—PAYMENT OF DEBTS.

A widow, redeeming from a mortgage in which she joined, cannot be required to pay a second mortgage in which she did not join, or to pay an open account due the first mortgagee.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1761.]

3. SAME—BILL TO REDEEM—QUESTIONS INVOLVED.

On a bill by a widow to redeem from a mortgage in which she joined, it is not necessary to consider the rights of heirs at law not parties.

Appeal from Circuit Court, Frederick County, in Equity; James B. Henderson and John C. Motter, Judges.

Action by Emily T. Cretin against James T. Hays. From a decree for plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Vincent Sebold and Wm. P. Maulsby, Jr., for appellant. Hammond Urner and Milton G. Urner, for appellee.

BRISCOE, J. This is a suit in equity, brought in the circuit court of Frederick county by the appellee, the widow of John T. Cretin, deceased, against the appellant, as assignee of a mortgage from Cretin and wife to Clayonia F. Maynard and Fanny Noonan, for an injunction to restrain the assignee from selling the mortgaged real estate and to enforce her equity of redemption as the alleged owner of a dower interest in the land. The injunction and the relief asked by the bill were granted by the court below, and from a decree so granting the relief an appeal has been taken.

It will be necessary for us to briefly state the material facts disclosed by the record, in order to obtain a clear and proper understanding of the case. The bill avers that John T. Cretin, of Frederick county, died intestate on the 6th of December, 1903, seised and possessed of a tract of land situate in that county containing 200 acres, more or less; that the appellee is his widow, and as such is entitled to a dower estate in the land; that on May 24, 1889, Cretin and his wife executed a mortgage of this farm to secure the payment of two promissory notes, dated the 24th day of May, 1889, payable 5 years after date, and given by Cretin to Maynard and Noonan, each for the sum of \$2,000; and that the mortgage was subsequently assigned to the appellant. The mortgage debt being overdue, the appellant advertised the property to be sold at public sale on the 13th of February, 1904, to pay the mortgage debt. The bill then avers that on the 10th of February, 1904, the appellee, as owner of the dower interest, offered to redeem the mortgage, and tendered the defendant the sum of \$4,300 in legal tender currency in payment and redemption of the mortgage debt, interest, and costs; but the defendant declined to accept the tender and refused to permit her to redeem. The prayer of the bill, in addition to the prayer for general relief, is, first, that the defendant may be enjoined and restrained by injunction from executing the power of sale contained in the mortgage, and from selling or assigning the mortgage debt, pending the proceedings; and, second, that the appellee's equity of redemption may be enforced, and the defendant be required to accept the amount of the mortgage debt, interest, and costs, so tendered and paid into court, and that the appellee may be subrogated to the rights of the mortgagee. The defendant, in his answer, admits the allegations contained in the first, second, and third paragraphs of the bill, but denies that the appellee has such a beneficial interest and estate in the mortgaged land as entitles her

to redeem. The answer avers that the alleged tender and offer to redeem is not for the purpose of protecting any beneficial interest in the real estate, but is a fraudulent scheme on the part of the appellee to defeat and destroy the rights and interest of those who have a legitimate beneficial interest in and to the land; that the estate of the decedent is largely indebted on other claims, including a second mortgage, in which the widow did not join, of \$300, and an unsecured balance due and owing to the appellant. The answer then avers that to grant the relief prayed by the bill would defeat the appellant's rights as second mortgagee and creditor of the estate, and would also destroy the interests of the heirs at law and the other general creditors of the estate.

It appears, then, according to the pleadings and the conceded facts of the case, the principal question raised for our consideration is the legal right of the appellee, the widow of Mr. Cretin, to redeem her interest in the equity of redemption from the first mortgage, in which she joined with her husband. There can be no difficulty, we think, as to the general proposition that a widow who has joined in a mortgage has the undoubted right to redeem, notwithstanding the fact there has been no legal assignment of the dower. This proposition is well settled upon reason and authority, because of the wife's inchoate right of dower and of her interest in the estate. In *Jones on Mortgages*, vol. 2, § 1067, it is said that a widow who has joined in a mortgage in release of dower may redeem, for she is entitled to dower as against every person except the mortgagee and those claiming under him. She has an undoubted right to redeem, although she has released her dower. And even a wife having only an inchoate right of dower may redeem land from a mortgage in which she has joined with her husband to release dower. In *Gatewood v. Gatewood and Others*, 75 Va. 413, the court, after citing a number of authorities to sustain the position that a tenant in dower may insist upon the redemption of a mortgage, says that the dower interest of the wife in the husband's estate is such as entitles her to redeem seems too clear for controversy. And it was also said that it may be laid down as a rule of almost universal acceptance that, when there is a mortgage upon real estate, any person who has the right to redeem such mortgage, and actually does redeem it, is entitled for his indemnity to be subrogated to the lien of the mortgage and to hold the land until he is reimbursed to the amount so paid. The case of *Davis v. Wetherell*, 13 Allen, 60, 90 Am. Dec. 177, and *Lamb v. Montague*, 112 Mass. 352, are express decisions on this point. In *Mantz v. Buchanan*, 1 Md. Ch. 202, the Chancellor said: "There can be no doubt that a wife, notwithstanding she joins her husband in the mortgage, may nevertheless take her dower

in the lands subject to the mortgage, and that she has a right to redeem, and may call on the personal representatives of her deceased husband to apply the personal assets to the extinguishment of the mortgage debt, so as to free her dower from the incumbrance." And the doctrine enunciated by the court in this case, is approved in *Lynn v. Gephart*, 27 Md. 547; *Bank v. Owens*, 31 Md. 327, 1 Am. Rep. 60; *Glenn v. Clark*, 53 Md. 603; *McNiece v. Eliason*, 78 Md. 176, 27 Atl. 940; *Pomeroy, Equity Juris.* 1220; *Story's Equity Jurisprudence*, vol. 2, § 1023.

But it is contended earnestly by the appellant that the right of redemption in this case should be denied, because the husband in the year 1896 executed a second mortgage to the appellant for \$300, by which he conveyed away his equity of redemption in the property in question, and at the time of his death he was not seised of such an estate as the wife could be dowerable. The cases cited and relied upon by the appellant do not maintain the proposition asserted by him. In *Bank of Commerce v. Owens*, 31 Md. 325, this court said: "But in this case it must be remembered the husband was seised of a legal title, upon which the wife's inchoate right of dower attached by the common law. And can it be said that, pledging this right to secure her husband's indebtedness, she thereby puts it in his power or that of his creditor to defeat it altogether. To this view we cannot yield our assent. The husband may assign the equity of redemption, but no act of his could deprive the widow of the right to redeem to which she is entitled under the common law." *Glenn v. Clark*, 53 Md. 603. The case of *Smith v. Hall*, 67 N. H. 200, 30 Atl. 409, is directly in point. In that case the husband and wife executed a mortgage on certain lands to secure a note given by the husband to the Farmington Savings Bank for \$641.78. Subsequently the husband executed a second mortgage, in which the wife did not join, to secure a promissory note of \$1,000. It was held that the wife was entitled, on redeeming the bank mortgage, to hold the whole estate until the defendant shall repay her the amount of the mortgage, when she will be entitled to have a homestead assigned; that her right to the equity of redemption was not affected by the second mortgage, to which she was not a party. The right of the wife in the case at bar to redeem the land from the first mortgage, in which she joined, notwithstanding the making of the second mortgage by her husband, rests upon her contingent right of dower and her interest in the land. She is entitled to exercise this right in order to protect her dower interest and to prevent a sale of the property. It would be a useless right, indeed, if it could be defeated and destroyed by the bare making of a second mortgage by the husband without her uniting therein. In *Pollard v. Noyes*, 60 N. H. 184, it is held that a sale of

the equity of redemption by the husband did not defeat the wife's homestead right in that equity.

As to the contention that the appellee should be required to pay the second mortgage and the open account due the appellant, we need only say that these claims are not her debts, and she is not liable therefor. *Brown v. Stewart*, 56 Md. 431; *Geiston v. Thompson*, 29 Md. 595.

There can be no serious contention as to the tender made by the appellee. The tender was made in the bill and the money was paid into court. The defendant by his answer refused to accept the money as tendered and denied the right of the appellee to redeem.

It will be seen, from what has been said, that we have disposed of all the questions determined by the decree. We concur in the views expressed in the opinion of the court below that "as to the interests of the heirs at law they are not parties to the present proceeding, and we do not see that we are required to consider their rights in the determination of the single question of the right of redemption, as distinguished from that of subrogation." As the view we have taken is decisive of the case, the decree will be affirmed.

Decree affirmed, with costs.

SAFE DEPOSIT & TRUST CO. OF BALTIMORE et al. v. GITTINGS.

(Court of Appeals of Maryland. Jan. 9, 1906.)

1. EQUITY—BILL OF REVIEW—EFFECT OF DECISION ON APPEAL.

Where a decree dismissing a bill for an accounting was reversed, and the trial court entered a decree in conformity with the opinion of the appellate court, a bill of review may thereafter be allowed on the ground of newly discovered evidence.

2. SAME—DISCRETION OF COURT.

Where a wife's executor filed a bill for accounting for property transferred to her husband, and he made the defense that it was a gift, and after hearing a decree was rendered in favor of her executor, it was within the discretion of the court to refuse leave to file a bill of review for newly discovered evidence that the proceeds of the property had been invested in specific securities which could be transferred to the executor, which facts were not discoverable by the husband in his invalid and infirm condition of health.

Appeal from Circuit Court, Howard County, in Equity: I. Thomas Jones, Judge.

Suit for accounting by John S. Gittings, as executor of Annie M. Winter, against the Safe Deposit & Trust Company of Baltimore and another, executors of Henry Winter. From an order refusing leave to file a bill of review, defendants appeal. Affirmed.

Argued before McSHERRY, C. J., and BOYD, PAGE, PEARCE, SCHMUCKER, and BURKE, JJ.

Arthur W. Machen, Jr., and Arthur W. Machen, for appellant trust company. Julian I. Alexander and Bernard Carter, for appellee.

PEARCE, J. This appeal is taken from an order of the circuit court for Howard county as a court of equity passed July 25, 1905, in the case of John S. Gittings, executor of Annie M. Winter, against the Safe Deposit & Trust Company of Baltimore and Arthur W. Machen, executors of Henry Winter, refusing the petition of the said executors of Henry Winter for leave to file a bill of review to review the decree of said court passed in said cause on the 1st day of July, 1905. This litigation originated in a bill filed in 1903 by John S. Gittings, executor of his mother, Annie M. Winter, against Henry Winter, her surviving husband, alleging that Mrs. Winter in the year 1869 delivered to her said husband certain securities, set out in said bill, belonging to her and of the value of about \$30,000, to be sold by him and the proceeds to be reinvested as her property, the income thereof to be enjoyed by him during his life, but the corpus to revert to her, if living at his death, or, in the event of her death before him, to go to her personal representatives. The prayer of the bill was that Mr. Winter should be required to return an inventory of the investments thus to be made, and to bring the same into court to be dealt with as should be decreed, and also for general relief. Mr. Winter answered, admitting that he had received all the securities mentioned in the bill except the eight shares of Northern Central Railroad stock, but he denied that he had ever agreed to hold or reinvest the proceeds in her name or for her benefit, and alleged that she had made him an absolute gift of all the securities delivered, and that he had accordingly sold the same for his own account and invested the proceeds in his own name and for his own benefit, together with other funds of his own, and that he could neither return an inventory of the investments of the proceeds of sale of said securities, or bring the same into court. After testimony was taken and hearing had, the plaintiff's bill was dismissed by the circuit court for Howard county. From that decree the plaintiff appealed to this court, which reversed said decree on April 9, 1905 (60 Atl. 634), and remanded the cause, "to the end that further proceedings should be had in conformity with the opinion of this court." That opinion sustained the plaintiff's claim, and declared "that, as the defendant did not invest the securities in his wife's name so that they could be easily identified, and has failed to say in his testimony in what they were actually invested, and at what price; it is but fair that he should be charged for the currency price in New York when the securities were sold; and this amount should be ascertained as \$29,000." Pending these proceedings in this court, Mr. Winter died, and his executors were made parties to the case before the passage of the decree in this court. After the case was remanded to the circuit court for Howard county, that court proceeded to decree, "in conformity with the opinion and

decree of the Court of Appeals, that the plaintiff recover against the Safe Deposit & Trust Company of Baltimore and Arthur W. Machen, executors of the last will of Henry Winter, deceased, to be paid out of the estate of said deceased, the sum of \$29,000, the value, as ascertained by the said court, of the securities of the plaintiff's testatrix converted by the said Henry Winter deceased in his lifetime, and adjudged to have been the property of Annie M. Winter, the plaintiff's testatrix." This decree was passed July 1, 1905, and on the 6th of July the executors of Henry Winter filed in the circuit court for Howard county a petition for leave to file a bill of review, upon the ground of material evidence newly discovered since the passage of said decree. This petition alleged that Arthur W. Machen, one of the said Winter's executors, in April, 1905, being then in San Francisco, received letters testamentary from the proper authority in California to enable him to administer upon certain personal property of Mr. Winter in that state, and there learned that a firm of Parrott & Co., now out of business, had been, in 1869 and 1870, the bankers of Mr. Winter, and in charge of the investment of the proceeds of the securities delivered to him by Mrs. Winter; that Mr. Machen obtained access to the books of said firm which had been carefully preserved, and ascertained therefrom that the proceeds of sale of said securities amounted in gold to the sum of \$21,027.50 and in currency to \$26,310, which sum, together with the other large sums belonging to Mr. Winter, he invested in 355 shares of the stock of the San Francisco Gas Company (now reorganized as the San Francisco Gas & Electric Company) at a cost of \$30,840 in gold, all of which shares constituted a part of his estate at his death, so that such number of said shares as represented the proceeds of sale of Mrs. Winter's securities could now be restored to her estate; and that these particulars were not known to Mr. Winter at the time of the filing of the bill of complaint of Mrs. Winter's executor, nor afterwards in the lifetime of Mr. Winter, nor discoverable by him by the use of any means in his power, in his then invalid and infirm condition of health. It also appeared from said petition that, while this stock was purchased at about \$90 per share, its market value at the time of the discovery of these facts had declined to \$57 or \$58 per share. Mrs. Winter's executor answered this petition, denying that the facts alleged therein were material to the issues raised and decided in the case, and alleging that, even if material, they were obtainable before the passage of the decree of July 1, 1905 by the exercise of reasonable diligence on the part of Mr. Winter, and the petition was refused by the order of July 25th, now appealed from.

In the argument in this court it was contended by Mrs. Winter's executor that the circuit court for Howard county had no

jurisdiction to grant leave to file a bill of review, to review a decree of that court passed in pursuance of a decree of this court reversing the former decree of the circuit court for Howard county, and such is the rule in the federal courts, as shown by the cases of *Southard v. Russell*, 16 How. 547, 14 L. Ed. 1052, and *Kingsbury v. Buchner*, 134 U. S. 671, 10 Sup. Ct. 638, 33 L. Ed. 1047. In the former case, it was said: "The better opinion is that a bill of review will not lie at all for errors of law alleged on the face of the decree after the judgment of the appellate court. These may be corrected by a direct application to that court, which would amend, as a matter of course, any error of the kind that might have occurred in entering the decree. Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for that purpose. This appears to be the practice of the Court of Chancery and House of Lords in England; and we think it founded in principles essential to the proper administration of the law and to a reasonable termination of litigation between parties to chancery suits. 1 *Vernon*, 416; [*Stafford v. Bryan*] 2 *Paige*, 45; [*Haskell v. Raoul*] 1 *McCord*, Eq. 22; [*McCall v. Graham*] 1 *Hen. & M.* 13; *Mitford's Pleading*, 88; *Cooper's Pl.* 92; *Story's Eq. Pl.* 408; [*Brewer v. Bowman*] 3 *J. J. Marsh.* 492 [20 *Am. Dec.* 158]." That case was decided in 1853, and was approved in *Kingsbury v. Buchner*, *supra*, decided in 1890.

Notwithstanding, however, the respect which is due and always rendered to the decisions of that tribunal, we cannot adopt that view after a careful examination of the authorities cited in *Southard v. Russell*. Some of these are cited in 2 *Daniell's Ch. Pr.* p. 1579, to sustain the opposite view. The author there says: "A bill of review, brought upon new matter, may, it seems, be permitted, even after the decree has been affirmed by the House of Lords"—and refers to *Barbon v. Searle*, 1 *Vernon*, 416; *Cooper's Eq. Pl.* 91, 92; *Story's Eq. Pl.* 418; and *Stafford v. Bryan*, 2 *Paige*, 45. It seems quite clear from the text alone that Mr. Daniell meant the bill should be filed in the court rendering the original decree, and this is confirmed on reference to the authorities he cites. Judge *Story*, in section 418 of *Equity Pleading*, says: "A bill of review upon new discovered matter has been permitted even after an affirmance of the decree in Parliament"—and he cites *Cooper's Eq. Pl.* 92. It cannot be doubted that he refers to the court of original jurisdiction, since he mentions a case where a demurrer was filed to the bill of review, and the demurrer was overruled and the defendant required to answer, which could not properly be done

in the appellate tribunal. In 3 *Enc. Pl. & Pr.* 574, it is said: "After a decision has been rendered by an appellate court and the cause remanded to the court below, the latter court has no authority to entertain a bill of review for error apparent; but, when the ground of review is newly discovered evidence, the jurisdiction is generally conceded." This work is regarded as high authority, and the text is supported by reference to cases from New Jersey, Arkansas, Kentucky, Virginia, West Virginia, Georgia, Illinois, North Carolina, and Maryland. In *Griffin's Heirs v. Griffin's Ex'rs*, 11 *N. C.* 403, the court said: "Where a lower court has passed a decree as directed by the appellate court, an application for leave to file a bill of review for newly discovered evidence is properly addressed to the lower court." In *Schaefer v. Wunderle*, 154 *Ill.* 577, 39 *N. E.* 623, it is said: "The application for leave to file a bill to review a decree affirmed by the Supreme Court must be made to the court of chancery where the decree was originally rendered, and not to the Supreme Court." In *Reynolds v. Reynolds, Ex'r*, 88 *Va.* 152, 13 *S. E.* 395, 598, the court held that where the Court of Errors and Appeals has rendered a decree after hearing on the merits, and the decree has been entered on the minutes in accordance with the views of the court, and the record has been regularly remitted to the court below, it has no further jurisdiction of the case, and therefore will not entertain an application for leave to file a bill of review. Such application is to be made to the court of chancery. In *King v. Ruckman*, 22 *N. J. Eq.* 551, the court said: "When the judgment of this court on appeal has been rendered after a hearing on the merits, and the record has been regularly remitted to the inferior court, this court has no further jurisdiction in the case." In *Putnam v. Clark*, 35 *N. J. Eq.* 145, Chancellor *Runyan* said: "*Stafford v. Bryan*, 2 *Paige*, 45, and *Southard v. Russell*, 16 *How.* 547, 14 *L. Ed.* 1052, have neither the authority of the books nor of adjudged cases for their support. The Court of Chancery has inherent power, without the consent of the appellate tribunal, to review, on the ground of newly discovered evidence, its decree, though it has been passed upon on appeal, and no principle or practice requires that it shall refrain from doing so until the consent or countenance of the superior court shall have been obtained. These propositions are established by the following citations: *Needler v. Kendall*, *cas. t. Finch*, 468; *Mitford's Pl.* 88; *Cooper's Pl.* 92; 2 *Daniell's Ch. Pr.* 1579; *Story's Eq. Pl.* §§ 408-418; 2 *Hoff. Ch. Pr.* 12; *Tommey v. White*, 1 *H. L. Cases*, 166; *Flower v. Lloyd*, *L. R.* 6 *Ch. Div.* 297; *Haskell v. Raoul*, 1 *McCord*, Eq. 22; *McCall v. Graham*, 1 *Hen. & M.* 13." The two English cases cited by Chancellor *Runyan* put those courts in accord with the current of American authority. In *Flower v. Lloyd*, plaintiff had obtained a

judgment which was reversed on appeal, and he applied to have the appeal reheard with fresh evidence, but it was held, in opinions by Sir George Jessel and Lord Justice James, that the Court of Appeals had no jurisdiction to rehear the appeal, and the same was held in *Tommey v. White*, 1 H. L. Cases, 166. In all these cases the strength of the position is that appellate courts, without original jurisdiction, exhaust their power in affirming the decree of the lower court, or in reversing it and remanding it for decree in conformity with its opinion, whether with or without further proceedings preliminary to decree. Moreover, our predecessors distinctly decided, in *Pinkney v. Jay*, 12 Gill & J. 69, that a bill of review for newly discovered evidence will lie in the lower court after affirmance on appeal, and we know of no principle which would discriminate in this regard between an affirmance and a reversal of the decree of the lower court. The reasons upon which that decision rest commend themselves to us as sound, and we must adhere to its authority, notwithstanding our deference to the views of the Supreme Court of the United States.

No question was made at the argument or in the briefs as to the right of appeal from an order refusing leave to file a bill of review, but, as it seems to be settled that the granting or refusing of such leave is left to the sound discretion of the court, the question suggests itself. In *Hollingsworth v. McDonald*, 2 Har. & J. 238, 3 Am. Dec. 545, and in *Burch v. Scott*, 1 Gill & J. 393, it was held that the application is addressed to the discretion of the court. There appears to be a diversity of view in the adjudged cases as to whether an appeal will lie from an order granting or refusing such leave. In *Ricker v. Powell*, 100 U. S. 107, 25 L. Ed. 527, and in *Nickle v. Stuart*, 111 U. S. 776, 4 Sup. Ct. 700, 28 L. Ed. 599, in both of which there was an appeal from an order refusing leave, the order was affirmed, the court declining to decide that the appeal would lie; but, in the former case, Mr. Chief Justice Waite said that, before a bill of review can be filed, the decree must first be obeyed and performed, and that, if it directs the payment of money, it ought to be paid before the bill of review was filed, though it might be afterwards ordered refunded, citing Judge Story's *Equity*, and Chancellor Kent in *Wiser v. Blachly*, 2 Johns. Ch. 488, as authority, and adding that it is only when the bill is for error of law alone that it becomes a matter of right and not of discretion. In this case, however, the execution of an approved appeal bond should be regarded as equivalent to performance of the decree. Without intending to decide that this appeal will lie, we are of opinion that the circuit court exercised a sound discretion in refusing the leave, since the facts set forth in the petition as newly discovered, though unknown to the executors and to their counsel, were facts

which were all known to Mr. Winter in his lifetime, and his failure to remember them cannot entitle his executors to insist that they were in fact newly discovered. To allow this case to be reviewed upon the facts alleged would be to make an entire new case, instead of rehearing the old case. Mr. Winter made his defense upon the issue of a gift of the securities in question, to him, and upon that issue the alleged newly discovered evidence is not material. His executors now ask to be allowed to set up a new defense, to enable them to discharge a money decree by the surrender of securities held in his own name, of a less nominal value, and which have since declined in market value about 30 per cent. In *Schaefer v. Wunderle*, 154 Ill. 577, 39 N. E. 623, the true rule is said to be that, unless there has been an abuse of the fair discretionary power with which the circuit court has been invested in the matter of such application, its decision should not be disturbed. This rule was adopted in *Michigan* in *Stockley v. Stockley*, 93 Mich. 307, 53 N. W. 523; and in *Craig v. Smith*, 100 U. S. 226, 25 L. Ed. 577, the Supreme Court said that Judge Story, in *Wood v. Mann*, 2 Sumn. 334, Fed. Cas. No. 17,953, stated the rule none too strongly, when he said: "This discretion was to be exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause."

Order affirmed, with costs to the appellee above and below.

SAFE DEPOSIT & TRUST CO. OF BALTIMORE et al. v. GITTINGS.

GITTINGS v. SAFE DEPOSIT & TRUST CO. OF BALTIMORE et al.

(Court of Appeals of Maryland. Jan. 9, 1906.)

1. APPEAL—REMAND OF CAUSE—DECREE IN LOWER COURT.

Where, on appeal from a decree dismissing a bill for an accounting, it was held that the plaintiff was entitled to recover \$29,000, and the cause was remanded to the lower court for further proceedings in conformity with the opinion of the Court of Appeals, a decree for the plaintiff for \$29,000 constituted further proceedings in conformity with the opinion of the Court of Appeals, though Code Pub. Gen. Laws, art. 5, § 36, authorizes the Court of Appeals to pass a final and effective decree without remanding the cause.

2. INTEREST—COMPUTATION.

Where a wife transferred property to her husband for sale and reinvestment of the proceeds, the income during his life to belong to him, and an action for an accounting for the principal was brought against his executors by her executor, and on appeal from a decree dismissing the bill it was held that her executor was entitled to recover \$29,000, the lower court, in rendering a decree in conformity with this opinion, properly allowed interest only from the date of the decree, and not from the death of the husband.

Appeals from Circuit Court, Howard County, in Equity; I. Thomas Jones, Judge.

Bill for accounting by John S. Gittings, executor of Annie M. Winter, against the Safe Deposit & Trust Company of Baltimore and another, executors of Henry Winter. From the decree, cross-appeals are taken. Affirmed.

Argued before McSHERRY, C. J., and BOYD, PAGE, PEARCE, SCHMUCKER, and BURKE, JJ.

Arthur W. Machen, Jr., and Arthur W. Machen, for Trust Company and another. Julian I. Alexander and Bernard Carter, for Gittings.

PEARCE, J. This record brings up cross-appeals from a decree of the circuit court for Howard county passed July 1, 1905, in a cause in which John S. Gittings, executor of Annie M. Winter, was plaintiff, and the Safe Deposit & Trust Company of Baltimore and Arthur W. Machen, executors of Henry Machen, were defendants. The facts leading up to the passage of that decree were sufficiently stated in an opinion rendered in another appeal embraced in this record (62 Atl. 1030), and need not be repeated here. The decree of July 1, 1905, was passed in obedience to a decree of this court (60 Atl. 634), reversing a former decree of the circuit court for Howard county, by which the plaintiff's bill had been dismissed, and remanding the cause "to the end that further proceedings may be had in conformity with the opinion of this court." The opinion states that "the object of the bill is in substance to declare the proceeds of certain securities which were derived from a sale of the wife's property, conceded to be her property at the time of her second marriage, but which was subsequently sold and reinvested by the husband in his own name and held by him at the time of his death, to be the property of the plaintiff's testatrix, and to belong to the plaintiff as the legal representative of the wife." It proceeds later on to state, after reviewing the evidence, that, "upon the facts thus disclosed and set out, we are of the opinion that the plaintiff is entitled to the relief sought by his bill," and adds, "as to the question of the measure of recovery in the case, we think the proof shows that the amount realized from the securities when sold in New York was about \$29,000. The memorandum in the handwriting of Mrs. Winter shows that they brought \$29,000. The defendant, according to the testimony of the plaintiff, admitted in the several conversations with him that they sold for about the amount here indicated. The defendant in his testimony states that they brought in currency between \$25,000 and \$26,000, but when reduced to gold he realized over \$21,000. We agree with the plaintiff's contention that the defendant did not invest these securities in his wife's name so that they could be easily identified, and has failed in his testimony to say in what they were invested, and of what price; it is but fair

that he should be charged for the currency price in New York when the securities were sold; and this amount should be ascertained at \$29,000." Upon the remanding of the cause with the decree and opinion above mentioned, the circuit court for Howard county proceeded to decree in its own language, "in conformity with the opinion and decree of the Court of Appeals, that the plaintiff recover against the said Safe Deposit & Trust Company of Baltimore and Arthur W. Machen, executors of the last will of Henry Winter, deceased, to be paid out of the goods, chattels, credits, and estate of the deceased, the sum of \$29,000, the value as ascertained by the said Court of Appeals of the securities of the plaintiff's testatrix, converted by the said Henry Winter, deceased, in his lifetime, and adjudged by the Court of Appeals to have been the property of Annie M. Winter, the plaintiff's testatrix, together with interest thereon from the date of this decree and the plaintiff's costs of suit in this court and in the Court of Appeals to be taxed by the clerks of said courts respectively"; and then further proceeded to decree in the usual form that the defendants bring into court the money so decreed to be due and recoverable by the plaintiffs, together with the costs of suit.

The question presented by the defendants' appeal, as stated in their brief, is "whether such a decree constitutes further proceedings in conformity with the opinion of this court," and the substance of the argument made in their behalf is that the cause would not have been remanded "for further proceedings if this court had meant merely that a decree for payment of \$29,000 should be passed. It may be conceded that under section 36, art. 5, Code Pub. Gen. Laws, this court could, without remanding, have passed a final and effective decree for the payment by defendants to the plaintiff, out of the estate of Mr. Winter, of the sum of \$29,000 and costs of suit; but the question presented to us is not in what form has the court decreed what is to be done, but what is the substance of that which it has been decreed shall be done? That section, while permitting the court either to pass a final decree where this can be done, or to remand for further proceedings in its discretion, requires the court in remanding to express the reasons therefor, and also determine and declare the opinion of the court on all points made before it or presented by the record, and it has determined and declared that the plaintiff is entitled not to an accounting, but to a money decree for \$29,000. Can it then be material whether the formal mandate for such payment is found in a decree of this court passed under one branch of the discretion reposed in it by section 36, art. 5, Code Pub. Gen. Laws, or in a decree of the circuit court passed upon the remand of the cause under another branch of the discretion reposed by the same section, with specific instructions

as to the decree? With sincere respect for the distinguished counsel of defendants whose zeal and ability is so often displayed in this court, we are unable to agree with their contention. The opinion of the court we think was a definite, present ascertainment of the amount for which the defendants were responsible to the plaintiffs, and that as the court, instead of passing its own final decree for payment of that amount, remanded the cause that the circuit court might pass such decree, the passage of such decree by that court was a further proceeding in strict conformity with the decree of this court, and we find no error in the decree of the circuit court in this respect. The plaintiff's appeal is from so much of said decree as adjudges him to be entitled to interest only from the date of the decree, and not from the date of Mr. Winter's death, which occurred January 21, 1905.

It is argued for the plaintiff that, inasmuch as this court found that, under the agreement between Mr. and Mrs. Winter, the proceeds of her securities were to be reinvested as her property and in her name, though he was to be allowed the income during his life, therefore both the principal sum derived from the sale of said securities and all the increment therefrom, except the life estate in the income, always continued to be her property, and that it necessarily follows from this that her executor was entitled to the interest from the cessation of his life estate in the income. This is based upon the theory that interest is a mere incident, or integral part of the debt. This is true where there is an express contract for payment of interest, and in such case interest is recoverable as such as a matter of right up to the time of breach, but not after. 16 Amer. & Eng. Enc. (2d Ed.) p. 999. In the leading case in this state (Newson's Adm'r v. Douglass, 7 Har. & J. 453, 16 Am. Dec. 317) it was held that on bonds, or contracts in writing to pay money on a day certain, or where the money claimed has been actually used, interest is recoverable as matter of right, but that in all other cases the question should be referred to the jury, who may allow it or not in the shape of damages, according to the equity and justice appearing between the parties. In Frank v. Morrison, 55 Md. 409, it was held that a subscription for stock in a corporation to be paid for in installments, at such times as should be called for, did not fall within that class of contracts upon which, under the rule in Newson's Adm'r v. Douglass, *supra*, interest was recoverable as of right. Equity allows interest in all cases where, under like circumstances, it might be recovered at law. Hammond v. Hammond, 2 Bland, 370. The allowance of interest therefore is discretionary with the court in equity cases where the court takes the place of the jury, unless in the given case interest is recoverable as of right. In the present case, Mr. Winter was using the proceeds of sale of his wife's se-

curities, with her consent during his life, not only to such use, but to the retention by him of the income therefrom. The time of his death could not be known, and until then his use and retention of the income was rightful. When this suit was brought, he defended upon the ground that the securities were an absolute gift to him. His executors must be taken to believe that this defense was made in good faith, and they could not be expected to pay such a sum as here is involved, until the matter was determined adversely to the estate by a court of last resort. To have done so would be a dereliction of duty on their part, the thought of which cannot be imputed to them. Until the decree of this court was made, the right of her executor to recover at all was not established, nor was the amount recoverable definitely ascertained, so that his executors, before the passage of that decree, could not know what sum to pay, if they had desired to pay, nor could her executor have known what sum he was entitled to demand. In Lewis v. Rountree, 79 N. C. 122, 28 Am. Rep. 309, the court said: "It is a rule which may be gathered from the cases that, whenever a debtor has notice, or ought to know that he owes a certain sum, and when he is to pay it, if he fails to pay it, he ought to pay interest. In the present case, although we may assume that the defendant had notice by the commencement of the action, that he was looked to for the payment of damages, yet, as a fact, not only was the amount technically unliquidated, but, owing to the unsettled state of the law, it was uncertain. He could not safely and without risk pay any sum, until it was ascertained by a judgment which he might expect it speedily would be." We think this sound reasoning and applicable to the case before us. Moreover, the opinion of this court ascertained the amount due as \$29,000, and said nothing about interest, and in passing its decree the circuit court certainly conformed literally to the opinion and decree of this court in allowing interest only from the date of its own decree. Had it allowed interest from the date of Mr. Winter's death, there can be small doubt that his executors would have appealed upon that ground as not in conformity with the opinion and decree of this court. We find no error in the decree in this respect.

Decree affirmed; costs to be paid by the executors of Henry Winter.

MARYLAND AGRICULTURAL COLLEGE v. ATKINSON, State Comptroller.

(Court of Appeals of Maryland. Jan. 11, 1906.)

1. STATUTES — CONSTRUCTION — LEGISLATIVE INTENT.

The object of statutory construction is to ascertain and effectuate the legislative intent, and that intent must be gathered from the words of the statute alone, if their meaning is plain and intelligible; but, if such meaning is

doubtful, it may become necessary to look to contemporaneous circumstances, the evil to be redressed, and the object of the law.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 291.]

2. STATES—APPROPRIATIONS—FORFEITURE.

Acts 1902, p. 912, c. 625, §§ 5, 6, appropriated \$5,000 for the maintenance of buildings at the agricultural experiment station, the printing of bulletins, etc., and authorized the Comptroller to issue his warrant upon the treasury of the state for the sums appropriated, which should be payable to and expended by the board of trustees of the Agricultural College, and directed the first payment to be made during the fiscal year ending September 1, 1902. Acts 1904, p. 951, c. 557, § 4, appropriated the sum of \$6,000 per annum for the formation and support of farmers' institutes, authorized the Comptroller to issue his warrant annually upon the treasury of the state for such sum of money, and declared such sum payable to the order of the Agricultural College on or after the 1st of October of each fiscal year, the first payment to be made during the year ending September 30, 1904. *Held*, that the appropriations payable during any year were not forfeited by failure to draw the same before the expiration of the fiscal year for which they were appropriated, and, if not drawn during that year, they could be drawn subsequently.

Appeal from Circuit Court, Anne Arundel County; Thomas Jones and Wm. H. Thomas, Judges.

Mandamus proceedings by the Maryland Agricultural College against Gordon T. Atkinson, Comptroller. From an order dismissing the petition, petitioner appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, PAGE, BOYD, PEARCE, SCHMUCKER, and BURKE, JJ.

Charles H. Stanley, for appellant. Atty. Gen. Bryan and Thomas A. Whelan, Jr., for appellee.

BURKE, J. This is an appeal from an order of the circuit court for Anne Arundel county dismissing a petition for a writ of mandamus to be directed against the appellee requiring him to draw his warrant upon the treasury of the state for the payment of the sums of money specified in the petition.

The Maryland Agricultural College was incorporated by Acts 1856, p. 114, c. 97. The purpose of its creation was the instruction of young men in those arts and sciences indispensable to successful agricultural pursuits. The people finding that industry greatly neglected, and believing it to be the duty and within the power of the Legislature to encourage and promote the farming interests of the state, by the act above mentioned constituted the plaintiff an agricultural college, whose duty it should be, in addition to the usual course of scholastic learning, to instruct young men attending the college, theoretically and practically, in those arts and sciences which, with good manners and morals, should enable them to become intelligent, successful, and scientific farmers, and elevate the state to the position its advantages in soil and climate and the moral and mental

capacities of its citizens entitle it to occupy. By the act of incorporation \$6,000 per annum was appropriated to the payment of salaries of professors, and for such other purposes as should be found reasonably necessary to promote the welfare and success of the college. The legislation of the state indicates that the people have manifested a deep and abiding interest in the welfare of the college, and have aided its work by generous appropriations, and by other measures calculated to increase its efficiency, and to enable it to accomplish more fully the useful and beneficent purpose of its foundation. Under Acts 1864, p. 109, c. 90, the state board of education became ex officio members of the board of trustees of the college. By Acts 1866, p. 103, c. 53, the state purchased a one-half undivided interest in the college property. By Acts 1868, p. 573, c. 320, the Governor, the Comptroller, the Treasurer, the President of the Senate, the Speaker of the House of Delegates, and the Attorney General of the state became ex officio members of the board of trustees, and represented the state's interest in said board, which consists of 18 members. This board is constituted as follows: The six state officials mentioned above, five members elected by the private stockholders of the college, one person from each congressional district of the state, appointed by the Governor by and with the advice and consent of the Senate, and the United States Secretary of Agriculture. The state holds a mortgage of \$15,000 on the stockholders' one-half interest. The college is controlled by the state, and is practically a state institution.

In pursuance of what appears to be a settled policy on the part of the state to contribute to the support of this institution, the General Assembly passed Acts 1902, p. 911, c. 625, and Acts 1904, p. 950, c. 557. The first of these acts set apart various sums for the use of the college, but in this case we are concerned only with sections 5 and 6 (page 912) of that act. These sections read as follows:

"Sec. 5. In order to provide for the maintenance, repairs and improvements of the buildings of the experimental station, to provide for the printing of bulletins, showing the results of the work, and also to provide for the investigation in the tobacco crop, meat production, and irrigation, an appropriation of five thousand dollars (\$5,000.00) is hereby provided for and made.

"Sec. 6. The Comptroller be and he is hereby authorized to issue his warrant upon the treasury of the state for the several sums hereby appropriated, the same to be paid out of any funds not otherwise appropriated; that said sums of money shall be payable to the Maryland Agricultural College, and shall be expended under the direction of the board of trustees of said institution, and the first payment shall be made during the fiscal year ending September 1, 1902."

By Acts 1904, p. 951, c. 557, § 4, it was provided as follows: "That the sum of six thousand dollars per annum be and the same is hereby appropriated for the formation and support of farmers' institutes in this state; and that the Comptroller be and he is hereby authorized to issue his warrant annually upon the treasury of the state for said sum of money out of any funds not otherwise appropriated; that the said sum shall be payable to the order of the Maryland Agricultural College on, or after the 1st of October of each fiscal year, and that the first yearly payment shall be made during the fiscal year ending September 30, 1904."

It is admitted that the work contemplated to be done by the college by Acts 1902, p. 912, c. 625, § 5, has been done by its officers, but the appropriation therein made has not been paid. It is also admitted that \$2,000 of the appropriation of \$6,000 made by Acts 1904, p. 950, c. 557, remains unpaid. It is further admitted that said sum of \$5,000 and said sum of \$2,000, appropriated by the acts aforesaid, are in the treasury of the state, and not appropriated for any other purpose. On July 17, 1905, demand was made by the Maryland Agricultural College upon Hon. Gordon T. Atkinson, Comptroller of the Treasury, for the payment of said several sums of money. Upon the advice of the Attorney General, the Comptroller declined to pay the money, whereupon the petition for mandamus was filed. The respondent, instead of answering the petition, filed a general demurrer, which the court sustained, and dismissed the petition. By agreement of parties, all errors in pleading have been waived. The Comptroller rested his refusal to pay these sums upon the ground that neither of these sums, or any part thereof, could be lawfully drawn from the state treasury after the expiration of the fiscal year for which they were appropriated, and, as it appeared that these sums were not paid during the fiscal year for which the appropriation was made, there was no warrant of law by which they could now be paid. This contention raises the question of the proper construction of the acts of assembly hereinbefore mentioned under which the appropriations were made. If the position of the respondent is not well founded, and if the allegations of the petition could be supported by evidence, it must be admitted that the writ of mandamus should issue as prayed. Upon a question of statutory construction the principles which should guide the court have been repeatedly declared by decisions in this state, and elsewhere. The underlying principle of all construction is that the intent of the Legislature should be sought in the words employed to express it, and when found it should be made to govern, not only in all proceedings which are had under the law, but in all judicial controversies which bring those proceedings under review. Beyond the words employed, if the meaning be plain and

intelligible, neither officer nor court is to go in search of legislative intent; but the Legislature must be understood to intend what is plainly expressed, and nothing then remains but to give the intent effect. If the words of the law seem to be of doubtful import, it may then, perhaps, become necessary to look beyond them in order to ascertain what was the legislative mind at the time the law was enacted; what the circumstances were under which the action was taken; what evil, if any, was meant to be redressed; what was the leading object of the law, and what the subordinate and relatively unimportant objects. *Cooley on Taxation* (2d Ed.) 264; *Gill v. Cacy*, 49 Md. 243; *Smith v. State*, 66 Md. 215, 7 Atl. 49; *Hooper v. Creager*, 84 Md. 195, 35 Atl. 967, 36 Atl. 359, 35 L. R. A. 202; *Commercial Building Ass'n v. Mackenzie*, 85 Md. 132, 36 Atl. 754.

There is no general law which declares that money not drawn in the fiscal year for which it has been appropriated cannot be drawn thereafter; but it is argued that it was the intention of the Legislature that these appropriations should fail, unless drawn during the time mentioned in the acts. It was undoubtedly within the power of the General Assembly to have provided that the money should not be paid after the expiration of the fiscal year. That it did not so declare in express or unquestionable terms must be conceded, but it is contended that this intention is manifest: First, because the appropriations were annual; and, secondly, because the first payments were directed to be made during the fiscal years named. It is to be noted that there is no duty imposed by either act upon the Maryland Agricultural College to make application for the payment of the appropriations within a specified time, but the authority is given to the Comptroller to draw his warrant upon the Treasurer for the payment of the several sums appropriated to the order of the college, and he is directed to draw his warrant for the first payment during the fiscal years named. This direction, given in express terms in the act, was not followed, and it is difficult to say how the failure to pay the money in the manner and at the times provided should operate to defeat the plain and evident intent of the Legislature respecting these appropriations. It is clear that the Legislature intended that the college should receive each year from the state treasury, out of any funds not otherwise appropriated, the several sums mentioned for the purposes specified in the act, and it indicated the time in which it became the duty of the financial officers of the state to see to the payment. To construe these directions as to the time of payment to be a limitation or a denial of the power to pay after the close of the fiscal year would be to frustrate the leading and evident purpose of the acts under consideration, as manifested by their language, and as gathered from the

foundation, the history, and the relation and settled policy of the state respecting this college.

We are therefore of opinion that the court committed an error in dismissing the petition. The order of the lower court will be reversed, and the case remanded for further proceedings in accordance with this opinion.

Order reversed, and cause remanded, with costs to the appellant.

MYLANDER v. BEIMSCHLA.

(Court of Appeals of Maryland. Jan. 11, 1906.)

1. APPEAL — REVIEW — INSTRUCTIONS — NECESSITY FOR OBJECTION AT TRIAL.

By the express provisions of Code Pub. Gen. Laws, art. 5, § 9, no instruction given is deemed defective on appeal, because of any assumption of fact, or because of the insufficiency of the evidence to sustain it, unless the record shows that an objection for such defect was taken at the trial.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1309, 1313.]

2. SAME—INSTRUCTIONS REFUSED.

The statute does not apply to a rejected instruction.

3. LANDLORD AND TENANT—REPAIRS—LANDLORD'S DUTY TO REPAIR.

A landlord is not obliged to make repairs during a tenancy, unless he has agreed to do so.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 536.]

4. SAME—NEGLIGENCE AS TO PREMISES AFFECTING ADJOINING PREMISES—ACTION—INSTRUCTION.

In an action for defendant's negligence in permitting a rain spout to remain in such a condition as to throw water against plaintiff's building, the evidence showed that at the time when the conditions complained of first existed defendant's building was rented, and that defendant had not covenanted to make repairs, but that subsequently the building was rented to another and that at that time the defects existed. One of plaintiff's instructions on the measure of damages declared that in case of a verdict for plaintiff she was entitled to recover "for the injuries according to the evidence in the case." *Held*, that the prayer was erroneous, as not limiting recovery to the damages sustained after the termination of the first tenancy.

5. SAME—TENANT'S FAILURE TO REPAIR—INJURIES TO ADJOINING PROPERTY—LIABILITY OF LANDLORD.

Where, after the creation of a tenancy, a rain spout on the building became defective, and cast water upon an adjoining building, the landlord was not liable for the damage, where he had not covenanted to make repairs.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 670.]

Appeal from Baltimore City Court; John J. Dobler, Judge.

Action by Catharine Beimschla against Mary Mylander. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

William S. Bransmer, for appellant. Edward L. Ward, for appellee.

BOYD, J. The appellee sued the appellant for "negligently permitting the waste and rain water from her property to be thrown against and upon the north wall of the plaintiff," thereby causing the injury set out in the declaration. The appellee relied especially upon the ground that the appellant had permitted the rain spout, which was supposed to carry the water from the roof of her house, to become and remain in such condition that it turned the water upon the house of the appellee, injuring the wall and foundation, and causing the cellar to be damp and unhealthy. The appellant's defense was based mainly upon the fact that her house had been occupied by tenants during the time the damage was alleged to have been sustained, and claimed that the property was in proper repair when she rented it. A verdict was rendered against her, and she appealed from the judgment entered thereon. Exceptions were taken to the granting of the first, second, and fourth prayers of the plaintiff and to the rejection of the first, second, and fifth of the defendant. The bill of exceptions containing the rulings on those prayers present the only questions for review by us, as the exception to the refusal to grant two prayers offered at the conclusion of the plaintiff's case was waived by the defendant proceeding with her testimony.

There was legally sufficient evidence tending to prove that the plaintiff's house was injured by reason of the condition of the rain spout of the defendant and the way the yard of the latter was graded, turning the water from the spout against the plaintiff's house. The "shoe" or elbow at the bottom of the spout was off. There was some testimony that this condition of the plaintiff's property had existed for four or five years, but the plaintiff did not ascertain the cause of the injury for some time after it was first noticed. The evidence shows that Charles E. Smith & Co. rented the house of the appellant on October 16, 1899, at \$20 per month. W. F. Mylander, a son of the appellant, testified that it was then rented by the year. In the fall of 1902 A. G. Fiedler bought the business of Charles E. Smith & Co., who were florists, and with the consent of the appellant took possession of the property and became her tenant. He testified distinctly that he was a monthly tenant and that the appellant accepted him as such. W. F. Mylander said "they consider Fiedler is a yearly tenant and not a monthly tenant;" but, however that may be, there is evidence tending to show that a new tenancy was created with Fiedler. Charles E. Smith & Co. had no written lease, and the term seems to have been an indefinite one, although Mr. Mylander said they rented by the year. But Fiedler and the appellant entered into an arrangement by which he was accepted as the tenant, and after that paid the rent monthly in advance, as Smith & Co. had done, and the exact terms of his tenancy

are not material under the view we take of the case.

The plaintiff's first prayer instructed the jury that if they found that at the time of renting to Fiedler the down spout and gutter was in such improper and neglected condition as to be a nuisance, or were in such condition that they would in the nature of things become so by their user, and the defendant received the rent from Fiedler, then the defendant was liable, if the jury believed the plaintiff's property was damaged by virtue of such condition and as a direct consequence thereof. The evidence is not very clear about the actual condition of the down spout and gutter when Fiedler became tenant, but there was some evidence reflecting on it, and at any rate there was no special exception to the prayer for the assumption of any fact or the want of evidence. Section 9, art. 5, Code Pub. Gen. Laws, provides that "no instruction actually given shall be deemed to be defective by reason of any assumption therein of any fact by the said court, * * * unless it appear from the record that an objection thereto for such defect was taken at the trial; nor shall any question arise in the Court of Appeals as to the insufficiency of evidence to support any instruction actually granted, unless it appear that such question was distinctly made to and decided by the court below." The defendant's second prayer did ask the court to instruct the jury that as the defective condition of the rain spout and yard in the defendant's premises is only shown to have existed during a period when said premises were in the possession of one Fiedler, a tenant of the defendant, and as the said defective condition is not shown to have existed when possession of said premises was delivered to Fiedler, the plaintiff has not made out her case, and the verdict must be for the defendant. There was some evidence tending to show that such condition did exist four or five years before the trial (April, 1905), which was before Fiedler became tenant, and the prayer was therefore properly rejected. The statute just quoted does not apply to rejected prayers, and hence the assumption of a fact would make it defective. The plaintiff's first prayer was properly granted. Her second was very much to the same effect as the first, being somewhat fuller in the statement of questions submitted, and it will not be necessary to now say anything further about that.

The plaintiff's fourth prayer was on the measure of damages, and was, under the circumstances of this case, calculated to mislead the jury. It was as follows: "That if the jury find a verdict for the plaintiff under the instructions of the court, then the plaintiff is entitled to recover such damages as will fairly compensate her for the injuries to her property according to the evidence in this case, provided the jury believe the plaintiff has sustained such injury by reason and

as direct consequence of the improper and neglected condition of the down spout and gutter in the defendant's yard." Under the evidence some of the injuries complained of were sustained before Fiedler became tenant, while Charles E. Smith & Co. were tenants. The rule of law in this state is that the landlord is not obliged to make repairs during the tenancy, unless he has agreed to do so, and "the common law has always thrown the burden of repairs upon the tenant, though it imposes no obligation on him to make them unless he covenants to do so." *Gluck's Case*, 81 Md. 323, 32 Atl. 515, 48 Am. St. Rep. 515. Of course, it may become necessary for the tenant to make the repairs for his own protection, as he is not relieved of paying the rent unless his landlord has agreed to make the repairs and the property has become untenable by reason of his failure or neglect to do so. Under those circumstances one of the tenant's remedies is to abandon the property and thereby relieve himself for liability for rent. In *Gluck's Case*, as there was no agreement on the part of the landlord to keep the property in repair and the tenant was consequently still liable for rent, the latter was bound to repair for his own protection, and hence we held he was entitled to recover as part of his damages (in the opening of a street by the city of Baltimore) the sum required to rebuild a front wall taken in the condemnation proceedings, and to restore an elevator which had to be removed. In this case neither the appellant nor the appellee nor Smith & Co. agreed to make repairs during the tenancy of either.

The uncontradicted evidence is that, when Charles E. Smith & Co. took the property, the appellant made some little repairs before turning it over to them, and her son testified "that in looking over the building he examined also the yard, and found everything in good shape, and there was a shoe on the rain spout in 1899, when witness was there looking [over] the property; that since that time witness' mother, the defendant, has never had possession of that property." Another witness, who was a carpenter, testified that he made improvements on the property for the appellant in 1895; that he had the yard graded; "that the yard was not paved until Mrs. Mylander got it, excepting that part against that wall had been; and that when Mrs. Mylander put the yard in condition she put a brand-new rain spout from top to bottom, with a shoe on the end of it, next to the plaintiff's house on her wall." There is no contradiction of the evidence of those witnesses as to the condition of the property at the times named by them. There is no evidence that the appellant had any notice of the down spout and gutter being out of repair while Charles E. Smith & Co. were occupying the property as tenants, and, of course, under the circumstances we

have related, the appellant would not be responsible for damages by reason of the defective condition of the spout and gutter during the tenancy of that firm. The only theory upon which she could be held liable at all was that when she rented the property to a new tenant it was her duty to see that it was then in such condition as would, or was likely to, injure third persons. The plaintiff's first and second prayers are based on that theory, and the defendant's fourth prayer, which was granted by the court, not only recognized that to be the law on that subject, but went further than the defendant had a right to ask, as it altogether ignored the change of tenants.

This fourth prayer did not limit the damages to injuries to the property from the time that Fiedler became tenant, but the jury might very well have understood that they could allow the plaintiff damages for all injury sustained by reason of the defective condition of the spout and gutter, regardless of the time when it occurred. The plaintiff's evidence tended to show that the injuries commenced before Fiedler became tenant, and, indeed, both of her prayers are based on the theory that the conditions complained of then existed. The plaintiff's witnesses who testified as to the amount of damages to the property did not, and probably could not, say what part of the damages were caused before, and what after, Fiedler became tenant, and yet the plaintiff could not recover for damages sustained while Charles E. Smith & Co. were tenants, under the circumstances detailed in this record. The plaintiff's second prayer concluded by submitting to the jury to find "that by virtue of said condition [referring to that of the down spout and gutter], and as a direct consequence thereof, the plaintiff's property was flooded with water prior to 1902, and since 1902, and damages according to the evidence, if they so find, then the plaintiff is entitled to recover in this action from the defendant." It is very questionable whether that may not have been misleading; but as we suppose the reference to the flooding prior to 1902 was intended to reflect upon the condition when Fiedler got possession, and the prayer only concludes that the plaintiff was entitled to recover, without stating for what, we did not hold that prayer bad. But, when we come to the fourth, that expression in the second undoubtedly might help to mislead the jury. So, taking all these matters into consideration, we are constrained to hold that there was error in granting the fourth prayer, because it did not limit the recovery to damages sustained after Fiedler became tenant, and is very misleading.

The defendant's first prayer was properly rejected, as there was legally sufficient evidence entitling the plaintiff to recover something. What we said about the second in another connection is sufficient, and we will not further refer to that. The fifth was

manifestly erroneous, as it entirely ignored the condition of the down spout, gutter, etc., at the time Fiedler rented the property.

It follows that the judgment must be reversed for the error in granting the fourth prayer.

Judgment reversed, and new trial awarded; the appellee to pay the costs.

PRICE v. MUTUAL RESERVE LIFE INS. CO.

(Court of Appeals of Maryland. Jan. 9, 1906.)

1. INSURANCE—LIFE POLICY—BREACH OF CONTRACT—RIGHTS OF BENEFICIARY.

A beneficiary under a life policy has no right of action for damages resulting from the making by the insurance company of illegal assessments on insured, its failure to set apart a reserve fund, or to place insured in a particular class, etc.; the beneficiary being entitled only to what can be realized under the policy.

2. SAME—ACTION—DEFENSES—FORFEITURE—CANCELLATION.

Where an insured, with knowledge of all the facts, refused to pay assessments then due to the insurance company, and directed the company to cancel the policy, in consequence whereof the same was abandoned, the beneficiary named in the policy had no claim thereunder.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Insurance, § 891.]

3. LIMITATION OF ACTIONS—PLEA—FRAUD—SUFFICIENCY.

Where, in an action on a life policy, defendant set up that with full knowledge of all the facts insured voluntarily elected to discontinue payment of assessments and dues and suffered the policy to lapse, and that for four years insured, with full knowledge of cancellation by the company in the premises, assented thereto, well knowing that the policy had lapsed and become void, a replication to a plea of limitation to the effect that by the fraudulent conduct of defendant plaintiff's right of action was not discovered until less than three years before suit, was insufficient for failing to allege that the fraud was not discovered and could not have been discovered with ordinary diligence within three years before suit.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 701.]

Appeal from Superior Court of Baltimore City.

Action by Eldridge C. Price against the Mutual Reserve Life Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, PAGE, SCHMUCKER, JONES, and BURKE, JJ.

J. Kemp Bartlett, for appellant. John Prentiss Poe, for appellee.

PAGE, J. The questions in this case arise upon demurrers to the several pleadings. The narr. contains 13 counts, the first 4 being the ordinary money counts, the other 9 are special counts. The fifth count alleges that the Mutual Reserve Fund Life Association, now known as the Mutual Reserve Life Insurance Company, in December, 1882, insured the life of Elias C. Price, deceased, father of the appellant, for the benefit of the plain

tiff, and that the said appellee failed to carry out its contract with the said Elias; that the said Elias has since died, and by his last will and testament the appellant is the sole legatee of his estate; that the said insurance company failed to comply with its said contract of insurance, in that it did the things and omitted to do the things mentioned in the narr., as particularly mentioned in the fifth to the thirteenth counts inclusive. To this narr. the appellee filed 19 pleas, wherein he pleaded by the first plea limitations, by the second and third the general issue, by several pleas, from the fourth to the eighteenth, inclusive, special traverses, of the several breaches set out in the narr., and by the nineteenth plea "that with full knowledge of all the actings and doings of the defendant on the policy of insurance, and without any concealment or misrepresentations on its part, the said Elias Price voluntarily elected to discontinue payment on the mortuary assessments and dues, levied and assessed by the defendant, and thereby voluntarily suffered the said policy to lapse, whereby all the rights and claims of the said Elias Price wholly ceased and determined according to the express terms of said policy; and that said Elias Price, with full knowledge of all the acts and doings of the said insurance company, for more than four years fully acquiesced in and assented to all said doings, and well knew that said policy had lapsed and become null and void, wherefore it is further alleged that the said policy was canceled and terminated during the lifetime of the said Elias, and was acquiesced in by the said life association. The appellant, by his replication to the defendant's first plea, set up to the plea of limitations as follows: That by the false and fraudulent conduct and deceit of the defendant, his right of action was not discovered until within a period of less than three years prior to the bringing of this suit. He joined issue upon all the other pleas, except upon the nineteenth plea, to which he demurred. To this replication the defendant rejoined, setting up to the plea of limitations, first, that the defendant was not guilty of fraudulent conduct and deceit in relation to the policy, and that the said Price, with full knowledge of all the doings and acts of the said insurance company in reference to the said policy, had voluntarily refused to pay the assessment and had directed the company to cancel the policy, and, further, that said Elias lived for more than four years thereafter, and that the said Elias, as well as the appellant, did know of said alleged causes of action, and that the appellant could have discovered by the use of ordinary diligence the alleged causes of action, four years next preceding the institution of this suit. The appellant demurred to the second, third, and fourth rejoinders, and joined issue as to the fifth, whereupon the court sustained the demurrer as to the narr., overruled the rejoinders to the plea of limitations, and on the

19th of July, 1905, on motion of appellees, rendered judgment in their favor, and from this the appellant has appealed.

Without further particularity in stating the voluminous pleadings in the case, it is apparent that the real questions involved are whether or not a legal cause of action is stated in the narr., and also whether the plea of limitations was properly pleaded, and, if so, whether the facts set out in the rejoinders thereto were legally effective to constitute a bar. Stripped of its verbiage, the ground of the plaintiff's right of recovery appears to be that the appellant, the son and sole legatee of Elias C. Price, bases his right to sue upon the facts that Elias in his lifetime entered into a contract with the appellee, and that the appellee failed to observe the obligations resting upon it by the terms of said contract in the several particulars specially set out in the narr., notwithstanding the fact that in the lifetime of Elias the contract was by agreement between the said Elias and the company canceled. The appellant claims this right to sue, not because, under and by virtue of the contract itself, he has any such right, but solely because he was named as the beneficiary therein. It was laid down in *Selgman v. Hoffacker*, 57 Md. 321, and it seems to be well established, that "in a matter of simple contract a promise to one for the benefit of another may be enforced by the person for whose benefit the promise was made; but, 'unless the promisee has some beneficial interest himself, he cannot maintain the suit.'" It does not appear whether the policy mentioned in the narr. was under seal or not. Assuming, however, that it was not under seal, the only averments showing the interest of the appellant are that he was named therein as the beneficiary, and also that he was the sole legatee of his father. If he claims as beneficiary, he can claim only as entitled to the fruits of the contract; but as beneficiary he cannot claim for wrongs inflicted by the company upon Elias Price, for the reason that he can claim by the terms of the contract only what can be realized therefrom. Here the injuries alleged are that the insurance company made illegal assessments upon Elias Price, failed to set apart a reserve fund, and did not place him in a particular class, etc., and unfairly and fraudulently took from him a large sum of money. These and the other matters set out in the declarations as breaches of the contract are matters for which the contract of insurance furnishes the appellant no ground of complaint as beneficiary. They are damages to Elias Price, which, when recovered, would inure to the estate of the deceased. An ordinary insurance upon the life of an individual is a contract by which the insurer, for a consideration, engages to pay a sum specified to the beneficiary according to the terms of the policy, if the person who is insured shall die within the period limited by the policy. 19 Enc. of L. & Eq. 42, tit.

"Life Insurance." The interest of the appellant being that of a beneficiary, he had no interest in the policy further than that he could claim as beneficiary, and therefore no right to sue for the breach of the contract with Elias Price. If the breaches set out in the narr. can be recovered at all (and of this we are not to be understood as expressing any opinion), the personal representatives of Elias Price are the proper parties to sue. But, apart from this, the appellee by his nineteenth plea alleges that about April, 1898, Elias Price, with full knowledge of the actions of the defendant in relation to the said policy, "voluntarily elected to discontinue payment on the mortuary assessments and dues lawfully levied and assessed and suffered the said policy to lapse," and directed the policy to be canceled, and the same was canceled, and for more than four years acquiesced in the cancellation of the policy and in the doings and acts of the defendant and well knew that said policy had lapsed, etc., according to the express terms and conditions of the policy. The demurrer admits these facts, which are set out in the pleadings; and, further, by the second rejoinder to the said replication, it is alleged, that Price, with full knowledge of all the facts, failed and refused to pay the assessments then due, and directed the defendant to cancel the policy, and that in consequence thereof the policy was abandoned, etc. These facts are conclusive against any claim under the policy. *Mutual L. I. Co. v. Sears*, 178 U. S. 345, 20 Sup. Ct. 912, 44 L. Ed. 1096; *Ryan v. Mutual Reserve Ins. Co. (C. C.)* 96 Fed. 796; *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 20 Sup. Ct. 906, 44 L. Ed. 1068.

The plea of limitations was set up by the appellee's first plea. It applied to all the counts in the narr. To this the replication was "that by the false and fraudulent conduct and deceit of the defendant his right of action was not discovered until within a period of less than three years prior to the bringing of this suit." This replication was insufficient, in that it is not alleged that the fraud was not discovered and could not have been discovered with ordinary diligence within a period of three years prior to the bringing of the suit. *Wear v. Skinner*, 46 Md. 269, 24 Am. Rep. 517. Apart from this, upon the facts alleged in the appellee's rejoinder, the appellant was not kept in ignorance of his alleged cause of action by the fraud of the defendant, and could have discovered it within three years by ordinary diligence. Inasmuch as the plea of limitations as set out by the appellee's plea went to the whole declaration, including the four first counts, the court committed no error in sustaining the demurrer to the declaration and the plea of limitations. The appellant not having asked leave to plead over, the appellee, on motion, was entitled to judgment on the pleadings.

Judgment affirmed.

JACOB TOME INSTITUTE v. SHIPLEY et al.

SHIPLEY et al. v. SAME.

(Court of Appeals of Maryland. Jan. 11, 1906.)

1. TRUSTS—CONSTRUCTION—ADVANCEMENTS.

Where a grantor by a deed of trust provided that at her death each of her children should receive a share of her estate, and in general terms made any advancements by herself or her husband to each child a charge on his share, and also made an advancement by one child to another a charge on the share of the latter, the specific advancement referred to had no priority over other advancements as a charge against the interest of the child to whom they were advanced.

2. SAME.

Where a grantor by a deed of trust provided that at her death, one-fourth of her estate should go to each of three children and the other one-fourth should go to the trustee for the benefit of the fourth child during his life and at his death to his children free of the trust, and the deed of trust made advancements to each child a charge on his share, advancements to the fourth child were a charge only on his equitable life estate, and not on the share of his children.

Appeal from Circuit Court, Baltimore County; N. Charles Burke, Judge.

Actions between the Jacob Tome Institute and Emory C. Shipley, trustee, and others, and between Harry V. Shipley and another and Emory C. Shipley and others. From an order overruling exceptions and ratifying an auditor's account, the Jacob Tome Institute and Harry V. Shipley and another appeal. Affirmed.

Argued before McSHERRY, C. J., and BOYD, SCHMUCKER, and JONES, JJ.

Joseph R. Gunther, for appellant Jacob Tome Institute. Z. Howard Isaac, for appellants Shipley and Duncan. Hyland P. Stewart, for appellees.

JONES, J. The questions in this case arise upon the construction to be given to certain provisions in a deed of trust executed on the 26th day of November, 1894, by Charlotte M. Shipley (widow), now deceased, to Emory C. Shipley, of all her estate and property of every nature. The deed provides for the payment of the grantor's debts; for the collection by the trustee of the "rents, profits, and income" from the granted property; and, after payment of expenses, for paying to the grantor a specified income and for a home for her with the trustee; then out of the remaining net income for paying to each of her four children during the lifetime of the grantor, and the children of any deceased child, the like sum of money, as a yearly income, as she provided for herself. Then, after directing what is to be done in case of an insufficiency of income from the estate, to pay to each child the specified annual sum, and what, in case the income should exceed the amount necessary, to pay said annual allowances, and conferring upon the trustee the power to sell, lease, mortgage, etc., the deed contains this provision: "Immediately from and after the death of the said Char-

lotte M. Shipley, then the said Emory C. Shipley to hold the property and estate hereby granted, as follows, that is to say: To have and to hold a three-fourths undivided interest in said estate unto and to the use of the said Harry V. Shipley, Emory C. Shipley, and Ella M. Shipley, their heirs, executors, administrators, and assigns, as tenants in common, free, clear, and discharged from the trust hereby created, and to have and to hold the remaining undivided one-fourth interest in said estate, in trust and confidence to collect the rents, income, and profits issuing from and arising out of said one-fourth interest, and after paying the expenses of said trust to pay over the net balance to the said Howard B. Shipley for and during the term of his natural life, and immediately from and after the death of the said Howard B. Shipley, then to the use of the children then living of the said Howard B. Shipley and the issue then living of any deceased child or children of the said Howard B. Shipley free, clear, and discharged from the trust hereby created; such children and issue to take per stirpes, and not per capita. And if no such children or issue then living of the said Howard B. Shipley then for the use of the said children of the said Charlotte M. Shipley, viz.: Harry V. Shipley, Emory C. Shipley, and Ella M. Shipley, then living and the issue then living of any deceased child or children of the said Charlotte M. Shipley, free, clear, and discharged from the trust hereby created. The said Harry V. Shipley, Emory C. Shipley, and Ella M. Shipley, and their issue, to take per stirpes, and not per capita: Provided, however, that at the time of the death of the said Charlotte M. Shipley there shall be an account taken of all sums of money that may have been heretofore advanced by Vincent T. Shipley, the late husband of the said Charlotte M. Shipley, to any of the said four children of the said Charlotte M. Shipley, respectively, and also of any sums that may have been advanced by the said Charlotte M. Shipley to them, or any of them, and also of any sums of money that the said trustee may be required to pay for, or on account of the said Charlotte M. Shipley by reason of any liability incurred by her through or on account of any of said four children, and all sums of money so found due by any one of the said children of the said Charlotte M. Shipley or to have been received by them, or any of them, shall be a charge upon the share of such child or children, respectively. And I hereby charge the share of the said Howard B. Shipley with the payment of the sum of \$1,700 in favor of the said Emory C. Shipley, money advanced by the said Emory C. Shipley to the said Howard B. Shipley. But provided, further, that no interest shall be allowed or charged on any of said sums so found to be due and hereby made a charge on the respective shares of the said children of Charlotte M. Shipley."

The deed now in controversy was before this court for construction in *Shipley et al. v. Jacob Tome Institute*, 99 Md. 520, 58 Atl. 200, as to questions which will appear by reference to that case. Since then the property which was the subject of the trust created by the deed in question has been sold, and the proceeds of sale are in court for distribution among the parties now entitled; some of the interests which passed under the deed to Mrs. Shipley's children having been acquired by other parties. An auditor's account was stated, making distribution of the proceeds of sale, and the questions in the case arise upon exceptions to this account of the auditor. The account was ratified by the court below, and the appeal here is from an order of the court overruling the exceptions and ratifying the account which was passed on the 1st of July, 1905. It appears that an order of ratification was passed on the 11th of July, 1905, also; and there being no specific reference in the order for appeal to this last-mentioned order or ratification some question was suggested as to the effect of a failure to appeal from such order. In the view we take of the case, this becomes an immaterial inquiry; though we may say that in the circumstances of the case we do not see much force in the suggestion. Any further recital of the facts will be unnecessary. The questions raised upon the exceptions are: (1) Whether the sums of money to be charged, under the provisions of the deed, against the share of Howard B. Shipley on account of money advanced to or paid for him as mentioned in the deed, are charges upon his equitable life estate only, or upon the entire one-fourth interest in the property which the deed conveys to the trustee to be held for the use of Howard B. Shipley during his life, and upon his death to his children then living, etc. (2) Whether the \$1,700, which, by the deed, is made a charge on the share of Howard B. Shipley in favor of Emory C. Shipley, has priority over the charges to be made against his share under the general provision for charges against the children of the grantor for moneys received by them as mentioned in the deed. The auditor's account in question was stated on the theory that the charges alluded to in the first inquiry were to be made only against the life estate of the said Howard B. Shipley; and that the charge alluded to in the second inquiry had no priority. We think the account was stated upon the theory supported by a proper construction of the clause of the deed which has been recited, and was therefore properly ratified. Deeds are to be construed according to the intention manifested in the instruments themselves when viewed in their necessary relation to the circumstances surrounding the parties. This court has said this was a familiar and well-established doctrine. *Ridgely v. Cross*, 83 Md. 161, 34 Atl. 469, and cases there cited. As to the claim of priority for the

charge of \$1,700 in favor of Emory C. Shipley no warrant can be found in the deed therefor. There appears no reason for a preference to be accorded to this charge, and the language and terms of the deed give no indication of an intention to give it priority. It is simply made a charge as other debts of Howard B. Shipley are made a charge against him and nothing more.

In regard to the first-mentioned inquiry, it is to be observed that in providing in the deed how the property is to be disposed of at her death the grantor gives to each of her children, except Howard B., a one undivided fourth "interest" in the same. The remaining undivided one-fourth "interest" is given to a trustee, who is to hold the legal title; and out of it is carved an equitable life estate for Howard B., and the whole of the estate in this one-fourth interest remaining, after carving out the life estate, is given to Howard's children; and then in certain contingencies it is to go over; thus making it manifest that all that Howard was ever to have was a life estate. Not only was it not provided that he should have anything more than this equitable life interest, but it was put beyond possibility that he should have anything more. Now when the grantor comes to provide for the charges the language is, "shall be a charge upon the share of such child or children," etc. She does not say the charge shall be upon each of the one undivided fourth interests. If each child had been allotted a one undivided fourth interest then the share of child and a one undivided fourth interest would have been equivalent terms; but each child did not take an undivided fourth interest. One of these interests was given to a trustee, and the child, as to this fourth, was given as a share thereof an equitable life estate in the same. All the balance of the estate or interest therein was given to others, and in such a way as to isolate, as it were, his life estate; for as has been seen no interest in the one fourth in question could come back to him, and it might pass out of his family.

The life estate in question, therefore, it would seem, was described by the term "share," as employed in the deed, and the most natural and obvious effect to be given to the term "share," as respects the share of Howard B. Shipley in the property disposed of by the deed, is to apply it to his equitable life estate. There does not appear in the deed anything to attach a different application to the term "share." On the contrary, there appears what would make this application the more reasonable one. We are to give effect to every provision in the deed, and carry out every intention indicated therein as far as possible. Now it seems evident that it was intended to make provision for the children of the son Howard and to make it independent of him; otherwise, why should they be brought into the deed or be taken into consideration in connection with it at

all? It is not reasonable to suppose that, in making this provision for Howard's children, it was in her mind so blended with the provision for Howard, that when she afterwards referred to the provision for Howard, or the interest she had given him, she was including in it the interest she had designated for the children. Again, it appears that the aggregate of the charges against Howard's share would more than consume the entire one-fourth interest, which was given in trust for the benefit of him and his children. The circumstances indicate that the grantor must have known, at least very nearly, if not accurately, the extent of these charges, and she must have known the extent of the property of which she was disposing. That being so, if in providing for the charges against the "shares" of her children she meant that the entire one-fourth interest put in trust for Howard and his children should be made liable to the charges against him, she would have known that she was going through an idle ceremony to provide any remainder in such interest to the children of Howard; that she was accentuating the folly of so doing by provisions for remainders to others in the contingency of Howard, the son, leaving no children living at his death. It is but reasonable to suppose she thought she was dealing with substance in providing these remainders. Lastly, if she designed that the charges in question should impose a liability for their payment upon the whole of the undivided fourth interest left in trust she could readily, and it would seem naturally would, have used forms of expression in making the provision under consideration that would have made the meaning clear to that effect. The fact that no such form of expression was adopted goes to strengthen the construction that gives to the expressions that were used their more natural and ordinary meaning.

For the reasons assigned, we are of opinion that the account of the auditor was stated in accordance with a proper construction of the deed in question, and the order ratifying the same will be affirmed.

Order affirmed, with costs to the appellees.

STATE v. CORRON et al.

(Supreme Court of New Hampshire. Sullivan. Dec. 5, 1905.)

1. CONSTITUTIONAL LAW—INTOXICATING LIQUORS—REGULATION.

The right to sell intoxicating liquor is neither a natural, essential, or inherent inalienable right, but one which the state may absolutely take away or regulate in its discretion.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 1, 4.]

2. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—LICENSES.

A license by the state to sell intoxicating liquors is not a contract or a vested right, but is a mere permission, which the state is entitled to revoke at any time.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 300.]

3. INTOXICATING LIQUORS—OFFENSES—ACTS OF SERVANTS.

A licensee to sell liquor could not be convicted for violating Laws 1903, p. 83, c. 95, regulating the sale of liquors, where the act constituting such violation was that of a servant, and was neither authorized nor ratified by the licensee.

4. SAME—STATUTES.

Laws 1903, p. 92, c. 95, § 28, authorizes the state board of license commissioners to prescribe regulations for the conduct of the liquor traffic under any license of the first class, and declares that whoever violates such regulations, or any provision of the act or of his license, shall, unless otherwise expressly provided, be punished, etc. Section 15 prohibits the sale of intoxicating liquors to an intoxicated person; and section 33 provides that whoever shall sell or keep liquor for sale contrary to the provisions of the act shall be punished by a fine, etc. *Held*, that the sale of intoxicating liquors by a licensee to an intoxicated person was an offense covered by section 33, and was not within section 28.

5. SAME—CONVICTION—ACTION ON BOND.

Where a licensee for the sale of liquor executed a bond conditioned that he would comply with all the provisions of Laws 1903, p. 81, c. 95, regulating the sale of intoxicating liquors, his conviction for violating some provision of such act was not a condition precedent to the right of the state to maintain an action for breach of the bond.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 91.]

6. JUDGMENT—RES JUDICATA—ACQUITTAL OF CRIMINAL CHARGE.

Under Laws 1903, p. 81, c. 95, regulating the sale of intoxicating liquors, and Laws 1905, p. 532, c. 117, § 10, providing that all money collected under bonds required by the license law shall be paid to the treasurer of the state board of license commissioners, to be accounted for in the same manner as money paid for license fees, an action on a liquor dealer's bond was a civil remedy for the benefit of the state; and hence an acquittal of such liquor dealer in a criminal proceeding for the act alleged to constitute a breach of the bond was not res judicata of his liability thereon.

7. DAMAGES—LIQUIDATED DAMAGES—PENALTY.

Where a liquor dealer's bond was conditioned that he would constantly adhere to the terms of his license and the provisions of Laws 1903, p. 81, c. 95, under which it was granted, the amount of the bond would be regarded as liquidated damages, and not as a penalty.

8. INTOXICATING LIQUORS—BONDS—LIABILITY OF SURETIES.

Where sureties on a liquor dealer's bond covenanted with the state that, if the state recovered a judgment against the dealer for a breach of the bond, they would pay the state's damages if the dealer did not, they were liable for any judgment enforceable against such liquor dealer.

9. JUDGMENT—CONCLUSIVE—DECISION OF STATE BOARD—EFFECT.

Laws 1903, p. 88, c. 95, § 14, provides that, at any time after a liquor license has been issued, the same may be revoked and canceled by the board of commissioners created by the act for a violation of its provisions, etc. *Held*, that a finding of the board that a licensee had violated the provisions of the act, and that his license should be canceled, was conclusive both on him and the sureties on his liquor bond of such fact in an action by the state on the bond. Chase, J., dissenting.

Exceptions from Superior Court.

Action by the state against Albert Corron and another. An order was entered denying

defendants' motion for a nonsuit, and they bring exceptions. Overruled.

Debt, on a bond. In August, 1903, the defendant Corron applied to the state board of license commissioners for a license of the first class, to be exercised in Newport. The license was granted upon the filing of the bond in suit, executed by Corron as principal, and the United States Fidelity & Guaranty Company as surety. During the term of the license complaint was made to the license commissioners that Corron had violated the law by selling liquor to an intoxicated person. Upon notice to Corron and hearing, the commissioners found him guilty of the offense charged, revoked and canceled his license, and made complaint to the county solicitor, who thereupon brought this suit. There was no evidence of a breach of the condition of the bond, other than the proceedings before the license commissioners. The defendants excepted to the admission of evidence of the action of the commissioners, to the exclusion of evidence other than the commissioners' finding upon the question of Corron's violation of law, and to the denial of their motion for a nonsuit. At the time of the trial an indictment was pending against Corron upon the charge of which the commissioners found him guilty, on which he has since been tried and acquitted. By agreement of counsel, the question of the competency of such judgment of acquittal upon the issue tried was argued.

Frank H. Brown and Edwin G. Eastman, Atty. Gen., for the State. George R. Brown, for Corron. Streeter & Hollis, for United States Fidelity & Guaranty Co. Frink, Marvin & Batchelder, for Fidelity & Deposit Co. of Maryland.

YOUNG, J. The right to sell intoxicating liquor is neither a "natural, essential, and inherent" inalienable right, nor a constitutional one. The state may absolutely forbid or may license such sale. The license, when granted, is not a contract or vested right, but a mere permission which may be revoked at any time. *State v. Holmes*, 38 N. H. 225. The manner in which such permission may be recalled, and the consequences attending thereon, are mere limitations upon the privilege. The statute confers a privilege which the citizen is at liberty to accept by becoming a licensee, or not, as he pleases. Having accepted the privilege, he cannot object to any conditions which have been attached thereto by a grantor with power to entirely withhold the privilege. *Dow v. Electric Co.*, 68 N. H. 59, 60, 31 Atl. 22; *Electric Co. v. Dow*, 166 U. S. 489, 490, 17 Sup. Ct. 645, 41 L. Ed. 1088. The only question open, therefore, is: What conditions and limitations did the Legislature intend should attach to the permission given? If the fair inference from the language of the act is that the Legislature intended that the finding of certain facts by the commissioners, in a pro-

ceeding to cancel and revoke the license in the manner stated in the case, should conclusively establish the same facts when in issue on the bond, and that a judgment of acquittal in a criminal proceeding should not have that effect, no further question remains to be considered. The question, therefore, is merely what was meant by the language of the act, read in the light of the surrounding circumstances and existing law. *State v. Gerry*, 68 N. H. 495, 502, 38 Atl. 272. 38 L. R. A. 228; *Kendall v. Green*, 67 N. H. 557, 42 Atl. 178.

The record does not contain the condition of the bond. It is therefore assumed that the bond complied with the statute; that it was a joint bond, in the language of the act "conditioned upon constant adherence to the terms of said license and the provisions of this act." Laws 1903, p. 86, c. 95, § 8, cl. 9. The only question presented at the trial was as to the competency and conclusive force in this suit of the action of the commissioners in revoking and canceling Corron's license. The competency of the fact of his acquittal upon an indictment charging the violation of law of which the commissioners found him guilty has also been argued by agreement of counsel. It is convenient to first consider the connection, if any, between the criminal proceedings authorized by the act and cases like the present. The defendants contend (1) that this suit cannot be maintained because Corron has not been convicted of the charge alleged as a breach of the bond; and (2) that his acquittal upon an indictment therefor is an answer to this suit.

Upon the first contention, the language of the section of the act referred to above seems conclusive. The bond is "recoverable in an action of debt to be brought by county solicitors upon complaint of said board" of license commissioners. It is manifest that the commissioners may make complaint, in the absence of prior action by prosecuting officers of the state. Upon such complaint, it is the duty of county solicitors to bring the suit. If it was the intention that the suit should be brought only after a forfeiture of the bond upon conviction, or not until after an adjudication in a criminal proceeding of facts constituting a breach of the bond, there would be no occasion for a complaint by any person to inform the solicitor or set him in motion. The criminal proceedings in his charge would give him full information. Section 10, c. 117, p. 532, Laws 1905, prescribes the manner of bringing actions for the enforcement of bonds given by licensees and for the recovery of sums due the state on account of the forfeiture of such bonds. As a declaratory statute, these provisions are evidence of the legislative understanding that under the act of 1903 suits were maintainable upon such bonds without the prior conviction of the licensee. The liquor tax law of New York (Laws 1897, pp. 219, 221, c. 312, §§ 17, 18), which is claimed

to have been the model upon which the New Hampshire statute was drafted, permits the maintenance of a suit without prior conviction of the licensee. *Lyman v. Kurtz*, 168 N. Y. 274, 276, 59 N. E. 903. The New York statute contains an express provision to that effect, doubtless considered unnecessary in the New Hampshire statute because of the omission of the condition for the payment of fines and costs, contained in the New York bond. By section 14 of the act, a license after being issued may be revoked and canceled by the commissioners "if any provision of this act is violated at the place designated in said license by the holder of the same, or by his agents, servants, or any person whomsoever in charge of said premises." One of the terms of the license, either expressed therein or understood from the language of the act, was, therefore, that the provisions of the act should not be violated at the place designated in the license, by the holder himself or by any of the persons named above. Such violation by any of these persons would constitute a breach of the bond conditioned upon constant adherence to the terms of the license. The licensee could not be convicted of crime because of a violation of the act by his servant not authorized or ratified by him. *State v. Wiggin*, 20 N. H. 449; *State v. Bonney*, 39 N. H. 206; *Lord Melville's Trial*, 29 How. St. Tr. 746; 1 Wig. Ev. 12. Liability on the bond may exist without criminal liability on the part of the licensee; and to hold that a licensee could not be held on his bond, unless previously convicted upon indictment or information, would be to defeat the plain intent of the act. The defendants' argument is founded upon section 28 of the act, which is: "The state board of license commissioners are hereby authorized and empowered to prescribe regulations for the conduct of the traffic in liquor under any license of the first class, as they may see fit, and whoever violates any such regulation, or any provision of this act or of his license, whatever its class, shall, unless otherwise expressly provided, be punished by a fine of one hundred dollars, the forfeiture of his license and the bond thereon, and by imprisonment for not more than sixty days. Such licensee shall be disqualified to hold a license for three years after his conviction, and if he is the owner of the licensed premises no license shall be issued to be exercised on the premises described in the license during the residue of the term thereof." The charge against Corron before the commissioners, upon the indictment, and in this case was the sale of liquor to an intoxicated person, forbidden by section 15 of the act. Such sale was a violation of the provisions of the act, punishable under section 28 "unless otherwise expressly provided." Although section 28 is a general provision for punishment for violation, both of the regulations of the commissioners and the provisions of the act, the

act contains several express punitive provisions, one of which (section 33), covers the present case—the sale of liquor contrary to the provisions of the act—in the following terms: “Whoever, in a city or town wherein the provisions of this act are in force, shall sell or keep for sale liquor contrary to the provisions of this act, shall be punished by a fine of two hundred dollars and by imprisonment for not less than one month nor more than two years.” While the provisions of section 28 may seem to be more appropriate for violations of the act by a licensee, the section cannot be extended to cover cases where other provision has been made. So far as the present case is concerned, there is no occasion to give any effect to the language of section 28, because it has no application to the matter in hand.

The defendants' second contention is that the judgment of acquittal upon an indictment against Corron charging the offense alleged as a breach of the bond is an answer to this suit. If the other defendants are privy with Corron, they could take the same advantage of this judgment that Corron could. If the state is bound as against them by the judgment, it would seem to follow that they would be bound by any judgment the state may have obtained against Corron—a proposition which the defendants deny, but which it is not necessary to consider at this point. “As a general rule, a verdict and judgment in a criminal case * * * cannot be given in evidence in a civil action, to establish the facts upon which it was rendered. * * * The same principles render a judgment in a civil action inadmissible evidence in a criminal prosecution.” 1 Gr. Ev. § 537. The rule is stated by Greenleaf to be based on three grounds: (1) The same parties are not admissible as witnesses in both cases. This rule has been changed to a considerable extent. The parties are compellable now to testify in a civil case; the respondent may testify in a criminal case, and the defendant can be compelled to testify in a civil case. To make the decision of a court in such a case evidence in a criminal proceeding would be to compel the defendant in the criminal case to be a witness against himself. (2) Lack of mutuality of the parties. This rule does not apply where the state is plaintiff in both proceedings. (3) The proof required is generally different in the two cases. To this there is an exception in some jurisdictions, that in actions strictly penal the rule is the same as in criminal cases. If in such jurisdictions the rule that the defendant cannot be compelled to be a witness against himself is enforced, there would be no logical objection, where the parties are the same, to the reciprocal application of the doctrine of res adjudicata or estoppel by verdict between civil and criminal cases; for the rule applies in criminal as well as in civil cases. *Commonwealth v. Ellis*, 160 Mass. 165, 35 N. E. 773; *Commonwealth v. Feldman*, 131 Mass. 588;

Commonwealth v. Evans, 101 Mass. 25; *Commonwealth v. Austin*, 97 Mass. 595; *Queen v. Haughton*, 1 E. & B. 501. The cases cited were all criminal proceedings, both those in which the adjudication was made, and those in which it was offered as evidence. Where penal proceedings, though civil in form, are in procedure treated as criminal actions, there would seem to be no difficulty in the application of the principles of res adjudicata; but where the form of the proceeding and not its nature controls (*State v. McConnell*, 70 N. H. 158, 46 Atl. 458), there appears to be insurmountable difficulties in the application of estoppel by verdict between actions civil and criminal. But, however that may be, it is only where the object of both proceedings is punishment that any well-considered authorities are to be found holding that a judgment in one case is an estoppel in the other. *Coffey v. United States*, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684. If the purpose of the civil suit is compensation and not punishment, the principle advanced in *Coffey v. United States* does not apply. *Stone v. United States*, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127; *United States v. Schneider* (C. C.) 35 Fed. 107; *United States v. Jædicke* (D. C.) 73 Fed. 100; *Britton v. State*, 77 Ala. 202. If the purpose of the civil action granted the state was the punishment of offenders, it is a penal statute; but if the purpose was the recovery by the state of damages caused it by the licensee's wrongdoing, it is a remedial statute. *Adams v. Railroad*, 67 Vt. 76, 30 Atl. 687, 48 Am. St. Rep. 800; *Reed v. Northfield*, 13 Pick. 94, 101, 23 Am. Dec. 662; *Grace v. McElroy*, 1 Allen, 563; *Cole v. Groves*, 134 Mass. 471; *Gardner v. Railroad*, 17 R. I. 790, 24 Atl. 831; *Nebraska Nat. Bank v. Walsh*, 68 Ark. 433, 59 S. W. 952, 82 Am. St. Rep. 301; *Huntington v. Attrill*, 146 U. S. 657, 667, 13 Sup. Ct. 224, 36 L. Ed. 1123; *Brady v. Daly*, 175 U. S. 148, 155, 20 Sup. Ct. 62, 44 L. Ed. 109.

The material inquiry, therefore, is: What was the legislative purpose in authorizing the civil action granted the state? Did the Legislature intend thereby to provide for the infliction of punishment upon the licensee, who violated the provisions of the statute and the terms of his license, or did they intend to secure to the state compensation for loss sustained in consequence of such wrongdoing? Usually punishment follows conviction of crime. No one can be convicted of crime, except upon proof beyond a reasonable doubt, or even be put upon trial, except for trifling offenses, without information or presentment by a grand jury (*State v. Gerry*, 68 N. H. 495, 498, 38 Atl. 272, 38 L. R. A. 228), i. e., in a criminal action. The form of the remedy under section 8, cl. 9, c. 95, p. 86, Laws 1903, establishes that the proceeding is civil, not criminal. *State v. McConnell*, 70 N. H. 158, 46 Atl. 458. Disputed questions of fact are determined by a balance of probabilities. *Hitchcock v. Munger*, 15 N. H. 97. Gen-

erally, the purpose of an action of this kind "is not the punishment of the defendant in the sense legitimately applicable to the term, but such action is brought to recover the penalty as a fixed sum, by way of indemnity to the public for the injury suffered by reason of the violation of the statute. The effect of the recovery is merely to charge the defendant with pecuniary liability, while a criminal prosecution is had for the purpose of punishment of the accused." *People v. Briggs*, 114 N. Y. 56, 65, 20 N. E. 820. For nearly 50 years the policy of the state, as evidenced by its legislation, was the suppression of intemperance by the absolute prohibition of the sale of intoxicating liquor for use as a beverage. Such was the avowed purpose of the act of 1855, which was the original stock upon which all subsequent legislation was engrafted. Laws 1855, p. 1527, c. 1658; Laws 1858, p. 1984, c. 2080; Gen. St. 1867, c. 99; Gen. Laws 1878, c. 109; Pub. St. 1901, c. 112; Laws 1895, p. 446, c. 87; Laws 1890, p. 308, c. 71. There is no foundation for the conclusion that the Legislature intended by the legislation of 1903 to change the policy of the state as to the suppression of intemperance; for there is no evidence from which it can be found that intemperance had become to be considered less of a menace to the public welfare than it was thought to be in 1855, or that it had been discovered that the evils resulting therefrom to the state are now less serious. The law of 1903 appears to constitute a change of method, not of principle. For nearly half a century the state sought to prevent the intemperate use of intoxicating liquor as a beverage by stopping by law the supply of liquor by sale for that purpose. The theory of the law was perfect. If liquors could not be obtained by purchase for such use, the amount which could otherwise be secured would be inconsiderable, and the use to any extent of such liquor so as to produce intemperance with its attendant evils would cease. But the sentiment of the state was not entirely uniform in support of the prohibitory principle. It was claimed that in some sections of the state the law was not and could not be enforced, and that the practical result of the law was in many places not prohibition, but unrestricted sale—the worst form of the evil. Advocates of a change were not wanting, who claimed that regulation of the traffic which could not be successfully stopped would better subserve the general governmental purpose of the suppression of intemperance. This sentiment found effect in the license law of 1903, with its provisions that the change should be in force only where adopted by vote of the local community (section 31).

One great argument against the unrestricted sale of liquor, or its sale at all, is that its use directly causes pauperism and crime, thereby increasing the necessary expenditure of the state for the maintenance

of police, almshouses, and jails. Advocates of the prohibitory principle claim that it is impossible to so regulate the sale as to prevent additional expense to the taxpayers as the inevitable result of any sale. If the Legislature were influenced at all by this argument, it would naturally be expected that some measures would be found in the act to save the taxpayers harmless from such additional burden. We should expect to find the sale of liquor permitted under such restrictions only as would be likely to diminish the probability of the legal sale resulting in intemperance. Many such are found in the act. See sections 14, 15, 16, 17, 19. One most obviously for this purpose, which forbids the sale to a person in a state of intoxication, is the foundation of this controversy. The claim of increased expense to the taxpayers is also apparently sought to be answered by the division of the sums received from license fees between counties and towns, the municipal agencies upon which the expense of supporting paupers and criminals and providing police administration is mainly thrown. It is clear that one part of the legislative purpose in these provisions was to compensate the state for any increased expenditure which might become necessary because of the restricted sale permitted by the act. If there was a possibility that the sale as permitted might cause expense to the state, there was great probability that sales in violation of the restrictions imposed would do so. Nothing would be more apt to promote intemperance, with its attendant evils and expense to the state, than the sale of intoxicating liquor to any person already in a state of intoxication from its use, or to an habitual drunkard, or in "case of riot or great public excitement." In view of the general provisions of the act above referred to, it would be reasonable to expect to find therein some provision by which the expense so occasioned should be met, not by the taxpayers, but by the person responsible therefor, who alone profited by such violation. Where there is probability that one who wishes permission to engage in a particular enterprise may, if permitted to proceed, do damage to another, a bond to respond in damages is usually required as a condition of granting the desired permission. If the Legislature, having determined what ought to be paid as a license fee to insure the state against loss from the sale of liquor in the manner permitted, desired to further protect the state against loss from sales beyond those for which permission was granted, the natural method of securing such protection would be to require a bond enforceable in a civil action. That such course was pursued is evidence that by the civil action, compensation, and not punishment, was intended. The bond required by the liquor tax law of New York, before referred to, includes as one of its conditions the payment of all fines and penalties imposed thereunder. The law of Massachusetts

(Rev. Laws, p. 846, c. 100, § 42) makes the payment of fines incurred by a violation of the law one of the conditions of the bond. The omission of these provisions from the New Hampshire statute must have been intentional if these statutes, as claimed, furnished a guide for the drafting of our statute. An intent to avoid inserting anything tending to establish a punitive purpose in the civil action is fairly inferable from such omission. The collection of fines and costs in criminal proceedings is usually enforced by imprisonment until the sentence of the court is performed. If the object of the law were to enforce payment of such fines and costs, we should expect to find the purpose declared in express language, as it is in the New York and Massachusetts statutes. The state sustains the same injury when liquor is sold in a licensed place so as specially to promote intemperance, whether it is so sold by the licensee's direction or in violation of his commands. The liability on the bond exists in either case, as has already been seen, and in the latter case can be enforced only by a civil suit. If the purpose of the Legislature was to secure compensation to the state, there is good reason why the licensee should be held by the bond to his civil responsibility for the acts of his servants while in his employment. There is no good reason why he should be punished for the authorized acts of others, even if they are his servants. It is not probable that the Legislature used the language of the act in disregard of the familiar distinction between the civil and criminal responsibility of a master for the acts of his servants, and intended to make the unauthorized acts of the servant the crime of the master. If they could legally do so, such intent cannot be found from language importing merely security for the master's civil liability for the acts of his servants.

It is plain that the opportunity to promote intemperance and to cause expense to the state by the increase of pauperism and crime by the sale of liquor would vary greatly in different parts of the state, and would be greatest in the most thickly settled communities. Accordingly, the license fees prescribed by the act are graded by the population of the towns and cities (section 7). The amount of the bond required is determined by the amount of the license fee, being at least double the amount of the fee in all cases (section 8, cl. 9). If the bond is punishment, then a licensee's violation of the act is an offense punishable by different penalties according to the population of the town or city in which the offense is committed. As to the first, sixth, and eighth classes, the commissioners fix the fee and, as a result, the amount of the bond. If the Legislature has power to make the violation of a general law punishable by a fine or penalty of different amount in different parts of the state, and of different amount in the same place according to the discretion of

another body—questions not now necessary to decide—such purpose cannot be inferred from language fairly importing merely an intent to secure the state against loss naturally and probably varying as the amount of the bond is made to vary. Section 10 of the original act provides that all fees collected and forfeitures incurred under the act shall be paid to the treasurer of the board and by him paid over; one-half to the city or town where the license was granted, and one-half to the county in which such town is located. It would seem to be clear from this language that the proceeds of suits for the collection of defaulted bonds were to be disposed of in the same way as the license fees, and were understood to subserve the same purpose. If doubt could exist, it is settled by section 10, c. 117, p. 532, Laws 1905, which distinctly provides that all sums of money collected under the bonds required by the license law "shall be paid to the treasurer of the state board of license commissioners, to be accounted for in the same manner as money paid for license fees." This section, as a declaratory statute, furnishes evidence of the legislative understanding that the funds arising from fees and from the bonds were intended to subserve the same purpose—the protection of the state from loss by the sale of liquor. The only evidence, which tends to controvert the conclusion that the bond was intended to secure compensation, and not to inflict punishment, is the tendency that liability under such a bond would have to secure obedience to the law, and the probability that this tendency may have had some weight in inducing the Legislature to give the state both the civil remedy of section 28 and the criminal remedy found in several sections. But the mere fact that a liability tends to secure obedience to law does not render such liability criminal or its enforcement a punishment. By section 27, a civil liability to third persons is established under certain circumstances for sales in violation of the act; but it could not be contended that the enforcement of such liability was the infliction of punishment. Contractors with the state and state officials are required to give bonds for the due performance of their contracts or the faithful performance of the duties of their offices. These bonds tend to secure the performance of the contracts and the official duties to which they relate; but it could not be contended that their purpose was punishment of the obligors for failure to perform their contractual or official duties. The usual purpose of such bonds is compensation or security.

No sufficient reason appears for a different conclusion as to the bond in suit. If the fact that by sections 21 and 28 provision is made for the forfeiture of the bond, as the result of criminal proceedings under those sections, has any tendency to show that as to

such violations of law the state's remedy should be criminal rather than civil, or if in such cases an election to pursue one method is a bar to a subsequent procedure by the other, these questions need not now be discussed, because, as has already been seen, they have no application to the present case. Upon all the competent evidence, it appears more probable that the purpose of the civil action now before the court was compensation and not punishment. It follows, therefore, that the prior conviction of the licensee is not essential to the maintenance of a suit on the bond and that his previous acquittal is not a defense. Corron's contract, as evidenced by his bond, was that he would constantly adhere to the terms of his license and the provisions of the act (section 8, cl. 9). One of these provisions forbade the sale to intoxicated persons. Hence, he agreed that he would not sell to such persons and, as the bond was intended to secure to the state the damages sustained by it if he did, that if he did so sell, he would pay the state the damages thereby occasioned to it. Whether the sum named in a bond is to be treated as a penalty or as liquidated damages is a question of intent, to be ascertained from the language of the instrument and the circumstances of the parties. The difficulty of ascertaining accurately the amount of damages arising to the obligee upon a breach of the condition of the bond by the obligor is evidence sufficient, in the absence of other evidence, to establish that the parties intended the sum named in the bond should be treated as liquidated damages. *Hurd v. Dunsmore*, 63 N. H. 171, 173; *Houghton v. Pattee*, 58 N. H. 326; *Davis v. Gillett*, 52 N. H. 126, 128, 129; *Philbrick v. Buxton*, 40 N. H. 384. That it would be practically impossible to ascertain the amount of damages sustained by the state through Corron's failure to comply with the condition of the bond, must have been apparent to the parties. The sum named therein must therefore be considered as liquidated damages, for there is no suggestion in the act that such sum is security for the payment of any lesser amount. Such is the construction of the similar bond required under the New York law (*Lyman v. Perlmutter*, 166 N. Y. 410, 413, 60 N. E. 21), although that statute requires as one of the conditions of the bond the payment of fines, penalties, and judgments arising under the law, which, as has been seen, is omitted from the New Hampshire statute.

The other defendants are sureties on Corron's bond. Their contract with the state is not that Corron should comply with the law, but that if the state recovers a judgment against him for a breach of his agreement to comply with its provisions, they will pay the state's damages if Corron does not. Hence, if the state is entitled to a judgment against Corron, it is entitled to

one against the other defendants. In short, the agreement of the defendants is collateral security given the state by Corron for the payment of any judgment which may be recovered by it against him, enforceable by the state upon Corron's failure to perform his agreement to pay. If, therefore, the state is entitled to recover of Corron, it is entitled to recover of them. The defendants must defend the issue of his compliance with the law through him, and therefore can make only such defense to the state's case as he can make. *Judge of Probate v. Sulloway*, 68 N. H. 511, 44 Atl. 720, 49 L. R. A. 347, 73 Am. St. Rep. 619; *Jones v. Chase*, 53 N. H. 234; *Towle v. Towle*, 46 N. H. 431; *Tracy v. Goodwin*, 5 Allen, 409; *Dennie v. Smith*, 129 Mass. 143. Whatever the rule may have been, it must now be considered as settled that the sureties on a bond to comply with a statute or an order of court are estopped in the same way and to the same extent as the principal obligor by any judgment or decree that estops him to deny that he has failed to comply with the condition of his bond. In so far as *Gookin v. Sanborn*, 3 N. H. 491, and *Judge of Probate v. Robins*, 5 N. H. 246, may be considered as laying down a different rule, they were overruled in fact, if not in terms, by *Towle v. Towle*, 46 N. H. 431, and *Judge of Probate v. Sulloway*, 68 N. H. 511, 44 Atl. 720, 49 L. R. A. 347, 73 Am. St. Rep. 619. It is a general rule that a party to a judicial proceeding in which there has been final judgment on the merits cannot be compelled by the parties to that action to again litigate any of the matters that were there in issue, if the tribunal had jurisdiction of the parties to and the subject-matter of the suit. *Towns v. Nims*, 5 N. H. 259, 20 Am. Dec. 578; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Towle v. Towle*, 46 N. H. 431; *Hearn v. Railroad*, 67 N. H. 320, 29 Atl. 970; *Meredith, etc., Ass'n v. Drill Co.*, 67 N. H. 450, 39 Atl. 330; *Gregg v. Company*, 69 N. H. 247, 46 Atl. 26; *Boston & Maine R. R. v. Sargent*, 70 N. H. 299, 47 Atl. 605; *MacDonald v. Railway*, 71 N. H. 448, 52 Atl. 982, 59 L. R. A. 448, 93 Am. St. Rep. 550; *Boston & Maine R. R. v. Brackett*, 71 N. H. 494, 53 Atl. 304; *Boston & Maine R. R. v. Sargent*, 72 N. H. 455, 57 Atl. 688; *Duchess of Kingston's Case*, 20 How. St. Tr. 355. The rule depends upon "the fundamental principle of the common law, that a matter once litigated and determined before a court of competent jurisdiction shall not again be controverted before any court." *MacDonald v. Railway*, 71 N. H. 448, 452, 32 Atl. 982, 984, 59 L. R. A. 448, 93 Am. St. Rep. 550. "The doctrine of the conclusiveness of a judgment rests upon the consideration that the parties have once had a full and fair trial of the matter sought to be drawn a second time in question. One of the elements essential to such a trial is that they have reasonable notice of the question to be tried, and an opportunity to obtain

and present all the evidence bearing upon it." *Metcalf v. Gilmore*, 63 N. H. 178, 188.

The controversy between Corron and the state was tried between the parties upon notice to Corron, and a finding was made against him. The cancellation of his license "being for cause and after due hearing, the proceedings authorized by the statute are necessarily of a judicial character; and as the mode of procedure is not specified in the act, the substantial principles of the common law, recognized and enforced in proceedings affecting private rights, are to be observed." *Gibbs v. Manchester*, 73 N. H. 265, 267, 61 Atl. 128. It has been repeatedly decided in this state that where an officer or a board is called upon to pass upon evidence and decide, their conclusion cannot be collaterally attacked, and that they are not liable to answer in a suit for their action. The reason given in the cases is that such action is judicial. *Sherburne v. Portsmouth*, 72 N. H. 539, 541, 58 Atl. 38; *Pittsfield v. Exeter*, 69 N. H. 336, 41 Atl. 82; *Plymouth v. County*, 68 N. H. 361, 44 Atl. 523; *Grand Trunk Ry. v. Berlin*, 68 N. H. 168, 36 Atl. 554; *Spaulding v. Groton*, 68 N. H. 77, 44 Atl. 88; *Bradley v. Laconia*, 66 N. H. 269, 20 Atl. 331; *Boody v. Watson*, 64 N. H. 162, 166, 198, 9 Atl. 794; *Horne v. Rochester*, 62 N. H. 347; *Edes v. Boardman*, 58 N. H. 580; *Waldrom v. Berry*, 51 N. H. 136; *Sanborn v. Fellows*, 22 N. H. 473, 488, 489. The fact that such officers or boards have also administrative power does not affect the validity of their judicial action. Of such a board the court in Indiana say: "Boards of commissioners, under the law, in the discharge of their duties have, at least, a dual character. In some respects they act judicially, and the law regards them as a court. * * * In other respects they act in an administrative capacity. * * * When they rightfully exercise their powers as a court, it is settled by the authorities that they are to be treated as such, and their judgments rendered, or orders made, cannot be collaterally impeached, and the principles of former adjudication are applicable thereto." *Commissioners v. Heaston*, 144 Ind. 583, 587, 41 N. E. 457, 458, 43 N. E. 651, 55 Am. St. Rep. 192. If the functions of the commissioners in passing upon the question litigated before them by the state and Corron were judicial, the same result must follow as would attend similar action by any judicial body. If it does not, their action is not judicial. That such action by the commissioners is judicial has recently been decided by this court. *Sargent v. Little*, 72 N. H. 555, 58 Atl. 44; *Parrent v. Little*, 72 N. H. 566, 58 Atl. 510. The rule of *res judicata*, or estoppel by verdict, must therefore apply to the litigation unless such rule is restricted in its application to proceedings according to the course of the common law. Such is not the fact. *Divoll v. Atwood*, 41 N. H. 443, 445, 446; *White v. Coatsworth*, 6

N. Y. 137. "The well-nigh universal rule is that the judgment of a court of competent jurisdiction, whether it be a court of record or not, upon a point litigated between the parties, is conclusive in all subsequent controversies directly involving the same question. * * * It makes no difference whether that adjudication was in a proceeding according to the course of the common law, or summary in its character. It is quite enough that the question in controversy was submitted to a judicial officer, to be determined in a judicial way; that the parties and their proofs were heard, and their rights settled by a judicial determination." *Marsteller v. Marsteller*, 132 Pa. 517, 19 Atl. 344, 19 Am. St. Rep. 604. "The rule of *res adjudicata* applies to all judicial determinations, whether made in actions, or in summary or special proceedings, or by judicial officers in matters properly submitted for their determination." *Culross v. Gibbons*, 130 N. Y. 447, 454, 29 N. E. 839, 841. The state had power to provide for the abrogation of Corron's license without notice or hearing. Such cancellation would have conclusively established in all future proceedings Corron's status as a nonlicensee. *State v. Holmes*, 38 N. H. 225. The fact that further provision was made indicates an intention that the cancellation of a license by the commissioners might be something more than a mere administrative or executive act. "Before any license is revoked or canceled, the holder shall be entitled to a hearing by said board and to five days' previous notice thereof in writing, except that licenses of the first class may be revoked at any time, by said board, with or without notice, in their discretion." Section 14.

The section itself recognizes two methods of exercising the power: One judicial, because of notice and hearing; the other administrative. The two methods must be construed in the light of existing law. They differ in that in the first the licensee is entitled to notice and hearing—to an opportunity to be heard and present evidence upon the question litigated. In the present case the action of the commissioners is not attacked in any way. Although they had power to dispose of Corron's right to a first-class license by an exercise of administrative power, there is no suggestion that they did so. He had notice, was heard, and litigated before a competent tribunal the matter in issue, and the same results must follow the judicial action in which he took part as ordinarily attend an adjudication of which the parties have notice and in the course of which they are heard. In short, the cancellation of Corron's license was a judicial act, and the commissioners had jurisdiction of the parties to and the subject-matter of the suit. *Parrent v. Little*, 72 N. H. 566, 58 Atl. 839; *Sargent v. Little*, 72 N. H. 555, 58 Atl. 44.

Any matter that was "in issue" in that proceeding is *res adjudicata*, so far as the

state and Corron are concerned, whether that was a proceeding in personam or in rem; for in proceedings in rem, not only the status of the person, or property in respect to which the inquiry is made becomes *res adjudicata*, but, also, so far as the actual parties to the litigation are concerned, all the matters that were in issue. *Morgan v. Dodge*, 44 N. H. 255, 258, 82 Am. Dec. 213; *Salem v. Railroad*, 98 Mass. 431, 448, 449, 96 Am. Dec. 650; *Brigham v. Fayerweather*, 140 Mass. 411, 413, 5 N. E. 265; *Vansleet, Col. At. § 17*. The matters which the plaintiff must allege in his declaration and the defendant deny in his plea are necessarily in issue. A broader definition of "matter in issue" sometimes obtains, but the one given in *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675, is most favorable to the defendants, and is sufficient for the present inquiry. Under it the test by which to determine whether Corron's failure to comply with the provisions of the act was a "matter in issue," upon the face of the pleadings in the proceedings before the commissioners, is to inquire whether the licensee's failure to comply with the provisions of the act is a matter that the state must allege in its complaint, and the licensee deny in his answer, in all proceedings of that kind. That it is, appears from the statute. Section 14 provides that "at any time after a license has been issued, * * * the same may be revoked and canceled by said board, * * * if any provision of this act is violated by the holder of the same. * * *". Consequently, a complaint against a licensee under this section and upon this ground must allege that he has failed to comply with the law in order to authorize the commissioners to act in the matter, in other words, to give them jurisdiction; and unless the licensee denies that allegation in his answer, there is no occasion for a hearing. Whether the licensee has failed to comply with the law, not whether he did the particular act which the state charges him with doing, for the purpose of proving that he has failed to comply with the law, is the matter in issue on the face of the pleadings in all proceedings of that kind. Since Corron's failure to comply with the provisions of the act was a matter in issue in the proceedings before the commissioners, and is also in controversy in this action, the court did not err when it admitted the record of that proceeding as conclusively establishing that Corron had failed to comply with the condition of his bond, unless it appears from the act itself that the Legislature intended to except matters that are adjudicated by the commissioners from the general rule. The ruling of the court, that Corron and his sureties were estopped to deny that he had failed to comply with the law by the judgment of the commissioners canceling his license, merely applied the rule as to the evidentiary effect of the matters that were adjudicated at the hearing before the commissioners, that would have

been applied to a judgment against him if he had been an administrator (*Judge of Probate v. Sulloway*, 68 N. H. 511, 44 Atl. 720, 49 L. R. A. 347, 43 Am. St. Rep. 619), the plaintiff in injunction proceedings (*Towle v. Towle*, 46 N. H. 431), a sheriff or constable, and they the sureties of his bond (*Dennie v. Smith*, 129 Mass. 143). If it can be reasonably contended that, because sections 21 and 28 provide that a conviction of the acts denounced in those sections shall work a forfeiture of the bond, while section 14 contains no such provision, the Legislature intended that the matters in issue before the commissioners should be again litigated in a suit on the bond, no such inference can be drawn as to violations of the act punishable criminally under section 33, which contains no such provision. The fact that the adjudication in the criminal suit could not be used in the civil suit on the bond would be a sufficient reason for the provision in sections 21 and 28; and that existing law makes the adjudication of the commissioners' evidence in the suit on the bond would seem to be a sufficient reason for the omission to refer to it in section 14.

There is no force in the defendants' claim that the ruling of the court deprived them of a jury trial. As the minimum amount for which a licensee's bond can be accepted is \$500, the defendants in all actions brought thereon have a right to a jury trial—"a proceeding in which the jury are the judges of the facts, and the court are the judges of the law." *State v. Saunders*, 66 N. H. 39, 76, 35 Atl. 588, 18 L. R. A. 646. Upon such trial, if desired by the defendants, and not waived by them, as in this case, the questions presented here of the admissibility and conclusive effect as evidence of the judgments offered would be, as now, questions of law for the court, and not of fact for the jury. The rulings admitting one and excluding the other, and the direction of a verdict because of the conclusive effect of the state's evidence (*State v. Harrington*, 69 N. H. 496, 45 Atl. 404), would present the same record that is now here. If under any plea properly pleaded in defense of the suit there was conflict in the evidence, the defendants would have had the right to invoke the judgment of the jury. If at the trial a question of fact that had not been adjudicated between the parties had been presented, upon which there was evidence, the defendants, if they wished, could have had the question determined by a jury. The defendants could have shown that the bond was not their bond, or that it had been paid. The sureties could have made any defense that Corron could, and could have made the defense, that the judgment against him offered in evidence was obtained by fraud. *Fall River v. Riley*, 140 Mass. 488, 5 N. E. 481. No such evidence was offered, and there is no claim that it could have been produced.

It is said that the Legislature could not

have intended that the commissioners' decision should be evidence in this suit, because thereby the defendants would be deprived of a jury trial in a matter relating to property—meaning that they are thereby deprived of the opportunity to contest before a jury the question of Corron's violation of law. If the bond had been conditioned in terms upon the failure of the commissioners to find Corron guilty of a violation of the law in the exercise of his license, there would have been no question to try by a jury. The use of language which, under existing law and the circumstances of this case, has in practical effect the same meaning cannot be explained away or altered by mere supposition. The right to a jury trial of matters previously adjudicated in a court without a jury did not exist when the Constitution was adopted, and cannot now be given except by a legislative act. To overturn a rule so well known and established, express language of the law-making power is required, unless the court is to usurp the province of the Legislature. Though a license is technically not property in the sense that it can be taken away by the state without compensation, yet under the statute it is a valuable right and possesses all other characteristics of property. It cannot be obtained except upon payment of the price, or fee, in cash. If the owner dies during the term, the unexpired portion is assets in his estate (section 18). It is assignable by the licensee, or his administrator, to any person capable of holding a license (section 12; Laws 1905, p. 449, c. 49, § 8). It can be taken from the licensee during the year, except for his breach of the conditions upon which it was issued, only by legislative action. Except for the latter possibility, the license is property. It is not probable that such action was thought by the Legislature to be so probable that, for that reason, they omitted to express their intention that the findings of the commissioners upon matters committed to and litigated before them should not be elsewhere conclusive, if such was the intention with which judicial duties were imposed upon them. Neither can any inference be properly drawn from the character or composition of the tribunal. It cannot be inferred that the Legislature doubted the competency of the executive to appoint as commissioners persons capable of performing the judicial as well as the other duties assigned to them, or that in so acting the persons appointed will violate legal rules, or that, if they do, the law does not afford a remedy.

It is also said that the lack of an appeal is evidence that the Legislature did not intend that the commissioners' decision upon matters litigated before and submitted to them should be conclusive. But the presence or absence of an appeal in matters constitutionally committed to the determination of a tribunal without a jury is not material

upon the character of their action as judicial or otherwise. *Manchester v. Fernald*, 71 N. H. 153, 158, 51 Atl. 657; *Boody v. Watson*, 64 N. H. 162, 168, 9 Atl. 794; *Doughty v. Little*, 61 N. H. 365, 368. "The inquiry as to the conclusiveness of a judgment in a prior suit between the same parties can only be whether the court rendering the judgment—whatever the nature of the question decided, or the value of the matter in dispute—had jurisdiction of the parties and the subject-matter, and whether the question, sought to be raised in the subsequent suit, was covered by the pleadings, and actually determined in the former suit. The existence or nonexistence of a right in either party, to have the judgment in the prior suit re-examined, upon appeal or writ of error, cannot in any case control this inquiry. * * * Looking at the reasons upon which the rule rests, its operation cannot be restricted to those cases which, after final judgment or decree, may be taken by appeal or writ of error to a court of appellate jurisdiction." *Johnson Co. v. Wharton*, 152 U. S. 252, 261, 14 Sup. Ct. 608, 38 L. Ed. 429; *Dolan v. Scott*, 25 Wash. 214, 65 Pac. 190. The general purpose of the act was to secure the state prompt and efficient remedies for action beyond or without its provisions. These include, in the case of licensees, the cancellation of licenses, the enforcement of the liability on the bond, and proceedings strictly criminal. To attempt by construction to diminish a remedy given by the ordinary meaning of the language used is to do violence to the purpose of the act to permit the sale of liquor only under such restrictions as would prevent as much as possible the increase of intemperance.

There was no error in the ruling, in substance, that the evidence required a verdict for the state.

Exceptions overruled.

PARSONS, C. J., and WALKER and BINGHAM, JJ., concur.

CHASE, J. (dissenting). I agree with the court that the acquittal of Corron in the criminal action is not an answer to this action; but I dissent from that part of the opinion, which holds that the decision of the license commissioners revoking Corron's license is competent evidence in this action, and conclusively establishes the fact that he did not adhere to the terms of his license and the provisions of the statute, and that he thereby violated the condition of his bond. It does not seem to me more probable than otherwise that the Legislature so intended, and for the following reasons: Because of (1) the absence of a provision in the statute distinctly stating such intent, especially in view of the fact that in sections 21 and 28 the intent is expressly stated that the bond shall be forfeited if the licensee is convicted of the offenses therein mentioned; (2) the very limited extent and character of the

judicial power granted to the commissioners; (3) the very general and extensive powers and duties of an executive or administrative character delegated to them; (4) the fact that they are custodians of licensee's bonds, and are charged by the statute with the executive or administrative duty of putting a bond in suit whenever they think there has been a breach of its condition—a duty that naturally disqualifies them to act as final judges upon the question of breach; (5) the peculiar nature of the subject-matter of their limited jurisdiction, namely, the question of the continuance of the permission conditionally granted to the licensee by the state in the exercise of police power; (6) the wide distinction there is between a question of this kind and a question that concerns property, such as the question in this action; (7) the authority to act in respect to first-class licenses without notice to or hearing of the licensee; (8) the absence of authority in the commissioners to decide whether the condition of the bond has been violated in other cases than those in which the license is revoked; (9) the great improbability that the Legislature would attempt to provide for the forfeiture of the condition of a licensee's bond, and the consequent charging him and his sureties with damages, without giving them an opportunity to submit the issues involved to a jury for determination; and (10) the absence of any necessity or substantial reason for such course of procedure—the courts of law being accessible to the state for the enforcement of liability upon a licensee's bond, the same as for the punishment of his offenses under the statute.

After the filing of the foregoing opinion, the defendants moved for a rehearing, alleging that no trial was in fact had in the superior court, but that the case transferred was merely an agreed statement of facts, that Corron was notified of the complaint against him at 4 o'clock in the afternoon of April 28, 1904, and to appear for a hearing thereon, to be held at 11 o'clock in the forenoon of April 30th, that the hearing before the commissioners was had at that time, and that Corron had no other notice thereof. In their motion the defendants asked leave to apply for an amendment showing these facts and for a further hearing upon the questions presented, if such amendment should be allowed.

Streeter & Hollis, for the motion.

PER CURIAM. If the reserved case, which purports to be the record of a trial before the court, was an agreed statement of facts, the court has no power to amend it. The only remedy of one wrongfully prejudiced thereby is an application to discharge the case and for a new trial. *Dame v. Woods*, 62 Atl. 379. No insufficiency appears upon the record in this court, and application

for relief must be made to the superior court. If the proceeding in the superior court was in substance a trial—the facts being ascertained from the statements of counsel conceded to be correct, instead of from the testimony of witnesses—the only amendment that could be made would be to include in the record omitted facts which were before the court at the trial. But the purpose of the suggested amendment may be to introduce into the case facts which were not presented to the court at the trial. This would also be an application for a new trial, and should be addressed to the superior court. The commissioners had authority to cancel Corron's license by an exercise of administrative power, without notice or hearing. Reasonable notice is essential to a valid adjudication. The statute implies that less than five days is not reasonable. If such notice was not given, and Corron did not waive the insufficiency of the notice, the proceeding before the commissioners was not a judicial trial. If a new trial should be granted, and it should appear that the cancellation of Corron's license was an exercise of administrative instead of judicial power, evidence of the action of the commissioners should be excluded. If at the trial, which the case states was had in the superior court, this fact appeared, the admission of the evidence of the commissioners' action, and the exclusion of all other evidence upon the question of Corron's guilt were erroneous, and the verdict should be set aside.

As the defendants in their motion do not controvert any matter of law heretofore decided in the case, there is no occasion for further argument at this time. If new questions are raised by further proceedings in the case, they can be considered when presented. That such further proceedings may be had in the superior court as justice may require, in accordance with the rules of law stated in the opinion, the order previously made is revoked, and the entry now is: Case discharged.

EDGEMOOR IRON CO. v. BROWN HOISTING MACH. CO.

(Supreme Court of Delaware. Jan. 16, 1906.)
SET-OFF AND COUNTERCLAIM — RECOUPMENT
— SUBJECT-MATTER.

In an action for the price of a traveling crane, defendant cannot recoup damages alleged to have been suffered through having paid, without suit, a claim for damages on account of the death of a servant killed by the overturning of the crane because of its alleged negligent construction.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Set-Off and Counterclaim, §§ 45, 46.]

Error to Superior Court, New Castle County.

Action by the Brown Hoisting Machine Company against the Edgemoor Iron Company. There was judgment for plaintiff, and defendant brings error. Affirmed.

Argued before NICHOLSON, Ch., and PENNEWILL and BOYCE, JJ.

William S. Hilles, for plaintiff in error. Saulsbury, Ponder & Curtis, for defendant in error.

BOYCE, J. (delivering the opinion of the court). The plaintiff brought an action of assumpsit against the defendant to recover an alleged balance due on the price of a 10-ton traveling crane, sold to the defendant, as averred, with a warranty, together with certain other items set forth in the bill of particulars filed. The defendant sought to avail itself of breach of warranty as a defense by way of recoupment. The plaintiff filed a general demurrer to the notice of recoupment. The court below sustained the demurrer as against the claim of the defendant for special damages set up in the notice of recoupment. The defendant elected to take a final judgment. And the case comes before this court on a writ of error sued out by the defendant. Briefly stated, the defendant claims that the crane, having been put in use by it at its yards, with one of its servants on it for the purpose of operating it, upset by reason of the failure to perform the service which it had been warranted to do, and killed the servant. And the defendant avers that it was forced to and did pay to the widow of the deceased servant (without suit or consent of the plaintiff) the sum of \$2,734.90 as damages, and also paid other items for repairs, etc., of the crane.

The chief question raised by the assignment of errors, and the only one which we will now consider, is whether the facts set forth in the notice of recoupment respecting the special damages alleged to have been paid by the defendant to the widow of the deceased servant entitled the defendant to set up such special damages by way of recoupment in reduction of the claim sued upon by the plaintiff.

That part of the notice of recoupment which was not allowed is as follows: "The defendant further gives notice that it will at the trial of the above-entitled cause prove, by way of recoupment, as follows: That the said crane mentioned in the declaration was purchased by the defendant from the plaintiff, the manufacturer thereof, under an express contract. That in and by the said contract it was provided, among other things, that the said crane on a track four feet eight and one-half inches gauge would have power, strength, and stability to safely handle the following loads at the given radii, and would swing these loads through a full circle without clamping the crane to the track, and would move the same along tracks with boom in any position, to wit: At 8-14 feet radius, 20,000 lbs. At 20 feet radius, 13,800 lbs. At 26½ feet radius, 9,500 lbs. And that the said crane, under its own steam, would have the functions of hoisting, rotating, and track travel, which might be

utilized simultaneously, with full load, within the limits of stability noted above at the following speeds: Hoisting, full load, 42½ feet per minute. Rotating, full load, four complete turns per minute. That the said defendant, relying upon the said agreement and guaranty of the said plaintiff, purchased the said crane and put the same in use at its yards at Edgemoor in New Castle county, Delaware, to wit, on or about the first day of September, nineteen hundred and three. That at the time aforesaid, and place aforesaid, the said defendant, relying upon the representations and warranty contained in the said contract with the said plaintiff, told one Horace O'Day, who was then and there a servant in the employ of the said company, to get upon the said crane for the purpose of operating it. That the said Horace O'Day was unskilled and unfamiliar with the said crane and its workings, but under the belief and reliance of this defendant upon the warranty aforesaid he was told to operate the said crane, and while operating it, with due care on his part, within the radii, weight, and speed provided in the said contract and warranty, to wit, with the weight of about 10,800 pounds, with a boom radius of about 20 feet, and at a speed of less than four rotations per minute, and while the same was being operated upon a track of four feet, eight and one-half inches, gauge, on practically level ground, the said crane upset, thereby killing the said Horace O'Day, who was then and there in the employ of the said defendant as aforesaid. That the said crane upset, and the death of the said Horace O'Day was caused by and due to the fact that the said crane would not, as aforesaid, comply and come up to the warranty contained in the said agreement between this defendant and the said plaintiff. That by reason of the premises the said defendant then and there became liable to pay, and was forced to and did pay to — O'Day, widow of the said Horace O'Day, the sum of two thousand seven hundred and thirty-four dollars and ninety cents as damages for the death of the said Horace O'Day caused as aforesaid," etc.

The doctrine of recoupment was recognized and allowed at common law, and was and is applied to actions whether founded in contract or in tort, but it is limited as a defense to defeating the plaintiff's action, in whole or in part. The doctrine is recognized by the courts of this state. Tomlinson & Co. v. Quigley, 5 Houst. 168; Shimp v. Siedel, 6 Houst. 421, and other cases.

Recoupment rests on the principle of the desirability of avoiding circuitry and multiplicity of actions by allowing the defendant, at his election, to give in evidence matters growing out of the same transaction by way of defense, instead of requiring a cross-action, when it can be done without a violation of principle or great inconvenience in practice; but while it is the policy of our law not to

compel parties to bring two actions, when, with equal convenience, their rights can be settled in one, the defendant may not set up his claim by way of recoupment unless it would be just and practicable to adjust it in the plaintiff's action. *Dorr v. Fisher*, 1 Cush. 271; *Sawyer v. Wiswell*, 9 Allen, 39; *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. Ed. 810; *Johnson v. White Mountain Creamery Ass'n*, 68 N. H. 437, 36 Atl. 13, 73 Am. St. Rep. 610; 1 *Suth. on Damages*, §§ 172, 174.

The claim or damage to be recouped must be a valid cause of action for which a separate suit could be maintained, and must not have occurred through the fault or negligence of the defendant. 1 *Suth. on Dam.* § 174. Whenever the defendant is permitted to submit his claim for damages as a subject of recoupment, he assumes the burden of proof in respect to it, and no recovery can be had for any balance or excess. And the defendant will be barred from any other suit or recoupment for such balance or excess over the plaintiff's claim. 1 *Suth. on Dam.* § 172. As developed and permitted by the American courts, recoupment has attained a wider and more extended application than in England. Very generally, at least, if not altogether, the courts of this country have not restricted its application to cases where the defendant may recoup his damages for the purpose of affecting the value of the goods sold, or of the work done, but they have allowed the defendant to recoup damages suffered by him from any fraud, breach of warranty, or negligence of the plaintiff, growing out of and relating to the transaction in question, for the purpose, as we have already indicated, of avoiding needless delay and litigation. *Dushane v. Benedict*, supra; *Harrington v. Stratton*, 22 Pick. (Mass.) 510; 1 *Suth. on Dam.* §§ 179, 180. It will thus be seen that a defendant is now, under the expansion of the doctrine of recoupment, permitted to allege and prove by way of defense to the plaintiff's action that which was formerly only the subject of a cross or independent action.

The defendant's claim in this action is based on the assumed liability of the maker of the crane for the personal injuries and death of the defendant's servant while in the act of operating the crane. This presents a most interesting question, and one of first impression in this state. It has arisen and has been adjudicated in other jurisdictions—some in support of, and others against, such liability. But we have had no case cited to us, and we have found none, where the defendant in the action has sought to avail himself of special damages, such as have been set up in this case, by way of recoupment. Without intending to indicate any opinion as to the liability of a vendor for personal injuries to third persons, the vendee's servants, we will proceed to determine whether in the judgment of the court

recoupment should be permitted in this case. Whether from the character of the defendant's defense, involving as it does, among other things, its liability to the widow of the deceased servant, it is practicable to adjust the defendant's claim in the plaintiff's action. There is in the defendant's claim for special damages the element of fault or negligence on its part. And while damages arising from negligence, where care, activity, and diligence are required, may be recouped, and very properly so, in the plaintiff's action for the price of a machine we think it will be carrying the principle of recoupment beyond any application heretofore allowed if permitted in this case. The claim of the widow of the deceased servant necessarily rested upon the negligence of the defendant. And whether the defendant was or was not liable for the death of its servant, we do not think, upon principle or convenience in practice, that such a question should be investigated in the plaintiff's action under a notice of recoupment. And we hold that damages in such a case, if recoverable at all, which we do not now determine, must be recovered in a separate action.

The judgment of the court below is affirmed.

PETHEY MFG. CO. v. DRYDEN.

(Superior Court of Delaware. Sussex. April 12, 1904.)

1. ANIMALS—INJURY FROM BEES—LIABILITY OF OWNER.

The liability of the owner or keeper of bees for any injury done by them to the person or property of another rests on the doctrine of negligence.

2. TRESPASS—WHEN LIES.

Trespass *quare clausum fregit* is an inappropriate remedy to recover for injuries done by bees to the person or property of another.

(Syllabus by the Court.)

Action by the Petey Manufacturing Company against Francis Dryden. Judgment of nonsuit.

The declaration contained one count, which was as follows: "For that, whereas, the said plaintiffs heretofore, to wit, on the — day of —, A. D. 1902, at, etc., aforesaid, were the owners of two mules of great value, to wit, of the value of \$500, lawful money of the United States, which said mules, to wit, on the said — day of —, A. D. 1902, at, etc., aforesaid, were lawfully and of right standing and being within the close of one Henry A. Houston, at the instance of and by and with the consent and permission of the said Henry A. Houston, and that the said defendant was then and there, to wit, on the said — day of —, A. D. 1902, at, etc., aforesaid, the owner and keeper of a large number of bees, for making honey. The said plaintiffs aver that on the said — day of —, A. D. 1902, at, etc., aforesaid, and while the said two mules were then and there

lawfully and of right standing and being within the said close as aforesaid, the said bees so as aforesaid owned and kept by the said defendant broke and entered into the said close where the said mules were then and there lawfully and of right standing and being as aforesaid, and then and there, to wit, on, etc., at, etc., aforesaid, and within the said close, did attack, sting, and bite the said two mules of the said plaintiffs. By means of said attacking, stinging and biting the said two mules then and there died and became of no value to the said plaintiffs. Wherefore by means of the premises the said plaintiffs say that they are injured and have sustained damage in the sum of \$1000, and they therefore bring their suit."

Plaintiffs proved the facts as set out in the above declaration, but there was no proof that the bees were kept in an improper place or in an improper manner, or that there was any notice brought home to the defendant of the propensity of the bees to do mischief. Whereupon the defendant moved for a nonsuit upon the following grounds: "(1) In this suit, negligence is the foundation of the action; and in order that the plaintiffs may recover it is necessary that they show by a preponderance of proof that there was negligence on the part of the defendant—not that he kept bees, for that fact in itself is not negligence, but that the said bees were kept in an improper place or kept in an improper manner, and that said defendant had had notice thereof. (2) That in this case actual notice must be brought home to the defendant of the propensity of the bees to do mischief, and there is no proof to that effect. (3) That the owner of bees is not liable at all events for any accidental injury they may do. (4) Though bees are *feræ naturæ*, they are kept for the use and convenience of man, and are excepted from the rule of law that the keeping of all animals *feræ naturæ* presumes negligence; and where, as in this case, an action is brought to recover damages for an injury done by bees against the owner, the scienter must be proved. As there is a total absence of any such proof, plaintiff cannot recover. *Earl v. Van Alstine*, 8 Barb. (N. Y.) 630; 1 Chitty, Marg. pp. 82, 83; *Goff v. Kilts*, 15 Wend. (N. Y.) 550.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Robert C. White, for plaintiff. Charles W. Cullen, for defendant.

BOYCE, J. The plaintiff brought an action on the case to recover damages for the loss of two mules, whose deaths, it is alleged, were caused by the bites and stings of bees belonging to the defendant. The declaration filed is in trespass, and not case. Counsel for the defendant, in his motion for a nonsuit, contended that the plaintiff's right of action, if any he may have, rested upon the negligence of the defendant, and that there-

fore a recovery could not be had under the declaration and evidence in this case. The keeping of bees is recognized as proper and beneficial, and it seems to us that the liability of the owner or keeper thereof for any injury done by them to the person or property of another must rest on the doctrine of negligence, and that the remedy afforded by trespass is inappropriate in a case like this. *Cooley on Torts*, 349. In disposing of the motion before us, we do not deem it necessary to pass upon the degree of care demanded of those who may own or keep bees. Upon the declaration and evidence in this case, we are unanimous in directing a nonsuit.

Let a nonsuit be entered.

LICZNERSKI v. WILMINGTON CITY RY. CO.

(Superior Court of Delaware. New Castle.
Dec. 28, 1904.)

STREET RAILROADS—SPEED — ORDINANCES — APPLICATION.

Wilmington City Ordinance, c. 7, p. 376, § 12, providing that it shall be unlawful for any locomotive, railroad car, or other vehicle to be propelled or drawn on such part of any railroad as shall be within the limits of the city of Wilmington at a faster rate than six miles an hour, has no application to the cars of a street railroad operated in such city.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 154.]

Action by Albert Licznorski against the Wilmington City Railway Company. On demurrer to the second count of the narr. Sustained.

The second count of the narr., after alleging that the defendant was a corporation of the state of Delaware, operating certain lines of street railway in the city of Wilmington and state aforesaid, further alleged: "That, being such corporation so engaged as aforesaid, the said defendant on the twenty-seventh day of November, A. D. 1903, at the city of Wilmington, county and state aforesaid, negligently and carelessly ran one of the cars operated by it on said railway at a high, dangerous, and unlawful rate of speed, to wit, upward of the speed of six (6) miles an hour, contrary to the ordinance of the city of Wilmington, along and over its tracks upon one of the public streets of the said city of Wilmington, to wit, on the street known as West Fourth street, between Scott street and Lincoln street, in the said city of Wilmington, said West Fourth street being then and there a public highway of the said city, whereby the said car did then and there run into a certain wagon which was then and there being driven by the said Alexander Licznorski, in the exercise of due care and caution on his part, upon said West Fourth street, whereby the said wagon was crushed, broken, and demolished, and the said Alexander Licznorski was struck, cut, and hurt in his head, back, limbs, and other parts of his body, and thereby the said Alexander Licz-

nerski was greatly bruised, wounded, and injured," etc.

The first two paragraphs of section 12, c. 7, p. 376, of the Charter, Laws, and Ordinances of the City of Wilmington of 1902, referred to in said second count, are as follows:

"It shall be unlawful for any locomotive, railroad car, or other vehicle to be propelled or drawn upon such part of any railroad as shall be within the limits of the city of Wilmington at a faster rate than six miles per hour.

"The engineer, conductor, controller, owner or owners, or other person or persons, having for a time the command of any locomotive, railroad car, or other vehicle, who shall propel or cause to be propelled or moved, such locomotive, railroad car, or other vehicle, upon such part of any railroad as shall be within the limits aforesaid at a faster rate than six miles per hour, for every such offense shall forfeit and pay a fine of one hundred dollars."

Defendant filed a general demurrer to said second count; counsel for defendant contending that the above-quoted section 12 of chapter 7 of the Charter, Laws, and Ordinances of the City of Wilmington does not apply to street railway cars.

Argued before LORE, C. J., and SPRUANCE and GRUBB, JJ.

Robert H. Richards, for plaintiff. Walter H. Hayes, for defendant.

LORE, C. J. While these questions have not been distinctly and separately passed upon formally, yet in the trial of cases again and again the question has been asked whether there was any ordinance governing the speed of electric cars in the city of Wilmington, and it seems to have been generally conceded that there was not. The ordinance seems to relate to railroad cars, but not to cars of city railways.

We sustain the demurrer.

In re HARTON'S ESTATE.

Appeal of ORR.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. INSURANCE—BENEFIT CERTIFICATE—BENEFICIARIES.

A foreign beneficial association was chartered for the relief of members and the payment of stipulated sums to the family or heirs of deceased members. A certificate was issued payable to the member's legal representatives. *Held*, that the death benefits were payable to the heirs at law of the member, though he may by will have given such benefits to other parties.

2. SAME.
Where a benefit association charter provided for the payment of a certain sum to the family or heirs of deceased members, the fact that after the certificate was issued the law was changed, so that executors, administrators, or assigns of the deceased members could be made beneficiaries, did not affect the certifi-

cate, where the member never surrendered his original certificate and accepted a new one containing the names of substituted beneficiaries.

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of G. Bruce Harton, deceased. From the decree dismissing exceptions to adjudication, Bertha Harton Orr appeals.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Charles P. Orr and Thomas C. Lazear, for appellant. George M. Harton, for appellees.

STEWART, J. G. Bruce Harton, a resident of Allegheny county, in this state, was the holder of a beneficial certificate issued by the Knights Templar & Masonic Mutual Aid Society in the sum of \$5,000, payable to his legal representatives. He died February 20, 1904, unmarried, and without issue. By his will he gave the residue of his estate, "together with moneys due from life insurance," share and share alike, to his sister, Mrs. William M. Orr, and his niece, Margaret Fertig. A controversy having arisen with respect to the fund between these residuary legatees and the heirs at law, it was agreed that the fund should be paid over to the executor of the will, and the rights of the parties with respect thereto should be determined on the audit of the executor's account. It resulted in an award of the fund to the heirs at law, and the residuary legatees have taken this appeal from the decree.

The relation between Harton and the association was contractual, and the contract is to be interpreted in the light of conditions existing when it was entered into. The association was a beneficial society organized under the laws of the state of Ohio. The act authorizing associations of this character expressly indicates the purpose and objects of the same, and to this extent places a limitation upon their powers and privileges. The purpose and objects, as expressed by the act, are "for the mutual protection and relief of the members, and for the payment of stipulated sums of money to the family or heirs of the deceased members of such association." The contract with Harton was to pay "his legal representatives" the sum of \$5,000. If we are to accept this designation of beneficiaries as meaning what the words used in their primary sense imply—executors or administrators—it would result that the association had contracted to do something outside of its powers. Such construction is always to be avoided where there is a secondary sense which would make the contract conform to law. The law does not presume that parties to a contract intended by it the accomplishment of an illegal object, but, on the contrary, every presumption is allowed in favor of a legal purpose; and so it is that, when words are susceptible of two different senses, they

are to be understood as to have a legal and actual operation, not by way of concession or correction, but as the true interpretation of the governing purpose of the parties. The rule thus stated is one of many used to discover the intention of the parties, which is always allowed to govern when ascertained. The rule imposes no intention, but seeks to discover the true one. The words "legal representatives" have a secondary sense, well recognized, which harmonizes entirely with the purposes and objects of the association. The instances are not few in which they have been held to mean heirs at law. "The terms 'legal representatives,' 'personal representatives,' etc., are often used in statutes and instruments of writing in a broader sense, so as to include all persons who stand in place or represent the interests of another, either by his act or operation of law." 18 Am. & Eng. Ency. of Law (2d Ed.) p. 814. "The word 'representative' may mean the next of kin of decedent or executors or administrators, according as the intention of the decedent is manifest in the will." Appeal of Trustees of the University of Pennsylvania, 97 Pa. 187.

The application of this rule, then, gives us not a possible or probable understanding of the parties to the contract, but an understanding which, for all judicial purposes, is to be regarded as definitely ascertained. As thus interpreted, this contract, when made, provided for the payment of a stipulated sum to the heirs of G. Bruce Harton. Did it so continue until his death in 1904? In 1891 the objects and purposes of these beneficial associations were extended by a supplement to the original act, so that thereafter executors, administrators, or assigns of deceased members could be made beneficiaries. In certificates thereafter issued, in which the stipulated sum was payable to legal representatives, these words would necessarily be given their primary sense, and be understood as meaning executors or administrators. Harton survived this change in the law some 13 years. During all this time, he had the right under the rules of the association to appoint other beneficiaries, in the prescribed mode, by surrendering his original certificate and accepting a new one with the names of the substituted beneficiaries therein, but he did not exercise this right. His certificate remained at his death as it was when originally issued, payable in terms to his legal representatives.

It is argued on behalf of appellants that surrender and substitution in this case were not required, since by the change of the law it was competent for the association to contract for the payment of the stipulated sum to executors and administrators, and that the amended law was so impressed on this earlier contract as to impose on the words "legal representatives" their primary meaning, and that Harton is presumed to have known of the change, and his retention of the original certificate, under these circumstances, re-

quires that the contract be interpreted as of the time of his death. We fail to see the force of this argument. The earlier contracts of this association stand clear of the amended law of 1891. The amendment was not curative in any sense. If this particular contract was invalid before, it was none the less so after, the amendment. But it was not invalid, as we have seen. It was a valid and subsisting contract that required payment of the stipulated sum to the heirs at law. Had Harton died prior to the adoption of the amendment, it is not open to question that his heirs could have successfully asserted their right to the money. The amendment did not interfere with their right. Nothing could defeat it but an unequivocal act on the part of Harton, in conformity with the rules of the association, appointing other beneficiaries. His attempt at a testamentary disposition of the fund was futile, for the reason that he had no property in it. *Masonic Aid Association v. Jones*, 154 Pa. 99, 26 Atl. 253, and for the further reason that the rules of the association provided that change of beneficiaries was to be made by surrender of certificate. Neither Harton's attempted disposition of the fund by will, nor the fact that for 13 years prior to his death the certificate that he held was in conformity to the letter of the amended law governing the association, and that certificates issued during that period in the same terms gave the stipulated sum to the executor or administrator, can be considered as affecting the rights settled under the original contract. We are concerned with Harton's desires and purpose with respect to this fund only as they find expression in the original contract; no subsequent act of his that could change or qualify them agreeably to law or the rules of the association being shown. It is familiar law, but will bear repetition here, that a contract is to be construed in reference to the time when it was made, and to contemporaneous laws and usages. 2 Story on Contracts, p. 43. There is nothing else in the case that calls for consideration here.

The conclusion reached by the court below was correct, the appeal is dismissed at the cost of appellants, and the decree is affirmed.

IN RE HARTON'S ESTATE.

Appeal of FERTIG.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of G. Bruce Harton, deceased. From a decree dismissing exceptions to adjudication, Margaret Fertig appeals. Dismissed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

STEWART, J. The facts are the same here as in No. 152, October term, 1905, just decided. 62 Atl. 1058. For reasons stated in the opinion filed in that case, the appeal in this is dismissed at the cost of the appellant, and the decree of the court below is affirmed.

HANFORTH et al. v. TARENTUM TRACTION PASSENGER RY. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

APPEAL—REVIEW—REFUSAL OF NEW TRIAL

A refusal of a new trial, in an action for personal injuries, on the affidavit of a juror that plaintiff had willfully misled the jury as to the extent of her injuries, is addressed to the discretion of the trial court, with which the court on appeal will not interfere.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3860-3876.]

Appeal from Court of Common Pleas, Allegheny County.

Action by Mattie Hanforth and James Hanforth against the Tarentum Traction Passenger Railway Company. Judgment for plaintiff for \$2,250, and defendant appeals. Affirmed.

In support of a motion for a new trial the following affidavit was filed:

"My name is W. D. Hill. I reside at Oakmont. I was one of the jurors in the case of Mrs. Hanforth and her husband against the Tarentum Traction Passenger Railway Company, in which case verdicts were rendered for the plaintiffs on the — day of February, 1905. I am employed by the P. C. & Y. Railway Company, and my office is in Pittsburg at the Lake Erie Railroad Station, South Side, Pittsburg. I am chief clerk to the secretary and accountant. On the evening of the day on which the verdicts were rendered, at about 5 o'clock, I boarded a street car at the P. & L. E. depot to come to Pittsburg. As soon as I entered the car I saw the plaintiff Mrs. Hanforth, her daughter, her daughter-in-law, and a young lady who testified in the case. They were all seated on the north side of the car; that is, the left side going towards the Union Station. The daughter-in-law had her child with her, and lifted the child onto her knee. The child seemed to me to be standing up on its mother's knee, but whether or not it was standing or not I do not know. At any rate it was in an upright position, not sitting. Mrs. Hanforth the plaintiff was sitting next to her daughter-in-law, and reached up with both hands to the child's bonnet strings, and seemed to be tying them. Her face was towards me, and she did this without the least expression of pain on her face. In fact she was smiling, apparently at the child. She raised both arms and extended them towards the child, up to or nearly at right angles with her body. Her movement was very much freer and greater than that she displayed to the jury on the trial of the case.

When the car reached the Pittsburg side of the river, along about Third or Fourth avenue, she threw the elbow of her left arm up onto the window sill, or the top of the back of the seat, into a position at full right angle with her body, and then raised her hand above or opposite to the top of her head, and apparently was rubbing the steam or frost off the car window. I watched her pretty closely, because I was interested in the case, as a matter of curiosity, and the movements of her arm on the car convinced me that her testimony, given in the trial of the case, was misleading, and so much so that, if the facts had been known to me before the verdict had been rendered, I could not have agreed to a verdict in her favor."

The following is the opinion of McClung, J., in the court below:

"The testimony submitted upon the reargument of this case would not justify us in concluding that the plaintiff had fraudulently misrepresented the fact as to the extent of her disability as to the use of her arm. Taking the testimony altogether, we have practically the same case that was submitted to the jury. The verdict expresses the judgment of the jury as to the damages sustained, and we cannot disturb it. The rule for a new trial must be discharged."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Richard A. Kennedy, David Smith, and Nelson McVicar, for appellant. George E. Alter, for appellees.

PER CURIAM. The charge that the plaintiff had willfully misled the jury as to the character and extent of her injuries raised only a question of fact. The affidavit of one of the jury, though tending strongly to establish the charge, was nevertheless only evidence addressed to the discretion of the judge on the motion for a new trial. We see no ground to interfere with his action.

Judgment affirmed.

NICOLETTE LUMBER CO. v. PEOPLE'S COAL CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

CARRIERS—DEMURRAGE—LIEN.

A carrier has no lien on freight for demurrage for delay in unloading the barges on which it was carried at their point of destination, and has no right to retain possession of the goods until the demurrage is paid.

Appeal from Superior Court.

Action by the Nicolette Lumber Company against the People's Coal Company. Judgment for defendant was affirmed by the Superior Court, and plaintiff appeals. Reversed.

The facts appear by the opinion of the Supreme Court and by the report of the case in 26 Pa. Super. Ct. 575.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William M. Hall, Jr., for appellant.
Henry A. Davis, for appellee.

BROWN, J. This is an action of replevin brought for the recovery of possession of lumber, which had been transported on barges of the defendant from the mill of the plaintiff in West Virginia to Pittsburg, under a freight contract of \$2 per thousand feet. This charge was paid before the institution of the replevin, and is not involved in the case. It seems there was a delay of some days after the lumber reached Pittsburg before the plaintiff or its consignees demanded the barges from the defendant for the purpose of taking them further up the Allegheny river to the point of delivery designated in the contract. The delay is alleged to have been due to the low state of the water, rendering navigation impossible. Be this as it may, the instructions to the jury were that if the plaintiff or its consignees neglected to receive the barges upon their arrival at Pittsburg, after reasonable notice from the defendant to do so, it was entitled to a verdict for demurrage, for the reason that it had a lien on the lumber for such claim. Under these instructions, there was a finding for the defendant for \$525.40. On appeal from the judgment on this verdict the Superior Court affirmed it, holding that the defendant, as a common carrier, had a claim for demurrage which was a lien on the lumber, by virtue of which it had a right to retain the property until the amount of the lien was paid.

The question on this appeal is not as to the right of the appellees to demand and recover compensation for the detention of its barges, if they were unreasonably detained by the appellant, but is as to its right of lien upon the lumber, entitling it to retain possession of the same until its alleged lien was paid. If it had such a lien, it was entitled to retain possession of the property until the lien was discharged; if it had not, it unlawfully detained the lumber from the plaintiff, even if its barges had been unreasonably detained. In an action of replevin nothing can be tried but the right of possession of the property in controversy. In this case the lumber admittedly belonged to the plaintiff, which could not be denied the possession of it by the defendant, unless the latter had a superior right of possession. A mere claim for compensation for the prolonged use of its barges could give it no such right, unless the right to such compensation created a lien on the property on the barges—a lien on the lumber for the demurrage. Even if it be conceded, as held by the Superior Court, that the appellee was a common carrier, by what rule of the common law, or by what statute, had it any such lien as it asserted, and as the Superior Court

recognized? The parties to the contract for carrying the lumber might have provided for it in their contract, and if so, the appellant would be bound by it; but there was no such agreement. That none exists in the absence of it is so well settled that we need do nothing more than call attention to some of the many authorities upon the subject.

When a shipper of goods commits them to a common carrier for shipment to a given point, he does so under a contract that fixed freight charges will be paid. The business of the common carrier is to carry freight, and to carry it for compensation to be paid either at the time of shipment or before the consignee is entitled to receive it. The amount to be paid is as well known to the shipper as to the carrier, and, as it is to be paid before the consignee receives the goods, it is a lien upon them until paid. But in the absence of any provision in the contract for demurrage, caused by the shipper or his consignee, it is not taken into account; for it is not reasonably to be anticipated in any case, either by the shipper or carrier. It is the exception in connection with the business of the common carrier, and therefore there is no rule of the common law applicable to it beyond the one that requires the delinquent shipper or consignee to pay for his detention of the cars, not anticipated or provided for in the contract of shipment. This is the liability that attaches to every one to pay reasonable compensation for the use and occupation of the property of another not used or occupied in pursuance of any contract; but out of such a condition no lien on the personal property on the premises so used and occupied can arise, because, if for no other reason, the amount of the liability is not fixed. For what amount is a common carrier, in any case, to have a lien for demurrage when the amount to be paid for it has not only not been fixed by a contract, but is in dispute and is to be settled by a jury?

If any lien could exist in the present case, it would be a common-law lien, which is "a right in one man to retain that which is in his possession belonging to another, till demands of him, the person in possession, are satisfied." * * * It is founded upon the immemorial recognition of the common law of a right to it in particular cases, or it may result from the established usage of a particular trade." 19 Am. & Eng. Ency. of Law (2d Ed.) p. 7. "The lien allowed to the carrier by the law extends only to his charges for the transportation of the goods, and does not include expenses for warehousing them; nor damages for the breach of collateral contracts or covenants by the shipper, even when incorporated in the bill of lading; nor extend to the payment of port charges; nor to damages for detention beyond the time fixed by the contract for receiving, or loading or unloading the goods; nor to compensation for delay in the nature

of demurrage." Hutchinson on Carriers, § 478. "There is no lien for demurrage unless it is stipulated for in the contract." 9 Am. & Eng. Ency. of Law (2d Ed.) p. 270. All liens are created by law or by contract of the parties; and when the law gives none, neither party can create one without the consent or agreement of the other. Hence the consignee of goods shipped by railroad is not bound by rules and regulations of the company providing for a lien for demurrage, though published, without his or the consignor's assent thereto when the contract for shipping the goods was made. Even a knowledge of such rules, without assent thereto, will not affect the shipper or consignee. A common carrier has no lien upon goods for damages arising from the neglect of the consignee to take them away within a reasonable time after notice to him of their arrival. *Chicago & Northwestern Ry. Co. v. Jenkins*, 103 Ill. 588. The inconvenience or expense occasioned by the detention of cars constitutes a claim in the nature of a demurrage, but the carrier must seek his redress in the ordinary manner for the breach of an implied contract to pay for the use and occupation of the cars. He cannot enforce it by a detention of the goods. *Crommellin v. New York & Harlem Railroad Co.*, *43 N. Y. 90. "The right of a common carrier to a lien extends to charges connected with the expenses of transportation strictly." 2 Redfield on Railways (6th Ed.) p. 193. Attention need not be called to more authorities upon this subject. The judgment of the Superior Court, affirming the judgment of the court below, must be reversed.

Judgment reversed, and a venire facias de novo awarded.

NESBIT et al. v. SKELDING.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)
WILLS—CONSTRUCTION—NATURE OF ESTATE.

Where testator gave and bequeathed "to my son and his heirs after him all my real estate," the son took an estate in fee simple.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1319-1326.]

Appeal from Court of Common Pleas, Allegheny County.

Ejectment by David F. R. Nesbit and others against Ellen P. Skelding. Judgment for defendant, and plaintiffs appeal. Affirmed.

The land in question had been devised to William E. Nesbit, father of the plaintiffs, by the will of David E. Nesbit, the material portion of which is quoted in the opinion of the Supreme Court. The defendant claimed title under foreclosure proceedings on a mortgage made by William E. Nesbit in his lifetime. The court construed the will as giving William E. Nesbit an estate in fee, and directed a verdict for the defendant.

Argued before MITCHELL, C. J., and

FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. T. Tredway and John C. Haymaker, for appellants. M. W. Acheson, Jr., and W. A. Griffith, for appellee.

ELKIN, J. The single question presented by this record is whether William E. Nesbit, father of the appellants, under the will of David E. Nesbit, deceased, took a fee simple or life estate. The language of the will is as follows: "I give and bequeath to my son, William E. Nesbit, and his heirs after him, all my real estate, consisting of a farm and appurtenances in the township aforesaid." It is conceded that the word "heirs," as used in this as well as every other will, is primarily a word of limitation, and will be so construed, unless it is so plain as to preclude misunderstanding that the testator intended to use it in other than its ordinary legal sense. We have searched this record in vain to discover such facts or circumstances as would have the effect of cutting down the fee simple estate which is presumptively created by the use of the word "heirs" in the devise. It is argued by the learned counsel for the appellants that the testator, by use of the words "his heirs after him," intended to limit the first estate to the life of William E. Nesbit and at his death to vest it absolutely in his children. This contention is based on the theory that the word "heirs" is used in the sense of "children." Our attention has not been called to any case that would support this position. There is no provision of the will, nor any circumstances shown by the record, to justify a departure from the settled rule of construction. There is no distinction, legal or grammatical, between the words "after him," or "after his death," or "after his decease." The use of the words "after him" must be construed to mean the same as if the provisions of the will read "after his death" or "after his decease." In a legal sense the devisee could have no heirs while he lived, they became his heirs "after him"; that is, "after his decease." This case is ruled in principle by *Reifsnnyder v. Hunter*, 19 Pa. 41; *Price v. Taylor*, 28 Pa. 95, 70 Am. Dec. 105; *Criswell's Appeal*, 41 Pa. 288; *Hlester v. Yerger*, 166 Pa. 445, 31 Atl. 122.

Judgment affirmed.

UNITED STATES, to Use of BAILEY et al., v. MERCANTILE TRUST CO. OF PITTSBURG.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)
1. PRINCIPAL AND SURETY—RELEASE OF SURETY.

The fact that limitations have run against a debt for which a bond was given as security does not release the surety on the bond from liability thereon.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, § 292.]

2. CORPORATIONS—SEALED INSTRUMENTS.

A bond signed in the name of a corporation by the vice president, with the corporate seal affixed, attested by the secretary, is a sealed instrument, though the seal is not opposite to the vice president's signature.

Appeal from Court of Common Pleas, Allegheny County.

Action by the United States of America, to use of Frank A. Bailey and another, against the Mercantile Trust Company of Pittsburgh. From an order making absolute rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Affirmed.

Rule for judgment for want of a sufficient affidavit of defense. The bond in suit concluded as follows: "In witness whereof, the parties hereto have executed this instrument this 20th day of April, 1897, the name and corporate seal of said surety being hereto affixed and these presents duly signed by its vice president, pursuant to a resolution of its board of directors, passed on the 24th day of February, 1897, a copy of the record which is on file in the War Department. In presence of: J. F. Casey, as to E. J. Hulings. [Seal.] John Costello, as to H. B. Hulings. [Seal.] Attest: Edwin Lewis Porter, Secretary. [Seal.] The Mercantile Trust Company, by Charles Holmes, Vice President."

The defendant filed an affidavit of defense which was in part as follows: "This defendant is advised and therefore avers that the bond given was given to secure the payment of the debts of Hulings Brothers, and that this defendant is only liable for such debts as could be collected from Hulings Brothers.

Defendant avers, and cites plaintiff's statement of claim to substantiate the same, that the claim in this case is for goods sold and delivered more than 6 years before the beginning of this action, to wit; between the dates of January 2, 1897, and November 18, 1897, this suit having been brought July 29, 1906, a period of 7 years, 8 months, and 16 days from the time when the last item was furnished in said account."

The court made absolute rule for judgment for want of a sufficient affidavit of defense.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Homer L. Castle, of Stone & Stone, for appellant. David S. McCann and J. L. Ritchey, for appellee.

PER CURIAM. As the principals, the contractors, signed the contract under seal, it is difficult to perceive the basis of the averment in the affidavit of defense, "that this defendant is only liable for such debts as could be collected from" the contractors. While it may be that the use plaintiff was too late to recover on his book account

against the contractors, yet it is very clear that he could recover against them on this bond.

But, independent of that, the bond in suit is security for the debt to the use plaintiff, and, like any other collateral, is not released until the debt has been paid, though the right of action on the debt itself may be barred by the statute of limitations. After its limit has expired its own statute may of course be pleaded; but in the meantime the principal's discharge is not available as a defense. *Winton v. Little*, 94 Pa. 64.

The bond is clearly intended as a sealed instrument by the appellant. It is signed in the name of the corporation by the vice president, and the corporate seal is affixed, attested by the secretary. This is a very common, if not the usual, method of execution of sealed instruments by corporations. The fact that the seal is not opposite the president's signature does not affect the plain intent of the instrument.

Judgment affirmed.

ROTH v. REITER.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

SET-OFF AND COUNTERCLAIM—UNLIQUIDATED DAMAGES.

In an action to recover on two notes, unliquidated damages arising out of a tort disconnected with the transaction sued on cannot be recouped by way of an equitable defense.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Set-Off and Counterclaim, §§ 52, 53, 61.]

Appeal from Court of Common Pleas, Allegheny County.

Action by Jacob Roth against Henry Reiter. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Schoyer & Hunter, for appellant. W. A. Challenger and I. S. Stentz, for appellee.

ELKIN, J. This is an action of assumpsit to recover upon two notes held by the plaintiff upon which the defendant is an accommodation indorser. The notes not having been paid at maturity by the maker, they were protested in due form, and this suit was instituted to enforce collection from the indorser. The defense set up is that the notes were given in consideration of the purchase price of plaintiff's interest in partnership property, and that before the maturity of said notes the plaintiff entered the partnership premises and forcibly took possession of the business and property of said partnership, and has ever since retained possession thereof. It is therefore contended that the alleged tortious act of the plaintiff is equivalent to and must be treated as a total fail-

ure of the consideration for which the notes were given.

It is conceded in this case, and it is the law, that in an action on a contract, unliquidated damages arising out of a tort independent of, and disconnected with, the transaction sued on, cannot be recouped by way of equitable defense. This rule of law needs no citation of authorities to support it. It is, however, earnestly contended that the defendant in the present case had a right to recoup the damages arising from the alleged tortious act against the amount of the notes, because said tortious act was directly connected with the transaction in consideration of which the notes were given. The appellee asserts that the tortious act complained of grew out of a separate transaction, and the court below has so found in the following language: "It appears possible that there was a tort committed against the maker of this note by the plaintiff in this case; but it was not a part of this transaction, and therefore cannot be used to extinguish this indebtedness."

There was sufficient evidence to justify the conclusion of the learned court, and this is an end of the case. It might be added that the burden of proving failure of consideration rests on the defendant. *Conney v. Macfarlane*, 97 Pa. 361. This burden has not been met by the defendant in this case.

Judgment affirmed.

COMMONWEALTH v. JOHNSON.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. JURY—SUMMONING.

That the sheriff, in summoning jurors, failed to state that they were to serve in the oyer and terminer, is no ground for setting aside a conviction.

2. CRIMINAL LAW — EVIDENCE OBTAINED FROM DEFENDANT'S WIFE — ADMISSIBILITY.

The objection to the plan of a house on a trial for murder, because the draftsman obtained some of his information from the prisoner's wife, was properly overruled.

3. SAME.

Facts learned by competent witnesses will not be excluded, because they may have been put on the track of the facts by information derived from the wife of the prisoner.

4. HOMICIDE — SELF-DEFENSE — INTRUDER IN HOUSE.

Where the house in which the homicide was committed was the property of the prisoner's wife, who was also mother of the deceased, and both were members of her family when a struggle took place between them, the ordinary rules of self-defense were alone applicable, and rights of a householder against a violent intruder did not apply.

5. SAME.

To justify killing in self-defense, the prisoner must have reasonably believed that he had no other means of escape from death or bodily harm.

Appeal from Court of Oyer and Terminer, Lawrence County.

Frank Johnson was convicted of murder in the first degree, and appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

A. W. Gardner, J. Norman Martin, and Andrew Marquis, for appellant. Robert K. Alken and Joseph V. Cunningham, Dist. Atty., for the Commonwealth.

PER CURIAM. Not a single one of the 12 assignments of error has any merit at all, substantial or even technical, and it is to be regretted that counsel feel themselves at liberty to impede and delay the cause of justice on such trifling grounds.

In the first assignment the constitution of the trial court is attacked, not because the names of the jurors were not duly and regularly drawn for service, nor because the proper jurors themselves did not appear and serve, but because the sheriff, in the notice summoning them, failed to state that they were to serve in the oyer and terminer. Even without the act of March 31, 1860 (P. L. 427), the objection would have been one that only a juror desiring to evade service could be heard to make; and under that act the objection by the prisoner, if otherwise valid, was made too late.

The objections to the plan of the house, because the draftsman obtained some of his information from the prisoner's wife, and to the testimony as to the cartridges, because they were obtained from the prisoner's trunk, are of no force. Facts which have been learned by competent witnesses are not to be excluded, because the witness may have been put on the track of them by information coming incidentally or otherwise from the prisoner or his wife. "An admission not competent as a confession is admissible when its truth is proved by the revelation of the fact by search." *Laros v. Commonwealth*, 84 Pa. 200. The admission of such facts in evidence was not permitting his wife to testify against the prisoner or compelling him to testify against himself.

The remaining assignments that are worth noticing at all are founded on a misconception of the law of self-defense. The judge, in answering the points and in charging the jury, stated as an essential ingredient of justifiable killing in self-defense that the prisoner must have reasonably believed that he had no other means of escape from death or great bodily harm. This was in the very language approved and affirmed in *Com. v. Mitchka*, 209 Pa. 274, 58 Atl. 474. The prisoner, it is true, had a right to be in the house where he was; but so had the deceased. The house was the property of the prisoner's wife, who was also the deceased's mother, and both were members of her family. Neither had any right to eject the other, and when the struggle between them took place the ordinary rules as to self-defense were alone applicable. Rights of a householder against

a violent intruder have no relevancy. The law was correctly laid down for the guidance of the jury, and they have found the facts against the prisoner.

Judgment affirmed, and record remitted for the purpose of execution in accordance with law.

LOVE v. ROBINSON et al.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. PARTITION—DEMURRER TO BILL.

Where, in a bill for partition, there is no averment that the parties were the owners of any other realty than that set out therein, a demurrer will not lie on the ground that the bill did not include all the property held in common.

2. EQUITY — ANOTHER SUIT PENDING — DEMURRER.

A demurrer to a bill in equity on the ground that the court had acquired jurisdiction of the subject-matter in a previous suit will not lie where the record of such suit shows that only a one-third interest in the lands involved in the second suit were in controversy.

3. SAME—EFFECT OF DEMURRER.

There is no authority in equity by which a plea is overruled by the filing by defendant of a demurrer which is sustained.

Appeal from Court of Common Pleas, Allegheny County.

Action by Mary A. Love against John W. Robinson and Andrew L. Robinson. From a decree sustaining a demurrer, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas James Meagher, Robert S. Bright, and Robert T. McElroy, for appellant. John P. Hunter and George D. Riddle, for appellees.

MESTREZAT, J. We agree with the learned counsel of the appellant that "the record is in a peculiar state of confusion"; and it may be added that neither court nor counsel appears to have given attention to our equity rules nor to the well-settled practice in equity cases. They have disregarded both, and it necessarily results in confusion, in delays in the disposition of the cause, and in expense to the litigants. This was a bill filed by Mary A. Love against John W. Robinson and Andrew L. Robinson for the partition of certain real estate in Allegheny county held by the parties as tenants in common. It is averred that the plaintiff is the owner of the undivided one-half, and each of the defendants of the undivided one-fourth, of the real estate, and "that the parties to this bill are all and the only parties having any interest or estate in the realty hereinbefore mentioned and described." It prays for the partition (1) of a lot of ground in the Second Ward of Allegheny City; and (2), (3), and (4) of certain ground rents charged on three several lots of

ground in the First Ward of the city of Pittsburgh. In the fourth paragraph of the bill it is averred that at No. 1,141, December term, 1903, of the court in which this bill was filed, John W. Robinson filed a bill against Andrew L. Robinson, William R. Park, now dead, and Mary A. Love, the plaintiff here, for the partition "inter alia, of an undivided one-third part of the lands and tenements described in this bill." Mary A. Love is, as the bill avers, the sole heir of William R. Park, and his interest, the undivided one-fourth, in the real estate, vested in her at his death. It therefore appears by the averments in the plaintiff's bill that (1) the parties to the two bills are essentially the same, and that they are the only parties having any interest in the real estate; and (2) that the bill filed by John W. Robinson at No. 1,141, December term, 1903, was for the partition of an undivided one-third of the property included in the present bill. To this bill the defendants filed what they call a "plea in abatement"; but in the body of the plea they "plead in bar and abatement" the several matters set forth in the plea. Simultaneously with the plea the defendants filed also a demurrer to the bill, and set forth as cause of demurrer that "it appears from said bill of complaint that this honorable court had already acquired jurisdiction of the subject-matter thereof and of the parties thereto, and said bill is improperly brought." The next step in the proceeding was a motion filed by the plaintiff to strike off the plea. The court seems to have made no formal order on this motion, but on the day subsequent the record shows the following: "June 14, 1905, on equity argument list and plea overruled by filing demurrer and demurrer sustained." Ten days thereafter the record shows the entry of a final decree as follows: "And now, to wit, June 24, 1905, this matter came on for hearing on amended bill of complaint filed, and demurrer thereto, and was argued by counsel, and upon consideration thereof the said demurrer is sustained and the said bill of complaint is dismissed, at the cost of complainant."

The plaintiff has taken this appeal and alleges that the court erred "in decreeing that the plea was overruled by filing demurrer and demurrer sustained," in sustaining the demurrer, and in not striking off the plea. It will be observed from the form of the decree that in the final disposition of the case the plea was disregarded and the case was determined on the bill and demurrer. It is sufficient to say, without any discussion, that there is no authority whatever in our equity rules nor in the well-settled equity practice to sustain the court's position that the demurrer overruled the plea. We will, however, not consider the assignment involving that question nor the assignment alleging error in not striking off the plea, as the case was heard and determined below solely on the bill and demurrer. Upon the

issue thus made we will determine this appeal, which will require the reversal of the decree; and when the record is remitted the trial court can, if further proceedings be taken, compel the parties in their pleadings to conform to equity practice. As the learned trial judge filed no opinion on sustaining the demurrer, we do not know the reasons for his action. We are unable, after a most careful consideration of the record, to discover any ground on which to sustain the decree. The learned counsel for the appellees have attempted to support the conclusion of the court on two grounds: (1) "The bill of complaint was bad because it did not include all the property owned by the tenants in common"; and (2) "the court having acquired jurisdiction of the subject-matter in controversy and of the parties to the suit by the bill filed at No. 1,141, December term, 1903, such jurisdiction is exclusive, and jurisdiction cannot be obtained either by a new proceeding instituted in the same court or in another jurisdiction." The decree cannot, as we think, be sustained on either of these propositions. The learned counsel have wholly overlooked the fact that the case was not heard on a plea or answer which discloses the facts they allege, but upon a demurrer which does not, and could not, set up the facts the counsel contend sustain the decree of the court. It is true the plea filed by the appellees alleges that the bill did not include all the property held in common by the parties, but the learned judge below should not have considered that fact, if it were a fact, on the demurrer. The bill itself did not disclose the fact, and showed nothing more than that the parties were the owners of the property described in it. There is not a single averment nor line in the bill that shows that the parties were the owners in common of any other realty than that set out in the bill. It is therefore manifest that the facts disclosed by the record do not sustain this position of the appellees.

The other reason assigned in support of the decree is equally untenable and without merit, as an inspection of the record clearly shows. The court did not acquire jurisdiction of the subject-matter of the plaintiff's bill when the prior bill was filed at No. 1,141, December term, 1903, as the appellees contend. That is simply an assertion with no facts on the record to support it. The present bill avers that the parties are tenants in common of certain real estate, fully described therein, and sets out the proportion in which they severally hold it. The prior proceeding at No. 1,141, December term, 1903, is then referred to, and it is alleged that the bill was filed for the partition, "inter

alia, of an undivided one-third part of the lands and tenements described in this bill; said undivided one-third of said lands and tenements being the portion of the same derived, under the intestate laws of the commonwealth of Pennsylvania, from James D. Robinson, a deceased uncle of the said parties." Hence it is apparent from the allegations of the present bill that the prior bill included but an undivided one-third of the realty embraced in this bill and held in common by the parties to the proceeding. The court, therefore, had not previously, as contended by the learned counsel of the appellees, "acquired jurisdiction of the subject-matter" of the present bill. And it may be suggested in this connection that, on the numerous authorities cited by the learned counsel of the appellees, the prior bill would be bad on demurrer if, as alleged, it prayed for the partition of only the undivided one-third interest of the lands held in common by the parties.

The learned court was, therefore, in error in sustaining the demurrer, and the decree must be reversed and a procedendo awarded. The record will go back to the court below, which will require the pleadings to conform to our equity rules and the equity practice. If the present bill does not embrace all the real estate held in common by the parties, as alleged by the appellees, and this fact is made to appear by proper pleadings, it is not clear how the appellant can succeed in the final disposition of the cause. It appears from the appellant's admissions that the prior bill, filed at No. 1,141, December term, 1903, by John W. Robinson, has, by leave of court, been amended so as to include all the real estate owned in common by the parties to this bill. If, therefore, an attempt is made to amend the present bill, the appellant will be met with the objection that there is now pending between the same parties, in the same court, a bill which embraces all the realty held in common by the parties. It is therefore not apparent, as suggested above, that the reversal of the decree of the trial court in this proceeding will ultimately avail the appellant or enable her to have the lands partitioned on her bill of complaint.

While, on the pleadings, we must reverse the decree below, we do so with regret, as it may delay the division of the property with no apparent benefit to any of the interested parties. The trial court should facilitate the speedy disposition of both bills filed for the partition of the property, so that the rights of the parties may be adjudicated without further delay.

The decree of the court below sustaining the demurrer is reversed, with a procedendo.

FIRST NAT. BANK v. MCKINLEY COAL CO. et al.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. CORPORATIONS—CREDITORS' BILL—ATTACHMENT IN EQUITY.

An attachment will not be issued in a suit in equity to compel officers of a corporation to restore the corporate assets, where the court finds as a matter of fact that there was no fraudulent misappropriation of them.

2. SAME—DECREE.

Where a creditors' bill was filed against the officers and stockholders of a corporation, and the court entered a decree that they must repay so much of the assets of the corporation received by them as may be necessary to pay plaintiff's judgment, no attachment could issue on the order until the required amount was liquidated.

Appeal from Court of Common Pleas, Allegheny County.

Action by the First National Bank of Pittsburg against the McKinley Coal Company and others. From a judgment refusing an attachment, plaintiff appeals. Affirmed.

Collier, P. J., dismissed the petition in the court below, saying: "We have again gone over the case with care, and have failed to find anything in the decree itself to justify the issuing of an attachment on the ground of fraud, or in the findings and pleadings to show that the conduct and acts of the defendants were fraudulent and with fraudulent intent. The only finding bearing at all on the question is one that there was a misappropriation by the defendants, but this is far from finding that there was a fraudulent misappropriation. At any rate, until it is determined how much, if any, of the stock now held by the plaintiff, is applicable to the payment of the plaintiff's judgment, the court would not allow the attachment as prayed for to issue."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Levi Bird Duff and L. B. D. Reese, for appellant. Homer L. Castle and H. S. McKinley, for appellees.

PER CURIAM. The finding of the court below was that certain stocks in the hands of the individual respondents were the property of the coal company, and assets for the payment of its debts, and that such assets had been "improperly disposed of." On the present application for an attachment, the court, after again going over the case with care, refused to find that the conduct of the respondents was fraudulent, or that there was a fraudulent misappropriation of the assets. This would seem to bring the case within the rule in *McCarrell v. Mullins*, 141 Pa. 513, 21 Atl. 778.

But there is a second reason why the attachment should not issue, alluded to by the learned judge, though not dwelt upon.

The decree was that the defendants "must refund and repay so much of the stocks, bonds, and assets of the McKinley Coal Company, received by them, or either of them, as may be necessary to pay the plaintiff's judgment, with interests and costs." This was an indefinite order, which imposed no exact duty on the respondents. Until the required amount was liquidated, the decree was wanting in the precision necessary for its enforcement by attachment.

Decree affirmed

DINAN et ux. v. SUPREME COUNCIL CATHOLIC MUT. BEN. ASS'N.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. NEW TRIAL—VERDICT AGAINST EVIDENCE.

Where the trial judge declares that the verdict was shocking to every fair sense of justice and right, it was reversible error for him to fail to set the verdict aside.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 130.]

2. INSURANCE—BENEFIT CERTIFICATE—ACTION—QUESTIONS FOR JURY.

In an action to recover on a death certificate, where the defense was that the member was over 50 years old when he was initiated, which was beyond the age limit of the association, and there is offered a statement of deceased under oath in naturalization proceedings showing that he was over 56 years of age at the time of his initiation, which evidence remained unimpeached, a verdict should be directed for defendant.

Appeal from Court of Common Pleas, Allegheny County.

Action by Andrew A. Dinan and Mary G. Dinan, his wife, against the Supreme Council of the Catholic Mutual Benefit Association. Judgment for plaintiffs, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

A. B. Reid and A. V. D. Watterson, for appellant. G. W. Williams, N. S. Williams, and Albert J. Edwards, for appellees.

BROWN, J. This case has been tried five times in the court below. It has reached us three times—twice before on appeals by the plaintiff (201 Pa. 363, 50 Atl. 999, and 210 Pa. 456, 60 Atl. 10), and now on the defendant's appeal from a judgment in favor of the plaintiff. Her right to recover depends upon the age of her father at the time he became a member of the supreme council of the Catholic Mutual Benefit Association and received the certificate of membership in which she was named as the beneficiary. By section 177 of the constitution of the association no person over 50 years of age can become a member of it. In the application of the deceased for membership, dated July 2, 1891, he gave September 15, 1842, as the date of his birth, making his age less than 49 years at the date of his initiation—August 20, 1891.

On the fourth trial a verdict was directed for the defendant by the learned president judge of the court below because, in his opinion, it had established by strong evidence that the decedent was over 50 years of age when he applied for membership in the association. On appeal, we held this direction to have been error, for the reason that the credibility of the witnesses, upon whose testimony the defendant relied to establish the over age of the insured, was for the jury, especially in view of their answers on cross-examination. *Dinan v. Supreme Council of the Catholic Mutual Benefit Association*, 210 Pa. 456, 60 Atl. 10. On the last trial, from which we have this appeal, the question of the age of the insured was submitted to the jury, because the learned trial judge was of opinion that he was required to do so, in view of what we said in reversing the judgment on the fourth trial. The result was a verdict in favor of the plaintiffs, which, in the opinion refusing a new trial, is said to be "shocking to every fair sense of justice and right," as the testimony was "an overwhelming demonstration against plaintiffs' right of recovery—a demonstration with almost mathematical precision that Coll, at the date of acquiring membership in 1891, was not under 50 years of age; was not 48 years of age, as his application for membership certifies, but some 56 or 57 years of age." This statement of the trial judge was fully justified, and his duty in passing upon the application for a new trial was free from all doubt. He does not simply state that the finding was one he would not have made in view of the testimony, or that he cannot set it aside for the reason that he does not agree with it, but declares it to be "shocking to every fair sense of justice and right," as it was a finding in the face of undisputed documentary evidence to the contrary. In such a case there is but one course open to a trial judge, and that is to set the verdict aside; for to sustain it is to sanction injustice in a court of justice. In all cases where the court is satisfied that the finding of the jury is against the truth, justice will not be administered unless it is set aside; for it is not *vere dictum*, on which alone judgment can be justly entered. But for the power lodged in courts to set aside untrue findings, the infliction of injustice could not be avoided; for, great as may be the jury system, whims, sympathies, prejudices, and caprices at times influence and control the judgment of men, even when sworn to be guided only by the law and the evidence in the case. The remedy for a perverse verdict, or for one so clearly against the weight of the evidence that it will result in wrong, if allowed to stand, is to set it aside and grant a new trial, and the power to do so, existing in the trial court, ought to be unflinchingly exercised: *Kohler v. Pennsylvania R. R. Co.*, 135 Pa. 346, 19 Atl. 1049. No other view of this verdict is possible than that entertained by the trial judge, and it

was therefore his clear duty to set it aside. The case having been submitted to the jury under a state of facts that permitted of but one conclusion, a different one cannot be permitted to stand.

But the case ought not to have proceeded so far as to have made it necessary for the defendant to ask for a new trial. On the last trial a situation was presented very different from that on the fourth, in which it was for the jury to pass upon the credibility of the witnesses called by the defendant. At this fifth trial a petition of Charles Coll for naturalization, addressed to the Circuit Court of the United States for the Western District of Pennsylvania, dated October 4, 1856, and sworn to by him, was offered in evidence by the defendant. In this petition Coll declared himself at that time to be over 21 years of age. Maurice Coll, a brother of the father of plaintiff, testified that the signature to the petition was that of the insured, and further stated that 21 days later, on October 25, 1856, Charles, who was older than he, appeared in the same court at his instance and request and vouched for him on his petition for naturalization, in which he at that time stated that he himself was over 21 years of age—a fact reaffirmed by him in his testimony on this last trial. No attempt was made to question the credibility of this witness, nor to impeach the petition of the insured for naturalization taken from the records of the United States court, in which he gave his age as over 21 years in October, 1856, making him in 1891 over 56 years of age. With this documentary evidence before the court, showing Coll's own declaration under oath, in October, 1856, that he was then more than 21 years of age, the question of the credibility of witnesses was no longer for the jury's determination; but their duty was to return a finding in accordance with the unimpeached and conclusive written evidence in the case, and they should have been so instructed by affirming the defendant's fourth point, asking that a verdict be directed in its favor. The *prima facie* case of the plaintiff, as made out by the certificate of membership, upon which alone she relied for her father's age, was completely overcome.

The judgment below is reversed, and judgment is now entered here for the defendant.

SCHOFIELD v. TURNER.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

INSURANCE — MUTUAL COMPANIES — ASSESSMENTS—LIMITATIONS.

Limitations run in favor of a member of a mutual insurance company as to an assessment levied by a receiver of the company from the decree authorizing the assessment, and not from the date when the insolvency of the company was established.

Appeal from Superior Court.

Action by Charles S. Schofield, receiver of

the *Ætna Mutual Live Stock Insurance Company*, against Alfred Turner. From a judgment of the Superior Court, affirming a judgment making absolute a rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Affirmed.

From the record it appeared that upon the application of the Attorney General the *Ætna Mutual Live Stock Insurance Company* was, on June 29, 1895, declared insolvent by the court of common pleas of Dauphin county, and Charles S. Schofield was appointed receiver of the company. On November 18, 1896, the same court authorized the receiver to levy and collect an assessment upon the outstanding policies of the company. The present suit was brought on November 18, 1902. The defendant pleaded the statute of limitations.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. K. Jennings and D. C. Jennings, for appellant. Pier Dannals and Charles S. Schofield, for appellee.

BROWN, J. A misapprehension of what was decided in *Swearingen v. Dairy Company*, 196 Pa. 68, 47 Atl. 941, 53 L. R. A. 471, is doubtless responsible for this appeal. In that case the proceeding was instituted to compel the payment of balances due by stockholders for unpaid subscriptions to the capital stock of the insolvent corporation. The amount that each stockholder still owed on his stock was 25 per cent. of its par value, a definite sum, which the company, at any time before its insolvency, might have called upon him to pay, but, until so called, there was no liability to pay, and the statute of limitations could not, therefore, begin to run. On January 5, 1891, when the company admitted its insolvency and executed a deed of assignment for the benefit of its creditors, every stockholder knew that the balance of his unpaid subscription—a fixed sum—might be needed for the payment of the company's indebtedness, and the representative of the company, its assignee, knew the balance was due. With the liability thus fixed, and the right to enforce it established, the statute of limitations began to run from the time of insolvency. The liability of a stockholder being definitely fixed by the amount of his unpaid subscription, the corporation, before insolvency, may enforce it by calling for payment, and an assignee thereafter may at once proceed to reduce the liability to a judgment. This is what was decided in that case, summed up in the following sentence: "The right of action of the plaintiff, whatever it was, accrued upon the fact of insolvency of the dairy company shown by the assignment for the benefit of creditors, and the statute of limitations began to run from that date."

In the case of *Franklin Savings Bank*, to

Use, etc., v. Bridges (Pa.) 8 Atl. 611, cited by the appellant, it appeared that prior to the execution of the deed of assignment in 1878 the board of directors had laid an assessment for the entire balance due on the subscription to the stock. The right of action accrued at the time the assessment was laid, but the suit to recover the balance was not instituted until more than seven years after the deed of assignment had been executed. In the late case of *Cook v. Carpenter* (Lipper's Appeal) 212 Pa. 165, 61 Atl. 799, in which the present Chief Justice exhaustively reviews the cases on the subject of the running of the statute of limitations in suits brought on claims like the present, the same rule is recognized. Speaking of the liability of a stockholder to pay a balance due on his subscription when called for by the company, he says: "Until such call, there is no obligation on the stockholder to pay. It may never be made. If the enterprise is successful and profitable from the start, or the provision for capital has been larger than actual needs require, the duty of payment is only a reserve duty for possible contingencies, and until they happen, either by calls by the corporation on the subscriptions, or by the rights of creditors, there is no duty of the subscriber to pay, no right of action against him for nonpayment, and no starting point for the statute of limitations."

The difference between the liability of a member of a mutual insurance company and the holder of capital stock in a corporation on his unpaid subscription seems to be overlooked by the appellant. Just what liability he assumed as a member of the insolvent mutual insurance company does not appear either from the plaintiff's statement or the affidavit of defense, but we assume it to be on a premium note or under the charter and by-laws of the association. Though the liability of a stockholder is different from that of a member of a mutual insurance company, it cannot be enforced in either case until a right of action accrues upon it, from which time only the statute begins to run. The stockholder, during the solvency of the corporation, can be called upon at any time by the board of directors to pay the balance due on his stock, but the member of the mutual association makes no such unconditional promise to pay. It is not a promise to pay the whole amount of his premium note, or any sum fixed by the charter or by-laws, but such sum or sums from time to time as may be assessed against him as his portion required for the necessities or losses of his company. How much that portion is cannot be known to him, nor to the company, until, after its necessities or losses have been ascertained, it is enabled to notify him how much he must pay and to demand payment of the same. His liability is not absolute, but conditional, depending upon the necessities or losses of the company and the demand of its officers. His liability upon

his note, if he gives one, is upon assessment and notice of the same after the happening of a contingency upon which the company is authorized to make the assessment on the note and upon performance by it of the conditions precedent to its right as the holder to enforce payment of the assessed liability; and so it is if the liability arises from an agreement to be bound by the charter and by-laws. The power and the duty of making the assessment are in the company until, upon its insolvency or dissolution, they pass to a receiver. But neither the one nor the other can bring an action without first making the assessment and complying with the conditions upon which the member of the insurance company obligates himself to pay. In *Eichman v. Hersker*, 170 Pa. 402, 33 Atl. 229, the assessment was not made within six years of the date of the policies and the premium note, nor within six years from the date of the losses, the payment of which had created the debt sought to be satisfied by assessment, and it was said by our late Brother Dean, "Nor is it any answer to say the company was dilatory in levying the assessment. Mere indulgence in levying the assessment will not bar the right; delay in enforcing collection after levy and demand would." Here there was no delay after levy and demand. That case, and *Smith v. Bell*, 107 Pa. 352, without more, were conclusive upon the court below in directing judgment to be entered. After referring to *Eichman v. Hersker*, in *Cook v. Carpenter* (Lipner's Appeal) 212 Pa. 165, 61 Atl. 799, it is said: "Distinctions based on the wording of the charters or the statutes under which they were conferred were repudiated, and the decision put explicitly on the general principle that the obligation was not to pay at once but upon a future event, the levying of an assessment by the directors, and the statute did not begin to run until such assessment." Judgment affirmed.

CARSON et al. v. ALLEGHENY CITY.
(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. MUNICIPAL CORPORATIONS — STREET IMPROVEMENT—REPORT OF VIEWERS—EVIDENCE OF BENEFITS.

Where a report of viewers assessing benefits and damages in a road case was appealed from, and the report was prepared in proceedings under Act May 16, 1891 (P. L. 75), it cannot be received as prima facie evidence of the benefits as therein mentioned, as provided by Act April 2, 1903 (P. L. 124), for reports of viewers in proceedings under the latter act.

2. SAME—APPEAL FROM REPORT—EVIDENCE.

Where an appeal is taken in a road case from viewers' report, the contract for the improvement is inadmissible in evidence for defendant.

Appeal from Court of Common Pleas, Allegheny County.

Action by William Carson and others

against Allegheny City. Judgment for plaintiffs, and defendant appeals. Affirmed.

The following is a portion of the opinion of the court below on refusing a new trial:

"This was an appeal by plaintiff from a report of a board of viewers assessing benefits and damages for widening and changing the grade of West End avenue in defendant city, and is one of the few appeals taken under the act of 1901 remaining undisposed of. The report was filed in court and confirmed nisi on November 4, 1902, and that report awarded plaintiffs' damages in the sum of \$651.75, and assessed benefits against them in the sum of \$2,900. At the trial a verdict was rendered in plaintiff's favor for \$3,500. In presenting defendant's case, defendant's counsel offered in evidence the viewers' report, for the purpose of showing the award and assessment made by the board, and in support of the offer cited that part of section 6 of the act of April 2, 1903 (P. L. 127), which is as follows: 'Upon the trial of any such appeal in court, the report of viewers, as finally approved, confirmed, modified, or changed by the court, shall be prima facie evidence of the benefits as therein mentioned.' An objection to the offer was sustained, and upon that ruling this motion for a new trial is principally based. The act of 1903 amends sections 2 and 6 of the act of May 16, 1891 (P. L. 76, 77), providing a new means for giving notice to property owners of the action of the viewers, and authorizing councils to provide by whom such notice shall be given. The act further requires the report to be filed in the office of the prothonotary and confirmed nisi, which report, after 30 days, becomes conclusive unless excepted to or appealed from within that time. The amended statute further requires the property owner appealing from such report to make affidavit that the appeal is not taken for delay. Then follows the clause above quoted, which defendant claims makes the report 'prima facie evidence of the benefits as therein mentioned.' The offer was refused because, in our opinion, this case was not within the act. The report here was made under the provisions of the act of 1891 and before the passage of the act of 1903. There is a material difference in the provisions of these acts. Upon completion of the viewers' report in this case, notice of the time and place of the viewers' meeting, to hear exceptions to their schedule of assessments for benefits and damages, was not given property owners in the manner required by the act of 1903. The report was not filed in the office of the prothonotary and confirmed nisi. Neither had appellants stated the grounds upon or for which the appeal was taken, except in a general way, nor had they made affidavit that the appeal was not intended for delay. Under these circumstances, we were of opinion the report was not admissible. While the Legislature undoubtedly had the right to make the report

prima facie evidence of benefits sustained, the statute should clearly show such intention. The act says, 'upon the trial of any such appeal in court,' which it seems to us means an appeal taken in compliance with the requirements of the act of 1903, 'the report * * * shall be prima facie evidence of the benefits as therein mentioned.' This language, in our opinion, refers to a report prepared and filed in accordance with the amended act of assembly, and does not refer to a report made under a previously existing law and not prepared and filed as required by the later statute. Viewers' reports made and filed since the approval of the act of 1903 are probably admissible as prima facie evidence of benefits sustained, but those made under the act of 1891 are not, and were not intended to be by the Legislature.

"The second reason for a new trial refers to our refusal to admit as evidence on the part of defendant the contract between the city and the contractors for doing the grading on the street. It seems to us this reason needs no discussion. That contract could not have given the jury any information whatever as to the value of plaintiff's property either before or after the improvement. It was, therefore, not proper evidence."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. W. Stoner, Stephen G. Porter, and Craig Smith, for appellant. Frank P. Sproul and Thomas M. Marshall, Jr., for appellees.

PER CURIAM. Judgment affirmed, on the opinion of the court below refusing a new trial.

DUQUESNE BOROUGH v. KEELER.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—ASSESSMENTS—SET-OFF.

On report of viewers assessing benefits for the improvement of a street where the landowner appeals, he cannot set off a claim for damages caused by the widening of the street by an ordinance passed nine months after the contract for the improvement had been awarded, where the cost of the widening was assessed before other viewers in a separate proceeding.

2. SAME—NOTICE OF ORDINANCE.

Where a borough failed to give, within 10 days of the passage of an ordinance for grading and paving of a street, the notice required by Act May 16, 1891, § 10 (P. L. 79), it was not fatal to the assessments for the cost of the improvement.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 779.]

Appeal from Court of Common Pleas, Allegheny County.

Action by Duquesne borough against Leonora Keeler. Judgment for plaintiff, and defendant appeals. Affirmed.

Defendant presented, inter alia, the following points: "(2) The plaintiff, having

offered no evidence that the council authorized the signing of the contract for the grading, paving, and curbing of Duquesne avenue, or that the burgess approved of the signing of the said contract by ordinance or otherwise, the plaintiff cannot recover, and the verdict should be for the defendant. Answer: Refused. (3) If the jury find from the evidence that the borough of Duquesne undertook to grade, pave, and curb Duquesne avenue in accordance with the provisions of the act of assembly passed May 16, 1891, upon the petition of a majority in number and interest of the owners of property abutting thereon, and that without further petition by the property holders, the council did not grade, pave, and curb Duquesne avenue as petitioned for, but did grade, pave, and curb a portion thereof to a greater width than that embraced within the lines of the street at the time the same was petitioned for, without the consent of the petitioner, in that event the plaintiff cannot recover in this action, and the verdict should be for the defendant. Answer: Refused, for the reason that there is no evidence that they did not."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. T. Tredway, for appellant. Fred W. Scott, for appellee.

FELL, J. This action was to recover benefits accruing to the defendant's property by the grading, curbing, and paving of Duquesne avenue. The defendant's main contention at the trial was that a part of the avenue was widened after the passage of the ordinance for its grading, etc., and that the work done on the new part was without any authority, no new ordinance having been passed providing for it, and that she was entitled to set off against the claim for paving and grading her damages resulting from the widening of the street. In support of this contention the defendant offered no proofs, and it was not sustained by the facts brought out by the witnesses for the plaintiff. The ordinance called for the paving of the avenue without stating its width, and it did not appear to what width it had been paved. If the defendant was charged with any part of the cost of work not duly authorized, she failed to show it at the trial, and the court properly disregarded this ground of defense. The widening was by ordinance passed nine months after the contract for grading had been awarded, and there were separate proceedings before another set of viewers assessing the cost thereof. It is clear that the defendant's claim for damages because of the widening could not be considered in the proceeding before us.

Nor was the failure to give the notice provided for by section 10 of the act of May 16, 1891 (P. L. 79), within 10 days of the passage of the ordinance, fatal to the

plaintiff's claim. The section mentioned provides that notice of the approval of the ordinance for the improving of a street shall be given within 10 days by handbills posted along the line of the proposed improvement, setting forth the fact and date of the approval, and that the petition for the improvement was signed by a majority in interest and number of owners of abutting properties, and any one in interest, denying that it was so signed, may appeal to the court of common pleas for a determination of the question whether the improvement was petitioned for by the requisite majority. This section, it was said in O'Mara's Appeal, 194 Pa. 86, 45 Atl. 127, is a special provision for raising, before the expense of the improvement has been incurred, the objection that a majority of the property owners had not signed the petition, and the penalty for not raising it is estoppel. If no notice, or an inadequate notice, is given, the owner is not estopped, and this ground of defense is open at the trial. The failure, however, to give notice does not invalidate the ordinance and all proceedings under it. The power to contract for a street improvement is not given by this section. It regulates only the manner in which a particular question that affects the exercise of the power may be decided, and concludes parties in interest who do not raise the question in the manner prescribed. The section does not confer jurisdiction on the council, but regulates a method of procedure for the determination of a particular question. In *Pittsburg v. Coursin*, 74 Pa. 400, it was held that a failure to comply with a provision of the act of 1864, requiring notice to be given of assessments for grading or curbing streets in order that interested parties might have an opportunity to correct mistakes, did not invalidate the assessment but made it nonconclusive, and left it open for the property owner to show at the trial that mistakes had been made. In *Erie City v. Willis*, 28 Pa. Super. Ct. 459, section 35 of the act of May 16, 1901 (P. L. 252), was under consideration, and it was decided that the effect of a failure to give notice of the time and place of making the assessment, as provided for, was to make the assessment nonconclusive, but not to make it invalid.

The judgment is affirmed.

HAYS v. FOREST OIL CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. MINES AND MINERALS — OIL LEASE — CONSTRUCTION.

An oil and gas lease provided that it should be void if a well was not completed within three months from its date, unless the lessee paid \$500 monthly for each month's delay in completing the well, each payment to extend the time for completion for one month. *Held*, that the monthly payment was only a condition

precedent necessary to maintain the vitality of the lease, and was not a covenant to pay \$500 per month until the well should be completed or the lease surrendered.

2. SAME — COMPLETION OF WELL.

Where an oil lease provided for the completion of a well, and the lessor has treated a well as completed and has accepted royalties for 2½ years, he cannot claim that the well was not completed in the first instance.

Appeal from Court of Common Pleas, Allegheny County.

Action by L. O. Hays against the Forest Oil Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Frazer, P. J., upon the trial in the court below, charged, *inter alia*, as follows:

"As we understand this agreement, defendant is not liable for the \$500 rental, in this action at least. Under the clause we have just read to you, if the defendant failed to complete the well within three months that was the end of the lease. It required no forfeiture. It required no action upon the part of the plaintiff to end the term and enable him to get possession of his property. That was the end of the lease, and plaintiff had the right to go upon the land, take possession of it and oust defendant. As we read the contract, there is no covenant or agreement upon the part of Mr. Thompson to pay the \$500. He does not agree to pay that sum, but under the lease, if the well was not completed within the three months, lessee might secure an extension of another month by paying \$500. There is nothing, however, in the contract requiring him to do so. If the well was not completed within the three months, and he did not see fit to continue the lease, he could surrender it by failing to make the payment. As we understand that clause, and reading it in connection with the case of *Glasgow v. Gas Company*, which you have heard counsel read, we are of the opinion plaintiff, under the circumstances of this case, is not entitled to recover the rental here sued for.

"In addition to what we have said, there is another reason set up by defendant which, in our opinion, is sufficient to prevent plaintiff from recovering; that is, the completion of the well. Who had the right to determine when the well was completed? In the absence of bad faith upon the part of the lessee, we think that was his right. If there was any bad faith, it would, perhaps, be a question for the jury; but without that it seems to us the driller, the lessee in this case, would have the right to say whether the well was completed or not. In a recent case the question was as to what was meant by 'producing oil in paying quantities,' and the Supreme Court used this language, and I see no reason why the principle laid down there should not be applicable to this case: 'So long as the lessee is acting in good faith on business judgment, he is not bound to take any other party's judgment, but may stand upon his own. Every man who invests his money and labor in a business does it on the confidence he

has in being able to conduct it in his own way. No court has any power to impose a different judgment on him, however erroneous it may deem his to be. Its right to interfere does not arise until it has been clearly shown that he is not acting in good faith on his business judgment, but fraudulently, with intent to obtain a dishonest advantage over the other party to the contract.

"We do not recall any testimony in this case that would indicate any intent on the part of the lessee to obtain a dishonest advantage over the plaintiff. It appears the well was drilled as deep as other wells in that hundred-foot sand, that in other wells in that field the pay streak was from the top of the sand, and the weight of the testimony is clearly in favor of there being but one pay streak in that sand, and that the upper pay streak. Lessee, having invested his money in the venture, and being liable for any expense there was in drilling, had a right to determine when the well was completed; and, having determined that it was completed after going below the first pay streak, he was not obliged to take any risks for benefit of somebody else, so long as he acted in good faith. We therefore direct you to render a verdict in favor of the defendant."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

D. F. Patterson and Charles S. Crawford, for appellant. J. McF. Carpenter and Robert W. Cummins, for appellee.

ELKIN, J. The plaintiff has proceeded in assumpsit to recover for monthly rentals alleged to be due under the provisions of a lease to mine for and produce petroleum and natural gas from a certain tract of land located in the county of Butler. The plaintiff's right to recover depends upon the construction of that part of the lease which reads as follows: "This lease to be null and void and no longer binding on either party if a well is not completed on the premises within three months from this date, unless the lessee shall thereafter pay monthly to the lessor \$500 per month for each month's delay in completing said well; each payment to extend the time for completion for one month and no longer." The contention of the appellant is that the lessee covenanted to pay a rental of \$500 per month until a well should be completed or the lease surrendered and canceled. The appellee denies that these provisions of the lease should be construed as a covenant to pay a monthly rental, but insists that the payment of the \$500 per month is only a condition precedent and necessary to maintain the vitality of the lease until a well is completed.

The question involved is practically ruled by *Glasgow v. Chartiers Gas Company*, 152 Pa. 48, 25 Atl. 232, wherein Mr. Justice Williams, construing the provisions of an oil

lease which in legal effect and almost similar language to that used in the present lease, said: "Its legal effect is to confer on the grantee the right to explore for oil on the tract described. If he does not exercise this right within one month, it is lost to him, unless he chooses to pay \$100 in advance as the price of another month's opportunity to explore. If he does exercise it, and finds nothing, he is under no obligations to continue his explorations. If he explores and finds oil or gas, the relation of landlord and tenant or vendor and vendee is established, and the tenant would be under an implied obligation to operate for the common good of both parties, and pay the rent reserved." It was held in that case that the monthly payment was the means provided in the contract by which the right of the lessor to forfeit the lease could be postponed, but that it was not a covenant to pay a monthly rental which the lessor could assert in an action on the lease. The learned counsel for the appellant has endeavored to distinguish that case from the one at bar. It is a distinction, however, without a difference. The two leases are almost identical in language and certainly are the same in legal effect. A reversal of the judgment in this case would mean an overruling of that one. It may be conceded that this is an improvident agreement; but, inasmuch as no fraud, mistake, or misrepresentation is alleged, the lease must be construed according to its plain meaning. This lease, in language too plain to be misunderstood, provides that it shall be no longer binding on either party if a well is not completed within three months, unless the lessee before the expiration of the three months' period shall pay lessor \$500 for each month's delay in completing said well. Each monthly payment is to extend the time for completing the well one month longer. It will be observed that these monthly payments are connected with and have only to do with the forfeiture of the lease, which by its own terms expires in three months from its date if a well is not completed at that time. This provision is a protection to the lessor in order that his property shall not be indefinitely tied up while the explorations are being made. On the other hand, if the lessee has not been able to complete a well within three months and still wishes to continue explorations, he can extend the time for completing the well by paying \$500 each month. He does not covenant to pay a monthly rental, but reserves the right to elect to pay \$500 a month, rather than forfeit his lease, until the well is completed.

On the other branch of the case the learned court below was clearly right in holding that the lessee had complied with the terms of the lease relating to the drilling of a well and that the lessor could not enforce the payment of a monthly rental on the ground of failure to complete the well. The lessor, before and after the defendant company took over the

lease, treated it as a completed well and received the royalties due under the terms thereof from the defendant from February, 1900 to September, 1902. After having treated the well as completed, and having accepted the royalties for so long a period of time, the lessor cannot now be heard to say that the well was not completed in the first instance.

Judgment affirmed.

GLASSPORT LUMBER CO. v. WOLF.
(Supreme Court of Pennsylvania. Jan. 2, 1906.)

MECHANICS' LIENS — RIGHTS OF SUBCONTRACTOR.

Where a building contract, duly filed of record in the prothonotary's office, stipulates that the contractor will not permit any person to file a lien on the building or premises, nor file any lien himself, such contract is binding, under Act June 4, 1901 (P. L. 431), as amended by Act April 24, 1903 (P. L. 297), and a subcontractor has no power to file a lien.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 185.]

Appeal from Court of Common Pleas, Allegheny County.

Action by the Glassport Lumber Company against Nicholas Wolf and others. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William M. Hall, for appellant. I. S. Stentz and R. A. Hitchens, for appellees.

BROWN, J. This is a suit on an injunction bond, given by the appellees when Nicholas Wolf, one of them, filed a bill to restrain the appellant, a subcontractor, from filing a mechanic's lien against his hotel building in the city of McKeesport. By a decree of this court the injunction awarded by the court below was dissolved, and the bill dismissed, because Wolf had an adequate and complete remedy at law if the appellant had no right to file the lien. *Wolf v. Glassport Lumber Co.*, 210 Pa. 370, 59 Atl. 1105. The sole question on this appeal is as to that right.

On November 12, 1903, F. E. Shallenberger, as contractor, entered into a written agreement with Nicholas Wolf for the erection of the building against which the appellant claims to have a right to file a lien. In that agreement there is the following stipulation: "The contractor covenants and agrees that he will not permit any person or persons to file any mechanics' liens for materials furnished and labor performed to said building and premises, nor will he file any liens himself." This is all that is said in the agreement on the subject of liens for work done or materials furnished. The act of June 26, 1895 (P. L. 869), provides that no

agreement for the erection of a building shall operate to defeat the right of a subcontractor to file a mechanic's lien, unless the contractor specifically covenants that the subcontractor shall not file it. In the act of June 4, 1901 (P. L. 431), as amended by the act of April 24, 1903 (P. L. 297), this requirement of a special covenant against liens to defeat the right to file them does not appear, but, instead, the language of the act is: "If the legal effect of the contract between the owner and the contractor is, that no claim shall be filed by any one, such provision shall be binding." We are, therefore, simply to determine the legal effect of the words used in this contract. The stipulation is not only that the contractor will not file any lien, which in itself would be sufficient to bar a subcontractor (*Schroeder v. Galland et al.*, 134 Pa. 277, 19 Atl. 632, 7 L. R. A. 711, 19 Am. St. Rep. 691; *Ballman v. Heron et al.*, 160 Pa. 377, 28 Atl. 914), but there is a covenant that no other person or persons shall be permitted to file mechanics' liens. To say that these words, standing alone and not to be read with any other part of the agreement to ascertain their real meaning, can have any other legal effect than to deprive the contractor, and all others furnishing through him work or materials for the building, of the right to file liens, would be to read them as no layman would understand them. They create an express covenant, "so plain that every mechanic and materialman, though of limited education, can understand it at a glance," and the advice of no lawyer is needed as to their legal effect. *Nice v. Walker*, 153 Pa. 123, 25 Atl. 1065, 34 Am. St. Rep. 688. Their meaning would be no less unmistakable if the words suggested in that case had been used, "No lien shall be filed against the building by either contractor or subcontractor"; and the stipulation in this case is binding, because the act says it shall be when filed of record, as it was, in the prothonotary's office within the time prescribed, as notice to all and for protection to the owner of the building.

Four cases have been cited by counsel for the appellant as authority for its right to file a lien. They are *Nice v. Walker*, supra, *Creswell Iron Works v. O'Brien*, 156 Pa. 172, 27 Atl. 131, 36 Am. St. Rep. 30, *Lucas v. O'Brien*, 159 Pa. 535, 28 Atl. 364, and *Gordon v. Norton*, 186 Pa. 168, 40 Atl. 312. No one of them is authority for the right asserted by the appellant. In the first, the contract contained neither an express covenant against liens, nor any implied one depriving a subcontractor of his right to a lien. This appears from the sixth and seventh clauses of the contract—the essential portions of it—which are quoted at length in the opinion of Paxson, C. J. As to *Creswell Iron Works v. O'Brien* and *Lucas v. O'Brien*, we said, in *Fidelity Mutual Life Association v. Jackson*, 163 Pa. 208, 29 Atl. 883, 43

Am. St. Rep. 789, that they were "cases in which the provisions of the contract were consistent with a privilege on the part of a subcontractor to file a lien, and contained nothing exclusive of such a right." That the contract in each of these cases contemplated the filing of a lien is manifest from the clause providing that no payment should be made to the contractor until any lien filed against the building had first been removed. In the last case—Gordon v. Norton—the second clause of the contract provided that the contractor should deliver a full and complete release of all liens, and by the eleventh he agreed that he would not himself file any liens against any one of the 65 houses, nor suffer or permit any liens to be filed against any one of them that in any manner might affect, impair, or take priority over the liens of certain mortgages held by the German-American Title & Trust Company. There was no covenant against filing liens, and, as said by the present Chief Justice, the concluding clause of the eleventh section "might well be taken to indicate that the whole provision was meant as a mere stipulation that no liens filed should be held to take priority or affect the mortgages." The cases cited by the appellee need not be reviewed. As authorities requiring the court below to discharge the rule for judgment it is sufficient to call attention to *Ballman v. Heron*, 160 Pa. 377, 28 Atl. 914, and *Fidelity Mutual Life Association v. Jackson*, 163 Pa. 208, 29 Atl. 883, 43 Am. St. Rep. 789.

The order discharging the rule is affirmed.

CITY OF McKEESPORT v. PITTSBURG, M. & C. RY. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

STREET RAILROADS—IMPROVEMENT OF STREETS—PAYMENT OF COST.

A city ordinance gave a street railway the right to lay tracks on certain specified streets, and provided that the company should pay the cost of the improvement between its tracks and the lines of its tracks and one foot on each side thereof of all highways which it occupied which should hereafter be improved. *Held* to apply to all streets occupied by the company, and not merely those enumerated in the ordinance.

Appeal from Court of Common Pleas, Allegheny County.

Action by the city of McKeesport against the Pittsburgh, McKeesport & Connellsville Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Frazer, P. J., filed the following opinion in the court below:

"This action is to recover from defendant the sum of \$5,014.17, with interest from August 1, 1901, being a proportionate share of the cost of improving Cherry lane in plaintiff city. The facts agreed upon by the parties and filed February 24, 1905, in substance show that defendant company is an incorporated street railway company, the

successor of and owning the franchises of the Citizens' Passenger Railway Company, the McKeesport & Wilmerding Railway Company, and the McKeesport, Wilmerding & Duquesne Railway Company. On or about October 15, 1894, the supervisors of Versailles township in an agreement in writing authorized the McKeesport & Wilmerding Railway Company to occupy Cherry lane, which highway at that time was situate in Versailles township. In accordance with the consent so granted that company entered upon Cherry lane and constructed thereon its railway tracks, and since that time the same have been maintained and used by the McKeesport & Wilmerding Railway Company during its existence and since its organization by defendant. The portion of Versailles township in which Cherry lane is located became a part of the city of McKeesport on July 28, 1897. By ordinance of the city of McKeesport, passed and approved on April 4, 1898, the McKeesport, Wilmerding & Duquesne Railway Company, for the purpose of extending its lines, was granted permission to use and occupy with its tracks certain additional streets in plaintiff city; Cherry lane not being one of the streets mentioned in that ordinance. That ordinance, in consideration of the rights granted, imposed certain duties upon the railway company; the portion applicable to this controversy being as follows: 'On all improved streets occupied under this ordinance, said company shall, at its own expense and cost, restore and repave the same in a good and workmanlike manner, and on all unimproved streets shall lay its ties on a bed of broken stone not less than eight inches deep, and place broken stone between the ties and to the top thereof, and shall at all times keep the space between its tracks and lines of tracks, and one foot on each side of its tracks, in good and complete repair. On all highways traversed by said company, which shall hereafter be improved, said company shall pay the cost of the improvement between its tracks and lines of tracks and one foot on each side thereof.'

"On July 9, 1900, an ordinance was passed by the councils of plaintiff city and approved July 14, 1900, providing for the grading, paving, and curbing of Cherry lane between certain points, and in accordance therewith that street was graded, paved, and curbed, which was the first improvement of the street. The proportionate cost of the improvement on the portion of the street occupied by defendant between its tracks and for a foot on each side thereof is \$5,014.07. This sum plaintiff claims is due it from defendant by reason of the terms of the ordinance of April 4, 1898; the clause relied upon to support this claim being quoted above. The agreement of the parties above referred to also provides that if the court shall be of the opinion that plaintiff is entitled to recover from defendant, under the facts agreed upon,

for a portion of the cost of the improvement of Cherry lane, judgment shall be entered in favor of plaintiff and against defendant for the sum claimed with interest; if of opinion that plaintiff is not entitled to recover, then judgment to be entered for defendant. The sole question here is the effect of the clause which provides that the company shall pay the cost of the improvement between its tracks and lines of tracks and one foot on each side thereof of all highways traversed by it which shall hereafter be improved; plaintiff's contention being that this clause applies to all streets in the city upon which defendant's tracks are located, while defendant's contention is that the clause applies merely to streets included in the ordinance of which it is a part. The Constitution provides that 'No street passenger railway shall be constructed within the limits of any city, borough or township without the consent of its local authorities.' This language is also incorporated in the street railway act of 1889. Under these provisions a municipality may undoubtedly impose reasonable conditions to a right granting the use of its streets for street railway purposes. *Allegheny v. Railway Co.*, 159 Pa. 411, 28 Atl. 202. That a requirement that the company, in consideration of the privilege of using certain streets, shall pay the cost of having such streets between its tracks and one foot on each side thereof, is a reasonable condition, is not denied. Therefore, if the ordinance of April 4, 1898, applies to all streets upon which defendant's tracks are laid, judgment must be entered for plaintiff.

"Giving the words used in the ordinance their natural, plain, and ordinary significance, they are certainly broad enough to impose the duty upon defendant of paying a proportionate share of the cost of improving all highways upon which its tracks are laid, and that it was intended they should do so seems clear. After requiring defendant to repave all improved streets and leave in good condition all unimproved streets 'occupied under this ordinance,' it is further provided in another separate and distinct clause that defendant shall pay a proportionate cost of the improvement of 'all highways traversed by said company which shall hereafter be improved.' This language is not doubtful, and, in the absence of any provision limiting its application to streets included in the ordinance or any words indicating an intention to do so, the language used should be given its ordinary meaning. The city having the power to impose conditions under which streets shall be used, and in plain and unmistakable words having prescribed the conditions under which the extension provided for in the ordinance of April 4, 1898, should be built, and those conditions having been accepted by defendant company, it must comply therewith and discharge the burden they placed upon it. The permission given by the supervisors of Versailles town-

ship, it seems to us, has no bearing upon this case; there being nothing in that permission which prevents the city from imposing additional burdens upon the company in the event of further privileges being given it."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James H. Beal, Robert P. Watt, E. P. Douglass, and J. Paul Fife, for appellant. W. B. Rodgers and W. E. Newlin, for appellee.

PER CURIAM. Judgment affirmed, on the opinion of the court below.

MASSETH v. MASSETH.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

WILLS — TESTAMENTARY CAPACITY — EVIDENCE.

On an issue *devisavit vel non* on the ground of want of testamentary capacity, evidence reviewed, and *held* that the issue was properly refused.

Appeal from Orphans' Court, Butler County. Action by Mary E. Masseth and others against Charles E. Masseth and others. From a decree refusing an issue *devisavit vel non*, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. H. Lusk, E. O. Gibbs, and W. D. Brandon, for appellant. Clarence Walker, John M. Murphy, and John S. Keenan, for appellees.

STEWART, J. The proceeding in the court below was an appeal from the decree of the register, admitting to probate a paper purporting to be the last will and testament of Ben Masseth. The only question there, as here, was whether the evidence submitted disclosed a substantial dispute about a material fact. Masseth was a resident of Butler county, in this state. With a view to obtaining relief from a dangerous physical ailment, from which he was suffering, he went to a sanitarium in the state of Michigan, in May, 1898. He there submitted to an operation, which proved of no avail, and his death followed in about three weeks thereafter. When it became apparent that his end was approaching, he was asked by his attending physician if he desired to make a will. He replied that he did, and a scrivener was sent for, who prepared the paper in controversy. This paper was executed by Masseth the following evening, and attested by the physician, the scrivener, and one other, who was an attendant at the sanitarium, but whose present whereabouts are unknown. Masseth died during the evening of the following day. When the paper was offered for probate before the register of Butler county,

a commission issued to take the testimony of these attesting witnesses in Michigan. This evidence established the execution of the writing; and being specifically interrogated as to the testamentary capacity of Masseth at the time of its execution, the physician and the scrivener, the only witnesses examined, the other having removed from the state, both testified that he was of sound and disposing mind and memory. The probate of the will followed, as matter of course. This was followed by an appeal by these contestants, who are the children of decedent's brother, Edward Masseth, in which they aver that Ben Masseth, at the time of the execution of the paper, was not of sound and disposing mind and understanding, and that the execution of the paper was procured through undue influence on the part of Charles Masseth and others. Evidence was taken, and upon full consideration the issue asked for was refused, and the appeal dismissed.

The case is singular in this: that the only witness called by contestants to impeach the integrity of the alleged will are the attesting witnesses to the will itself. The testimony of one of these witnesses, Dr. Stewart, the attending physician in the last illness, calls for no consideration in this connection, since he rests his conclusion that Masseth's mind was confused when the paper was executed, and his doubts as to whether he was at times in condition to make a will, not upon anything he saw with the eye of the physician, nor upon anything he observed in the conduct or conversation of the patient, but solely and exclusively on the fact that the disposition of the property directed in the paper executed did not conform with the wishes expressed by Masseth to this witness on several occasions and as recently as the day before. Apart from this circumstance, the witness saw nothing to indicate that he was not in condition to make a will. His testimony may be dismissed without comment. The testimony of the scrivener, McCoy, was evasive and inconclusive. He had never seen Masseth except in connection with the making of the will, once when he received instruction as to how it was to be drawn, and again when it was executed. He testified to his weakened physical condition on both occasions, but not to a single act or speech from which an inference of mental weakness could be drawn. He said he had grave doubts whether he understood what he was doing; that sometimes he thought he did, and at others, that he did not. When told what was implied in mental capacity, and asked whether he had at that particular time sufficient capacity to make a will, his reply was: "I wouldn't like to answer that question 'Yes' or 'No.' If I may be allowed, I would answer it that the man was very poorly qualified to do that." If both of these witnesses, the

physician and the scrivener, stood clear of all legal prejudice which attaches in consequence of their asserting now to the contrary of all their attestation of the will implied, and of what they testified to on examination in connection with its probate, their testimony would furnish no adequate basis for a dispute as to the decedent's testamentary capacity. At most it shows an extreme bodily weakness existing, which, without more, is never allowed to invalidate a will.

The effort to show undue influence, aside from one or two circumstances of but little significance, derives its only support from the testimony of these same witnesses. The relevancy and weight of the evidence in this regard can be appreciated only as the occasion for the present dispute is understood. The contention arises because of the fact that in this later will testator distinguishes between his nephews and nieces, giving to the children of his brother, Edward Masseth, 12 in number, but \$400 each, and dividing all the remainder, except the bank stock given to his friend and bookkeeper, John N. Hyle, between his other nephews and nieces, 14 in number, in equal shares; whereas in his earlier will he had directed an equal division among all his nephews and nieces, and in his conversations with both his physician and scrivener, preceding the making of the last will, declared such to be his wish and purpose, reiterating it to the scrivener at the very time he was giving his instructions as to its preparation. What the testator said to the physician, standing by itself, is little to the purpose. It shows a change of mind in the testator with respect to his will, and that is all. Here, as on the other branch of the case, the testimony of the scrivener has a larger significance, but no greater effect in the determination of the present inquiry. When this witness was being instructed by Masseth as to how the will should be prepared, he was told by the latter, verbally, that he desired to distribute the balance of his estate between his nephews and nieces in equal shares. At the same time Masseth gave him a written memorandum of instructions. When the witness came to write the will he discovered the disagreement between the verbal and written instructions, and returned and told Masseth of the variance, and asked him which he should observe in preparing the will. Masseth replied, "You follow the writing," or "Make it as it is written." The will having been written according to this last instruction, the next evening, immediately before its execution, so much of it as related to the bequest to Edward Masseth's children was read over to the testator by the scrivener, and then the entire will was read over to him by the physician. He was then asked if that was his will, and he replied that it was. To the question whether he wished to execute it

as his will, or whether he desired the parties present to sign as subscribing witnesses, he replied that he did.

Charles Masseth, a nephew of testator, but not one of the children of his brother Edward, was with testator in the sanitarium continuously from the time of the surgical operation until his death. This nephew and his sister were the only surviving children of their parents. Some days before testator's death, he conveyed to them a property in New York state valued at \$10,000, but subject to a mortgage of \$5,000. With this circumstance stated, and the fact that there is a resemblance in the phraseology of the two wills, the one made in Butler, and the other in Michigan, but not in any degree striking or remarkable, the whole of the contestant's case is presented. There is not a word shown to have been spoken by Charles Masseth, or any act done by him, or, for that matter, by any one, that contributed to the determination of the testator to dispose of his property as he did. So far as the evidence shows, the testator was entirely free from control and wholly uninfluenced by those about him. The evidence may afford to some minds a basis for suspicion that testator's real purpose was to equalize Edward Masseth's children with those to whom he had conveyed, during his illness, the property in New York, by giving to each of them \$400 and allowing them to share equally with his other nephews and nieces in the remainder; that the scrivener failed to catch the actual meaning of the testator, or the testator failed to understand that the will as written did not express this purpose. Whether such mistake was made in the will can never now be determined. The will must speak for itself. At best it would be a suspicion only, and not in any way a matter of concern in our present inquiry. Barring the possibility of such a mistake on the part of the testator or the scrivener, with which we have nothing to do, the will stands, so far as the evidence shows, the correct expression of the free and deliberate choice of an understanding mind. The assignments of error relating to the admission of evidence and the cross-examination of witnesses do not need to be considered. If error was committed in respect to these matters, it was inconsequential, and therefore without prejudice to appellants.

Appeal dismissed, and decree affirmed.

BROWN v. FOREST WATER CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. APPEAL — ASSIGNMENTS OF ERROR — SUFFICIENCY.

Where the assignments of error to rulings on evidence do not refer to the printed page of the testimony, or where they contain more than one bill of exceptions, or where they allege error of the court in refusing to strike

out testimony of several witnesses, embodied in one assignment, they will not be considered.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3010-3012.]

2. EMINENT DOMAIN—DAMAGES—EVIDENCE.

Where a water company sought to condemn land, the landowner may show that his property was adapted, from the natural formation of the land and other causes, to reservoir purposes.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 353.]

3. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

That a judge reads to the jury instructions given by another court, in order to show that they were found erroneous by the Supreme Court, is no ground for reversing the judgment.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4219-4225.]

Appeal from Court of Common Pleas, Cambria County.

Action by P. M. Brown against the Forest Water Company. Judgment for plaintiff and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

P. J. Little, for appellant. Alvin Evans, J. W. Leech, and John E. Evans, for appellee.

POTTER, J. Plaintiff in this case was the owner of a tract of 175 acres of land in Croyle township, Cambria county, of which defendant appropriated, under the power of eminent domain, about 3½ acres for a reservoir site, together with a stream of water, and a strip of land for the laying of its water line. Viewers were appointed to assess the damages, and upon an appeal from their report this issue was framed. Upon the trial the verdict was for \$3,250, which was reduced to \$2,500 by the court. Judgment was entered for the latter sum, and the defendant has appealed.

The first seven assignments of error relate to the admission of testimony offered by plaintiff, and the eighth assignment complains of the refusal of the court below to strike out certain testimony. All these assignments violate rule 31 of this court, for the reason that they contain no reference to the page of the paper book where the matter embodied in them may be found in its regular order in the printed evidence. They must, therefore, be disregarded. *Gerwig v. W. J. Johnston Company*, 207 Pa. 585, 57 Atl. 42. The fifth assignment of error also violates rule 29 by referring to more than one bill of exceptions; and the eighth assignment violates the same rule by embodying in one assignment alleged error by the court in refusing to strike out the testimony of three different witnesses. Distinct questions must be assigned separately.

The defendant cannot properly complain of the admission of evidence that the property taken by it was adapted to reservoir purposes, from the natural formation of the land, the amount of water flowing over it, and its proximity to certain towns. All these mat-

ters were elements entering into the market value of the property. In estimating the market value of land, everything which gives it intrinsic value is to be considered, and it is not to be limited to a particular use. *Allegheny v. Black's Heirs*, 99 Pa. 152. This rule was again applied in *Wilson v. Gas Co.*, 152 Pa. 566, 25 Atl. 635, and in *O'Brien v. Ry. Co.*, 194 Pa. 336, 45 Atl. 89. We said in *McGroarty v. Coal Co.*, 212 Pa. 53, 61 Atl. 570: "Any present or proximate use to which land is likely to be put, though not by itself a criterion of damages, is an element of its value, and may be shown as such." The trial judge was very careful in his charge to exclude from the consideration of the jury in assessing the damages all speculative elements and future profits, and to confine them strictly to the market value of the property before and after the appropriation. Whether or not the evidence which the court refused to strike out was improper and tended to prejudice the defendant cannot be considered, as the defective assignments do not bring it properly upon the record. But it appears that the court felt that the jury had not given due weight to the caution which had been given to disregard speculative estimates of the damages, and accordingly the verdict was reduced in amount.

As to the question raised by the ninth assignment, it would perhaps have been better not to have read to the jury any erroneous instructions given by another court, to another jury. The purpose was, of course, to point out the fact that such instructions had been pronounced erroneous by this court, and we do not see that the defendant could have suffered any harm from the reading of the extract from the opinion in another case. The true measure of damages was clearly set forth to the jury.

The tenth assignment complains of a reference by the court in the charge to some evidence of a demand for water in the vicinity by one or more companies needing a supply. But the contention of both sides with reference to this matter was cautiously brought to the attention of the jury. Taken as a whole, the charge of the court stated correctly and clearly the rule as to the measure of damages laid down so frequently by this court in similar cases.

The assignments of error are dismissed, and the judgment is affirmed.

MARGO v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. CARRIERS—INJURY TO PASSENGERS—EVIDENCE.

In an action to recover for the death of plaintiff's husband while alighting from the train of defendant, evidence held insufficient to justify verdict for plaintiff.

2. SAME—CUSTOM.

In an action against a railroad to recover for the death of plaintiff's husband while alighting from the train of defendant, an offer to show that the railroad company was accustomed to stop its train at the place of the accident, which was not a station for general railroad purposes, and that when trains so stopped passengers frequently got off and on, is inadmissible, where there is no offer to show that deceased had knowledge of such custom.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1303.]

Appeal from Court of Common Pleas, Cambria County.

Action by Annie Margo against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

H. W. Storey, for appellant. P. J. Little, for appellee.

ELKIN, J. The plaintiff, with her husband, Michael Margo, in company with other companions, were returning from a point on the Cambria & Clearfield Division to a place near Kittanning Point on the main line of the defendant company. It was necessary for these passengers to change cars at Cresson Station in order to make the proper connections to their place of destination. Two special cars were attached to the train, to be delivered on the main line. The conductor, for the purpose of securing orders relating to the delivery of these special cars, stopped the train at the office of the superintendent a half mile east of the station, and while awaiting orders at that place the plaintiff, her husband, and their companions, got off the coaches in which they were riding on the south side of the track, opposite to the side where the trainmen were standing, without notice of their intention to get off. The starting of the train jolted or jarred the husband, who was the last of the party to alight, as he was getting off the steps leading from the platform, and he fell under or near the wheels of the car, receiving injuries resulting in his death. It is clear from the testimony that the husband of plaintiff knew the train had not reached Cresson Station and that he attempted to get off at the place of the accident for his own convenience, without being misled by any notice or act of the trainmen. The question therefore arises whether, under these circumstances, such negligence by the defendant was established, as to permit a recovery in this action. The deceased husband undertook to get off the train while it had temporarily stopped for the purpose mentioned, at a place where there was no station, and where no provision had been made for taking on or letting off passengers. It was nearly a half mile distant from the station to which the deceased, as well as all other passengers on the train, were going. It was a dangerous place. It was within the yard limit, where shifting

engines and trains were constantly moving about. Six tracks had to be crossed before reaching the public highway, and, it not being intended for the accommodation of passengers, no crossings or other safeguards were provided. The tickets called for Cresson Station, and the conductor and brakemen had a right to presume that passengers would remain in the cars until the train reached and stopped at the station. The testimony does not show, nor tend to show, that the trainmen knew these passengers intended to get off at that place, or that they saw them at the time they undertook to alight. Under these circumstances, about which there is no dispute, the deceased must be held to have assumed any risk incident to his alighting from the train.

It is argued that it was the duty of the defendant company to see either that the passengers got off the train safely at that point, or to prevent them from getting off, and if it failed in the performance of its alleged duty in either respect it can be held liable in damages for injuries resulting therefrom. This is not the rule. In *Penna. Railroad Co. v. Zebe*, 33 Pa. 318, Mr. Justice Thompson, in discussing the rights of passengers in attempting to get off a train in a manner not provided by the company, said: "The abstract question of their right to do so is one thing, and need not be disputed; but the liability of the company by reason of their so doing is quite another thing. It was not negligence on the part of the company that they did not, by force or barriers, prevent the passengers from leaving the train on the wrong side." If it is not the duty of a railroad company to prevent passengers from getting off at the wrong side at a regular station, it is less its duty to prevent their getting off not only at the wrong side, but at the wrong place, and one not intended as a stopping place for passengers. In *Victor v. Penna. Railroad Co.*, 164 Pa. 195, 30 Atl. 381, Mr. Justice Fell said: "The train was stopped in the cut before reaching the station by the engineer for reasons that were wise and, under the rules of the company, imperative. It was not anticipated by the conductor or brakeman, nor was the reason for it at the time understood by them. They had not announced that the next stop would be Stewart, but that the next station was Stewart, and while they knew that the plaintiff intended to leave the train they had no reason to expect that she would get off until it stopped." The facts of that case were more favorable to the plaintiff in this respect than are those of the one at bar. In that case prior to the stopping of the train the brakeman had announced, "The next station is Stewart," and for sufficient reasons the train temporarily stopped before reaching the station; the plaintiff being injured in attempting to get off. The plaintiff relied on the notice of the brakeman that the next station was Stewart, where she intended to

get off, and claimed to have been misled by this announcement. Notwithstanding these facts it was held there could be no recovery. In the present case it is not contended that Cresson Station had been announced, or that the deceased was misled by any notice or acts of the trainmen. On the other hand, the undisputed evidence is that the deceased knew he had not reached Cresson Station; but for his own convenience and because his companions and himself desired to get something to eat at the town of Cresson, he attempted to leave the train while it was temporarily stopped. In the light of our authorities, it is difficult to see under what theory a recovery can be permitted under the facts of this case. It is not denied that, where passengers get on and off a train at proper places, the railroad company owes them the duty of providing safe and convenient approaches to the train, and it is conceded that under such circumstances it is the duty of the railroad company to stop the train sufficiently long to permit passengers to alight safely. These questions, however, do not arise under the facts of the present case.

The learned court below held, and the counsel for appellee argues here, inasmuch as some evidence was offered relating to a custom of the defendant company to stop its trains at the place of accident for general railroad purposes, and when the trains were so stopped passengers frequently got off and on, it was a question for the jury to determine whether the defendant was negligent in this case. It is a sufficient answer to say that the offer of evidence to establish a custom, without offering to show that the deceased had knowledge of such custom, is inadmissible. When a custom is set up to assert a right or justify an act, the party relying on the custom must show he had knowledge of it. *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354. In the present case the facts are undisputed that the plaintiff, her husband, and their companions had no knowledge of any such alleged custom, and therefore could not have been misled by it. They had never been at the place, except on the previous day. They were not familiar with any custom in reference to getting on and off trains at this or any other point on that division. They knew where the station was located, because on the day prior they had changed cars at the station on their way to visit friends. On the day of the accident they were returning by the same route traveled the day before. It is not denied, and could not be, under the evidence, that they knew they were not at the station, and do not claim to have given notice of their intention to get off at that place, or that they had any knowledge of a custom which permitted them to get off at that point, and therefore it is idle to contend that the deceased was misled by the so-called custom.

There are several assignments relating to the contributory negligence of deceased and

other grounds of reversible error, the consideration of which is unnecessary, for the reason that what has already been said is fatal to the plaintiff's case.

Judgment reversed.

MARGO v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. EXECUTION — PROPERTY SUBJECT — RAILROAD PROPERTY.

Property essential and necessary to the existence of a railroad company and in actual use cannot be sold under an ordinary writ of fieri facias.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, §§ 185, 136.]

2. SAME.

Materials used for repairs of bridges, tracks, siding, and other like emergency purposes belonging to a railroad company, cannot be levied on and sold under an ordinary writ of execution.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, § 136.]

Appeal from Court of Common Pleas, Cambria County.

Action by Annie Margo against the Pennsylvania Railroad Company. Rule to set aside sale of personal property discharged, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

H. W. Storey, for appellant. P. J. Little, for appellee.

ELKIN, J. The plaintiff recovered a verdict in the court below in an action of trespass for injuries resulting in the death of her husband. On February 10, 1905, after a new trial had been refused, judgment was entered on the verdict. On March 4th a fieri facias was issued thereon, returnable the first Monday of June following. A levy was then made on some personal property in the office of the superintendent of the defendant company. On March 13th the defendant took an appeal to the Supreme Court. On the following day the levy was stricken off by order of the court. On May 22d another levy was made on the personal property in and around the superintendent's office. On the same day a levy was also made on seven separate parcels of land, which were formerly a part of the right of way of the old portage road, and notice was served on defendant that inquisition proceedings would be held thereon June 5th. The defendant then presented a petition asking that the sale of the personal property be set aside on the ground that the writ was invalid. On the return day of the writ, the sheriff made another levy on the railroad ties, rails, lumber, and other materials used by the defendant company for emergency purposes, and advertised the same to be sold on June 22d. On June 14th defendant presented a petition

asking that the levy on the personal property and the inquisition proceedings on real estate be set aside. A rule to show cause was granted, returnable June 19th, at which time testimony was taken and the court discharged the rule. Thereupon the sheriff again advertised the sale of the personal property to take place July 6th. On July 3d, on petition to the Supreme Court, a rule to show cause why the appeal, when taken, should not be a supersedeas, was granted, and an order was made staying the proposed sale and all other proceedings; the rule being made returnable to the western district October 14, 1905. On July 5th this appeal was taken from the orders of the court below as above indicated.

A little forbearance and professional courtesy, which should always be shown by members of the bar to each other, would have saved this vexed and complicated record. The fieri facias was issued a few days before the appeal was taken, without notice to the defendant or its counsel, and a levy was made on certain personal property; but on the day following the appeal this levy was stricken off by the court. Notwithstanding that the appeal was pending, counsel for plaintiff caused the sheriff to make a new levy and proceed to a sale thereon for the purpose of satisfying the judgment appealed from. It is contended that his right to thus proceed is justified by the act of May 19, 1897 (P. L. 67), relating to appeals to the Supreme and Superior Courts, wherein it is provided that an appeal shall not be a supersedeas to an execution issued on a judgment, unless taken and perfected within three weeks from the entry of the judgment. More than three weeks elapsed from the entry of the judgment until the appeal was taken. Counsel for defendant, within a few days from the time he had notice of the entry of the judgment, took an appeal and proceeded at once to perfect it. He has been diligent in resisting the claims of the plaintiff at every stage of the proceedings since that time. This record discloses a somewhat anomalous situation. The plaintiff has caused a fieri facias to be issued, levy to be made, and the sheriff has actually sold personal property belonging to the defendant in partial satisfaction of the judgment entered in the court below, while the validity of that judgment was still pending in the Supreme Court. This court at No. 65, October Term, 1905 (62 Atl. 1079), reversed the judgment, and as the record now stands there is no judgment to support an execution. It would have been wiser for the learned counsel for appellee to have waited the final determination of the questions involved on the appeal.

Another question has been raised by this appeal, which it is necessary to consider. The levy of June 5th was made on railroad ties, rails, lumber, water pipe, iron pipe, and other personal property which the defendant

alleges is used for emergency purposes. It is contended that this property is exempt from levy and sale under the ordinary writ of *fi. fa.* On grounds of public policy the law does not permit the seizure and sale on execution of the property of a railroad company necessary to enable it to perform its duties to the public. This is the settled rule of our cases. *Foster v. Fowler*, 60 Pa. 27; *Youngman v. Railroad Co.*, 65 Pa. 278; *Mausel v. Railway Co.*, 171 Pa. 606, 38 Atl. 877; *Bell v. Wood*, 181 Pa. 175, 37 Atl. 201. In a number of cases it has been held that property essential and necessary to the existence of a railroad company and in actual use cannot be seized and sold under an ordinary writ of *fi. fa.* In such cases the special writ provided by the act of April 7, 1870 (P. L. 58), is the proper remedy. It has also been held that property, real or personal, necessary to the exercise of a public franchise, is to be regarded as part thereof, and is not subject to execution by the ordinary writ. *Bank v. Tanning Co.*, 170 Pa. 1, 32 Atl. 539. The testimony taken on the rule in the court below clearly shows that the materials levied on were all intended to be used for emergency purposes; that it was necessary to keep in stock a large amount of these materials in order to insure the proper maintenance and operation of the railroad; and that the materials on hand were not more than were necessary for these purposes. No evidence was offered in contradiction of the testimony of the witnesses produced by the defendant. Their testimony stands unimpeached. It clearly established the fact that the materials levied upon were used for repairs of bridges, tracks, sidings, and other like emergency purposes, wherein the very highest standard of care is required in the discharge of the defendant's duties to the public. The learned court was in error in disregarding the testimony offered and drawing its own conclusions that the materials levied on did not hinder the defendant in the performance of those acts authorized under its charter.

The order of the court of July 19, 1905, discharging the rule to show cause why the levy and inquisition should not be set aside, is reversed, and it is ordered that a writ of restitution be issued by the court below for the property sold.

ESTEP et al. v. WEBSTER COAL & COKE CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

NEGLIGENCE—INJURY TO MINOR—EVIDENCE.

In an action against a coal company to recover for injuries to a child two years old, struck by an electric car operated by defendant on its own grounds, evidence held to require the granting of nonsuit.

Appeal from Court of Common Pleas, Cambria County.

Action by Burdine Estep, by his next friend, H. C. Estep, and H. C. Estep in his own right, against the Webster Coal & Coke Company. From an order refusing to take off a nonsuit, plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Edward L. Kearns, James B. O'Connor, and Smith & Kearns, for appellants. P. J. Little, for appellee.

STEWART, J. The circumstances under which the injuries in this case were sustained, afford no basis for a recovery by way of compensation. The injured party, a little child less than two years of age, while on the track of the trolley road owned and operated by defendant company in connection with its coal mines, was struck by a motor drawing an empty train of cars, while on its return trip to the mines, and seriously hurt. The accident occurred at a point about 200 yards from the public crossing, on the ground of the defendant company. It is needless to inquire how the child came to be there. It is enough to know that it was improperly there, and that no responsibility in connection therewith attaches to the defendant in this action. At the public crossing the electric current is broken and the cars are carried across by their momentum. After the crossing is cleared, the motorman is required to readjust the trolley to connect with the power. To do this his attention must be directed to the rear of his car, and for the time being he is prevented from looking in the direction in which the car is moving. On this occasion he was so engaged, certainly until the motor was within 25 or 30 feet of the child. The witness Alexander testifies that, when he saw the motor first, it was at this distance from the child; that the motorman then had his knee upon his seat, with his face toward the rear, and was engaged in fixing his trolley; that up to that time he had not turned around. The evidence affords no reasonable ground to believe that, if the motorman from this point had had an unobstructed view of the child, the accident could certainly have been averted by any degree of vigilance or alertness. The train was running at a speed of from six to ten miles an hour. Upon his cross-examination the witness Morney, an experienced motorman, testified that he could stop a train such as this was, moving at the rate of speed here given, within 40 feet, if the motor were in first-class repair. The witness spoke of his own skill, and not of what was to be expected of the ordinary motorman. Even with the skill that comes to one of his experience, the rescue of the child under the circumstances we have here, without hurt, would be accounted a hair breadth escape. Failure to accomplish such a rescue would not impute to the party failing ordinary negligence, much less the gross negligence, without which no lia

ability can attach. The general qualifications of the motorman Nicholson are outside of the case. He may have been too young or too inexperienced for the work assigned him in running the motor; but neither of these things contributed to this particular accident. Nor does the circumstance that the train was moving at more than ordinary or usual rate of speed, if such fact appear, affect the case in any respect. It was defendant's own road, operated for its own purpose, on its own land, where the public had no rights. There was nothing in the situation, so far as the safety of others was concerned, that called for any rate of speed other than that which best met the requirements of the defendant. The motorman had a right, after he had passed the public crossing, to expect a clear track, and was not guilty of negligence in exceeding the usual rate of speed, if in point of fact, he did so, where he had no reason to expect interruption. *P. & R. R. Co. v. Spearen*, 47 Pa. 300, 86 Am. Dec. 544.

The nonsuit was properly ordered, and the judgment is affirmed.

ESTEP v. WEBSTER COAL & COKE CO. (Supreme Court of Pennsylvania. Jan. 2, 1906.)

Appeal from Court of Common Pleas, Cambria County.

Action by Burdine Estep, by his next friend, H. C. Estep, and H. C. Estep in his own right, against the Webster Coal & Coke Company. From an order refusing to take off a nonsuit, plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN and STEWART, JJ.

STEWART, J. This case but repeats the facts appearing in 213 Pa. —, 62 Atl. 1082, just decided. The action is brought by the father of the injured child in his own right. As there could be no recovery in that, for like reasons there could be none in this.

TROXELL et al. v. ANDERSON COAL MIN. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. MINES AND MINERALS—COAL LEASE—ROYALTIES.

A coal lease provided that a certain number of tons of coal should be mined each year, and for the payment of a royalty thereon, whether the coal was mined or not, unless prevented by unforeseen faults in the strata. The lessee, in attempting to reach the coal from an adjoining mine, was prevented from so doing by faults in the strata of such mine. It appeared at the trial, after the termination of the first year of the lease, that the coal had been reached without difficulty by an opening upon the leased premises. Held, that the lessor was entitled to recover, and it was error to refuse to charge that the lessee had not made the effort

to mine the coal in the first year, which was required by the terms of the contract.

2. APPEAL—REVIEW.

On appeal, the appellate court will not pass upon the correctness of a particular instruction to which no error is assigned, for the purpose of guiding the court below in the event of a retrial.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2975, 3087.]

Appeal from Court of Common Pleas, Cambria County.

Action by J. M. Troxell and others against the Anderson Coal Mining Company. Judgment for defendant, and plaintiffs appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

A. L. Cole, Alvin Evans, and John E. Evans, for appellant. A. V. Barker, S. L. Reed, and Fred D. Barker, for appellee.

BROWN, J. On August 28, 1902, the appellants leased property belonging to them in Reade township, Cambria County, to E. F. Spencer, A. T. Beers, and William D. McCausland, for the purpose of mining coal. The lease, with the assent of the lessors, was assigned to Christian P. Anderson, who assigned it to the appellee, the Anderson Coal Mining Company, and this suit was brought against it to recover the balance alleged to be due on the first year's minimum royalty of \$1,800, or six cents per ton for 30,000 tons of coal. The covenant in the lease, which is the basis of appellants' claim, is that the lessees will "mine and ship from the said premises not less than thirty thousand tons during each and every year during the continuance of this lease, and shall pay royalty for said amount whether mined and shipped or not, unless prevented by faults in the strata unforeseen, difficulties in the mines, strikes, scarcity in car supply or other unavoidable causes."

On the trial of the cause it appeared that during the first year no effort to mine the coal had been made on the leased premises, but an attempt was made to reach it through a mine operated by the appellee on adjoining land known as the Van Ormer tract; and the jury were instructed that, if faults were encountered there which rendered it impossible to reach the coal on the leased premises, the plaintiffs could not recover. Under the testimony submitted by the defendant the jury found that faults in the adjoining mine had prevented it from reaching and mining the coal on the leased premises, and the verdict was in its favor. We need not consume time in demonstrating the self-evident proposition that the lease contemplated an effort on the leased premises to reach the coal, and that the faults contemplated were such as might be there encountered. Indeed, this is not questioned by the appellee, but it is urged that, as the cause was tried on the theory that there could be no recovery if the

defendant company was prevented from reaching the coal on the leased land by faults in the strata on the Van Ormer tract, we ought not to disturb the judgment. If the record showed that the cause had been tried upon that theory alone, and nothing more appeared, we would not interfere with the judgment, for, if the lessors themselves had put such an interpretation on the agreement, it would be too late for them, after a verdict against them, to complain of the consequences resulting from their own construction of the lease. When a case is submitted to a jury from the standpoint from which both parties to the issue manifestly tried it, the court cannot be said to have erred because it was not submitted from another, which may really have been the true one. *Hartley v. Decker*, 89 Pa. 470; *Carpenter v. City of Lancaster*, 212 Pa. 581, 61 Atl. 1113.

The defendant undertook to show, without objection from the plaintiffs, that it had made an effort to reach the coal on the leased premises through the opening on the Van Ormer land, but had been prevented from doing so by the faults there found in the strata. In rebuttal, the plaintiffs offered testimony to show that if proper efforts had been made on the adjoining land the coal on theirs might have been reached, and, as just stated, if there were not more on the record, we would not reverse. It appears, however, that the plaintiffs, in meeting the defense as made out by the appellee, did not conclude themselves from asking that the case be tried on the proper theory, that the effort to mine the coal should have been made on the leased premises. Though no effort was made during the first year to open the coal on these premises, it appeared on the trial that at that time (September 21, 1904) coal was opened on them. O. R. Ellicott, the resident manager of the appellee, and called by it as a witness, was asked on cross-examination: "Q. During the time you were there the work in which you were engaged was principally in the directing of the mines and the shipment of coal from the Van Ormer tract? A. Yes, sir. Q. But not upon the Glasgow and Troxell? A. No, sir. * * * Q. You did get into the Troxell and Glasgow tract? A. Yes, sir; we are in there now. * * * Q. So far as anything is disclosed from the condition of the mine as it appears there now, there is no fault on the Troxell and Glasgow tract? A. Not where we tried to turn the heading." Another witness called by the defendant, James Logan, its mine foreman, on cross-examination, testified as follows: "Q. The faults that you have observed are all on the Van Ormer property? A. Yes, sir. Q. From the investigations which you made there were no faults visible on the Troxell and Glasgow tract? A. No, sir; not at present. Q. So far as it appears now, from an inspection of the mine, the coal of the Glasgow and Troxell tract is in its

normal condition? A. Yes, sir. Q. You have so far no evidence or intimation of the fault on that property? A. No, sir." The seventh point submitted by the plaintiffs was as follows: "The defendant having failed to show that any effort was made to mine the coal on the Glasgow and Troxell property from the opening on that property itself, and the evidence being that the coal was opened on that property, the defendant did not make the effort to mine the 30,000 tons of coal, which was required under the terms and conditions of the contract." This was a distinct statement by the plaintiffs before the case was submitted to the jury of just what their contention was, and the point should have been affirmed. It stated the true construction of the agreement and what the plaintiffs had a right to insist upon from the defendant, which ought to have done from the beginning what it was doing in September, 1904. The answer to the point was: "We cannot affirm the point as a legal proposition. There is no evidence that any effort was made to open the coal upon the property described in the lease. There is no evidence that it could be done to any advantage. There is some evidence that some vein of coal was opened by Mr. Spencer, but there is no evidence that it was a feasible point from which to mine the coal, or that it was intended that any extensive mining operations should be pursued at that point."

The assignments relating to the scarcity of cars need not be considered, for that question cannot be regarded as involved in the case, in the absence of any effort by the appellee to mine the coal in accordance with the agreement. Its learned counsel make the following frank admission in their printed argument: "The undisputed evidence in the case showing that cars enough had been received at this particular mine to ship over 30,000 tons during the year 1903, the irresistible conclusion is that the jury so found, and the question of car supply, as an independent matter of defense being 'out of the way altogether,' the verdict was based upon the other question in the case."

We are asked by the appellants to pass upon the correctness of the instruction by the court below that, if they were entitled to recover, the verdict should be for the balance of the royalty for the first full mining and shipping year ending December 1, 1903. Of this, of course, they do not complain, but in their anticipation of a reversal they ask for an expression from us as to the correctness of the instruction for the guidance of the court below on a retrial of the case. We do not sit as an advisory board for lower courts, but to correct errors alleged to have been committed by them when brought up to us by proper assignments.

The first, fourth, fifth, sixth, and twelfth assignments are sustained, and the judgment is reversed, with a venire facias de novo.

HENKEL v. WABASH PITTSBURG TERMINAL R. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

EMINENT DOMAIN—DAMAGES—EVIDENCE.

Where, in proceedings to condemn land, the opinions of the landowner's witnesses as to the value of the property were based mainly on sales of property in the immediate vicinity, the railroad company may show that such sales were under special circumstances and that the prices obtained were in excess of the market value.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 540½, 541; vol. 20, Cent. Dig. Evidence, §§ 416-421.]

Appeal from Court of Common Pleas, Allegheny County.

Action by John Henkel against the Wabash Pittsburg Terminal Railroad Company. From a judgment in his favor, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

R. B. Petty, for appellant. A. M. Neepor and W. M. Lindsay, for appellee.

FELL, J. This action was to recover the value of land taken by the defendant company under the right of eminent domain for the purpose of building a station. The specifications of error all relate to the admission of testimony offered by the defendant. The main ground of the appellant's complaint is that the defendant was allowed to prove the circumstances attending the sale of two properties in the immediate vicinity. The plaintiff's counsel had called the attention of witnesses on both sides to these sales, his own in their examination in chief, and on the cross-examination of the defendant's witnesses he had shown the prices paid. On the cross-examination of the plaintiff's witnesses it appeared that one of them had based his opinion of the value of the plaintiff's property entirely on one of these sales, and that another witness had based his opinion mainly, if not exclusively, on the two sales. The prices paid for these properties thus became a standard of value of property in the vicinity. The defendant's offer was not to show the prices paid for these two properties, but to prove by the purchasers that the sales were made under special circumstances, and that the prices were greatly in excess of the market values and were not a criterion thereof.

It has been long established that the proper test of the value of land taken under the right of eminent domain is its market value, and that this value is not to be ascertained by proof of particular sales, but by the general selling price of land similarly situated. While particular sales may not be proved as establishing a market value, the good faith of a witness and the accuracy and extent of his knowledge may be tested by questioning him as to particular sales, to ascertain wheth-

er he knew of and considered them in forming an opinion. These inquiries go directly to the value of the opinion expressed. We see no reason why a party against whose interest a witness has testified may not show that the opinion expressed is valueless as evidence, because it is founded on a misapprehension of the facts, as that a supposed sale has never been made, or that the consideration named was fictitious, or that the sale had been without regard to the market value. This does not lead, as would the proof of particular sales, to the trial of collateral issues. It goes only to impair the value of an opinion which has become evidence in the case by showing that it is based on a misapprehension of the real facts.

The assignments of error are overruled, and the judgment is affirmed.

In re MARSHALL AVENUE.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS—CURATIVE ACT.

Act April 8, 1899 (P. L. 57), known as the "Curative Act," and providing that, where a street has been improved by a municipality under an invalid law or ordinance, such improvements shall be valid and binding, is constitutional.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 835.]

2. SAME.

A failure to advertise a grading contract as required by Act May 22, 1895 (P. L. 105), is cured by Act April 18, 1899 (P. L. 57).

3. SAME — REPORT OF VIEWERS — CONFIRMATION.

A failure to have a report of viewers on the grading of a street confirmed nisi by the court is immaterial, where all parties concerned had knowledge of the filing and came into court and excepted thereto within the proper time.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 832.]

Appeal from Court of Common Pleas, Allegheny County.

In the matter of the grading of Marshall avenue. From an order dismissing exceptions to the report of jury, W. G. Park appeals. Affirmed.

The following is the opinion of the court below:

"Under an ordinance approved April 6, 1896, and passed without petition therefor by abutting property owners, Marshall avenue was graded. The ordinance under which the work was done, owing to an oversight, was not advertised in the official newspapers of the city for 10 days, as required by the act of May 22, 1895 (P. L. 105). Nor was the viewers' report presented to the court for confirmation nisi, as required by the act of April 18, 1899 (P. L. 57). It was, however, filed in the prothonotary's office, and by that office confirmed nisi, pursuant to the provisions of the act of April 2, 1903 (P. L. 124); exceptants all having notice of the report being filed and confirmed nisi. To the report

a number of exceptions have been filed by abutting property owners. It seems to us the only exceptions that need to be considered are those relating to the failure to advertise the ordinance and the neglect to have the viewers' report confirmed nisi by the court. Without the act of April 18, 1899, above referred to, these exceptions would have to be sustained. Does that act apply to this case and cure the defect caused by the failure to advertise the ordinance? The city's contention is that it does do so, while exceptants contend the act is unconstitutional, and, if valid, does not apply to this case. The act is what is known as curative legislation, and provides that, where a street has been graded, paved, or otherwise improved by municipal authority under the provisions of invalid laws or ordinances, 'such improvements are made valid and binding.' The act is similar in nearly all respects to the curative act of 1891. As that act was declared to be constitutional in *Donley v. City of Pittsburgh*, 147 Pa. 348, 23 Atl. 394, 30 Am. St. Rep. 738, we have no hesitation in holding the act of 1899 to be valid.

"Do its provisions cover a failure to advertise an ordinance authorizing an improvement under a valid act of assembly as in this case? The provisions of the act are quite broad, and, it seems to us, were intended to cover all cases where properties 'have been by such improvement peculiarly and specially benefited.' The act applies in three events to cases where a municipality has incurred expense in improving streets, which has resulted in benefiting abutting property, namely, (a) where the act of assembly granting the authority has been declared unconstitutional; (b) where the act, ordinance, or contract 'is or are otherwise invalid'; and (c) 'where for any reason private property cannot be assessed for peculiar special benefits.' The Legislature might have omitted the requirements for advertising the ordinance in the official newspapers of the city, and, having the power to do so, clearly had the right to legalize what it might previously have done. The act, in our opinion, is broad enough to cover the defect in this case, and remedies the failure to advertise the ordinance, and prevents the proceeding from being void. The improvement having been made in good faith by the city at an expense of \$56,752.94, it is no more than right that exceptants should assist in meeting that expense, if the respective properties were benefited thereby. Whether they were or were not benefited will be determined by a jury, as all exceptants have appeals pending.

"The exceptions relating to the failure to have the report confirmed nisi by the court cannot be sustained, as it appears no injustice was done any of the exceptants by the oversight. All had knowledge of the report being filed, and came into court and excepted thereto within the proper time.

"The remaining exceptions are without merit, and need not be considered."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Charles P. Lang and A. C. Johnston, for appellant. Stephen G. Porter, City Sol., for appellee.

PER CURIAM. Judgment affirmed on the opinion of the court below.

RIGGS v. BAIR.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. SALE—DELIVERY—EVIDENCE.

Where an owner of coffee sold the same, and it was left with the seller to be roasted, and the purchase was set apart in different piles from the other stock of the seller, and on the front bag of each pile a tag was sewed giving plaintiff's name and address and the kind of coffee and the number of bags, and it was to be delivered to plaintiff when roasted as he should from time to time order, and plaintiff paid part cash and gave notes for the balance, which he subsequently paid, there was a delivery valid against an execution creditor.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 353, 568.]

2. TRIAL—DIRECTING VERDICT—RESERVATION OF LAW QUESTION.

Where a reserved question of law is susceptible of a clear statement, it is the better practice to so state it, and a direction by the court of a verdict for plaintiff, reserving the question of law "whether there is any evidence to go to the jury entitling the plaintiff to recover," is an inappropriate form.

[Ed. Note.—For cases in point, see vol. 46 Cent. Dig. Trial, § 33.]

Appeal from Court of Common Pleas, Allegheny County.

Action by E. H. Riggs against H. C. Bair. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the opinion of Evans, J., in the court below:

"Binding instructions were given for the plaintiff, subject to the question of law reserved, to wit, whether there was any evidence to go to the jury to sustain the plaintiff's claim to this coffee. The real question reserved was whether the setting apart of the coffee, as narrated above, constituted such a delivery as would make the sale a valid one against execution creditors.

"The rule of law that a sale of personal property without a delivery to the vendee is a fraud against creditors has long been the rule in this state, and has not been modified by any recent decisions. But as to what will constitute a delivery in a particular case has been reformed to meet the changed requirements of business from what they were 100 years ago. This modification, and the reason therefor, has been so well set forth by Mr. Justice Dean, in the case of *Keystone Watch Case Company v. Bank*, 194 Pa. 585, 45 Atl.

328, that we quote at large from that opinion: 'In the 80 years that have elapsed since the decision of *Clow v. Woods*, 5 Serg. & R. 275, 9 Am. Dec. 346, the rigor of the rule laid down in that case, and it is the leading one in this state, has been greatly relaxed. Nor, considering the progress in population and wealth and the change in methods of conducting business, could it have been strictly adhered to without great obstruction to business and hardship to individuals. Under that ruling the cases were rare where as to creditors the ownership of chattels could be in one and the possession in another; in such circumstances, with few exceptions, the transaction was constructively fraudulent as to creditors. But in the long line of cases following it, step by step, the rule has been so softened that now it may be said, with few exceptions, where the purpose of the contracting parties was as between themselves an honest one, and there was no concealment, as to creditors, of its true nature, the contract is not constructively fraudulent; in other words, the law will be slow to hold the parties scamps constructively, if the contract, in view of its purpose, was actually an honest one.' We do not understand the court to have meant in the case just quoted that there was any change in the rule laid down in *Olow v. Woods*, but that what would be a sufficient delivery of possession now, owing to the changed conditions of business, might not have been a good delivery at the time the latter case was decided. And this is the meaning of the opinion of the court in *White v. Gunn*, 205 Pa. 229, 54 Atl. 901: 'Less than a year ago we said: "There has been no deviation from the general rule that delivery of possession is indispensable to transfer of title by the act of the owner that shall be valid against creditors." What, however, would be a sufficient delivery of possession and retention of it in one case might not be in another; and, in saying that the rigor of the rule requiring the purchaser to take and keep possession of property purchased by him has been relaxed, nothing more was meant than that the law does not have nor set up an unbending test of the sufficiency of delivery and retention of possession to be applied in all cases, but that, in passing upon the sufficiency of possession taken by the purchaser in a particular case, there must be taken into consideration the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties, and the usages of trade or business.'

"Let us apply this rule to the case in hand. The purchaser was buying coffee from the company that roasted his coffee, and the Huff Company, it must be borne in mind, were not only dealers in coffee. They stored coffee and roasted it for the trade. The transaction was an honest one. The price paid for the coffee was the current price for that article. The purchaser paid part cash

and gave bankable notes for the balance, which he subsequently paid. He left his coffee with the Huff Company to be roasted, as he had been doing for seven or eight years. We do not understand the defendant to contradict the proposition that he could leave the coffee with Huff and still make the sale to him valid as against creditors. Certainly no one would insist that Riggs should have shipped his coffee to Wellsville and reshipped it back to Pittsburg in order to have it roasted. But it is contended that the separation from the coffee of the vendor was not complete. True, they might have placed Riggs' coffee all in one pile; they might have marked every individual sack; but how that would have been more of an identification of his coffee than what was done in this case we are at a loss to see. Each pile was marked by a tag which told to the person who looked at it that that coffee was sold to E. H. Riggs, giving the number of bags so sold, which corresponded with the number of bags in the row. And if there was a row of coffee on either side of this Riggs row belonging to the Huff Company, it was separate and distinct from it, both by actual space and by the markings on the Riggs' coffee. And so as to the weighing of the coffee. It is alleged that this was not an accurate weighing, and that there would have to be another weighing out before the actual shipment of the coffee to Riggs. Certainly with the weighing that was done Riggs could have demanded and received all of the coffee that had been set apart to him; and that is all that is in question in this case. If all of his coffee had not been set apart to him, and if, as between him and Huff, he had a claim for other coffee, that is not material here, as he is only claiming what was set apart; but, if Huff had weighed out to him in the manner in which he did more than 7,000 pounds of coffee, still Riggs could claim the amount set apart. And as the evidence goes to show that this was the ordinary, customary way of weighing out large quantities of coffee such as this, there can be no question but what this was a proper weighing. 'Unusual and unnecessary formalities in such transactions are generally a badge of fraud rather than of honesty.' *Garretson v. Hackenberg*, 144 Pa. 107, 22 Atl. 875.

"We are of opinion that the admitted facts in this case show that a delivery of the coffee was made to Riggs, and the sale was valid against execution creditors of the Huff Company. Judgment should be entered for the plaintiff on the verdict."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

R. B. Petty and Shiras & Dickey, for appellant. A. S. Moorhead and John N. Dunn, for appellee.

MITCHELL, C. J. Plaintiff bought of the Huff Company some thousand pounds of

green coffee, at specified prices, and received an invoice showing the kinds and the quantity of each. Payment was made partly in cash and partly in a note subsequently paid. The good faith of the transaction was not impeached, but defendant in this issue, a levying creditor, disputed the sufficiency of the delivery. The purchase was made in the office of the Huff Company, and plaintiff did not see the coffee but bought on description, as he had done in previous dealings. Plaintiff was a retail dealer who did not sell green coffee, and he testified that the arrangement was that Huff should put the coffee aside for him, mark it, and keep it stored until he gave orders for roasting. No charge was to be made for storage if Huff did the roasting, and a written memorandum to that effect was put on the invoice. All this was in accordance with the custom of the parties in dealings for several years previously. The coffee was in the storage room on a different floor, and was in bags piled up according to convenience; the kinds being kept separate. On the day of the sale, or the next day, the plaintiff's purchase was set apart in different piles from the Huff stock, in the same room, and on the front bag of each pile a tag was sewed, giving the purchaser's name and address, the kind of coffee, and the number of bags. Exactly how this was done is thus detailed by the witness: "We took the order for the first item of coffee, whatever it called for; I went to the piles and found how much was in the pile, and, if there was enough in that pile to make it, I marked it, and, if there wasn't, I would go to another until I did get enough; and, if there was too much in the pile, I would take away until there was enough left to make out the amount. Q. Now, take this order of 7,000 pounds of Mocha coffee; tell us how you put that up and what you did. A. That first order was in three separate piles; each pile was marked with a tab to the front bag, sewed on—how many bags there were in the order

and what kind it was, so anybody could see it as they would go along through the aisle. * * * Q. Now, was there any weighing done by you? How did you ascertain that the 54 bags marked there in the left-hand margin amounted to 7,000 pounds? A. There were five bags taken off the pile and weighed and the average weight of the bags estimated from those five, and then counted from that." The facts not being disputed, the judge below directed a verdict for plaintiff, reserving the question of law "whether there is any evidence to go to the jury entitling the plaintiff to recover."

We have already had occasion at this term (*Duplex Press Co. v. Clipper Co.*, 62 Atl. 841) to say that, while this is a permissible form of reservation in an appropriate case, it is not a good form for general use, and is not appropriate here. A reservation whether on all the evidence the plaintiff is entitled to recover would have been bad in form, and yet there is no real difference between that and the question reserved here. *Casey v. Pennsylvania Asphalt Paving Co.*, 198 Pa. 348, 47 Atl. 1128; *Mayne v. Fidelity, etc., Co.*, 198 Pa. 490, 48 Atl. 469. There is no difficulty in ascertaining and expressing the real question at issue and intended to be reserved here. It is very clearly stated by the learned judge himself in his opinion. The real question reserved was whether the setting apart of the coffee as shown by the uncontested evidence was a good delivery as against the vendor's creditors. Where, as in this case, the reserved question is susceptible of clear and simple statement, it is much the better practice to so state it, and thus raise the issue of law directly. As the learned judge below, however, dealt with the case on the basis of the real question, the error in form becomes immaterial.

On the main question of delivery, the judgment is affirmed, on the opinion of the court below.

TODD v. EVERY EVENING PRINTING CO.

(Superior Court of Delaware. New Castle.
March 12, 1906.)

LIBEL — PRIVILEGED PUBLICATION — JUDICIAL PROCEEDING—PRELIMINARY AFFIDAVIT.

A preliminary affidavit, filed for the purpose of procuring a writ of capias ad respondendum, is not such a judicial proceeding that the publication of a fair and impartial report thereof is privileged within the law relating to libel.

Action on the case by George W. Todd against the Every Evening Printing Company. Demurrer to the declaration overruled.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Anthony Higgins, for plaintiff. Thomas F. Bayard, for defendant.

BOYCE, J. This is an action for libel. The plaintiff's declaration, with innuendoes, contains two counts. The publication complained of contained allegations included in an affidavit filed with the prothonotary of the Superior Court for New Castle county for the purpose of procuring a writ of capias ad respondendum. The defendant filed a general demurrer to the declaration. Argument upon the demurrer has been heard by the court.

By section 1, c. 180, vol. 15, Laws Del. (Revised Code p. 777), it is provided, among other things, "that hereafter, no writ of capias ad respondendum shall be issued against any citizen of this state, in any civil action unless the plaintiff therein, or if there be more than one, some one or more of the plaintiffs, shall have made a written affidavit, and filed the same in the office of the prothonotary of the Superior Court of the county out of which the writ is to issue, stating, that to the best of his or their belief * * * that the defendant is justly indebted to the plaintiff, in a sum exceeding fifty dollars, and that he verily believes the said defendant has * * * conveyed away * * * real estate of the value of more than one hundred dollars, with intent to defraud his creditors, and shall, moreover, in such affidavit specify and set forth the supposed fraudulent transactions." Prior to the bringing of this suit Winfield S. Palmer and William M. Palmer, administrators of Mary G. Todd, deceased, filed with the prothonotary of this court their written affidavit, in which they did depose and say that George W. Todd, the plaintiff in this action, is justly indebted to them in a sum exceeding \$50, and that they verily believe the said George W. Todd has conveyed away real estate of the value of more than \$100 with intent to defraud his creditors, and did, in their said affidavit, specify and set forth the supposed fraudulent transactions. And thereupon the prothonotary issued a writ of capias ad respondendum, directed to the sheriff of New Castle county, against the said George W. Todd, late trading as George W.

Todd & Co., at the suit of the said Winfield S. Palmer and William M. Palmer, administrators of Mary G. Todd, deceased. The sheriff made arrest of the said George W. Todd but subsequently released him upon entering into a satisfactory bail bond.

Upon the filing of an affidavit in a case in which, by the said act of assembly, a capias is authorized, the prothonotary issues the writ with the amount of bail demanded indorsed thereon, and the sheriff to whom the writ is directed takes the defendant, named in the writ, into custody, if he shall be found within his bailiwick, to answer the plaintiff, on the first day of the next term of the court out of which the said writ issued. Having made arrest of the defendant, he may be released by the sheriff, upon entering into a bail bond, in such sum as may have been indorsed on the writ, with good and sufficient sureties to be approved by the sheriff, conditioned, in substance, that he, the defendant, do well and truly make his personal appearance before the Superior Court as stated, and then and there answer unto the action set forth in the writ. This the defendant must do by entering into special bail either in open court or before the prothonotary. Having done the latter, the defendant has made his appearance upon the record of said suit, which is thereafter proceeded with in the same manner as if the suit had been commenced by summons, in the first instance, after due and proper service of the summons. The affidavit required by the statute, before a capias may issue in a civil action, is a preliminary, ex parte proceeding, and serves no other purpose in the case than a necessary step in the commencement of a suit by a capias. It cannot be used at any stage of the case after the issuance of the writ.

The alleged libel was a report of the contents of the affidavit upon which the capias was issued, and which report was printed in the Every Evening, a newspaper published by the defendant company in this action. Assuming that the report was fair and accurate, the affidavit itself as shown by the declaration included allegations which would be actionable unless justified, if not privileged. Counsel for the defendant contended that the matters complained of were not sufficient in law for the plaintiff to have or maintain his action against the defendant, because the alleged publication was a fair and accurate report of a judicial proceeding, and, as such it was privileged. Counsel for the plaintiff claimed, however, that the filing of the affidavit with the prothonotary for the purpose of obtaining the writ, the issuance of the writ by the prothonotary, the subsequent arrest of the plaintiff by the sheriff, and the execution and delivery of the bail bond by the plaintiff to the sheriff did not constitute such a judicial proceeding as would warrant a report of the same under the protection of privilege, and that the publication of the contents

of the affidavit which included actionable allegations was not privileged. We are therefore called upon to determine whether privilege extends to a report of a preliminary, ex parte proceeding, such as is disclosed by this case.

A fair and accurate report, unaccompanied by defamatory comments, of a judicial proceeding had in open court, where the parties to the action have an opportunity to be heard, is privileged. In the case of *Rex v. Lee*, 5 Esp. 123, it was urged "that the publisher of a newspaper had a right to publish a fair account of all public transactions in which occurred, and which were matters of public notoriety, provided they were given fairly and impartially; that the paragraphs in question were an account of a matter of public notoriety, and that which he had published was a true report, founded on the depositions as they had been taken before a justice of the peace; that the paragraphs in question, being therefore a true narrative of public matter, they could not be deemed to be libellous."

The clerk before whom the depositions had been taken was not permitted to testify to the fact, Justice Heath saying "that, putting the criminality of such proceeding out of the question the evidence offered was ex parte. It was the deposition made by the prosecutor only." In the case of *Rex v. Fisher*, 2 Camp. 563, which was likewise a libel case for the publication of a preliminary ex parte deposition, Lord Ellenborough said: "Trials at law, fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them continue so privileged. The benefit they produce is great and permanent, and the evil that arises from them is rare and incidental. But these preliminary examinations have no such privilege. Their only tendency is to prejudice those whom the law still presumes to be innocent, and to poison the sources of justice." In the case of *Duncan v. Thwaites*, 10 Eng. Com. Law, 180, Abbott, C. J., said: "This court has, on more than one occasion within a few years, been called upon to express its opinion judicially in the publication of preliminary and ex parte proceedings, and has, on every occasion, delivered its judgment against the legality of such publications."

These cases (and there are others of a like character) show the limitation which the English courts have placed upon the doctrine of privilege as applied to the publication of preliminary matters in judicial proceedings. So far as the adjudications by the courts of this country have dealt with cases similar to the one now before this court they are in accord with the decisions of the English courts. In the case of *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 549, 78 Am. Dec. 285, it being for libel for publishing the preliminary and ex parte proceedings had before a justice of the peace against

Timberlake for an alleged obtaining of goods under false pretenses, and before he had an opportunity to appear and deny or explain the charge of which he was, on the day following his arrest, and after the publication, acquitted, Scott, J., said: "The defense rests wholly on the claim of privilege; and if the publisher of a newspaper may, in virtue of his vocation, without responsibility, publish the details of every criminal charge made before a police officer, however groundless, and whether emanating from the mistake or the malice of a third party, then must private character be, indeed, imperfectly protected." And the court refused to extend the privilege claimed to the publication. The case of *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318, was for a libel printed in the *Boston Herald*. The alleged libel was a report of the contents of a petition for the removal of the plaintiff, an attorney at law, from the bar. The petition had been presented to the clerk of the Supreme Judicial Court for the county of Middlesex in vacation, had been marked by him "Filed February 23, 1883," and then or subsequently had been handed back to the petitioner, but it did not appear that it ever had been presented to the court or entered on the docket. In their answer the defendants relied upon privilege.

We shall quote at length from this very interesting and instructive opinion by Holmes, J.: "The privilege set up by the defendant is not that which attaches to judicial proceedings, but that which attaches to fair reports of judicial proceedings. Now what is the reason for this latter? The accepted statement is that of Mr. Justice Lawrence in *Rex v. Wright*, 8 T. R. 293, 298: 'Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.' See, also, *Davison v. Duncan*, 7 El. & Bl. 229, 231; *Wason v. Walker*, L. R. 4 Q. B. 73, 88; *Commonwealth v. Blanding*, 3 Pick. (Mass.) 314, 15 Am. Dec. 214. The chief advantage to the country which we can discern and that which we understand to be intended by the foregoing passage, is the security which publicity gives for the proper administration of justice. It used to be said, sometimes, that the privilege was founded on the fact of the court being open to the public. *Patteson, J.*, in *Stockdale v. Hansard*, 9 A. & E. 1-212. This, no doubt, is too narrow, as suggested by Lord Chief Justice Cockburn in *Wason v. Walker*, *ubi supra*; but the privilege and the access of the public to the courts stand in reason upon common ground. *Lewis v. Levy*, El., Bl. & El. 537, 558. It

is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under a sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed. If these are not the only grounds upon which fair reports of judicial proceedings are privileged, all will agree that they are not the least important ones. And it is clear that they have no application whatever to the contents of a preliminary written statement of a claim or charge. These do not constitute a proceeding in open court. Knowledge of them throws no light upon the administration of justice. Both form and contents depend wholly upon the will of a private individual, who may not be even an officer of the court. It would be carrying privilege farther than we feel prepared to carry it, to say that, by the easy means of entitling and filing it in a cause, a sufficient foundation may be laid for scattering any libel broadcast with impunity. See *Sanford v. Bennett*, 24 N. Y. 20, 27; *Lewis v. Levy*, ubi supra; *Barber v. St. Louis Dispatch Co.*, 3 Mo. App. 377."

The case of *Park v. Free Press Co.*, 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544, was for publishing a libel against the plaintiff to the effect that he had been the day before arrested and brought before one of the justices in Detroit on a charge of bastardy. He was released on his personal recognizance to appear 60 days thereafter for his preliminary examination. In the Supreme Court, Campbell, J., said: "There is no rule of law which authorizes any but the parties interested to handle the files or publish the contents of their matters in litigation. The parties, and none but the parties, control them. One of the reasons why parties are privileged from suit for accusations made in their pleadings is that the pleadings are addressed to courts where the facts can be clearly tried, and to no other readers. If pleadings and other documents can be published to the world by any one who gets access to them, no more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting those printed as news. The public have no right to any information on private suits till they come up for public hearing or action in open court; and, when any publication is made involving such matters, they possess no privilege, and the publication must rest on either nonlibelous character or truth to defend it."

We fail to see, after this discussion, how we can maintain the position contended for by the learned counsel for the defendant. However much publicity may have attended the proceedings, in the former suit against

the plaintiff in this action, at the time of the filing of the affidavit and the issuance of the writ, or at the time of the arrest and holding to bail by the sheriff, such proceedings were, from their inception to the execution and delivery of the bail bond, wholly preliminary and ex parte, and afforded no opportunity to the plaintiff here to be heard in his defense to the charge contained in the affidavit. And, after a careful consideration of this case, we are constrained to hold that both upon authority and sound public policy the doctrine of privilege cannot be extended to the publication complained of in the declaration. Further than this, we express no opinion upon this case. But, before leaving the case, we desire to say that the importance of a free press in the maintenance of popular government early engaged the attention of the founders of the American republic. And by the first amendment to the Constitution of the United States, Congress was expressly prohibited from making any law abridging the freedom of speech or of the press. And by the Declaration of Rights set forth in the Constitution of this state, it is provided that "the press shall be free to every citizen, who undertakes, to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty." The American people have ever regarded the press as one of the strongest bulwarks of liberty, and they have guarded it with jealous care. And certainly we are not disposed to underestimate its importance in a government like ours, or to abridge or restrain the liberty guaranteed to it, yet the Constitution of this state, while guarantying the right to any citizen to print on any subject, he being responsible for the abuse of that liberty, secures to "every man for an injury done him in his reputation, person, movable or immovable possessions" a "remedy by the due course of law." The liberty preserved to the press and the restraint imposed upon it for the protection of private character, for which the law has high regard, emanate from the same source. And the rights of each—of the individual and of the press—must be maintained under the established rules of law with respect to each.

The demurrer is overruled.

BRAUNSTEIN et al. v. BLACK.

(Superior Court of Delaware. New Castle. Dec. 8, 1900.)

GROUND RENTS—PAYMENT—PRESUMPTION OF CREATION.

Where deeds executed between 1810 and 1883 subjected the premises to an annual ground rent, payable to a specified person, his heirs and assigns, forever, and payments were made during such interval, the creation of the ground rent would be presumed, though the deeds by which it was alleged to have been created could not be found.

Appeal from Justice's Court.

Action by Mary Roberts Black against Phoebe D. Braunstein and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

The case stated filed by the parties set forth the following facts:

"That on the 13th day of January A. D. 1900, suit was entered before Lewis Sasse, Esquire, one of the justices of the peace, in and for Wilmington hundred, New Castle county, and state of Delaware, by Mary Roberta Black, the plaintiff below, against Phoebe D. Braunstein and Henry Braunstein, her husband, the defendants below, for an alleged annual ground rent of \$9.60, 16 years being in arrear and unpaid, together with interest thereon. Said alleged ground rent issuing out of all that certain lot of land with a store and dwelling house thereon thereon erected, situate in the city of Wilmington aforesaid, known as No. 515 French street, and bounded and described as follows, to wit: * * * And on the 3d day of February A. D. 1900, the parties having met, judgment was given in favor of the plaintiff for \$153.60 for payments in arrear, and \$75.83 for interest, making total \$229.43, besides costs of suit. And on the same day an appeal was entered by the defendants in the Superior Court and transcript filed.

"And it is agreed the facts relating to said action are as follows: That Vincent Bonsall, the elder, on the 21st day of February A. D. 1754, purchased from George Morrow, sheriff, a tract of land in the city of Wilmington, county and state aforesaid, bounded by French, King, and Queen (now Fifth) streets. The deed making the above conveyance cannot be found; neither can the deed by which the said Vincent Bonsall was alleged to have created the said ground rent, although diligent search has been made therefor. Reference, however, is made to the first-mentioned deed in Deed Record B, vol. 3, p. 250, and to both deeds in Deed Record K, vol. 4, pages 460 and 462. That part of said tract, being the premises out of which the said rent is alleged to issue, was conveyed by Richard C. Dale, sheriff, to John Warner and William Warner, by deed poll dated the 7th day of December, A. D. 1805. That the said John Warner and wife and William Warner and wife conveyed the said premises to John Torbert by deed bearing date the 4th day of October, A. D. 1810. This deed cannot be found. Reference, however, is made to it in the deed next following. That the said John Torbert and wife conveyed the said premises to John Kelly by deed bearing date the 9th day of October, A. D. 1810, and recorded in Deed Record 1, vol. 3, page 377. Said deed conveys, subject to annual ground rent of \$9.60, payable to Vincent Bonsall, his heirs and assigns forever. That the said John Kelly continued in possession until the time of his death. That during his lifetime he paid the said annual ground rent of \$9.60 to the heirs or

assigns of the said Vincent Bonsall. That after the death of the said John Kelly, payments of the said rent were continued by one William Jenkins, who occupied the said premises, although not seised thereof. That on the 10th day of February, A. D. 1876, upon the petitions of the heirs of said John Kelly (among others being the petition of Mary Ransom, said petition reciting that the said premises were subject to annual ground rent of \$9.60), the estate of the said John Kelly was ordered by the orphans' court to be sold. That pursuant to said order the premises were offered for sale, subject to said rent. The said Henry Braunstein (one of the defendants below), being the highest and best bidder, the sale was confirmed to him at the February term, A. D. 1876. That the above facts relating to the payment of the said rent were well known to the said Henry Braunstein at and before the time of his purchase. That from the time of his purchase to the 25th day of March A. D. 1883, the said Henry Braunstein paid the annual rent. That on the 3d day of September, A. D. 1883, the said Henry Braunstein transferred the said premises to his wife, the said Phoebe D. Braunstein. That on the 25th day of March, A. D. 1884, the said Braunsteins refused to pay the said ground rent, and still refuse to pay either that or succeeding installments of rent, although often requested so to do.

"And it is hereby agreed that the title of the said Mary Roberta Black to the said ground rent is as follows: That Vincent Bonsall, by will dated the 9th day of January, 1796, devised all the rents, use, and profits of his land situate on Queen street, between King and French streets, to his grandchildren. And the said grandchildren conveyed all their interest in said estate to their brother, Stephen Bonsall, by three deeds made in the year 1823, and recorded in Deed Record K, vol. 4, pp. 460, 462, and 464. That the will of the said Stephen Bonsall bearing date the 25th day of September, 1865, and recorded in Will Record A, vol. 2, p. 47, devised to Mary H. Bonsall, his wife, a certain ground rent of \$9.60 per annum on John Kelly's estate on French street, between Fifth and Sixth streets, Wilmington, Del. That the said Mary H. Bonsall devised all her right to her sisters, Rebecca A. Zane and Elizabeth R. Zane. That the said Rebecca A. Zane devised her interest to Elizabeth R. Zane. That the said Elizabeth R. Zane assigned her right to said rent to the said Mary Roberta Black, the plaintiff below.

"And it is hereby further agreed that, if the court be of opinion that the above facts are sufficient in law to warrant the presumption that the said ground rent was legally created and is payable out of the property hereinbefore known and described as No. 515 French street, then judgment to be given in favor of the plaintiff below for \$229.43; but, if the court be not of such opinion, then judgment

to be given for the defendants below for costs."

Argued before LORE, C. J., and SPRUANCE and GRUBB, JJ.

Francis H. Hoffecker, for appellant.

Edward W. Cooch, for respondent.

Ground rent is a rent reserved to himself and his heirs by the grantor of land in fee simple, out of the land conveyed. Both grantor and grantee have an estate in fee simple, each has an estate of inheritance. In Pennsylvania and Delaware ground rents are regarded as real estate. 1 Bouv. Law Dict. 905; 14 Am. & Eng. Ency. Law (2d Ed.) 1121; Rev. Code 1852, amended in 1893, p. 634; Cobb v. Biddle, 14 Pa. 444; Ingersoll v. Sergeant, 1 Whart. (Pa.) 350; Juvenal v. Patterson, 10 Pa. 282; Irwin v. U. S. Bank, 1 Pa. 349; Bosler v. Kuhn, 8 Watts & S. (Pa.) 183; Mitchell v. Steinmetz, 97 Pa. 251.

Where a ground rent is paid for more than 21 years in accordance with recitals in title deeds, no objection being made on the part of those who naturally would have objected, the existence of an ancient ground rent deed should be presumed. Heckerman v. Hummel, 19 Pa. 64; McElroy v. Railroad, 7 Pa. 536; Wallace v. Pres. Church, 111 Pa. 164, 2 Atl. 347; Stephen's Digest Evidence, 122, a, b; Greenleaf on Evidence, §§ 16, 17.

Secondary evidence of contents of lost or destroyed deeds or records is admissible when it is shown that search has been made for them and that they cannot be found. This is particularly true when the deeds or records are ancient, and are shown to have been acted upon. 13 Am. & Eng. Ency. Law (1st Ed.) 1100, 1102; 5 Am. & Eng. Ency. Law (1st Ed.) 365; Heckerman v. Hummel, 19 Pa. 64.

Actions or claims to or in any lands, tenements, or hereditaments must be made within 20 years. Rev. Code 1852, amended in 1893, p. 887, c. 122, §§ 1, 2; Doe v. Pepper, 2 Marv. 221, 43 Atl. 90.

Mere lapse of time without demand of payment is not sufficient to raise presumption that rent has been released or extinguished. St. Mary's Church v. Miles, 1 Whart. (Pa.) 229; McQuesney v. Hlester, 33 Pa. 435; Cole v. Patterson, 25 Wend. (N. Y.) 456; Van Schaick v. Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451.

Interest is recoverable on arrears of ground rent. 11 Am. & Eng. Ency. Law (1st Ed.) 387; Naglee v. Ingersoll, 7 Pa. 185; Guthrie v. Stockton's Adm'r, 5 Har. 123; McQuesney v. Hlester, 33 Pa. 435; Buck v. Fisher, 4 Whart. (Pa.) 516; Rev. Code 1852, amended in 1893, p. 740, c. 99, § 1.

The lien of a ground rent, judgment, or mortgage takes priority according to date of entry, and the lien of a judgment for arrears of ground rent relates back to date of ground rent deed and takes precedence over older liens. Rev. Code 1852, amended in 1893, p.

629, c. 83, § 19; 14 Am. & Eng. Ency. Law (2d Ed.) 1125; 9 Am. & Eng. Ency. Law (1st Ed.) 63; 1 Bouvier, Law Dict. 905; Powell v. Whitaker, 88 Pa. 445; Pancoast's Appeal, 8 Watts & S. (Pa.) 331; Bosler v. Kuhn, 8 Watts & S. (Pa.) 183, 185; Bantleon v. Smith, 2 Bin. (Pa.) 146, 4 Am. Dec. 430.

After argument the court (LORE, C. J.) made the following order: And now, to wit, this 8th day of December, A. D. 1900, the above and foregoing case stated having been read and argued by counsel, and the same having been duly considered, the court are of opinion that the facts set forth in the above case stated are sufficient in law to warrant the presumption that the said ground rent was legally created and is payable out of the property therein before known and designated as No. 515 French street in the city of Wilmington; and therefore the court orders, adjudges, and decrees that judgment be given in favor of the plaintiff below, respondent, for the sum of \$229.43.

NATIONAL TUBE CO. v. SHEARER. Tax Collector. et al.

(Court of Chancery of Delaware. Dec. 4, 1905.)

1. MUNICIPAL CORPORATIONS—TAXES—COLLECTION—INJUNCTION—BILL.

A bill to restrain the collection of a municipal tax, charging that several supervisors had purposely assessed complainant's property beyond its value and above the assessment of other persons with a fraudulent intent to compel payment by complainant of an undue portion of the public taxes, and that such assessment was not made in good faith by the proper exercise of the discretion of the assessing officers, stated a case for equitable relief.

2. SAME—EVIDENCE.

In a suit to enjoin the collection of certain city taxes, evidence held insufficient to establish that complainant's property had been fraudulently overvalued or that the assessment had been arbitrarily made without the proper exercise of discretion on the part of the assessing and levying officers.

Suit by the National Tube Company against Charles H. Shearer, collector of taxes for the mayor and council of New Castle, and others. Bill dismissed.

Andrew E. Sanborn, for complainant. Alexander B. Cooper, for respondent.

NICHOLSON, Ch. This bill was filed for the purpose of restraining the mayor and council of New Castle and the collector of taxes for that municipality from collecting certain taxes from the complainant who prays in his bill as follows: "That the respondents, the said Charles H. Shearer, collector, and the said the mayor and council of New Castle, and each of them, may be perpetually restrained by the injunction of this honorable court from demanding, or attempting in any way whatever to collect, by legal process or otherwise, from the complainant, under the fraudulent and illegal

assessment made by the said Edward Wegge-man, assessor for the said city of New Castle for the year 1903, as set forth in paragraph 6 of this bill, any further sum or sums of money additional to that already paid to the said Charles H. Shearer, collector as aforesaid, by the complainant as set forth in paragraphs 12 and 13 of this bill, or than that which may be due and payable by the said complainant upon a legal, just, and equitable assessment of complainant's said real estate, and also that a preliminary injunction may issue to restrain the respondents, their agents, etc., in like manner until the further order of the Chancellor." It is alleged in the bill that the said assessment of complainant's property was "fraudulently, capriciously, and illegally" made, in that said property was grossly overvalued by the assessor for the purpose of compelling complainant "to start up and operate its pipe and tube mill, which had been shut down since February 7, 1900, and to pay more than its proper share of city taxes, and more than the amount of taxes paid by other taxpayers upon similar property in said city, and that the city council of New Castle, sitting as a board of revision and appeals, upon application made to it by said complainant, fraudulently, capriciously, and illegally, and with like intent to compel the complainant to pay more than its proper share of the said city taxes, refused, in direct violation of all the evidence and facts testified to before it, to reduce the said assessment of 1903 to a just and proper valuation."

The bill is long and carefully drawn, containing a number of allegations of specific words and declarations on the part of the assessor and certain residents of New Castle, and setting forth with great fullness and precision a case which seems *prima facie* to give the complainant standing in this court to bring his suit. In the case of *Railroad Company v. Neary*, 5 Del. Ch. 600, 8 Atl. 363, the general principle was announced by Chancellor Saulsbury that a bill to restrain the collection of a tax would be dismissed unless the case was brought under some recognized head of equity jurisdiction, and unless it appeared that there was no adequate remedy at law. In the case of *Equitable Guarantee & Trust Co. v. Donahoe* (Del. Ch.) 45 Atl. 583, the case of *Railroad v. Neary* was cited and approved by me, and after a long discussion of the nature and extent of the jurisdiction of the Court of Chancery, and a careful review of the authorities in other states upon the question of restraining the collection of taxes by courts of equity, the Chancellor says: "A thorough examination of all the cases in which the collection of a tax is restrained by injunction will disclose the fact that in most of them it is municipal taxes or assessments, constituting a lien upon the real estate which are restrained." And the opinion of the Chancellor concludes as follows: "While

there is no doubt that tax controversies may arise in this state from time to time where special circumstances may be shown to exist which will bring them under some well-settled principle of equity jurisdiction, and require the interposition of the strong arm of the Court of Chancery, these cases must be judged, and the principles controlling the action of this court in regard to them must be announced, as they come before me. In the case before me I am unable to discover such special circumstances as are necessary to justify me in assuming jurisdiction, and I am "constrained to decide that the motion to dismiss the bill for want of jurisdiction must be granted."

In that case the tax to restrain the collection of which the bill was filed was a state tax upon personal property, and the ground upon which it was contended that the Court of Chancery had jurisdiction was that the suit was brought to avoid a multiplicity of actions at law. In the present case, however, as already shown, the tax to restrain the collection of which the bill was filed is a municipal tax constituting a lien upon real estate of complainant, and the ground upon which equitable relief is sought is fraud—a fraudulent intent on the part of both the assessor and the city council of New Castle; there being, if complainant's contention be correct, no adequate remedy at law. A restraining order was granted upon the filing and presentation of the bill, and a rule issued requiring the respondent to show cause why a preliminary injunction should not be granted. I declined to dismiss the bill for want of jurisdiction; for, as is apparent from the above statement of the case, the question presented is one of fact, and depended entirely upon the proofs presented at the hearing of the rule. A great number of affidavits were filed on both sides at that hearing, the respondents meeting with counter affidavits the affidavits filed by complainant, denying fraud or unfairness in any particular and alleging that the assessment as corrected by the said city council was not only fair and reasonable, but lower in proportion than that upon similar property contained in the same assessment list. The arguments of counsel were long and exhaustive, and every affidavit on both sides was read, analyzed, and commented upon. After mature consideration and careful examination of the proofs submitted I ordered the rule to be discharged and the motion for a preliminary injunction denied, upon the ground that it did not appear from the proofs submitted that the action of city council, respondent, was fraudulent; that it was impossible to hold from the whole of the evidence that the said city council, sitting as a board of revision and appeals, had failed to exercise their judgment and discretion, from the actual exercise of which there was no appeal.

The cause subsequently came on for a further hearing for the purpose of concluding it

by a final decree, but by agreement of counsel it was submitted to me upon bill, answer, and the same affidavits and proofs that were presented at the hearing of the rule to show cause why a preliminary injunction should not issue, which had been decided as above stated. Only additional briefs were filed, and counsel for the National Tube Company, complainant, collected in his brief all the leading cases in which this branch of the law of taxation is considered, while counsel for the respondents quoted many of the same cases to illustrate his views, and practically admitted in every particular the points of law made by complainant's counsel. It is obvious, therefore, that my discussion and statement of the law may be very brief. Indeed, so far as the cases directly applicable to the questions at issue are concerned, their complete agreement is remarkable, and the law governing it cannot be better set forth than by quoting the late Judge Cooley, than whom there is no greater authority on the Law of Taxation. First, with regard to the general point, upon which I have cited above, from our own state cases, *Railroad Co. v. Neary* and *Equitable Guarantee and Trust Co. v. Donahoe*, he says: "Enjoining Collection. To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot, of themselves, furnish any ground for equitable interposition. In ordinary cases a party must find his remedy in the courts of law, and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident, or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these in proper cases may be afforded in the courts of equity." *Cooley on Taxation* (Ed. 1883) p. 536.

The subject of overvaluation and the precise point made by complainant's counsel in the present case is discussed as follows: "A tax, when assessed by valuation, may be made unequal and oppressive by the unfairness with which the valuation is made. The remedies for an excessive valuation we have no purpose to consider in this place. They belong more properly to a subsequent part of the work. As a general rule, a tax cannot depend for its validity upon the ability of those who lay it to make plain its justice to the satisfaction of a court or jury. Value is matter of opinion, and when the law has provided officers upon whom the duty is imposed to make the valuation, it is the opinion of those officers to which the interests of the parties are referred. The court cannot sit in judgment upon their errors, or substitute its own opinion for the conclusions the officers of the law have reached.

It is possible, however, that there may be circumstances under which the action of the officers will not be conclusive. Suppose it is admitted, or established beyond a peradventure, that a public officer, who has been empowered by the law to apportion certain burdens among the citizens as in his judgment shall be just, has been actuated by a fraudulent purpose, and, instead of attempting to carry the law into effect, has wholly disregarded its mandate, declined to bring his judgment to bear upon the question submitted to him, and arbitrarily, with the intent and purpose to defeat the equity at which the law aims, has determined to impose an excessive burden upon a particular citizen. Suppose this to be unquestioned or unquestionable, can it be that the citizen has no remedy against the wrong intended? Such a question, it would seem, could admit of but one answer. 'A discretionary power cannot excuse an officer for refusal to exercise his discretion. His judgment is appealed to; not his resentments, his cupidity, or his malice. He is the instrument of the law to accomplish a particular end, through specified means; and when he purposely steps aside from his duty to inflict a wanton injury, the confidence reposed in him has not disarmed the law of the means of prevention. His judgment may indeed be final if he shall exercise it, but an arbitrary and capricious exertion of official authority, being without law, and done to defeat the purpose of the law, must, like all other wrongs, be subject to the law's correction.' Assessors, indeed, are clothed with a power which is quasi judicial; but fraud vitiates even the most solemn judgments of courts, and the action of these quasi judicial bodies cannot stand on any higher ground.'" *Cooley on Taxation* (Ed. 1903) vol. 1, p. 385. See, also, the cases cited in the notes, which contain a practically exhaustive list.

Finally upon the same point, in delivering the opinion of the Supreme Court in *Merrill v. Humphrey*, 24 Mich. 172, the same learned judge speaks to the same effect, as follows: "The Attorney General insists that an assessment for the purpose of taxation is a proceeding quasi judicial in its nature, the valuation being confided to the judgment and discretion of the assessor, and that, as the statute has provided for no review of his decision by the courts, it is not competent to appeal to them for redress, upon allegations impugning the fairness of his conclusions. And he very properly and strongly sets forth the evils that may arise if the process of injunction shall be employed to stay the collection of the public revenue whenever the judgment of the taxpayer regarding relative values may so far differ from that of the assessor that he is led to suspect favoritism and partiality. That this process may be employed to an extent that shall prove embarrassing to the public authorities is quite possible; and that fact should make us hesitate long and

consider the subject fully in all its bearings before sustaining a jurisdiction that shall appear in the least doubtful or unnecessary to the due protection of individual rights. And we agree fully with the Attorney General, that the courts cannot sit in judgment upon supposed errors of the assessor, and substitute their own opinions for the conclusions he has drawn, where it is his judgment, and not theirs, to which the subject has been confided by the law. But it remains to be seen whether what is sought here is a review of the assessor's judgment. The charge is that the several supervisors have purposely assessed the property of the complainant beyond its value, and above the assessment of other persons, with a fraudulent intent to compel the payment by him of an undue proportion of the public taxes. The demurrer confesses the charge, so that we are not troubled with any collateral questions or inquiries into matters of fact. It is admitted that the supervisors have not brought their judgment to bear upon the question of value, but have set aside and disregarded their duty for the express purpose of perpetrating a wrong upon an individual. The question, then, is this: A public officer being empowered by law to apportion certain burdens among the citizens as in his judgment shall be just, being actuated by a fraudulent purpose, instead of obeying the law disregards its mandate, declines to bring his judgment to bear upon the question submitted to him, and arbitrarily and with express reference to defeating the ends at which the law aims, determines to impose an excessive burden upon a particular citizen. Has this citizen any remedy against the threatened wrong? We think this question can admit but one answer. A discretionary power cannot excuse an officer for refusal to exercise his discretion. His judgment is appealed to; not his resentments, his cupidity, or his malice. He is the instrument of the law to accomplish a particular end through specified means, and when he purposely steps aside from his duty to inflict a wanton injury the confidence reposed in him has not disarmed the law of the means of prevention. His judgment may, indeed, be final if he shall exercise it; but an arbitrary and capricious exertion of official authority, being without law, and done to defeat the purpose of the law, must, like all other wrongs, be subject to the law's correction."

These citations leave nothing further to be said in regard to the principles of law governing the case. The city council of New Castle was made by statute the court of ultimate resort for the revision of the decisions of the assessor for that city, and the Court of Chancery has nothing whatever to do with the correctness or soundness of its judgment as to values. The sole question for the court to decide in this case is whether or not it appears affirmatively from the proofs submitted that that judgment was not honestly exercised. In other words, the sole ground

for the intervention of this court in the present case would be the fact that the city council of New Castle in revising the assessment list was actuated (to borrow the language of Judge Cooley) by a fraudulent purpose, and, instead of attempting to carry the law into effect wholly disregarded its mandate, declined to bring its judgment to bear upon the question submitted to it, and arbitrarily, with the intent and purpose to defeat the equity at which the law aims, determined to impose an excessive burden upon a particular property owner. Such is the complainant's contention, as we have already seen, and we have also seen that it is denied by the respondents.

Upon this crucial point respondent's answer alleges as follows: "(8) The respondents, answering the ninth paragraph of said bill, admit that the city council of New Castle, acting and sitting as a court of appeals as provided by law, to hear and redress grievances as to the city assessment of 1903, at or about the time mentioned, sat in official session for at least three successive evenings; that the complainant, through some of its officers, agents, and its counsel, with one or two witnesses, appeared before said court of appeals, and asked for a reduction of its said assessment. But these respondents allege that no charge or even intimation of fraud or unfairness on the part of the assessing officers was made by them or any of them. The sole and only ground of complaint was that in their judgment the assessment of their mill property was excessive and more than its true value, and in their opinion should be reduced. Different estimates of its value were given by the appealing party and its witnesses then present. The said court of appeals heard all that was said, patiently and attentively so as to arrive at a just and fair conclusion. There was no feeling or attitude of hostility or prejudice against said complainant whatever; their sole desire and intention (as stated) being to fix upon a just and proper valuation of said property. The said members of council, as such or as the court of appeals, did not at any time or in any manner attempt to influence or control the action of any of the city assessors in making any of the said assessments of said property. As a matter of fact the city council, when some of the prior assessments were made, was composed of different men. The respondents further allege that, after a careful consideration by the said court of appeals of the said appeal of the said complainant, they reduced the said assessment as made by the said Edward Weggeman \$25,000 on the said mills, which amount in their best judgment was a sufficient reduction, and they so fixed the assessment on said mills at the sum of \$230,000, they believing said amount just and reasonable, although the same as so fixed was relatively lower than much of the other real

estate in said city. And their entire proceeding and action in the matter were free from any conspiracy, combination, fraud, or intention to wrong the said complainant in any way."

This allegation of the answer is supported by the joint affidavit of all the individuals composing the said city council. Their affidavit, after citing, *inter alia*, that the assessor had valued the complainant's "fue mill, cutting shop, tracks, foundry, boiler house, and gas house at \$260,000," continues as follows: "Copies of said assessment were duly posted as required by law, and the city council, acting as a court of appeals, under the city charter, for the hearing and redressing of such as might appear to be aggrieved, sat in the council chamber on the 17th, 18th, and 19th of June, A. D. 1903, according to law, to hear all appeals which might be made from said assessments, as made by the said assessor. That the National Tube Company, represented by its attorney, Andrew E. Sanborn, Esq., Hiram R. Borie, its manager, and others acting in its behalf, appeared before said court of appeals and objected to said assessment of \$260,000, on its fue mill, etc., as aforesaid, as being in excess of its true value. No charges were made of any misconduct on the part of the assessor, or that he intentionally and unjustly discriminated against said company. Nor was there any objection made to any other item of the assessment of said company's land; the only objection urged being that the said fue mill, etc., was valued too high. After a full hearing the said court of appeals, after full consideration, in the exercise of their best judgment and with the utmost good faith, on June 22, 1903, reduced the assessment \$25,000, making thereby the assessment of the said fue mill, etc., \$235,000, instead of \$260,000, and the total assessment of said company's lands in said city \$273,000, instead of \$298,000. The deponents declare that all and each of them, so acting as said court of appeals, acted with the utmost good faith in all that they did, and that they believed and do now believe that the said assessment of said company's real estate in said city was and is at a true and fair valuation, and is not excessive, and is in equal and just proportion to the valuation and assessment of other real estate in said city. They deny that either intentionally or otherwise was the said real estate of said company assessed in any particular at a higher valuation than its true value for the purposes of taxation under the charter and laws of said city."

In addition, there are a number of affidavits made by citizens of New Castle, alleging that they are acquainted with the value of the said real estate and that the said assessment of the property of the complainant, the National Tube Company, for 1903, was not excessive; that, on the contrary, it was in their opinion a fair and proper valuation for the purpose of taxation. The respondent also put in evi-

dence extracts from the deed of the Delaware Iron Company to the said the National Tube Company, dated June 22, 1899, to show that the consideration paid by the complainant for the said property was \$750,000, of which the sum of \$250,000 was paid in cash and the balance secured by a mortgage of \$500,000, which still rests upon the property. There are also affidavits to the effect that the assessments of said property prior to 1903, especially during the time the plant was operated, had been disproportionately low, and that the assessments for 1903 of the properties of other manufacturing plants in the city of New Castle for the purpose of municipal taxation were relatively much higher than this assessment of complainant's property. It appears that the persons composing the city council in 1903 were not members of the council at the time of the prior assessments, and it is claimed by the respondent's counsel that the reason why the assessment of the plant now owned by the National Tube Company had been made so low in former years was on account of the great benefits that were supposed to accrue to the city of New Castle from the operation of the plant.

The complainant, on the other hand, introduced a great number of affidavits containing estimates of the value of the said property. These affidavits are, for the most part, made by persons not resident of New Castle and prominent in the business circles of Wilmington, who inspected the property in 1904, a year after the disputed assessment was made. These affiants testify to the dilapidated appearance of the plant at the time they viewed it and to its lacking many modern improvements, and by inference and from information they make their estimates of what was the value of the plant in the previous year; such estimates being at the most less than one-half the amount of the disputed assessment, and varying in the different affidavits from \$15,000 to \$90,000. Further citations are made from the deed above referred to for the purpose of showing that what is called "the good will" of the old company was included in the deed and accounted in great part for the amount of the consideration. Complainant also showed that the assessment had been increased considerably year by year since the mill had been closed, although it was obvious that the property was constantly depreciating in consequence of disuse. It was also alleged in the bill that the county assessment was only \$96,000.

The foregoing seems to include every point made on either side, with the exception, perhaps, of some argumentative affidavits, such, for instance, as one presented by the complainant, containing a review of the occupations, etc., of those citizens of New Castle who made affidavit as to value at the instance of the respondent. It was alleged that these affiants are some of the leading physicians

and lawyers, etc., of the place, and are entirely without such special knowledge of manufacturing plants as would qualify them to judge of the values of such plants. When we come to consider the effect of all this testimony, it is only necessary to reflect that the issue in this case is not the value of the property assessed, but the bona fides of the city council of New Castle, and immediately it becomes manifest that the complainant has failed to prove his case affirmatively against the direct and positive testimony introduced by the respondent. The respondents have alleged, and it is not denied by the complainant, that no charges were made at the hearing before the board of revision of any misconduct on the part of the assessor or that he intentionally and unjustly discriminated against the complainant; the only objection urged being that the fue mill, etc., were valued to high. Then, in addition to the sworn answer, there is the affidavit above quoted of the individual members of the board of revision and appeals denying bad faith and improper motives absolutely, while the explanation made of the great increase of the assessment since the close of the mill is a very plausible one, to wit, that when the mill was running the benefits to the city were such that the assessors, however improper and illegal such action may have been, nevertheless did favor the mill owners to the extent of making a valuation that was excessively low for the purpose of thus indirectly creating a partial exemption from municipal taxation in return for the benefits believed to accrue to the city from the operation of the mill. The members of the city council, respondents in the present suit, exempt themselves from responsibility for this illegal conduct or complicity with it by alleging that they were not members of the board of revision and appeal at the time of any prior assessment, and that they had never had anything to do with the making of assessments by the assessors.

Again, in support of the board's estimate of values there appear, as we have seen, the affidavits of a number of citizens of New Castle, some of them being, as alleged in affidavits introduced by the complainant, leading professional men of the city and its most prominent citizens. In additional support of their own judgment based upon inspection, they had the evidence that this very property had been sold about three years before for \$750,000; and if it be contended that an inspection of the deed would have shown that "the good will" was included in the sale, yet it does not appear that they had any means of knowing what proportion of the price went for "the good will," and there still remains the evidence of a mortgage of \$500,000 resting upon the real estate itself. Finally, the affidavits of the gentlemen who inspected the plant in 1904 were not before the board of revision at the time of its revision of the assessment; only the

counsel for the company and several others appearing in behalf of the complainant as to the values. It is therefore apparent that, even if I should take the view which favors the complainant most strongly, and should assume the affidavits of value presented by it were absolutely conclusive, and be convinced by them that the actual value of the mill did not exceed \$90,000 in 1903, nevertheless such conclusion would not affect at all the question at issue. And it may also be observed that the board did not have the benefit of this evidence. Those gentlemen did not appear before it, and its conclusions were reached without the influence that their judgment and experience might possibly have exerted.

Every attack upon the bona fides of the board has been met at every point by absolute denials, and by the most positive testimony as to the deliberate exercise of the judgment of its members, to which judgment, whether good or bad, the law had committed the decision of values for the purpose of municipal taxation within the limits of the city of New Castle. As said by Judge Coolcy in the quotation read above: "Value is a matter of opinion, and, when the law has provided officers upon whom the duty is imposed to make the valuation, it is the opinion of those officers to which the interests of the parties are referred. The court cannot sit in judgment upon their errors, or substitute its own opinion for the conclusions the officers of the law have reached."

It follows, therefore, that on the whole case, as presented, I feel obliged to dismiss the bill, with costs.

McMAHON v. BANGS.

(Superior Court of Delaware. New Castle.
May 31, 1904.)

1. DAMAGES—EVIDENCE—EXPECTANCY OF LIFE—MORTALITY TABLES.

In an action for damages for the breaking of a leg of a boy 15 years old, evidence of his expectancy of life, as shown by a table of expectancy of life, was admissible.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 487-489; vol. 20, Cent. Dig. Evidence, § 1520.]

2. SAME.

The pendency of an action by a parent for the wages of an injured son till 21 years of age does not render inadmissible evidence of his earning capacity in an action by the son for the same injury.

3. MASTER AND SERVANT—INJURIES TO SERVANT—WARNING SERVANT—EVIDENCE.

In an action for injuries to a servant who had been in the master's employment for eight weeks, evidence as to whether the servant had received any warning of danger connected with the employment was inadmissible.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 927.]

4. EVIDENCE—ADMISSIBILITY—HOSPITAL RECORD.

In an action for personal injuries, a record as to plaintiff's condition, kept by a hospital nurse, who had since been dismissed from the

hospital and was not present in court, was inadmissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1491.]

5. SAME—EXPERTS—COMPETENCY.

A witness familiar with blasting in a city street, but having no experience with stone quarries, and not knowing the amount of powder or dynamite used in blasting in stone quarries as compared with that used in the city work, was not competent to testify as an expert as to whether there was any method to protect persons, when blasting in a stone quarry is being carried on, from injury by flying fragments of rock.

6. MASTER AND SERVANT—EXISTENCE OF RELATION.

Where plaintiff, in an action for injuries caused by a rock hurled by a blast in a stone quarry, was employed by his brother to drive a cart, but in doing his work was under the direction of an employé of the owner of the quarry, he was a servant of the owner.

7. SAME — INJURIES TO SERVANT — FELLOW SERVANT.

A servant whose negligence in discharging a blast in a stone quarry resulted in injury to the plaintiff, who was engaged in hauling away the soil cleared from the top of the rocks, was the plaintiff's fellow servant, and the owner of the quarry is not liable for the injury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 491.]

Action by James F. McMahon, by his next friend, James McMahon, against Anson M. Bangs. Verdict for the defendant.

Action on the case to recover for injuries alleged to have been received by the plaintiff, a 15 year old boy, by being struck upon the leg by a rock hurled from a blast in a stone quarry, operated by defendant, in Brandywine hundred near Bellevue, while plaintiff was driving his brother's horse and cart which were being used in the service of the defendant company in connection with said quarry.

At the trial plaintiff testified in part as follows: That on the day of the accident, December 20, 1902, he was engaged in hauling dirt for the defendant with the horse and cart of his brother, William J. McMahon; that he drove the horse, and that certain employés of the defendant did the "stripping" (which witness explained was clearing off the soil from the top of the rocks), and loaded the dirt in the cart; that he was employed and paid by his brother for driving the horse and cart, and that his brother had the right to discharge him. The witness then testified concerning the accident as follows: "Q. What, if anything, happened to you on the 20th day of December, 1902? Did you meet with any accident? A. I got my leg broke. Q. How? A. By a stone hurled from a blast. Q. Where did the blast take place? A. Down in the quarry of Hughes Bros. & Bangs. Q. Where were you working? A. Up on top of the bank. Q. How near the edge of the quarry? A. About four feet. * * * Q. What were you doing at the time you were struck? A. Sitting on my cart. Q. Was the cart being loaded or not? A. Yes, sir; I had just got backed in,

and they started to load the cart, and I was struck. Q. Where were you struck? A. On the right leg. Q. What struck you? A. A stone. Q. What became of you after that? A. I was knocked unconscious. * * * Q. Was there any warning of any kind given to you or the other men about there at the time this blast was fired? A. No, sir; there was not. Q. What was the first thing you knew about a blast being fired? A. There was always warning given about five or six minutes ahead of the blast, in order to give us time to get away from the bank. Q. What did you do when warning was given as a rule? A. Took the carts away—either down to the dump, or got away off from there. Q. Was that done this day? A. No, sir; it was not. Q. What was the first thing you knew on this particular day about a blast being fired? A. The first thing I knew after I was struck? Q. Yes. A. When I was being carried out of the quarry store. Q. Did you know anything at all about the blast until after you were struck? A. No, sir; I did not. Q. Did anybody who was at work there where these carts were engaged in stripping leave the place just prior to the blast being fired? A. No, sir; they did not. Q. Did they all stay there and keep on with their work? A. Yes, sir; kept on with their work. Men who were laboring, and all."

Cross-examined, he testified as follows: "X. How long had you been employed at the quarry? A. From the 20th of October to the 20th of December, 1902, the day I was struck. X. That would be about two months or eight weeks? A. Yes, sir. X. How long had you known that quarry? A. I heard tell of it for nine years. * * * X. You say that your brother employed you? A. Yes, sir; he did. X. And you say that your brother had the right to discharge you? A. Yes, sir. X. Did your brother tell you what to do? A. The boss up there on the hill told me what work to do when I went up there. X. Had your brother anything whatever to do with the work up on top of the hill? A. No, sir; he had not. X. Had your brother ever gone there with you? A. No, sir. X. Did he ever give you any directions? A. He told me to be careful. X. Therefore you were under the direction of the boss of the gang? A. Yes, sir; I was hauling the dirt. X. Did he not tell you where to back your cart? A. Yes, sir. X. Did he not tell you where to go with it? A. Yes, sir. X. If you did not obey him, what would happen? A. I think I would get laid off. X. Then, did not that boss have the right to lay you off? A. Well, he had the right to send me away from the quarry. X. He had the right to discharge you, did he not? A. From the quarry, he did. X. And your brother also had the right to discharge you, if he wanted to, and so did the quarry man there, the boss? A. Yes, sir. X. So that you were working under the directions of the boss of the gang? A. Yes, sir. X. And did just what he told you to do?

A. Yes, sir. X. And if you did not do what he told you to do, he was likely to 'fire' you? A. Yes, sir. X. You say you had been there about eight weeks? A. Yes, sir. X. About how many blasts a day was fired off there at that quarry? A. Well, sometimes there was 10 or 12, maybe, if they were short of small stone or anything. Sometimes it was not very many. X. Were not there 100 sometimes? A. There might have been. X. It is a large quarry, is it not? A. Yes, sir. X. You also said in your testimony that somebody usually gave notice? A. They always did until this day. X. Who gave the notice? A. The men down in the quarry. X. What men? A. The Italians. Sometimes the walking boss in there. X. Do you know what man it was down there that gave notice? A. No, sir; I did not know his name. X. Was not there a man down there whose duty it was to give notice? A. I don't know whether he was there or not. X. Was not there a man down there whose duty it was to give notice? A. The walking boss would; yes, sir. X. Was not there a man down in the quarry whose duty it was to give notice or warning before the blasts were fired? A. Yes, sir; I think there was. X. And you had been there eight weeks? A. Yes, sir. X. And during all of those eight weeks there was somebody down in the quarry whose duty it was to give notice, and who gave notice? A. Yes, sir. X. And you had always had an ample opportunity to get out of the way until this day? A. Yes, sir. X. Is that so? A. Yes, sir. * * * X. You say you know there was somebody down there whose duty it was to give notice. Was not that one of the men working down there? A. Yes, sir; I think it was. X. Was not the man employed by Hughes Bros. & Bangs, just the same as the other men? A. Yes, sir. X. And he was employed there, was he not, for the purpose of giving notice? A. So far as I know. I did not know his name; did not know much about it. X. Was not this the only day while you were there that they failed to do it? A. Yes, sir. * * * X. Leaving out the question of the blasting, was there any danger there—was it a safe place? A. It was all right, only the backing over. X. It was all right in other respects. Then, you would have been perfectly safe there if that blast had not gone off, would you not? A. Yes, sir. X. And you would always have been safe there if you had had sufficient warning? A. Yes, sir. X. You could have gotten out of the way? A. Yes, sir."

On redirect examination he testified: "Q. When you spoke of being subject to the orders of the boss, do you mean that, when he would tell you to go and haul dirt to a certain place, you would have to go and haul it to that place? A. Yes, sir. Q. And, if you did not do it, he could send you and your cart all away? A. Yes, sir. Q. That boss had noth-

ing to do with employing you? A. No, sir; he did not. My brother did that."

Ralph Dale, a witness, being produced, sworn, and examined on the part and behalf of the plaintiff, testifies upon cross-examination as follows: "X. Could not there have been a warning given without your hearing it? A. I was right there, and the boss was right over the top of me, and I could hear it as well as anybody else. X. What boss? A. The boss we had there; the boss of the gang that told us what to do. X. Who was that? A. I don't know. He was an Italian. X. Was he not employed by the quarry people? A. He was employed by the quarry people. X. And he was your boss, was he not? A. Yes, sir. X. He told you where to put the horses and carts? A. Yes, sir. X. And told you where to take the dirt, did he not? A. Yes, sir. X. Was it he who gave you warning? A. He did not give us any warning. X. Did he give you warning sometimes? A. Yes, sir; he always did. X. That man always gave warning, did he? A. Yes, sir; only when we were on the other side. X. I mean did not somebody down below give warning? A. No, sir; not that I recollect. X. I mean at other times, did not somebody down where the blast was going off give warning? A. Yes, sir. They hollered 'Fire' X. And that was one of the men working there? A. Yes, sir. X. Working for the firm of Hughes Bros. & Bangs? A. Yes, sir. X. It was that man's duty, was it not, to give warning? A. I don't know who it was. X. Was there a man there whose duty it was to give warning? A. Yes, sir. X. And he always did do it until this day? Is that right? A. Yes, sir. X. And on this day he did not do it? A. No, sir. * * * X. Because the man down there did not say 'Fire' it became unsafe? A. Yes, sir. X. Because he did not say 'Fire' and give you a chance? A. Yes, sir. X. He would generally do that, and then your boss told you to get back? A. Yes, sir. X. That was how the thing was done? A. Yes, sir. X. That was the custom, was it? A. Yes, sir."

On redirect examination he testified: "Q. You say it was the duty of this boss to give you warning when somebody below would holler to him? A. Yes, sir. Q. And the man there had the same duty that this boss in charge had to give them notice? A. Yes, sir. Q. And he did not give any such notice that day? A. No, sir; sometimes, if we heard them down below, we would go then. Q. But this boss was up on the surface with you, was he not? A. Yes, sir. Q. And the people below would call to him, and then he would tell the rest of you? A. Yes, sir. Q. That was a general custom; but that was not done on this day? A. No, sir. Q. Or at the time that McMahon was injured? A. No, sir. Q. He did not do that? A. No, sir; the boss generally always stood on the end of the quarry, and he could hear. Q. You mean

the edge right over where they were blasting? A. Yes, sir. Q. He generally stood there, so that he could hear down below and tell the rest of you? A. Yes, sir. Q. But that was not done at this time? A. No, sir."

Charles A. Whalen, Isaac Showell, and George Johnson, all drivers, testified concerning the accident to the same effect, as did the plaintiff.

William J. McMahon, a witness, being produced, sworn, and examined on the part and behalf of the plaintiff, testifies as follows:

"Q. Did you ever have any business dealings with the defendant firm? A. I did at different times. Q. What was it? A. I hired them horses and teams—horses and carts—for the purpose of hauling dirt. Q. What was your contract with them? A. My contract with them was that they paid me so much a day for the team. Q. What did that include? A. That included a driver. Q. A horse, cart, and driver? A. Yes, sir. I got \$2.50 for a horse, cart, and driver. If I did not furnish the driver, I did not get that much, and the price of the driver was taken out, \$1.35 a day. Q. Did you ever furnish drivers to go with your horses and carts? A. I generally did. It was very seldom that they went without drivers. Q. Did you ever employ and put in charge of one of those horses and carts your brother, James F. McMahon? A. I did, about the 29th of October, I think it was. Somewhere in that neighborhood. Q. How long did he continue in that capacity? A. Until the 20th of December, when he was hurt there at the quarry. Q. Where was the horse and cart with this boy in charge working at the time—for whom? A. For Hughes Bros. & Bangs. Q. For that firm? A. That firm. Q. When was he hurt? A. He was hurt on the afternoon of the 20th of December, shortly after they went to work. I don't know the exact time. I judge about half past 1, the time I found it out. Q. What control or authority had that firm of Hughes Bros. & Bangs, or the defendant Anson M. Bangs, over your brother, James F. McMahon? A. They had no control whatever over him at all. The only control they had was over the cart. They had no control over the driver at all. The only thing they could do, if he was not satisfactory, was to send the cart away. They could not discharge him. Q. If the horse and cart with this driver was not doing the work satisfactorily to them, they could dismiss the horse and cart? A. Yes, sir. Q. And with it went the driver? A. Yes, sir; that is right. Q. This horse and cart were assigned to do whatever work that somebody about the quarry would designate to be done? A. Yes, sir."

Cross-examined, he testified as follows: "X. Is it true that the boy worked for Hughes Bros. & Bangs, or not? A. He drove a cart for me. He was employed by me under my directions. Hughes Bros. & Bangs had no jurisdiction over him whatever. X.

What had you to do with the boy when the cart was being loaded? You were not there to direct him and tell him what to do? A. Very seldom. X. Were you ever there? A. I have been there; yes, sir. X. Did you ever tell him what to do when he was on the cart and it was being loaded? A. I have once or twice told him to pull out; that he had a load on. * * * X. So far as the boy had to do with the stripping of the quarry, was not he subject altogether to the directions of that boss? A. Well, I would judge in a certain sense he was. X. That boy could not do as he pleased there, could he? A. Oh! no. X. And that boy was not subject to your orders there, was he, to do just what you told him? A. No, sir; he was in charge of my cart. X. And who had the control of the cart? A. I had the control of the cart. X. When? A. As long as I owned it. X. Did you control the cart when it was on top of the hill being loaded with dirt? A. Certainly. I could take it away from there any time I saw fit. X. Did you have any general direction of the cart when they were taking dirt away from there? A. Taking it where? X. Taking the dirt to dump it. A. No, sir. X. Who did that? A. One of the men there, known as 'gang boss,' I believe. X. Was not that gang boss employed by Hughes Bros. & Bangs? A. I believe he was, so far as my knowledge goes."

Argued before GRUBB, PENNEWILL, and BOYCE, JJ.

J. Harvey Whiteman, for plaintiff. Harry Emmons, for defendant.

Plaintiff called W. W. Knox, a life insurance agent, and asked him to consult his table of the expectancy of life and tell the court and the jury the probable expectation of life of a perfectly healthy boy whose nearest birthday is 15.

Objected to by defendant's counsel on the ground that the evidence showed that the plaintiff was not so injured as to interfere with his earning capacity.

BOYCE, J. We overrule the objection, and admit the testimony.

"A. The expectation of life of a person 15 years of age is 45.50."

James F. McMahon was recalled and asked: "Q. What wages were you paid as driver?"

Any proof of earning capacity was objected to by counsel for defendant as immaterial, because a suit by the father of the boy was pending seeking to recover wages for the boy until 21 years of age. Plaintiff's counsel contended he was entitled to prove that the plaintiff was in such condition up to the time of the accident that he could earn money.

BOYCE, J. We overrule the objection, and admit the testimony.

"A. Seventy-five cents a day. Q. When you went there with your horse and cart as

its driver, were you notified by Mr. Bangs or any one in his employ of the character of danger connected with that employment?"

Objected to by counsel for defendant, first, because the witness had been employed at the quarry for eight weeks and knew of the danger; second, he was an employé and assumed the usual risks of his employment.

BOYCE, J. We hardly think that this question is admissible.

Alida Turner, head nurse of the Homeopathic Hospital in Wilmington, was produced by plaintiff, and after testifying as to the condition of the plaintiff when brought to the hospital, was questioned concerning a certain record of the case, which she testified was regularly kept by one of the nurses of said hospital, who had since been dismissed and was not present in court. Said record was thereupon offered in evidence and was objected to by counsel for defendant on the ground that the only person who could testify to said record, so as to make it proper evidence, would be the person who made it.

BOYCE, J. It seems to the court that the object of offering this paper in evidence is to show pain and suffering. For that purpose the nurses themselves might be called, and under proper circumstances this paper could be used to refresh their memories. Beyond that we think it is not admissible.

Arthur Sullivan, being produced as a witness on behalf of plaintiff, was examined as follows: "Q. Have you ever had any experience in charge of blasting operations? A. Yes, sir. Q. What was that experience? How many years? A. Three and a half years. Q. What was it? A. Loading holes with dynamite and putting a fuse off with a battery. Q. Where were you blasting? A. All about different parts of the city of Wilmington. Q. In connection with what work or department? A. The street and sewer department, for which I was foreman. Q. Do you know the kind of blasting that was done at the Bellevue quarry? A. Well, I have never seen it done in the quarry; but I have an idea about it. Q. Is that the same kind of blasting as you did here, so far as boring holes and putting in blasts is concerned? A. I believe it is. Q. I will ask you if you know of any method that can be employed to protect persons nearby when blasting is being carried on, from injury by flying fragments of rock?"

Mr. Emmons objects to the above question, and pending the ruling of the court upon the objection, in cross-examination, draws out from the witness the fact that the witness had had no experience with stone quarries, and that while he had set off blasts while working for the street and sewer department in the city of Wilmington he did not know how much powder or dynamite was

used as a charge in the Bellevue quarry, or whether it was a greater or less amount than was used in the city work which he had been engaged in doing; or what precautions were taken in quarry blasting, or whether it was necessary or feasible in the Bellevue quarry to cover their blasts. Mr. Emmons then stated that he objected to the question upon two grounds: (1) That under the testimony adduced there was no duty resting upon the defendant to cover the blasts; (2) that the witness was not qualified to speak as an expert upon the subject of what precautions were employed to protect persons near blasting operations in a quarry.

Mr. Whiteman, for plaintiff, contended that the method of blasting or protecting the public was the same whether the blasting was done in a city or in a quarry in the country; therefore that the witness was qualified to speak as an expert.

BOYCE, J. We think the witness is not qualified to speak as an expert in this case.

The plaintiff rested, and Mr. Emmons for defendant moved for a nonsuit on the ground that the proof established the relation of master and servant between the defendant and the plaintiff; that the employé who failed to give warning of the blast, whereby the plaintiff was injured, was a fellow servant with the plaintiff, and that the failure of a fellow servant to perform his duty could not be charged to the master; that the plaintiff, being a servant of the defendant, assumed all the ordinary risks of his employment, among which was the danger arising from the fact that the blast had not been covered. Said motion was argued at length by the respective counsel, and numerous authorities were cited.

BOYCE, J. We have, as carefully as we could in the limited time afforded, examined the authorities of counsel, and we have also examined all of the testimony of the witnesses in this case, and we have reached the conclusion that as between the plaintiff and the defendant at the time of the accident the relation of master and servant existed. We have further concluded that as between the plaintiff and the person whose negligence it is alleged caused the injury complained of there existed the relation of fellow servants, and because of such relation the motion for a nonsuit is granted; there being no liability on the part of the defendant.

The plaintiff declining to take a nonsuit, upon request of counsel for defendant the court gave binding instructions to the jury as follows:

BOYCE, J. (charging the jury). We instruct you to find a verdict for the defendant.

Verdict for the defendant.

In re KOUNTZ'S ESTATE.

Appeal of JONES et al.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. PERPETUITIES—SUSPENSION OF POWER OF ALIENATION.

Testatrix gave the residue of her estate to her husband, in trust for her children and grandchildren. The income was to be paid to the immediate children for life, and at their death to their spouses for life. If any child died without leaving issue or spouses, its share of the income was to go to the surviving co-heirs. The will also provided that after the death of the last child, and 10 years from the time when the youngest grandchild should become of age, the principal should be divided among the grandchildren. *Held*, that the period fixed by the will for the gift to the grandchildren was within the rule against perpetuities.

2. WILLS—CONSTRUCTION—CONTINGENT REMAINDER.

Where a will provided for a trust for the children of testatrix and the grandchildren, the income to be paid to the children for life, and, on the death of the children, and 10 years from the date when the youngest grandchild should become of age, for the division of the estate among the grandchildren, the estate in the grandchildren was a contingent remainder.

3. SAME—FAILURE OF BEQUEST—EFFECT.

Where a gift under a will to grandchildren failed as within the rule against perpetuities, the antecedent particular estate which was to pass to the grandchildren also failed, and the property covered by the trust created in favor of the particular estate passed to the heirs under the intestate law.

4. SAME—VESTED REMAINDER.

A vested remainder is one that takes effect in interest and right immediately on the death of the testator, though it may not take effect in possession and enjoyment until the death of the devisee for life or other determination of the present estate.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1460.]

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of Peninah W. Kountz. From an order dismissing exceptions to adjudication, Caroline B. Jones and others appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

George B. Gordon and R. H. Hawkins, for appellants. William H. McClung, Thomas D. Chantler, and William M. McGill, for appellee.

POTTER, J. The question in this case is whether the trust created by the will of testatrix violates the rule against perpetuities. Mrs. Peninah W. Kountz died in November, 1899, survived by her husband, W. J. Kountz, and five children. A sixth child, W. J. Kountz, Jr., died three months before his mother. By her will, dated January 8, 1898, Mrs. Kountz appointed her husband, William J. Kountz, executor, and devised and bequeathed her residuary estate, as follows:

"Fifth. The rest of my estate I give to my

husband in trust for my children and grandchildren.

"Sixth. He shall manage my real estate to the best advantage according to his judgment. For that purpose he may lease or sell all or part thereof, and invest the proceeds as he may consider best. Under no construction of this will shall purchasers be required to see to the application of the proceeds.

"Seventh. He shall keep my stocks, bonds, money and the rest of my personal property invested in safe securities so as to yield a regular periodical income. The whole income from the real and personal property (less such reasonable expenses and charges, if any for management, as said executor may choose to withhold) shall be divided as follows: (1) While all my said children continue to live each shall have one-sixth of the aggregate net income, unless in the discretion of my said executor any one should receive either more or less than the one-sixth. (2) Should any of my said children die leaving children but no husband or wife, as the case may be, that parent's share of the income shall go to his or her children, in equal parts. (3) Should any one leave a husband or a wife, but no child, such husband or wife shall have his or her spouse's share of the income for life, provided that he or she 'has always had and maintained a good character and does not marry again'; in case of marriage 'or proof of bad character' his or her right shall immediately cease. (4) Should any one leave a husband or a wife and children, the deceased parent's share of the income shall be given to the surviving parent for the use of the survivor and children. (5) Should any one die without leaving a spouse or a child, that one's interest in the income and principal shall go to the surviving co-heirs, the children of any deceased heir to take such heir's portion. (6) After the decease of the last of my immediate children, and the lapse of ten years from the date when my youngest grandchild shall have become of age, the principal of the whole estate shall be equally divided among my grandchildren."

Other clauses of the will conferred additional and very extensive discretionary powers upon the trustee.

The court below held that in the will an antecedent gift was made to the grandchildren as a class, under which such of them who were in existence at the death of the testatrix took immediately a vested interest, subject to opening, to let in after-born members of the same class. In his opinion the subsequent provision, postponing the time of distribution of the principal of the estate until 10 years from the date when the youngest grandchild shall have become of age, was not of the substance of the gift, and, while the provision for this postponement was undoubtedly void, yet, in his opinion, it did not vitiate the gift, which, it was held, was already complete in the grandchildren. The

appellants contend that the conclusions thus reached by the court below are incorrect, and maintain that, as under the will the distribution of the corpus among the grandchildren is not to take place until 10 years after the youngest child has become of age (a period beyond a life or lives in being, and twenty-one years and a fraction thereafter), no interest or estate will vest in the grandchildren until that period arrives; and, further, that the trust cannot stand because a part violates the rule against perpetuities, and the whole must therefore fail, and the estate be distributed to the next of kin, under the intestate laws.

The pivotal fact, then, upon which this case turns, is whether under the terms of the will the estate in the grandchildren is vested or is contingent. In the first place, it is apparent that the testatrix intended to vest the estate in trust in her husband, and in him alone, for the benefit of her children and grandchildren, and in certain contingencies for the benefit of the spouses of deceased children. Beyond doubt also the trust was active, or special, for the trustee had numerous duties to perform. He was to manage the real estate in accordance with his judgment. He could sell or lease all of it, or any part thereof, and invest the proceeds as he saw fit. He was to keep the personal estate invested in safe securities, and distribute the income. He had power to preserve the estate or to dispose of it in whole or in part to the children, either in his lifetime or by his will. The power given to the trustee is so broad that he was at liberty to free the corpus of the estate partially or wholly from the trust, and bestow it upon the immediate children for their own use. In fact he did exercise this power in so far as the stocks and bonds and personality were concerned. The court below recognized and sustained this right in the trustee, as is shown by the second opinion filed in this case, wherein it is said: "The will of Peninah Kountz conferred upon her husband very large powers over her estate. * * * The whole estate was vested in him in trust for their children and grandchildren. * * * In addition and far more extensive were her directions in the eighth and ninth clauses. These reposed entire confidence in his judgment, and a power in effect unlimited to do as he saw fit with her estate, either in his lifetime or by his will." And further on: "The authority to give outright to their children by her will is not limited to her executor's lifetime; coupled with it was the distinct authority to do additional things either in his lifetime or after his death; he not only was authorized to modify her dispositions, but in connection therewith he was empowered to make other and different gifts. They are not equivalent expressions, but were intended not only to enable him to limit or enlarge the estate she had given, but to make entirely new dispositions thereof. He was to be the judge of what was the best for their descend-

ants; in the exercise of that judgment he saw fit to give absolutely to their children. * * * the present benefit of the whole of the personal estate."

But, coming to the vital point in the case, was the estate in the grandchildren a vested remainder? The fifth paragraph of the will is as follows: "The rest of my estate I give to my husband in trust for my children and grandchildren." The court below construed this as being in itself a distinct and substantive gift to the grandchildren as a class, and as making a complete devise to them. We cannot so regard it. It seems to us that the important element, and the significant feature of the clause, is its vesting of the estate in the trustee. Mention of the fact that it was for the benefit of the children and grandchildren was only incident to the creation of the trust whose terms and conditions were yet to be defined. It was as if she had said: "I give the rest of my estate to my husband in trust for the purposes and to be administered upon the conditions hereinafter set forth." Nothing is determined or defined in this paragraph of the will as to the extent or quality of the estate which the children or the grandchildren were to have. If we were to regard this as the substantive portion of the gift, we would be without any hint of the scheme which the testatrix had clearly in mind, and which she outlined so definitely in the various clauses of the succeeding paragraph of her will. It is not until we come to the sixth clause of paragraph 7, that we find the real intent of the testatrix expressed, with regard to the corpus of the estate, and there we find that it is to be divided among her grandchildren, after the decease of the last of her immediate children, and the lapse of 10 years from the date when her youngest grandchild shall have become of age. Even here there is no direct and explicit gift of the principal; it is only implied from the direction to divide. Chief Justice Gibson said, in *Moore v. Smith*, 9 Watts, 403: "Where a gift is only implied from a direction to pay, it is necessarily inseparable from the direction, and must partake of its quality; insomuch that if the one is future and contingent, so must the other be." And in *Smith on Executory Interests*, § 314, it is said: "Where there is no gift but in a direction to pay or transfer or divide among several persons at a future period, though the future period is annexed to the payment, possession, or enjoyment, yet it is also annexed to the devise or bequest itself. For, in this case, the direction to pay or transfer or divide, constitutes the devise or bequest itself; and therefore the vesting in interest is postponed, and not merely the vesting in possession or enjoyment."

We must note, then, that the corpus of the estate is devised to and vested in the husband as trustee. No grandchild takes anything until its father and mother are both dead. The income is devised to the immediate children for life, and at their death

to their spouses for life, and it is not until the death of both the child and the spouse that any of the income goes to a grandchild. And in such case the grandchild takes only such portion of the income as would have gone to the parents. In case any child died without leaving either spouse or issue, its share of the income was to go to the surviving coheirs. The intent of the testatrix is plain that her children should have no control over the estate, and that her grandchildren should have no control until all her children had died, and 10 years had elapsed after her youngest grandchild arrived at lawful age. It will be noticed, too, that the gifts of income to the grandchildren of testatrix are not in the same proportions as the gifts of the principal. They take only such shares of the income as their respective parents received. The income is therefore to be divided among them per stirpes. The parents were to receive one-sixth each of the net income, though this proportion was subject to variation at the discretion of the trustee. But when the distribution of principal is reached, it is to be equally divided among all the grandchildren; that is, per capita. It will be noticed that we do not have here the case of income and principal to be paid to the same person in the same right. The testator has not given the principal to be paid at a future time, with income or maintenance in the meantime. On the contrary, these are distinct gifts of the income to the children and of the principal to the grandchildren.

In *Spencer v. Wilson*, L. R. 16 Eq. 501, and the following cases there cited, *Batsford v. Kebbell*, 3 Ves. 363; *Leake v. Robinson*, 2 Mer. 363; *Vawdry v. Geddes*, 1 Russ. & My. 303; *Watson v. Hayes*, 5 My. & Cr. 125; *Peck's Trusts*, L. R. 16 Eq. 221, it was held that, where there are separate gifts of the income and the capital of the estate, the latter does not vest until the period of distribution. The application of this test to the present case, would determine the interest of the grandchildren as contingent. But, in any event, the remainder in the grandchildren could only be deemed vested in a case they had the right to immediate possession whenever and however the preceding state determined. A concise rule is found in *Tiffany on the Modern Law of Real Property*, § 120 (b), as follows: "It is frequently stated that the capacity of a remainder to take effect immediately in possession, if the particular estate were to terminate, is the criterion of a vested, as distinguished from contingent, remainder." In the authorities cited by the author in support of this proposition we find the following: "It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that, every remainder for life in tail is and must be liable, as the remainderman may die, or die without issue before

the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." *Fearne on Contingent Remainder*, 216. "As distinguished from a vested remainder, a contingent remainder is an estate in remainder which is not ready, from its commencement to its end, to come into possession at any moment when the prior estates may happen to determine." *Williams on Real Property*, *267. "It is the uncertainty of the right of enjoyment, and not the uncertainty of its actual enjoyment, which renders a remainder contingent. The present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a vested from a contingent remainder, and not the certainty that the possession will ever become vacant while the remainder continues." Quoted from 4 *Kent's Comm.* *203, note a, in *Doe, Lessee of Poor, v. Considine*, 73 U. S. 458, 476, 18 L. Ed. 869. "A vested remainder is one by which a present interest passes to the party, though to be enjoyed in future, and by which the estate is fixed to remain to a determinate person after the particular estate is spent. He has an immediate fixed right of future enjoyment. A remainder is contingent when it is limited to take effect on an event which may never happen till after the preceding particular estate ends, or is limited to a person not in being or not ascertained. * * * It is the present capacity of taking effect in possession, if the possession were to become vacant, not the certainty that it ever will become vacant while the remainder continues, which distinguishes a vested from a contingent remainder. In other words, in the former the enjoyment is uncertain; in the latter the right to that enjoyment." *Williamson v. Field's Ex'rs*, 2 Sandf. Ch. (N. Y.) 533, 552. "A vested remainder is one that takes effect in interest and right immediately on the death of the testator, although it may not take effect; indeed, if it be a remainder, it cannot take effect, in possession and enjoyment, until the death of the devisee for life, or other determination of the particular estate. * * * A present capacity of taking effect in possession, if the possession were to become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. In general, the law favors that construction which holds a remainder vested, rather than that which considers it contingent, when the question is doubtful." This is from the opinion of Chief Justice Shaw, in *Brown v. Lawrence*, 57 Mass. 390, 397. "A remainder is contingent when it is limited to take effect on an event which may never happen, or which may not happen until after the preceding particular estate ends,

or is limited to a person not in esse or not ascertained. A present capacity of taking effect in possession, if the possession become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. In other words, in the former the enjoyment is uncertain, in the latter the right to that enjoyment is uncertain." 1 Boone on Real Property (2d Ed.) § 173. In addition to these authorities, we find the following from Mitchell on Real Estate & Conveyancing in Penna. 227: "A vested remainder is an estate to take effect after another estate, for years, for life, or in tail, which is so limited that if the particular estate were to expire or end in any way at the present time some certain person would become thereupon entitled to the immediate enjoyment."

In the present case the particular estate is the life estate of the immediate children of testatrix. If this estate were to terminate immediately, would the remainder in the grandchildren take effect immediately? Clearly not, by reason of the limitation to that future date, 10 years from the time when the youngest grandchild shall have become of age. The remainder in the grandchildren is subject to this condition precedent, that it is only after the death of the last of the immediate children and the lapse of 10 years from the date when the youngest grandchild shall have become of age that the remainder to the grandchildren can take effect in possession. As a result, then, of this test, we must conclude that the estate in the grandchildren is a contingent remainder. The bequest is to the grandchildren as a class, living at a certain time; that is, after the death of the last of the children and 10 years after the youngest grandchild shall have become of age. The existence of a particular grandchild at that future date is a condition precedent to his right to participate in the division of the corpus of the estate. To hold that the interest of the grandchildren vested would be to give to them an estate which would be transmissible or alienable during the continuance of the particular estate. We cannot find any such intent in the will. On the contrary, it seems clear to us that the chief purpose of the testatrix was to tie up the estate and place it beyond the power of either children or grandchildren, to interfere with the distribution she purposed to have made after the death of all of her children, and 10 years after the date when her youngest grandchild should become of age. This period was to remote, and the gift made to take effect at that time is void under the rule against perpetuities. That being the case, the antecedent particular estate would fail also, and the heirs at law of the testatrix are entitled to immediate possession. Johnston's Estate,

185 Pa. 179, 89 Atl. 879, 64 Am. St. Rep. 621; Gerber's Estate, 196 Pa. 368, 46 Atl. 497.

The assignments of error are all sustained, and the decree of the orphans' court is reversed.

In re KOUNTZ'S ESTATE.

Appeal of FIDELITY TITLE & TRUST CO. (Supreme Court of Pennsylvania. Jan. 2, 1906.)

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of Peninah W. Kountz. From a decree dismissing exceptions to adjudication, the Fidelity Title & Trust Company appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

POTTER, J. In the opinion which we have this day filed in the appeal of Caroline B. Jones et al., 62 Atl. 1103, from this same decree, we have held that the trust created by the will of Mrs. Peninah W. Kountz violates the rule against perpetuities, and is therefore void. As her entire estate is distributable at this time, under the provisions of the Intestate law, it is unnecessary to pass upon the questions raised by this appeal.

It is therefore dismissed, at the cost of the appellant.

COMMONWEALTH v. MAGEE et al.

(Supreme Court of Pennsylvania. Jan. 9, 1906.)

APPEAL—JURISDICTIONAL AMOUNT.

Where judgment for want of a sufficient affidavit of defense is refused by the court below, the amount really in controversy, within Act May 5, 1899 (P. L. 249), relating to appeals and providing that the judge hearing the case shall certify to the same, is the amount alleged to be due in the statement of claim at the time of bringing the suit, and not as of the time of appeal.

Appeal from Court of Common Pleas.

Action by the Commonwealth, to use, etc., against one Magee and others. From an order discharging rule for judgment for want of sufficient affidavit of defense, plaintiff appeals. Motion to remit to Superior Court granted.

Plaintiff brought suit September 2, 1902, claiming \$889.70, with interest from March 16, 1892. At that time the claim, with interest, was less than \$1,500. On March 27, 1905, the court below discharged a rule for judgment for want of a sufficient affidavit of defense, from which, on August 22, 1905, plaintiff appealed to the Supreme Court. At both these later dates the claim, with interest, exceeded \$1,500. Appellant obtained from the court below and printed in his paper book a certificate that the amount really in

controversy exceeded \$1,500. The act of May 5, 1899 (P. L. 249) provides as follows: "Sec. 4. The amount or value really in controversy shall be determined as follows: In actions of ejectment, either legal or equitable, and in all other actions or issues in the common pleas or in the orphans' court that involve the possession of or the title to real property, or chattels, real or personal, the judge hearing the case shall certify whether the value of the land or of the interest or of the property really in controversy, is greater than fifteen hundred dollars, and his certificate shall be conclusive proof of such value for the purposes of this act. In any suit, distribution or other proceeding in the common pleas or orphans' court, if the plaintiff or claimant recovers damages either for a tort or for a breach of contract, the amount of the judgment, decree or award shall be conclusive proof of the amount really in controversy, but if he recovers nothing the amount really in controversy shall be determined by the amount of damages claimed in the statement of claim, or in the declaration."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Charles L. Brown and Alex. Simpson, Jr., for the motion. Trevor T. Matthews, opposed.

PER CURIAM (orally at bar). For the purpose of determining to which court to take an appeal, the amount really in controversy in any suit wherein judgment was refused by the court below, is the amount claimed in the statement as of the time of bringing the suit. The case will be certified to the Superior Court.

GROSSBAUM CERAMIC ART SYNDICATE v. GERMAN INS. CO. OF FREEPORT.

SAME v. POTOMAC INS. CO. OF DISTRICT OF COLUMBIA.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. INSURANCE—CONTRACT—EXECUTION—QUESTION FOR JURY.

Plaintiff brought an action on a parol contract of insurance purporting to cover property from the time of the application until the policy was issued. There was no question as to the amount of the loss, nor as to the proofs of loss; but the sole issue was as to whether a binding contract had been executed. *Held* a question for the jury.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1734.]

2. TRIAL—INSTRUCTIONS—REQUESTS.

Where defendant desired fuller instructions than those given by the court, and that the attention of the jury should be specifically directed to any part of the testimony, he should respond to a suggestion of the court and request such detailed instruction as he might desire.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 628.]

3. INSURANCE—INSTRUCTIONS.

It was not error for the court to direct the jury to consider the correspondence between

plaintiff and defendant's brokers in determining whether a parol contract of insurance had been entered into.

Appeal from Court of Common Pleas, Allegheny County.

Actions by the Grossbaum Ceramic Art Syndicate against the German Insurance Company of Freeport, Ill., and against the Potomac Insurance Company of the District of Columbia. From judgments for defendants, plaintiff appeals. *Affirmed*.

The trial court charged in part as follows:

"In measuring the value of testimony in this case, and in all cases, it is important to keep in view certain leading ideas that help you to measure the force of the testimony. In some cases the testimony, perhaps all of the way through, may be truthful, or some witnesses may be mistaken, and innocently mistaken. You may fail to believe their testimony, or rather fail to give credence or weight to it on the ground that you believe they are innocently mistaken—simply mistaken. On the other hand, you may fail to give value to the testimony because you may believe it bears the impress of perjury. Another thought is that the manner and appearance of witnesses upon the stand may help you to some extent to determine the value of the testimony. So that the testimony in a case of some witnesses may be as genuine as a standard coin; of others it may be as worthless as a counterfeit. It may measure up to par, or be absolutely worthless. Some of it may impress you as being that simply of witnesses who did not intend to testify falsely, or who perhaps were careless, or whose memory as to the facts was wrong.

"Coming, then, to this case, with these suggestions in measuring the testimony, the main turning point is the question whether there was a contract executed here which bound these insurance companies to pay the insurance. There is no contest as to the amount of the loss, and no contradiction of the testimony showing exactly what the loss was. There is no dispute that proofs of loss were sent. But the fact that there was a loss, and the fact that proofs of loss were sent in, does not make a contract. I cannot compel you to pay a loss, arising from fire or from any other source other than a tort, where you do a willful wrong or injury. I cannot compel you to pay the same, based on a contract, simply because I claim it. If you dispute my right, or deny that there was any contract between us, the burden is upon me to show that contract and establish it by the weight of the evidence. So here, when the plaintiff, the Grossbaum Ceramic Art Syndicate, comes along with claims based upon contracts which the company alleges were made with these insurance companies, and the insurance companies contest the point that there were contracts, the burden is upon the plaintiff to satisfy you, by the weight of the evidence,

that there was a contract. A contract for what? A contract covering ceramic art goods located, we will say, at Atlantic City; perhaps not necessarily there, because if the testimony is to be believed, it was, substantially, that a floater policy, which it is alleged was the kind of policy contracted for here, is just what the term 'floater' means—floating about from point to point. I may not recall exactly the cities; but, as illustrating the manner of their business, there was some testimony that in three months they exhibited at perhaps Chicago, Cleveland, Boston, New York, and Pittsburg. So that a floater meant a policy that floated around with these goods, and insured them to the extent that the understanding of the parties agreed they should be insured. Now, was there a contract made? If there was no contract, no binding agreement between these parties, that is the end of the plaintiff's case. The plaintiff must show a contract which binds the defendants. It is for you to determine whether there was a contract, and, if so, what it was.

"It is alleged by the plaintiff that it was a floater policy, and the meaning of that I think is quite clear from the testimony. These policies were policies to the extent of \$5,000. There is some dispute as to whether the goods were to be in Atlantic City. Probably, within the fair atmosphere of all the testimony, the policy was intended to be—but that is for you to say—a floater policy covering Atlantic City, to run a year at the rate of 3 per cent., and covering any other points within the express arrangement of the parties, if there was an express, definite arrangement made. It takes three links to make the contract. Two out of the three will not make it. All of the links must be established. If it is clear that the first link in the contract is established, that the minds of these two agents met, and it was clearly understood to be a floater policy to the extent of \$5,000, covering ceramic art goods, and then if it is clear that that meant a floater policy, wherever the goods might be, that part of the link would be established, unless the expression, 'wherever they might be,' was qualified by some other definite arrangement. If it was definitely understood between them that, while it was to be a floater policy, which meant floating from point to point, the insurance was not to cover every place that these goods might float or be placed, but was only to cover, say, the best hotels, or high-class hotels, and railroad depots; if that is all, even if their minds met to that extent, that is the second point in the case. If they were to cover simply those points, then there could be no recovery in this case, because stores, no matter how good they were, were not part of the arrangement. If the arrangement was generally to cover hotels, depots, and good stores, and if this was a fairly good store, which, perhaps, cannot very well be disputed, then the policy

would cover the store. If it did not cover the store, in the sense that the parties agreed, if they agreed at all, but simply covered railroad stations or depots and good hotels, then, of course, the plaintiff cannot recover. Then another step or link which would be essential, even if it is all established up to that point, is what were the terms of payment? The rate was 3 per cent. That cannot be disputed, and if the testimony of Mr. Hast is to be believed it was to cover a year. It is asserted here, as a principle of law, that because the premium was not actually paid at the time there could be no recovery. That might, or might not, be a good proposition; but, leaving that out of the case, as not for your consideration, we have a set of facts which settle that question, if you believe the testimony.

"On the question of payment, within the general scope and method in which these two agents did business with each other, there is testimony that Logue & Bro. and Mr. Hast, in the interchange of business, amounting sometimes, as Mr. Hast says, to 9 or 10 policies a day, and in the hurry of business necessarily, and in accordance with the general custom of all the insurance agents in the city of Pittsburg, credit was extended, in the sense of running accounts, perhaps as a clearing house would run and clear at the end of 20 or 30 days, or whatever the custom was as between Logue & Bro. and Mr. Hast, to settle the balance as shown by the contra accounts, whatever business Logue & Bro. had charged against Hast would be summed up in an account, whatever business Hast had against Logue & Bro. would be summed up, and the difference between the two accounts would represent the cash balance due from one to the other, and then a settlement would be made and the cash paid. If it is true that there was this general custom, not only between these two parties, but generally among the agencies here, insurance agents, to run a line of credit and conduct the business in that way, then it is fair to imply that this transaction, being one of perhaps dozens and dozens had between the parties, went into the account in that way, and therefore it was a sufficient contract, as to that link, and bound these companies. Mr. Logue, of Logue & Bro., who represented these insurance companies, testifies that the contract was not closed. Of course, you are to take your own recollection, and from that point of view weigh the value of the testimony; but I believe Mr. Logue's testimony is that Mr. Hast came to see him, and there is no dispute about that. There was some talk about a floater policy, and Mr. Logue said to him that he would like to know where these goods were. Mr. Hast replied that he was not sure, but he judged they were at Atlantic City, because the telegram came from there. Mr. Logue's testimony is that he refused to bind himself, refused to make a contract, unless the location of the property in the

float policy was limited to railroad depots or stations, and high-class, or first-class, or best hotels. Now, if that story is true, if that is exactly what he agreed to do, and to that extent he was willing to make a contract, and did make a contract, he would be bound only to that extent. If the contract did not include stores, then there was no contract as to stores, and, of course, these companies would not be liable, and the plaintiff could not recover.

"Then there is a letter that is important here. Mr. Hast said, in chief, when he was on the stand, that he made an absolute contract; that is, he made a closed contract with Mr. Logue, not a contract that was subject to any restrictions, not a contract subject to any condition which left the actual full contract open, to be settled afterwards, but that he made a full contract. Mr. Logue denies that. Is Mr. Hast supported in his allegations that, at the time he alleges the contract was made, it was actually made, a completed full contract, containing all of the essential links that bound the parties. Is that true? It is for you to judge, to some extent, as to that, from the letter which Mr. Hast subsequently wrote to Mr. Grossbaum, who is now dead, but who was the president of the plaintiff company at that time. Mr. Hast wrote Mr. Grossbaum on April 1, 1902, after he had had this alleged conversation with Mr. Logue: 'We wired you this morning in reply to your telegram as follows: "\$5,000 covered, subject to condition, particulars by mail"—which we now beg to confirm.' The condition referred to is 'that it will be absolutely necessary to incorporate the full coinsurance clause in the form in order to get the company to accept the float business.' Now, if his testimony in the first instance was, regardless of this letter, that he had actually made a full contract, complete in all its term, clearly understood by all of the parties, and binding upon the parties, why did he write this letter? The condition referred to is that it will be absolutely necessary to incorporate the full coinsurance clause in the form.' Absolutely necessary to do that in order to do what? In order to get the company to accept the float business. From that would you, or would you not, infer that he had not completed his contract? If you infer that he had not completed his contract with Mr. Logue, that the terms were not all fully agreed upon, that there was still something to be done—if that is the true interpretation—there could be no recovery here by the plaintiff, and your verdict would be for the defendant. If the completion of the contract depended upon Mr. Grossbaum's wiring or writing back in reply to this letter, 'That is entirely satisfactory, you may close the contract,' there never was any telegram and never was any letter back from Mr. Grossbaum, prior to the fire, stating he was satisfied to add the coinsurance clause and therefore close the contract. Not having done

that, the contract, not having been closed prior to the fire, the defendant would be entitled to a verdict.

"I do not know that there is anything more to say, gentlemen, unless we have overlooked something. If there is anything counsel would like to have us call the attention of the jury to, we would be glad to do it. In a general way, and by way of repetition, it is for you to say whether there was a completed contract, completed in the sense that there was no condition attached to it, completed in the sense that Mr. Logue and Mr. Hast met and talked about it, and agreed that the insurance should be placed, and should be placed in the sense that it was absolutely binding and fixed, and no condition whatever attached to it, and that it covered the goods, in the float sense, in stores. As before stated, even if the minds of the parties met upon a contract, and that contract did not cover stores, but did cover railroad depots and good hotels, these insurance companies would not have to pay. If they did not contract in their float arrangement to cover stores, it does not matter how good the stores were, or where they were, they would not be bound to pay. If the contract was to cover merely railroad stations, goods in transit and in good hotels, then that is what the parties agreed upon and are bound by."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

M. W. Acheson, Jr., and O. H. Rosenbaum, for appellant. Edwin P. Young and Dalzell, Scott & Gordon, for appellee.

MESTREZAT, J. These two actions are assumpsit, brought by the Grossbaum Ceramic Art Syndicate against the German Insurance Company of Freeport, Ill., and the Potomac Insurance Company of the District of Columbia, on two preliminary contracts for the insurance of certain ceramic goods, which are alleged to have been the property of the plaintiff company, and destroyed by fire at Atlantic City, N. J., on April 3, 1902. The cases involve the same questions and were tried together in the court below. Verdicts were rendered for the defendant companies, and from the judgments entered thereon the plaintiff company has appealed.

There are two assignments and they allege error in the charge of the court, that it was partial and inadequate. The contracts sued on were verbal and what are known in insurance parlance as "oral binders." Their purpose is to bind or cover the property against loss by fire from the time of the application until a written policy is issued. The plaintiff company alleges that on April 1, 1902, it wired Benswanger & Hast, its brokers, at Pittsburg, to place \$5,000 "floating" insurance on its goods then at Atlantic City, and that in pursuance of the message its brokers, on the same day, called

on Logue & Bro., the agents of the defendant companies, who accepted a risk of \$3,000 for the German Company and one of \$2,000 for the Potomac Company. The plaintiff claims that this was a "floater" contract, and was to cover the goods wherever they might be, whether in transit, or in hotels, railroad depots, or stores. It is conceded that Mr. Hast called at the office of Logue & Bro. on April 1st, and informed them of his firm's instructions from the plaintiff company and that a conversation ensued as to placing the insurance. But it is denied by the defendants that any contract was entered into at that time, and it is claimed by them that in this conversation Mr. H. A. Logue gave Hast the terms on which they would insure the goods in hotels and railroad depots, and that Hast said his company would object to the rate, but he would write that night and advise the company what it would have to do to secure the insurance. On the trial of the cause, the learned judge said in his charge that "the main turning-point is the question whether there was a contract executed here which bound these insurance companies to pay the insurance. There is no contest as to the amount of the loss, and no contradiction of the testimony showing exactly what the loss was. There is no dispute that proofs of loss were sent." As stated by the plaintiff company in its printed brief, "the sole issue in the case was raised by conflicting testimony as to whether the contracts sued on had been entered into or not." This necessarily sent the case to the jury. The adequacy of the charge, and its fairness, are the only questions raised on this appeal.

We are not convinced that the appellant has convicted the learned trial judge of reversible error on either of the grounds laid in the assignments. We do not think the appellant's claim of inadequacy in the charge can be sustained. There was but a single question for the jury, and that was whether the insurance companies had entered into the verbal contracts sued upon. The trial judge eliminated all other questions from the consideration of the jury, and told them that their verdict would depend solely upon their finding on that question. After instructing them as to the manner of testing the credibility of the witnesses and defining a "floater" policy, he presented the claims of the respective parties on the question at issue. He told the jury what the plaintiff company must show to establish its contracts. The testimony on each side was partly written and partly oral, but the judge in his charge did not refer to any part of it, except the letter written by Benswanger & Hast to Grossbaum. After thus directing the attention of the jury to the issue, the claims of the parties, and what the plaintiff was required to show to sustain its contracts, the court said: "In a general way, and by way of repetition, it is for you to say whether there was a completed contract, completed in the

sense that there was no condition attached to it, completed in the sense that Mr. Logue and and Mr. Hast met and talked about it, and agreed that the insurance should be placed, and should be placed in the sense that it was absolutely binding and fixed, and no condition whatever attached to it, and that it covered the goods, in the floater sense, in stores." Immediately preceding this part of his charge, the judge said: "If there is anything counsel would like to have us call the attention of the jury to, we would be glad to do it." The appellant's counsel availed himself of this opportunity, and at his request the court gave further instructions to the jury. We cannot find, under the circumstances, that the charge was inadequate. If the appellant desired fuller instructions, and that the attention of the jury should be directed specifically to any part of its testimony, counsel should have responded to the learned judge's suggestion and requested such detailed instructions as he desired. The charge was already of sufficient length to furnish adequate instructions to the jury, and if the appellant company considered it deficient or lacking in presenting any part of the testimony, the judge's attention should have been directed to the matter. When, as he suggested, he would have given additional instructions.

Nor can the charge be condemned for unfairness or partiality. It is true the plaintiff claimed that the contract was closed at the interview between the agents of the respective parties, and that it contained a coinsurance clause, but this was strenuously denied by the defendants. They maintained that the contract was not closed, and that their proposition to insure the plaintiff's goods was on the condition, yet to be accepted, that the policy should contain a coinsurance clause. It was therefore proper, and certainly not unfair, for the judge, in calling attention to the matter, to refer to the correspondence between the plaintiff and its brokers, which bore directly on the question. This is what he did, and we do not see that his manner in presenting it to the jury was misleading or had any tendency to give any undue weight to it against the plaintiff. There is certainly nothing in the record or verdict that leads to such a conclusion. While the jury might have interpreted this correspondence as the plaintiff does, they certainly could not be convicted of clear error in sustaining the defendants' construction of it—that at the close of the interview between Hast and Logue the proposed contract needed the confirmation of the plaintiff company to complete it. Whatever may have been the necessity for speedy action in securing the insurance, as suggested by the appellant's counsel, the telegram and letter of Benswanger & Hast to the plaintiff are strongly corroborative, if not conclusive,

in support of the defendants' position that the contract was open and "subject to conditions" which required the acceptance of the plaintiff to complete it. It might have been error for the learned judge to have failed to advert to this correspondence in his charge, but it was unquestionably neither error nor unfairness for him to direct the jury to consider it in determining the question whether the contract between the parties had been fully completed.

The charge is not justly open to the objection that it is argumentative in favor of the defendants. In referring to the letter written to Grossbaum, the court did not, as claimed by the appellant, ignore the testimony of Benswanger and Hast. That testimony was before the jury and was commented on by counsel, and hence whatever support it gave to the existence of the alleged contract was presumably given due weight by the jury. It was not error for the court to charge the jury that the plaintiff could not recover unless the contract included stores, nor did the court, in advertising to stores, raise an issue not in the case, as contended by appellant's counsel. The plaintiff claimed that there was a contract, and that it covered goods in stores, as well as those in hotels and railroad depots. The defendants not only denied the existence of a contract, but alleged, and introduced testimony to show, that in the conversation in which it was claimed the contract had been entered into their agent had agreed to accept the risk on goods only in railroad depots and hotels on the condition that the plaintiff would carry full coinsurance. It was therefore contended by the defendants that, if there was a contract, it covered goods only in hotels and railroad depots, and not those in a store where the plaintiff's goods were alleged to have been when they were destroyed. Hence it was not error for the court to tell the jury that, to entitle the plaintiff company to recover, it was required to show a "floating" contract which covered goods in stores.

The assignments of error are overruled, and the judgment is affirmed.

FLACCUS v. WEST PENN GAS CO.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

GAS—CONTRACT TO FURNISH—CONSTRUCTION.

A natural gas company contracted in writing to supply gas for a glass works, but there was no provision as to the pressure required. The gas company for several years prior to the execution of the contract had supplied gas at a pressure of one pound, which was the standard pressure at which it furnished gas to similar works. *Held*, that it was under no obligation to furnish gas at a higher pressure.

Appeal from Court of Common Pleas, Allegheny County.

Action by C. L. Flaccus, trading as the C. L. Flaccus Company, against the West

Penn Gas Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

James Francis Burke and Thomas J. Ford, for appellant. George N. Chalfant, for appellee.

FELL, J. This action was to recover for the breach of a written agreement by the defendant to furnish natural gas to the plaintiff's glass works. The material part of the agreement is as follows: "We hereby agree to furnish natural gas at your glass works at Tarentum, Pa., for the period of one year from this date at seven cents per thousand cubic feet, provided you take at least sufficient gas to run your No. 3 furnace. * * * We will furnish a meter and regulator and make connections with your pipe at our own cost." Gas was furnished at the meter at a pressure of one pound in quantities sufficient to run the whole of the plaintiff's works, but it was found that, at this pressure, not enough gas would pass through the furnace pipes to heat the glass sufficiently. The defendant declined to furnish gas at a higher pressure, and the plaintiff disconnected his works from its line and obtained gas from another company at a higher pressure, at ten cents per thousand. The learned trial judge directed a verdict for the defendant for the reason that, while there was an implied obligation to furnish enough gas to run the No. 3 furnace, the plaintiff had failed to show that he was entitled to gas at a higher pressure than that at which it was furnished.

The dispute was not as to the quantity of gas, but as to the pressure at which it should be furnished. The supply of gas at the meter was at all times ample. The plaintiff declined to take it unless it was furnished at a pressure which would force enough gas through the burners of the No. 3 furnace to heat it. The contract was silent as to the pressure, and the plaintiff, on whom the burden of proof rested, offered no evidence from which it could be inferred that any particular pressure was intended. It was shown by the uncontradicted evidence presented by the defendant that a pressure of one pound was the standard pressure at which it furnished gas to all its customers who operated glass factories, and that during a period of several years before the contract in question was made gas had been furnished by it to the plaintiff at this pressure under a contract that did not require the use of a meter. There is nothing in the contract, and nothing was shown outside of it, from which it can be inferred that there was an intention to furnish gas at a pressure suited to a particular construction of furnace, or at other than the usual pressure.

The judgment is affirmed.

**MICHALOFSKI et al. v. PITTSBURG
SCREW & BOLT CO.**

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

**MASTER AND SERVANT—INJURY TO EMPLOYÉ—
CONTRIBUTORY NEGLIGENCE.**

Where a boy, over 13 years of age, was injured while trying to remove an obstruction from a machine while in motion, and at the time was meddling with something that was not his business, and was not performing any duty for which he was employed, his master was not liable.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 654, 678.]

Appeal from Court of Common Pleas, Allegheny County.

Action by Felix Michalofski and Joseph Michalofski, by Felix Michalofski, his next friend, against the Pittsburg Screw & Bolt Company. From a judgment refusing to take off a nonsuit, plaintiffs appeal. Affirmed.

The following is the opinion of Macfarlane, J., in the court below:

"The plaintiff, a boy of 13 years and 7 months, was employed by the defendant at a thread-cutting machine, and his duty was to push nuts under four taps which were raised by a lever worked by the foot which raised the taps. The nut is then put in oil in a tin pan and pushed under the taps, which descend and cut the thread. The only instruction given him was by the foreman who put a nut under the tap and showed him how to do the work, and then directed another boy to show him, and he put four nuts in the machine. The foreman told the boy to be careful and not break any taps. On the next day he put a nut in the machine, tramped on the treadle and his foot slipped, the tap broke, and the nut flew up and got caught in a cogwheel, breaking the cog. The boy did not know how to stop the machine and had not been instructed, although there was a lever for that purpose. He took a stick and tried to poke the nut out, and by the pulling of the stick or in some other way his hand was caught in the cogs and injured. It was no part of his duty to remove the nut from the cog, and the case is not like that of Creachen v. Carpet Co., 209 Pa. 6, 57 Atl. 1101, where it was part of the boy's duty to remove the 'choke,' which was the accumulated wool caused by the operation of the machine. The plaintiff was not injured in performing any duty for which he was employed, and was attempting to remove a difficulty which was not caused by the ordinary operation of the machine, but was meddling with something that was not his business. Had he been hurt in the operation of the machine he might be entitled to recover. The case of Doyle v. Pittsburg Waste Co., 204 Pa. 618, 54 Atl. 363, differs from that before us in that the clearing out of the waste after it had caught fire and been extinguished was a part of the duty of the operator. This

frequently happened and the case was for the jury.

"We do not hold that this is a case of obvious danger, and, were we satisfied that the removal of the nut was in any way a part of the plaintiff's employment, we would take off the nonsuit. As it is, the motion is refused."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

A. M. O'Brien and G. W. Brawner, Jr., for appellants. Dalzell, Scott & Gordon, for appellee.

PER CURIAM. Judgment affirmed, on the opinion of the court below.

S. JARVIS ADAMS CO. v. KNAPP.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

**1. JUDGMENT — DECREE OF FOREIGN COURT —
ENFORCEMENT.**

A court in Pennsylvania is without jurisdiction to enforce a decree of another state.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1501.]

2. SAME.

A court is without power to adjudge the decree of any other court binding, or punish for the violation thereof.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1501.]

3. INJUNCTION—BREACH OF CONTRACT.

Where a nonresident was enjoined in a federal court from manufacturing certain specialties in violation of a contract, and thereafter moved into the state and continued such manufacture, equity will enjoin the same under its general powers, but not with intent to enforce the decree of the other state.

Appeal from Court of Common Pleas, Allegheny County.

Bill by the S. Jarvis Adams Company against Sanford A. Knapp. From a decree for defendant, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Thomas Patterson, for appellant. W. K. Shiras and O. C. Dickey, for appellee.

STEWART, J. The appellant, a corporation of this state doing business in the city of Pittsburg, obtained a decree in the Circuit Court of the United States for the Southern District of Ohio awarding an injunction against the appellee, then a resident of the state of Ohio, enjoining and restraining him from directly or indirectly engaging in the manufacture of certain specialties, described in the decree, in that particular part of the United States east of a line drawn north and south from the city of Denver, Colo. The present bill averred that the defendant in that proceeding, and appellee here, had removed from the state of Ohio and had be-

come a resident of the city of Allegheny in his state, and was there engaged in the manufacture of the several articles he was enjoined against manufacturing by the decree aforesaid. It prayed (1) that an injunction issue enjoining and restraining him from violating the terms of the decree and injunction of the said Circuit Court, in accordance with the terms therein; (2) that the decree of the said Circuit Court be decreed to be binding upon the defendant as fully to the same extent as it could or would be within the jurisdiction of the said Circuit Court; (3) that the defendant be required to purge himself of his said contempt of the decree of said Circuit Court, and to make such amends for his violation thereof as may be just and proper; (4) for such other and further relief as the case may require and seem proper. To this bill an answer was filed admitting every averment set out, except that charging defendant with being at that time engaged in the manufacture of the articles mentioned and against the making of which he was enjoined. Upon issue joined testimony was taken, and upon final hearing, the bill was dismissed, on the ground that but one witness having testified to the violation of the terms of the decree, this testimony did not overcome the responsive answer of the defendant.

This view of the case overlooks the facts and circumstances disclosed in the testimony, or fails to allow them their proper significance, in support and corroboration of the testimony offered on behalf of the plaintiff. Defendant is employed as a workman in the mills of the Monongahela Casting Company, whose business is the manufacture of car wheels and pipe balls. Three-fourths of the entire product of the mill consists of pipe balls; and these are the specialty which the defendant agreed with the plaintiff he would not manufacture or engage directly or indirectly in producing. While the several specialties are manufactured on different machines, the work in connection with all of them is done under the same roof, and in the same room, where no one is admitted but those employed. The general superintendent of the mill receives an annual salary of \$1,200; whereas the defendant, a subordinate, exercising no control or authority, unless it be that of a foreman, is paid a salary of \$2,500. Considering that defendant's contract with the plaintiff prohibits him from engaging directly or indirectly in the manufacture of pipe balls, the circumstances above referred to—for which he himself is responsible, since his employment in this particular establishment is a matter of his own pleasure—make his conduct more than equivocal. They establish a prima facie case against him, and the burden is upon him to overcome it. They are strongly corroborative of the plaintiff's witness. Allowing them their due weight, in connection with this testimony, we are of opinion that a prop-

er case is made out for equitable interference. The specific relief asked for in the bill could not be given, for the reason that the court is without power to enforce any but its own decrees, nor can it adjudge the decree of any other court binding, or punish for the violation of any except its own; but under the general prayer for relief the court could have enjoined the defendant against violating his agreement with the plaintiff not to engage, directly or indirectly, in the manufacture of pipe balls, or other specialties which he had agreed not to manufacture, and this much relief we think the plaintiff was entitled to under the evidence submitted.

The decree in this case is reversed, at the cost of defendant. The bill is reinstated, with instructions that an injunction issue, enjoining and restraining defendant from engaging, directly or indirectly, as an individual or partner, or as a stockholder, director, or officer of any corporation, limited partnership, or other concern, or, as an employee of any corporation, limited partnership, or other concern, or any person or persons whatsoever, in the manufacture or sale of pipe balls, bell dies, long dies, or angle boxes, being the specialties mentioned in the bill of complaint in this case, for or during the term of years ending November 12, 1910.

BEALAFELD et al. v. SLAUGHENHAUPT. (Supreme Court of Pennsylvania. Jan. 2, 1906.)

WILLS — CONSTRUCTION — DESCRIPTION OF DEVISEES.

Where a man married a woman having an illegitimate child, and thereafter had seven children, and died leaving his whole estate to his wife for life, and on her death to be divided "among her children and mine," the first child took nothing under the will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1085.]

Appeal from Court of Common Pleas, Allegheny County.

Action by Frederick W. Bealafeld and others against Milton Slaughenaupt. Judgment for defendant on case stated, and plaintiffs appeal. Affirmed.

The following is the opinion of Shafer, J., in the court below:

In this case the parties have agreed upon a case stated in the nature of a specific verdict, from which it appears that the plaintiffs have agreed to sell certain lands in Allegheny county to the defendant, and that the defendant has declined to pay the purchase money thereof, because, he says, the title of the plaintiffs is not good and marketable. The title of the plaintiffs depends upon the will of August Bealafeld, deceased. It appears from the case stated that in 1858 the testator married a woman who had at the time an illegitimate son about 7 years old,

who was not a son of the testator; that this son lived with the testator and his wife as a part of the family until he was 17 years old and until shortly before the making of the will in question; that the testator had by this wife seven children who are the plaintiffs or whose interest is owned by the plaintiffs; that in 1884 August Bealafeld made his will, which was probated in that year, by which he gives all his property to his wife, the mother of the children named, for life or widowhood, and at her death the property to be sold by his executor and to be divided share and share alike 'among her children and mine.' He then provides that his wife or his executor, if she shall marry a second time, shall see that 'my children, Fred, William, August, John, Louis, Mina, and Lizzie, shall be clothed and educated out of the proceeds of my estate aforesaid.' The mother is now dead. The contention upon the part of the defendant is that the illegitimate son takes, under the will, one-eighth, or at least some share, of the estate, and that therefore the plaintiffs, who are, as we understand it, conveying the title of the seven legitimate children, have not a marketable title to the whole of the land. We understand the claim of the defendant, made at the argument, to be that the words 'her children and mine' designate two classes of persons, 'her' children being eight in number and including the illegitimate son, and 'mine' including only the seven, and it is argued, not without some plausibility, that this view is strengthened by the use which the testator makes of the expression 'my children' where he enumerates the seven by name. On the other hand, it is claimed that the rule which requires a will to be interpreted so as not to disinherit the heir, in case of doubt, should be applied, and that the word 'and' must be interpreted as joining the designations 'her' and 'mine' into one term descriptive of the children to take, and not as joining the classes described. The question is substantially the same as that mooted in the celebrated fictitious case of the bequest of the black and white horses. But, whatever the testator may in fact have had in his mind, we have no doubt that the illegitimate child of the mother can take nothing under the terms of this will, because of the well-established rule of law that the word 'children' and like words are to be applied only to legitimate children, unless the illegitimate children are otherwise described so as to leave no doubt that they are to be included. *Appel v. Byers*, 98 Pa. 479.

"We are of the opinion, therefore, that the title of the plaintiffs is good and marketable, and that judgment should be entered upon the case stated for the plaintiffs. We therefore order that judgment be entered for the plaintiffs and against the defendant for \$1,900, with interest from June 14, 1905, and costs."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

William S. McDowell, for appellants. Sol. Schoyer, Jr., and John P. Hunter, for appellees.

PER CURIAM. Judgment affirmed, on the opinion of the court below.

TODD v. ARMSTRONG.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

WILL—CONSTRUCTION—NATURE OF ESTATE.

Testator devised land to his daughter, with the provision that if she died unmarried, or, having married, died without issue, the estate should vest in her mother for life, if she were living, or, if the daughter had been married and the husband living, in him for life, and on failure of these then over to certain persons named. The daughter died without leaving issue, and the mother died before the daughter, and the husband survived the daughter. *Held*, that he took a life estate in the real estate devised to his wife.

Appeal from Court of Common Pleas, Allegheny County.

Action by James Walker Todd against John H. Armstrong. Judgment for defendant on case stated, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

J. M. Shields, for appellant. Joseph Stadtfeld, for appellee.

ELKIN, J. The affirmance or reversal of the judgment entered in the court below depends upon the decision of the question whether the appellant took a fee-simple estate under the will of his wife, or only a life estate under the will of William Jackson, deceased. The title to the property in question was originally vested in the said William Jackson, deceased, who by his will, dated August 17, 1864, devised it to his daughter, Agnes Jackson, subject to certain conditions and contingencies therein set out. It is provided in the fourth paragraph of the will as follows:

"I direct that if my daughter should die unmarried, or having been married should die without issue born of her body, the estate herein bequeathed and devised to her shall vest in the manner following, to wit: If her mother be living, a life estate to her, or if my daughter be married and her husband living, a life estate to him, on failure of these then the same shall vest in Robert Watson." The daughter named in the will, wife of the appellant here, died without leaving living issue. The mother died before the daughter, and the daughter was survived by her husband, the plaintiff in this case. Agnes Jackson, the daughter, acting on the theory that she took an estate in fee simple under the will

of her father, devised the property in dispute to her husband, the appellant, and his heirs, forever. The husband after the death of his wife, the said Agnes Jackson, entered into an agreement to sell and convey said property to the appellee, in fee simple, by general warranty deed, clear of all incumbrances. The purchaser refused to take the title on the ground that the appellant only enjoys a life estate in the property, and cannot convey a title in fee simple. The court below held that the will of William Jackson, deceased, imports a definite failure of issue in Agnes Jackson, and that the plaintiff only took a life estate in the real estate in question, and therefore entered judgment in favor of the defendant. In this there was no error. We arrive at the same result no matter whether we view the question from the standpoint of the plain meaning of the testator as appears in the will itself, or apply the technical rules of construction recognized and followed in many cases.

We have frequently said, and now repeat, that where the intent of the testator clearly appears in the will itself it is unnecessary to apply technical rules in order to determine the meaning intended. What did the testator mean by providing that if his daughter should die unmarried or, having been married, should die without issue born of her body? The answer is obvious. Under these conditions the estate devised should be enjoyed by her mother for life, then a life estate to the husband, and when these estates failed the title should vest absolutely in Robert Watson. The testator said what he intended and intended what he said. At the time of the death of the daughter, the mother was dead. There was no living issue born of the body of Agnes Jackson. Her husband therefore took a life estate. We arrive at the same result by an application of settled rules of construction. In a will, it is true, the primary meaning of the word "issue" is heirs of the body," and it is construed as a word of limitation, and "dying without issue," standing alone, means an indefinite failure of issue; but this general rule does not apply where the devise over of land to take effect is expressly or impliedly for a period of a life or lives in being and 21 years thereafter. The rule has been stated by Mr. Justice Fell in *Beckley v. Riegert*, 212 Pa. 91, 61 Atl. 641, wherein it is said: "In a will 'issue' prima facie means 'heirs of the body' and will be construed as a word of limitation, and 'dying without issue' standing alone means an indefinite failure of issue. But this construction will always yield to an apparent intent on the face of the will that the words were to have a more restricted meaning and to be applied to descendants of a particular class or at a particular time and not to all the descendants of every generation."

The will of William Jackson, deceased, imports a definite and not an indefinite failure of

issue, and therefore comes within this exception to the general rule. The estate of the daughter was subject to the condition that she had issue born of her body and living at the time of her death. No issue having been born and living at that time, the husband took a life estate, and the fee passes to Robert Watson.

Judgment affirmed.

STECK v. CITY OF ALLEGHENY.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—CONTRIBUTORY NEGLIGENCE.

Whether plaintiff was guilty of contributory negligence, when injured by a fall on a sidewalk because of ice thereon, *held* under the evidence a question for the jury.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1754-1756.]

2. SAME—QUESTION FOR JURY.

Where all the streets were icy at the time plaintiff fell on a sidewalk, the question as to whether there was a safer road which plaintiff could have taken is for the jury.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1755.]

3. SAME.

Where the testimony shows a defect in a street of such a character that it can be used with safety by reasonable care, notwithstanding the defect, whether the injured party used such care is a question for the jury.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1754-1756.]

4. SAME—CONTRIBUTORY NEGLIGENCE.

A person is not guilty of contributory negligence in using a street which he knows to be defective, unless the danger is so obvious that a person using ordinary care would not travel on the street.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1677, 1755.]

5. SAME.

Where a person is injured while using a sidewalk by a defect therein, he is not guilty of contributory negligence if he did not know of such defect.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1678.]

6. SAME.

Where a person uses a defective street, whether he was guilty of contributory negligence in not using another street was a question for the jury.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1755.]

Appeal from Court of Common Pleas, Allegheny County.

Action by George F. Steck against the city of Allegheny. Judgment for defendant notwithstanding the verdict, and plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Richard B. Scandrett, James E. Barnett, Thomas M. Benner, and Rody P. Marshall, for appellant. L. K. Porter, for appellee.

MESTREZAT, J. This action was brought to recover damages for injuries sustained by the plaintiff in falling on the ice which had accumulated in a depression in the cinder sidewalk of Morris street in Allegheny city. The jury returned a verdict for the plaintiff, which was taken "subject to a question of law reserved, whether there is any evidence in the case entitling the plaintiff to recover." Subsequently the court entered judgment for the defendant non obstante veredicto on the ground that the plaintiff was guilty of contributory negligence. The learned judge held that the evidence warranted the jury in finding the city negligent. He, however, was of the opinion that in attempting to pass over this part of the sidewalk the plaintiff was negligent, as "he knew the condition at this point and passed over it every day." Morris street is an unpaved street with cinder sidewalks, each of which is about 5 feet in width. The depression or hole in the sidewalk in which the ice had accumulated on which the plaintiff fell was 5 or 6 feet in length, 2 inches deep and 15 to 18 inches wide. The accident occurred as the plaintiff was going the usual and direct route to his work at the Ft. Wayne railroad shops shortly after midday on February 10, 1902. The ground was covered with an inch of snow which had fallen during the morning.

Persons are not necessarily prohibited from using a street of a city because it is defective or may be partly obstructed. If this were so, business would be unnecessarily retarded and people would be greatly incommoded in the pursuit of their daily avocations. While, however, such conditions may not of themselves prevent the use of a street they nevertheless impose upon the person using it a higher degree of care than if the street were free from obstructions. In such cases the party traveling the street must use that degree of care demanded by the circumstances of the particular case. If he is injured in the use of the street, known by him to be defective, and the evidence shows that when he entered upon it the danger was imminent and immediate, the court as matter of law may declare him guilty of negligence. On the other hand, when the testimony shows a defect of such character that the street can be used with safety by the exercise of reasonable care notwithstanding its defective condition, it is not for the court, but for the jury, to determine whether the injured party performed the duty required of him under the circumstances. In 15 Am. & Eng. Enc. Law (2d Ed.) 468, it is said, citing numerous decisions of many states, including our own, in support of the rule, that "it is generally agreed that a traveler's previous knowledge of a defect in a highway whereby he is injured is not of itself sufficient as a matter of law to prevent his recovery on the ground of contributory negligence." In *Stokes v. Ralpho Township*, 187 Pa. 333, 40 Atl. 958, we held that one is not precluded from recover-

ing for an injury received from a defect in a road, though knowing it was defective, unless the danger was so apparent that in the use of ordinary care he ought not to have undertaken the passage. "A person who uses a street or highway that is thrown open for public travel, knowing at the time that there is a safer route which he may take to reach his destination," says Sterrett, Chief Justice, delivering the opinion in *Mellor v. Bridgeport Borough*, 191 Pa. 562, 43 Atl. 365, "is not necessarily guilty of negligence because he does not take the safer route. It is only when the danger is so great and apparent that an ordinarily prudent person would regard it as dangerous, and therefore avoid it, that a trial court can say as matter of law that the person using the more dangerous route is guilty of contributory negligence. If the alternative route has dangers of its own, as was the fact in this case, and the dangers of the route actually taken are not so great and obvious as to deter the general public and ordinarily prudent and careful people from using it, the question of the contributory negligence of a person injured in using it is a question for the jury." And in *Brown v. White*, 206 Pa. 106, 55 Atl. 848, this court said (page 108 of 206 Pa., and page 849 of 55 Atl.): "It is not necessarily negligence to attempt to pass over even a 'noticeable accumulation' of ice on the pavement. That may depend upon the size and shape of the accumulation, the obviousness and magnitude of the danger, the means at hand of avoiding it, and other circumstances. In the present case the plaintiff had passed over the obstruction the evening before, and whether it was prudent in her to try to do so again was for the jury."

Applying these principles to the facts of the case in hand, it is clear that the learned judge was in error in holding that the plaintiff's negligence was a question of law for the court and not of fact for the jury. The danger was neither great nor imminent. On the contrary, it is apparent that the walk might have been used with comparative safety. The plaintiff and other persons in that vicinity of the city had been constantly using the walk and with but a single exception no one had fallen on the ice. It is therefore quite evident that it was not necessarily dangerous for one to attempt to use the walk at that point. Whether all the circumstances made it the duty of a prudent person to refrain from using the walk on that occasion was for the jury. At that time, snow covered the street as well as the sidewalks. This may have increased the risk of using the walk, but to what extent, and whether the plaintiff exercised greater and proper care by reason of the fact, was a question the jury must determine. As suggested by the court, the depression covered by the ice was only about two feet wide and there was space on the walk on either side of the ice for the plaintiff to pass. For aught that appears in

the testimony, he may have been attempting to do that very thing when he fell. If he knew of the defect, it was his duty to avoid it if reasonable care would enable him to do so. He testifies that at the time he fell he was walking carefully along the pavement. He says he "was walking along naturally, wasn't hurrying, had lots of time, was walking very carefully." In fact, there is very little, if any, evidence in the case that tends to show that the plaintiff was not exercising the care required of him on the occasion, if we except the fact that he knew of the ice when he attempted to use the walk. This, as we have seen, would not as a matter of law convict him of negligence.

We do not agree with the learned court that there was a safer way by which the plaintiff could have reached his destination and thereby have avoided the danger of the route which he took. The learned judge concedes that the walk on the opposite side of the street was in bad shape and icy. He also admits that the roadway was rough, but says that, according to the plaintiff's witnesses, it was not dangerous. That was, however, a question for the jury, and under the testimony they could have found that the cartway of the road was very rough and was dangerous, as it had been cut in ditches by the wheels of the wagons driven over it. One witness testified that it was "very rough, frozen hard, almost impossible to walk on it." This part of the street was covered with snow, and if the testimony of the witnesses was credible the use of it by pedestrians might have been dangerous. In the language of the Mellor Case, quoted above, "the alternative route had dangers of its own."

Thus far, in considering the case, we have regarded the plaintiff as having prior knowledge, not only of the depression in the sidewalk, but also of the ice which had accumulated in it. In his opinion, entering judgment for the defendant, if we understand his language, the learned judge disposed of the case on that view of the facts. But the testimony does not clearly show that the plaintiff knew that there was ice in the depression at the time he attempted to pass over that part of the pavement. It is true that the evidence on that point was neither as full nor as clear as it should and could have been, but if we properly construe the plaintiff's own testimony, he testifies that he could not see, and hence did not know, of the ice because it was covered by the snow which had fallen earlier in the day. He testified on cross-examination: "Q. There was considerable ice on the street everywhere that day? A. I could not notice any ice, because there was about an inch of snow." And as the verdict was for the plaintiff the jury necessarily found, under the instructions given them, that the plaintiff had no knowledge of the ice in the depression. In his charge to the jury, the learned judge said: "If he (plaintiff) knew of this condition,

knew that there was ice here, then he had no right to go upon it, because a man knowingly going into a place of danger cannot hold anybody else liable for his injury." It is therefore difficult to see how the court could justify his action in declaring the plaintiff guilty of negligence if he had no prior knowledge of the ice on the sidewalk, which was the conceded cause of his injuries. The law will not convict a pedestrian of negligence who, while using a sidewalk of a city street, is injured by a defect in the walk of which he was ignorant.

We are of opinion that the learned judge should have directed judgment to be entered on the verdict in favor of the plaintiff, and that he erred in entering judgment for the defendant.

The judgment is reversed, with direction to the court below to enter judgment for plaintiff on the verdict.

OWENS v. GOLDIE.

(Supreme Court of Pennsylvania. Jan. 2, 1906.)

1. EQUITY—OBJECTIONS TO JURISDICTION.

An objection to jurisdiction in equity may be raised at any time before findings of fact and conclusions of law.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 119.]

2. SAME—DEMURRER.

The question of jurisdiction in equity is properly raised by demurrer.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 397, 497.]

3. MONEY HAD AND RECEIVED—DEFENSES.

Where plaintiff sues for money had and received, if money due the plaintiff, which defendant should have received, remains in the hands of a third person under a scheme by defendant to delay the plaintiff in its receipt, he cannot allege as a defense that he has not received it.

4. EQUITY—REMEDY AT LAW.

Plaintiff assigned to defendant a half interest in certain inventions and in improvements to be made therein. There was at the time a license to a third person for the use of the inventions in consideration of certain royalties, and a specified amount of these royalties was alleged to have been received by defendant. The bill also alleged that defendant, with plaintiff's consent and with an agreement that both should have a share in the transaction, sold the interest in the patent for a large sum, one half of which defendant had received, and that the purchaser retained the other half under a notice from defendant that plaintiff was not entitled to the sum and a request to hold it as a stockholder. Held, that plaintiff had an adequate remedy at law, and a bill in equity to determine the rights of the parties was properly dismissed.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 153.]

Appeal from Court of Common Pleas, Allegheny County.

Bill by Samuel T. Owens against William Goldie. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and

FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

D. F. Patterson, W. B. Rodgers, and J. M. Freeman, for appellants. Clarence Burleigh and Kay, Totten & Winter, for appellee.

STEWART, J. A demurrer to this bill would have been fatal. Nothing is set out in connection with plaintiff's claim that distinguishes it, so far as concerns the remedy for its enforcement, from those cases which find their appropriate and convenient remedy in a common-law action. The allegations in the bill are (1) that defendant, to whom had been granted letters patent for certain inventions, assigned to the plaintiff a one-half interest therein, as well as a one-half interest in all improvements made in connection with said inventions, with an agreement for a quarterly settlement of all profits derived from the patents; (2) that at the time of the assignment there was an outstanding license in Dilworth Porter & Co., Limited, for the use of the inventions covered by the letters patent in consideration of certain royalties, and that there had been paid to defendant on account of plaintiff's share in these royalties the sum of \$10,746.76, which he unjustly detains; (3) that on November 8, 1902, defendant, with plaintiff's consent and approval, and with the express understanding and agreement that both were to share equally in the transaction, sold the entire interest in the letters patent to Dilworth Porter & Co., Limited, for the consideration of \$100,000 the one half of which sum has been paid to the defendant, the other half being retained by Dilworth Porter & Co., Limited, in consequence of a notice from the defendant to the effect that he did not recognize the right of the plaintiff to the purchase money, and asking them to retain it as a stakeholder until the settlement of the matters in dispute was reached.

The case as thus presented is simply a demand for money had and received to plaintiff's use; one item being on account of royalties received, and the other on the sale of the patent, both being ascertained and fixed in amount. The circumstance that plaintiff is without right of action against Dilworth Porter & Co., Limited, does not affect the case. If they stand clear of all liability to him and are accountable only to the defendant, it is because of the course of dealing he chose to adopt—for a purpose which finds its proper explanation in the evidence, but which calls for no remark here, except that it is one always obnoxious to equity—in allowing Dilworth Porter & Co. to act in the belief that defendant was the sole and exclusive owner of the patent. Nor does the fact that the whole of the purchase money has not passed into the hands of the defendant. In an action for money had and received, a recovery may be had for money that a defendant ought to have received. We so held

in *Paul v. Grimm*, 165 Pa. 139, 30 Atl. 721, 44 Am. St. Rep. 648, where the very question was raised and met. If this purchase money, though due, yet remains in the hands of the purchaser because of a scheme on the part of the defendant to defraud or delay the plaintiff, he could not be heard to assert, as matter of defense, that he had not received it. Instead of a demurrer, which we repeat must have proved fatal to the bill for the reasons we have stated, defendant filed an answer, and upon issue joined testimony was taken. Before any findings the court was asked, on behalf of defendant, to conclude that it had no jurisdiction to entertain the bill or grant the relief prayed for. The court so concluded, and dismissed the bill accordingly.

What we have said above is sufficient expression of our view as to the proper remedy at the outset. It is argued here, however, that the action of the court in dismissing the bill was unwarranted, in that it came too late; that by answering, and permitting the case to proceed until the testimony was all taken, defendant waived objection to the jurisdiction. The cases are not infrequent where the court has refused to entertain objection to the equity jurisdiction, when made for the first time in connection with the appeal. Submission to the jurisdiction, until overtaken with defeat on the merits, has been always held to be a waiver by the party, when adequate remedy without violence to settled rule could be obtained through either form, law or equity. But that was not the case here; objection was made before any finding, and it was upon the objection that the bill was dismissed. Unquestionably the better practice in such cases is to meet the bill with a demurrer in the first instance; but this court has never gone so far as to hold that the question of jurisdiction could only be raised by demurrer. True, in *Penna. R. R. Co. v. Bogert*, 209 Pa. 589, 59 Atl. 100, our late brother, Justice Dean, quotes from a decision of Judge Lowrie in the district court, to the effect that want of jurisdiction must be taken advantage of by demurrer, and not by objection; but that he intended to assert this as a general rule of practice is not to be supposed, when in the same connection, and disposing of the case immediately before the court, he says: "Objection in this case is first made to the jurisdiction in the argument in this court, which objection to the jurisdiction can, generally, be made at any stage of the proceeding. Objection to the jurisdiction of equity on the ground that the proceedings should have been instituted on the law side of the court, will not be entertained, unless made within a reasonable time after bill filed." The case thus referred to does not advance at all beyond the settled rule as asserted in *Edgett v. Douglass*, 144 Pa. 95, 22 Atl. 868, and repeated in many cases, that

where parties submit to the jurisdiction and take their chances of a decree in their favor, the objection on appeal will not, as a general rule, avail, unless the want of jurisdiction is so plain that the court would feel justified in dismissing the bill on its own motion.

Defendant took no chances in the court below for a favorable finding. It is the appellant who is the disappointed party. The right to a common-law action remains to him, and through it he can obtain all the redress he is entitled to.

Decree affirmed.

POPE v. BALTIMORE WAREHOUSE CO.
(Court of Appeals of Maryland. Jan. 24, 1906.)

**1. MARSHALING ASSETS AND SECURITIES —
PARAMOUNT CREDITOR — RIGHTS — COMPROMISE
OF LITIGATION.**

Defendant, a paramount creditor of a bankrupt, was secured by a mortgage and by other liens, including a lien on certain tin plate, on which alone plaintiff also had a junior lien, as against the bankrupt. The mortgage was disputed because of alleged defective execution, as securing an antecedent debt, and as a preference. Pending the decision of such questions by the federal court, a compromise was offered defendant by the bankrupt's trustee, which, if accepted, would compel defendant to resort to the tin plate in order to satisfy its claim. Before accepting the compromise, defendant offered to permit plaintiff to continue the litigation at his expense, or, on payment of \$3,000, agreed to assign to plaintiff its interest in the fund. *Held* that, plaintiff having refused either alternative, defendant was entitled to complete the settlement without rendering itself liable to plaintiff for a pro tanto portion of the securities realized by the compromise.

2. SAME—INTEREST.

Where plaintiff prevented the delivery of certain tin plate to a paramount lien holder entitled to such possession, he was properly charged with interest for the benefit of such lien holder on the valuation of such tin plate during the period it was so retained.

Appeal from Circuit Court No. 2 of Baltimore City; J. Upshur Dennis, Judge.

Special case submitted by Charles E. Pope against the Baltimore Warehouse Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Robert P. Graham, for appellant. Charles McH. Howard, for appellee.

BRISCOE, J. This is a special case stated under the forty-seventh general equity rule. Code Pub. Gen. Laws 1888, art. 16, § 184. The facts, to enable the court to decide the questions presented and raised on the record, are contained in two statements of facts, submitted to the circuit court No. 2 of Baltimore City. One was filed on the 7th of May, 1903, and the other (a supplemental statement) was filed on the 14th of February, 1905. The facts as stated in the record are these: The William Falt Company, a cor-

poration engaged in the business of canning and packing fruits and vegetables, in the city of Baltimore, purchased of the appellant two lots of tin plate, and delivered to him two promissory notes, one for the sum of \$1,857.35, and the other for \$1,806.49, for the purchase price. The plate was shipped in two lots, one on the 4th and the other on the 17th of September, 1902, from the factory of the appellant in Steubenville, Ohio, to the purchaser in Baltimore, via the Wheeling & Lake Erie and the Baltimore & Ohio Railroad Companies. Two bills of lading were issued by the railroad companies for these shipments, to the order of the appellant, were indorsed by him and sent to the purchaser. Subsequently the bills of lading were on the 6th and 19th of September, 1902, assigned to the appellee warehouse company as collateral security for the payment of two notes, of \$1,625 each, for money loaned, and for any other liability or indebtedness then existing or may hereafter be contracted or incurred by the appellant. At the time of the loans, and without the knowledge of the warehouse company, the Falt Company was insolvent, and upon application, receivers were appointed on the 26th of September to take charge of and to wind up its business. Afterwards it was adjudicated a bankrupt by the District Court of the United States and the appellee trustees were appointed trustees in bankruptcy. The tin plate had not been delivered at the time of the failure, and it was stopped in transit by the appellant. Thereupon, the plaintiff and defendants entered into an agreement to submit the matters here in controversy to the determination of the court. A bond of indemnity was executed in lieu of the fund, and the goods were returned to the shipper. It also appears that the total indebtedness of the Falt Company to the appellee warehouse at the time of its failure was \$183,847.56, and a part of the indebtedness was secured by collaterals pledged by notes similar to the two set out in the record. The sum of \$12,750 of the debt was secured by a mortgage of a leasehold lot, on which stood the plant of the Falt Company, subject to a ground rent of \$2,700 per year.

On the 22d of March, 1904, the circuit court No. 2 of Baltimore City decided and determined the questions at issue and submitted by the rendition of the following decree: (1) That the plaintiff was not entitled to the stoppage in transitu and return of the two consignments of tin plate described in these proceedings as against the lien of the defendant the Baltimore Warehouse Company thereon for the repayment of the two loans respectively made upon the bills of lading therefor, as set forth in these proceedings. (2) That the plaintiff was also not entitled to any legal or equitable right of stoppage in transitu over said goods or over the surplus resulting therefrom after repaying said two loans out of the proceeds thereof, as against the lien of the defendant, the Baltimore Warehouse

Company thereon, to secure all other liabilities of said William Falt Company to it, which had accrued at the time at which it, the said Baltimore Warehouse Company, was first notified of the attempted stoppage of said goods by the plaintiff. (3) That the plaintiff was, however, entitled to an equitable right of stoppage in transitu over said goods or the proceeds thereof as against the William Falt Company, and its receivers, and the defendants, its trustees in bankruptcy, so far as the same can be asserted and enforced without prejudice to the aforesaid prior rights of the Baltimore Warehouse Company, and is further entitled to have the various securities held by said Baltimore Warehouse Company marshaled, so far as such marshaling may be effected without prejudicing the said prior rights of the Baltimore Warehouse Company as pledged, so that any surplus resulting from the proceeds of all of the property held by said Baltimore Warehouse Company as collateral for the liabilities of said William Falt Company to it (other than said two consignments of tin plate) after payment in full of all such other liabilities, which surplus would otherwise be payable to the said William Falt Company, its receivers, or trustees in bankruptcy, shall be applied to the payment of the two loans made upon said two bills of lading, thereby releasing said two consignments or the proceeds thereof for the benefit of said plaintiff, in full or pro tanto. (4) The court reserves the right to pass such further orders as may be necessary or proper for the carrying out and execution of this decree, and retains jurisdiction of the case for the purpose of determining the amounts, if any, to be paid by the plaintiff under the bond of indemnity referred to in these proceedings, according as it shall hereafter appear that there is a surplus or deficit resulting from the said other collateral held by said Baltimore Warehouse Company as security for indebtedness due it by said William Falt Company. There was no appeal from this decree and being a final decree or one in the nature of a final decree it is not open for revision or review on this appeal. The questions there presented were fully determined, and the rights of the parties thereunder were fixed. The law as established by the decree, constitutes the law of the case. *Tome v. Stump*, 89 Md. 264, 42 Atl. 902; *Hopper v. Smyser*, 90 Md. 379, 45 Atl. 206; *Gardiner v. Baltimore City*, 96 Md. 382, 54 Atl. 85.

We come, then, to the questions presented by the supplemental agreed statement of facts, in so far as they were not defined and settled by the first decree. By the supplemental statement of facts filed on the 14th of February, 1905, it appears that a part of the indebtedness of the Falt Company to the warehouse company consisted of a balance of \$12,750 due on a mortgage of a certain leasehold property dated the 2d day of September, 1902. The validity of the mort-

gage was attacked and disputed, and the property conveyed thereby was by agreement, sold by the trustees in bankruptcy under a decree of court, free and clear of the mortgage. The proceeds of sale, the sum of \$7,500, the trustees were directed to hold, to represent the property, subject to the further order of the court. All questions as to the validity of the mortgage and the priorities of payment out of the proceeds of the sale were also reserved for the future determination of the court. It further appears that the total balance of indebtedness due by the Falt Company to the warehouse company, after an application of the proceeds of sale of all the collaterals held as security except the mortgage claim, the bond of indemnity of the appellants, and a disputed claim against the Baltimore & Ohio Railroad Company, amounted to the sum of \$9,317.41. On the 22d of October, 1904, the appellee warehouse company submitted to the appellant the following proposition of compromise as to the mortgage debt. It is claimed by the trustees that the mortgage in question was given to secure a pre-existing indebtedness and is preferential and voidable. They also make the claim that the mortgage, though dated September 2, 1902, was not acknowledged until September 25, 1902, and that therefore, although actually delivered on the earlier date, it is defective for that reason. The trustees in bankruptcy have offered to compromise this litigation with the Baltimore Warehouse Company by paying it \$3,000 out of the \$7,500 so set aside, upon its releasing the balance of the fund. The present situation, as regards the state of account between the Baltimore Warehouse Company and the Falt Company, is as follows: "Including the proceeds of your tin pledged, and applying all other collaterals of the Falt Company held by it upon the indebtedness, there would remain a balance of about \$5,500 to be paid out of the mortgage money, in order to repay all of the indebtedness of the Falt Company to the Baltimore Warehouse Company. If, therefore, the Baltimore Warehouse Company accepts the proposition of the trustees, it will lose about \$2,500, and there will be no equity to release your clients' tin plate. If the Baltimore Warehouse Company should get the entire \$7,500, now deposited subject to the order of the bankrupt court, there would be about \$2,000, applicable to release your clients' tin plate pro tanto. The Baltimore Warehouse Company is willing to accept this offer of compromise, but before so doing it realizes that, as your rights are to some extent involved also, your clients should be given the opportunity to fight the matter, if they prefer to do so. If, therefore, your clients are willing to pay the Baltimore Company the sum of \$3,000, the latter will assign to them all its right, title, and interest in the fund so deposited in court or permit your clients, if they prefer, to continue the litigation.

tion for their use in the name of the Baltimore Warehouse Company but, of course, at your expense. In making this compromise the Baltimore Warehouse Company would give up \$2,500 of its own money, and does not feel that the doctrine of marshaling of securities would require it to continue a litigation for the benefit of your clients, when it is willing to compromise the same by giving up so large a portion of its own claim." This proposition was declined by the appellant. The warehouse company, however, accepted the compromise and credited the sum of \$3,000 on the debt, leaving a balance due it of \$6,817.41, with interest thereon. It is admitted that, even if the full amount of the claim (\$1,447.50) of the warehouse company is recovered against the railroad company, it will not reduce the indebtedness to such an extent as to release the claim under the bond of indemnity given by the appellant. Under these facts the circuit court No. 2 of Baltimore City held that the appellee warehouse company was entitled to compromise the litigation in which its mortgage claim was involved, and on the 25th day of May, 1905, decreed that the sum of \$5,678.25, with interest from October 28, 1902, be paid by the appellant to the warehouse company in satisfaction of the bond of indemnity mentioned herein; and it is from this decree that an appeal has been taken.

The real question to be considered by us, and the one upon which the decision of the case must turn, is the right of the appellee warehouse company to compromise its mortgage claim and its effect upon the marshaling of the securities directed by the first decree. It is contended upon the part of the appellant, that the appellee had no right to compromise this suit and thereby deprive him of \$4,500 relinquished by reason of the compromise, and in so doing they released pro tanto their claim upon the tin plate and the bond of indemnity. The rule in equity as to marshaling of securities has been established by numerous decisions of the courts. In *General Insurance Co. v. U. S. Insurance Co.*, 10 Md. 528, 69 Am. Dec. 174, it is said, the securities or assets can never be marshaled to the prejudice of the creditor, or so as to suspend or put in peril his claim, or upon any other terms than giving him entire satisfaction. The creditor who calls for it must show that the right of his co-creditor will neither be endangered nor injuriously delayed; for, if he fails to do so, he can have no other benefit than a subrogation of his right or the being allowed to stand in his place. And it must be clear that the creditor can sustain no loss, nor be in any way delayed, or have his claim subjected to any additional peril. In *Kidder v. Page*, 48 N. H. 382, the court held that the general principle of equity that, where a creditor who has a right of recourse against two different funds has acted in such a manner as to put one of them beyond his own reach, with full knowl-

edge that his debt cannot be satisfied out of the other fund without injury to the interests of third persons, will be held to have forfeited his right to the second, by the abandonment of the first, can only apply when the creditor's right to resort to both funds is clear and not seriously disputed, and when the remedies available for reaching and applying the funds are reasonably prompt and efficient. In that case there was a controversy as to a right to certain mortgaged property, and the litigation was compromised under somewhat similar circumstances to those here, and the court said it would have been inequitable to have compelled the trustee, in order to gratify the plaintiffs, to persevere in a litigation which might be protracted and the result of which could not be certain. The plaintiffs, not having offered to assist or indemnify the trustee in his suit to recover the value of the mortgaged goods, are in no position to complain of his compromise of that suit. And Mr. Sheldon in his work on Subrogation distinctly says that a settlement of a contested litigation made in good faith, whereby a prior creditor receives less than its value from the primary fund, will not interfere with the prosecution of his right to the secondary fund.

Applying, then, the general and well-settled principles enunciated by the decisions just cited to the facts of this case, we do not see upon what legal ground the appellant's contention can rest or be supported. The status or position of the appellant was fixed and determined by the first decree as that of a junior creditor and entitled to have the various securities marshaled, subject to the prior rights of the paramount creditor, the warehouse company. The mortgage was disputed and contested for defective execution and upon the ground that it was a security for an antecedent debt and amounted to a preference. By the decree of the District Court of the United States for the District of Maryland, all questions as to its validity were reserved for the future determination of the court. The appellee's right, therefore, to the fund derived from the mortgage sale, was by no means clear and certain, and could only be realized by continuing a dubious litigation. But, apart from this, it appears that before accepting the offer of compromise an opportunity was given the appellant to continue the litigation at their expense, or, if they preferred to pay the sum of \$3,000 to the appellee and the latter would "assign to them all its right, title, and interest in the fund so deposited in court." Under the facts thus stated we think it is obvious that the appellee was entitled to compromise the litigation in the manner it did, and was in no way bound to carry on the suit for the benefit of the appellant, when he refused and declined the proposition submitted by the appellee. The allowance of interest on the valuation of the tin plate, by the decree, from the 28th

of October, 1902, was correct. The appellant prevented the delivery of the tin plate and had the use of the amount of its valuation during this period.

Finding no error in the decree, it will be affirmed.

Decree affirmed, with costs.

FIFER v. CLEARFIELD & CAMBRIA COAL & COKE CO.

(Court of Appeals of Maryland. Jan. 11, 1906.)

1. PLEADING—WRITTEN INSTRUMENTS—DEED—STATUTES.

Code Pub. Gen. Laws 1888, art. 75, § 23, subsec. 108, provides that, "whenever the execution of any written instrument filed in the cause is alleged in the pleadings, the same shall be taken as admitted for the purpose of the action or matter, unless the same shall be denied by the next succeeding pleading of the opposite party or parties. *Held* that, where an action was brought on a written contract for the sale of coal executed on defendant's behalf by its alleged agents, defendant's failure to deny the execution of the contract as alleged relieved plaintiff from proving the contract, but was not an admission that the alleged agents who made the contract were defendant's agents or acted with authority to bind defendant as alleged.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 272; vol. 40, Cent. Dig. Principal and Agent, § 714.]

2. SAME—SEPARATE PLEAS—EFFECT.

Where, in an action on contract, defendant filed a separate plea alleging that the contract was obtained by fraud, which plea did not refer to matters set up in other pleas, in which defendant denied the authority of certain agents to execute the contract on defendant's behalf, the implied confession of the execution of the contract in the plea of fraud could not be taken advantage of to disprove the issue presented in the other pleas.

3. EVIDENCE—ACTS AND DECLARATIONS OF AGENT—PROOF OF AUTHORITY.

In an action on a contract alleged to have been made by defendant's agents on his behalf, neither the contract, the letters of the agents, nor their declarations or acts in making the contract, were admissible to bind defendant until some proof aliunde had been offered tending to prove the existence of the agency.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1006.]

4. SAME—PROOF OF AGENCY—QUESTION FOR JURY.

In an action on a contract made on defendant's behalf by its alleged agents, evidence tending to show the existence of the agency *held* sufficient to require submission of such question to the jury.

5. CONTRACTS—IDENTITY OF PARTIES—MEETING OF MINDS.

Plaintiff, an individual, trading under the name of the C. Coal Company, contracted for the purchase of coal through defendant's agents. Three days after the contract was made plaintiff was asked for a statement as to "where the company was incorporated, a list of its officers and directors, and the amount of capital paid in," and defendant, on being informed that plaintiff was not incorporated, replied that its understanding was that plaintiff was a corporation, with a paid-in capital and legal existence, and declined to extend credit or ship the coal. *Held*, that there was no meeting of minds as to the identity of the parties, and therefore no valid contract of sale.

Appeal from Baltimore City Court; Daniel Girard Wright, Judge.

Action by Clarence A. Fifer, trading as the Cambria Coal Company, against the Clearfield & Cambria Coal & Coke Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, SCHMUCKER, PEARCE, JONES, and BURKE, JJ.

William Colton and Martin Lehmayr, for appellant. Edgar Allan Poe and John Prentiss Poe, for appellee.

PAGE, J. This suit was brought to recover damages for the alleged failure and neglect of the appellee to ship and deliver to the appellant certain coal, alleged to have been sold by the latter to the former, by special contract in writing dated the 5th day of May, 1902. The court by its instruction took the case from the jury, and, the judgment being for the appellee, this appeal was taken.

The narr. alleges that on the 5th of May the appellant, by his general agent, Dietrich, entered into a written contract with the said appellee, by Rogers, Holloway & Co., agents of the appellee, "duly authorized by it to execute said contract in its behalf." The written contract is thus set out, and it is further alleged that the appellee refused to make any shipments of coal under the contract, etc., by reason whereof the appellant sustained great loss and damage, etc. The appellee pleaded that it was never indebted, and never promised as alleged, and for a third plea that the alleged contract was procured by the fraud of the appellant. At the trial the appellant contended that, the contract having been set forth verbatim in the declaration and not having been denied by the appellee in its next succeeding pleading, it must be taken as admitted for the purposes of this action, as well as the agency of Rogers, Holloway & Co. Such a construction, however, is broader than that warranted by the terms of the statute, which are: "Whenever the partnership of any parties, or the incorporation of any alleged corporation, or the execution of any written instrument filed in the cause is alleged in the pleadings in any action or matter of law, the same shall be taken as admitted for the purpose of said action or matter, unless the same shall be denied by the next succeeding pleading of the opposite party or parties." Code Pub. Gen. Laws 1888, art. 75, § 23, subsec. 108. The words, "the same shall be taken as admitted for the purpose of said action or matter," refer to the allegations of "partnership of any parties," etc., the incorporation of any alleged corporation, and "the execution of any written instrument," alleged in the pleadings. The failure to deny any of these in the next succeeding pleading, operates as an admission against the opposite party. In *Banks v. McCosker*, 82 Md. 525.

34 Atl. 541, 51 Am. St. Rep. 478, this court, having this section of the Code under consideration, said: "We think it very clear that the legal effect and meaning of the statute is that the next succeeding pleading must in terms deny the signatures of the maker and payee as well, and we do not think the general issue is such a denial as the law contemplates. Before the passage of Acts 1888, p. 390, c. 248 [of which the provision in the Code is a codification], under issue joined on the general issue plea, the plaintiff had the burden cast upon him to establish the due execution of the note sued upon. Such being the case, what possible purpose could the Legislature have had in the passage of the act in question, if not to relieve the plaintiff from the burden of proving the partnership of parties, the incorporation of an alleged corporation, or the execution of any written instrument filed in the case or alleged in the pleadings." The failure of the appellee to make denial of the execution of the contract as set out in the declaration had the effect only of relieving the appellant of proving it; but it did not admit that Rogers, Holloway & Co. were the agents of the appellees, with authority to bind them, as charged in the narr. That was put in issue by the pleas, and was open for proof as any other fact that had been alleged.

It was also contended that the third plea, to the effect that the contract was obtained by fraud, being a plea of confession and avoidance, admits all the facts upon which the making of the contract must depend, and therefore estops the defendant from thereafter denying them. This plea by implication, it is true, does admit the contract, but solely for the purpose of alleging the special defense, viz., that the alleged contract was obtained by fraud. But it does not refer to the matters set up by the other pleas, and "cannot be taken advantage of to prove or disprove the issue presented in his other pleas." In the case of *Kirk v. Novill*, 1 Term R. 115, where this was attempted, Buller, J., said: "There never was such an idea before, that one plea might be supported by what is contained in another. Each plea must stand or fall by itself. They are as unconnected as if they were on separate records." And in *Harrington v. Macmorris*, 5 Taunton, 228, it was held "that the defendant's language in one plea cannot be used to disprove another plea, as in the familiar instance I have given of trespass, and not guilty and a justification pleaded, where the justification would certainly, if admissible, prove the act." See 16 Enc. Pl. & Prac. p. 562, note 1, where many American cases to the same effect are cited. The main question before the trial court was whether there was evidence from which the jury could find that Rogers, Holloway & Co. were the agents of the appellant and authorized to bind it in the contract set out in the narr. The

character of the evidence upon which the appellant relies for this was for the most part circumstantial, consisting of implications properly inferable, as he claims, from his dealings with Rogers, Holloway & Co. and from the acts and declarations of the president of the company. It is not contended that the appellant or his general manager, prior to or on the 5th of May, the time of the making of the contract, had any reason to believe from the ordinary course of business of the appellee that Rogers & Holloway were in fact the agent of the latter, or had been held out to them as such, except as hereinafter will be stated. Both Fifer and Dietrich admit that up to that time they did not know Rogers and had no knowledge of the Clearfield Company. So that the question is reduced to the following inquiries: (1) Were Rogers, Holloway & Co. in fact the agents of the appellee, authorized to sell its coal, on the 5th of May? and (2) was the appellant at that time warranted in so regarding them, either by their conduct in the making of the contract, by the acts and declarations of Tome, its president, or by any other fact or circumstance?

The declarations of Rogers, Holloway & Co., made during the transaction, either verbally or in writing, are not sufficient of themselves to prove the agency. If agency was once established, however, such statements might be given in evidence as a part of the res gestae. In *Rosenstock v. Tormey*, 32 Md. 182, 8 Am. Rep. 125, this court said the declarations of an agent are not admissible to bind his principal under any circumstances until the agency is first clearly established. This authority or agency need not be proved by writing. It may be inferred from facts and circumstances, or from the permission and acceptance of his service, and subsequent adoption and ratification of his acts will suffice. But, before his admissions, declarations, or acts are admitted, we think the court should have required the production of some proof tending to show the existence of such agency or authority. It seems to be clear, therefore, that neither the contract, nor the letters of Rogers, Holloway & Co., nor their declarations or their acts in making the contract, are admissible to bind the appellant, until some proof aliunde has been offered tending to prove the existence of the agency. There is here no proof of an express authority. On the contrary, Mr. Tome, the president of the appellee, in November, 1902, stated to Mr. Fifer, "If Rogers, Holloway & Co. made that contract, the Clearfield Company was not liable." This was a repudiation of the contract, and, whatever may be the effect of it, it is far short of proving the agency. Nor does the letter of Tome, the president, to D. L. Hutchinson, taken by itself, prove the agency. One Wm. Bryant, up to the 1st of April, 1902, had been the agent for the sale of the Clearfield Com-

pany's coal, and a certain Hutchinson was his manager. As such he handled the Clearfield Company's coal by a special arrangement made with Mr. Tome. In latter part of March, 1902, in a conversation with Mr. Tome, he stated that Rogers & Co. would have the exclusive handling of this coal, or, as it appears by Tome's letter to him, dated 20th of March, 1902, that they would have the exclusive handling of the coal, "beginning 1st of April proximo." The witness, however, never had any dealings with Rogers, Holloway & Co. after April 1, 1902, and testifies to no fact tending to show that he had knowledge whether they did in fact assume such agency.

J. R. Fleming testified that he was superintendent of the appellees up to September, 1902; that prior to April, 1902, Bryant was the agent; and that he was succeeded by Rogers, Holloway & Co., who, "when they became agents, . . . sent orders for coal," and no one else sent any, and the coal was shipped. It was contended that this is little more than a statement that in 1902, Bryant was succeeded in the agency by Rogers, Holloway & Co., and after the latter became agents they "sent orders for coal, which were shipped to their consignees." It appears that up to April, 1902, one Wm. Bryant was the agent of the appellee "to handle its coal from year to year; that such arrangement was terminated by the letter of Mr. Tome, dated the 20th March, in which the latter said "that Messrs. Rogers, Holloway & Co. will handle our coal beginning April 1st proximo"; also that in conversation Mr. Tome said "it was advantageous to have Rogers, Holloway & Co. handle their coal, and suggested that witness take up and do business through them, which I said wouldn't be satisfactory to me"; and, further, that Mr. Tome said "that Rogers, Holloway & Co. would have the exclusive handling of their coal, and any business I had for them in the future would have to be through them." There was also evidence that after the 1st of May, Rogers, Holloway & Co. "sent orders for coal," which was shipped to their consignees, and nobody else sent in orders but them. This testimony, when taken together, was sufficient to go to the jury as tending to show the agency, and to let in the evidence that was ruled out by the court as set forth in the 14 exceptions of the appellant.

There is another point presented by the record. The testimony shows that the contract entered into by the appellee was with the Cambria Coal Company, which so far as the record discloses was a fiction, not representing any corporation or association. It is clear from all the evidence that the appellee and its agents, during the whole time the negotiation for the sale of the coal was going on, thought they were dealing with a corporation. Three days after the signing of the contract, Rogers, Holloway & Co., on behalf of the Clearfield Company, wrote to the Cam-

bria Coal Company, asking it "where the company is incorporated, a list of officers and directors, and the amount of capital paid in." On the 9th Dietrich replies: "Beg to say that we are not incorporated," etc. On the 17th, the Clearfield Company further wrote to Dietrich: "When you called on us to make a purchase of coal for future shipment, we understood from your statement to us that the Cambria Coal Company was a regularly incorporated company with a paid-in capital. Your information letter that you are not incorporated, and our investigations, compel us to notify you that we cannot confirm a contract or extend credit to a company without capital or without legal status." The reply, signed the Cambria Coal Company, assures the appellee of its good faith. On May 21st the appellees again wrote: "We feel you should have informed us that your company was not incorporated, and, failing to give us this information, we took it for granted that same was incorporated, and therefore liable for debts." It is therefore clear that the appellee supposed it was dealing with a corporation, and not with an individual; and, furthermore, the evidence will show that this belief on its part was induced by the conduct of Dietrich, the agent of the appellant. The law applicable to such a state of facts is thus stated in *Anson on Contracts* (8th Ed.) p. 163: "Mistakes as to the identity of the person with whom the contract is made arise where A. contracts with X. believing him to be M.; that is, where the offerer has in contemplation a definite person with whom he intends to contract." The author cites in support of this position the cases of *Boulton v. Jones*, 2 H. & N. 564, and *Cundy v. Lindsay*, 2 App. Cases, 459. In the latter case, where "a person named Blenkarn imitated the signature of a respectable firm named Blenkiron, induced A. B. to supply him with goods, which he afterwards sold to X., it was held an innocent purchaser could acquire no right to the goods, because as between A. B. and Blenkarn there was no contract." "Of him," said Lord Cairns, "they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never for an instant of time rested upon him, and as between him and them there was no consensus of mind, which could lead to any agreement or contract whatever." *Roof v. Morrisson, Plummer & Co.*, 37 Ill. App. 41. The author in a note adds: "These cases must be distinguished from those where B. deals with A., supposing A. to be acting for himself, when in fact A. is acting for an undisclosed principal X."

Applying these principles to the undisputed evidence in the case, it seems that the appellee was led to suppose that it was dealing with a corporation with "paid-up capital" and "a legal status." It did not intend to contract with an individual, and was misled by Dietrich in so doing. There was, there-

fore, no valid contract between the appellee and the appellant, and the latter cannot maintain this suit. Notwithstanding the errors pointed out in the rulings and instruction of the court, the judgment must be affirmed. Judgment affirmed.

BALTIMORE BELT R. CO. et al. v. SATTLER.

(Court of Appeals of Maryland. Jan. 9, 1906.)

1. DAMAGES—VINDICTIVE DAMAGES—INSTRUCTION.

In all cases where the facts forbid the finding of vindictive damages, the jury must be instructed to allow only such sum as would compensate plaintiff for the injury actually received.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 543, 544.]

2. SAME—QUESTIONS FOR JURY.

Whether damages were suffered by plaintiff as a direct consequence of acts of defendant alleged to have injured plaintiff's premises, and the extent of such damages, were questions for the jury.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 533.]

3. EVIDENCE—OPINIONS OF EXPERTS—DAMAGES.

In an action for injury to real property, a witness testifying merely as an expert is not permitted to testify either as to the fact or the amount of damage resulting from the injurious act, but may give his opinion as to the value of the property before and after the commission of the alleged tort.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2285, 2286, 2341.]

4. SAME—REASONS FOR OPINION.

In an action for injuries to real property, an expert witness, testifying as to the value of the property before and after the commission of the alleged tort, may state to the jury the reasons upon which his opinion is based, in order that they may judge of the value of his testimony.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2376.]

5. SAME—CROSS-EXAMINATION.

In an action for injuries to plaintiff's property from the discharge of smoke and burning cinders from defendant's engines, where plaintiff had stated the facts inducing him to believe that cinders had set fire to his stable, such testimony could not be excluded because on cross-examination he declined to state that in his own knowledge the burning of the stable was caused by cinders from defendant's engines.

6. RAILROADS—FIRES—EVIDENCE.

In an action for injuries to plaintiff's property from the discharge of smoke and cinders from defendant's engines, evidence of witnesses acquainted with the property, and who had observed the injurious effects caused thereby, as to the fact of damage to the property, was admissible.

7. WITNESSES—REDIRECT EXAMINATION—NEW MATTER.

In an action for injuries to plaintiff's property by smoke and cinders from defendant's engines, defendant was not injured by the exclusion of testimony on re-examination of a witness, to show that the raising of fruit and vegetables was one of the uses giving a market value to lands in the same city, and that such use would measure its market value, no reference having been made to the matter, either

on examination in chief or on cross-examination.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 997.]

8. RAILROADS—FIRES—EVIDENCE—CONDITION OF PROPERTY.

In an action for injuries to plaintiff's property from smoke, cinders, etc., testimony as to the condition of the property at the time the witness was called to testify thereto was properly excluded; the jury being treated as temporary, and the claim for damages limited to the institution of the suit.

9. SAME.

In an action against a railroad for injuries to plaintiff's property from smoke and cinders, a witness familiar with the property was properly permitted to describe the effects thereon produced by smoke, gas, vapors, etc.

10. SAME—INSTRUCTIONS.

In an action for injuries to plaintiff's property from smoke and cinders, an instruction that the jury might allow such damages as were directly caused to his interest in the premises by reason of the said smoke, etc., at the time the effect was first produced down to the institution of the suit, was properly refused, as too general and indefinite.

11. SAME.

In an action for injuries to plaintiff's property from smoke and cinders from the defendant's engines, an instruction that plaintiff could not recover if, after the institution of the suit, the drawing of engines over the tracks of the railroad had ceased, was erroneous.

Appeal from Court of Common Pleas; George M. Sharp, Judge.

Action by George W. Sattler against the Baltimore Belt Railroad Company and another. Judgment for plaintiff and defendants appeal. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, SCHMUCKER, JONES, and BURKE, JJ.

Duncan K. Brent and W. Irvine Cross, for appellants. Oscar Wolff and Alfred S. Nilea, for appellee.

BURKE, J. 1. This is an action of trespass on the case, brought by George William Sattler against the Baltimore Belt Railroad Company and the Baltimore & Ohio Railroad Company to recover damages for certain alleged acts of the defendants. The plaintiff is the owner of two unimproved lots of ground in the city of Baltimore on the east side of Charles street, one of which has a frontage of 50 feet, and the other of 100 feet, on said street, and each has a depth of about 180 feet to an alley. The Baltimore Belt Railroad Company runs near to the north of said last-mentioned lot, and about 150 feet north of the first-mentioned lot. The Baltimore & Ohio Railroad Company runs engines and trains of cars over the tracks of the Baltimore Belt Railroad Company under an arrangement between it and the latter company. The alleged tort, which constitutes the ground of the action, is stated in the narr. in the following words: "That from the engines which are run over the said railroad by the defendants aforesaid, and have been for a long time past, are discharged

large quantities of smoke and offensive unwholesome vapors upon said plaintiff's land, and from the engines and cars so run by the defendants aforesaid there is caused to come upon the plaintiff's said land a large amount of noise and vibration." And the injury which is alleged to have resulted from said unlawful acts is stated as follows: "That by reason of said discharge of smoke and offensive and unwholesome vapors upon plaintiff's said land, and by reason of the causing of said noise and vibration to come as aforesaid upon the plaintiff's said land, the plaintiff's said land is rendered far less desirable for dwelling or building purposes than it otherwise would be, the plaintiff is deprived of the profits and advantages that would reasonably inure to him from the development and improvement of his said property, and the value thereof is seriously impaired." In the case of the Baltimore Belt Railroad Company v. Sattler, 100 Md. 306, 59 Atl. 654, it was decided that the plaintiff would have a right to recover under the declaration in this case, provided the allegations thereof were supported by the proof. That case was reversed for errors found to have been committed by the court in the admission of certain testimony, and a new trial was awarded. It was retried in the court of common pleas, and resulted in a judgment for the plaintiff against the defendants, from which judgment they have prosecuted this appeal. The evidence shows that between the two lots mentioned in the declaration there is a lot improved by a dwelling house in which the plaintiff resides, but that the plaintiff does not own this lot, and that the adjacent lots on the north and south are used in connection therewith as a garden and lawn. During the trial the defendants reserved 21 exceptions upon questions of evidence, and two to the refusal of the court to strike out certain testimony. At the conclusion of the case the plaintiff offered one prayer, which was granted, and the defendants offered three prayers, and made seven motions to strike out testimony. The court refused the defendants' prayers, and also their third, fourth, and fifth motions. To the granting of the plaintiff's prayer, and the refusal of their prayers, and their third, fourth, and fifth motions, the defendants excepted, and this constitutes the twenty-fourth exception.

2. While the exceptions are numerous, they present little difficulty, and may be disposed of by application thereto of well-recognized legal principles. In order to recover, it was incumbent upon the plaintiff to prove, first, his ownership or possession of the land; secondly, the injurious acts alleged to have been done by the defendants, or one of them; and, thirdly, the damages directly caused to his interest in the lots by the wrongs complained of. The plaintiff's title to the lots was admitted

by the defendants. It was also admitted that the Baltimore Belt Railroad Company is operated by the Baltimore & Ohio Railroad Company, and has been so operated since August 4, 1895; that the tracks of the Baltimore Belt Railroad Company run immediately north of the plaintiff's property, and are used by the Baltimore & Ohio Railroad Company in running its trains between Baltimore and Philadelphia, and have been so used since August 4, 1895. The plaintiff then offered evidence by a number of witnesses tending to prove the wrongful acts on the part of the defendants alleged in the narr., and the injurious effects of said acts upon his property. Upon this branch of the case it becomes important, in disposing of some of the questions raised, to refer to the testimony of the plaintiff. As to the condition of the property before the injury complained of, he testified that the lots mentioned in the declaration were used as pleasure grounds or garden, and contained shade trees, flowers, and shrubs, and were generally used as a gentleman's garden; that he made all the improvements upon the property; that he graded it; that he used the lots as a pleasure ground, as a place to get a little fresh air, and also for having some fruit there; that he had some of the finest trees there, flowers, and shrubs, and imported trees from Germany and other places; that there are two tracks in the open cut of the Belt Railroad immediately north of his property, over which practically all of the trains between Baltimore and Philadelphia and New York run; that there are more than 120 trains that pass that point daily; and that they are passing continually day and night.

As to the effects upon said lots due to the running of the trains, he testified that there was always a quantity of thick smoke with gas and cinders thrown over his place; that the smoke ruined all of his fruit, and was so bad that he could not eat the fruit without washing it; that this takes the pleasure away; that the cinders are falling all the time, burning cinders; that the brush on the road was set on fire, and in that way his fence was set on fire several times; that his stable was burned—that is, the fire commenced in the grass, or old hay, and the cinders and nothing else did it; that the gas smells very strongly at times, and occasionally there is none, according to how the wind blows; that the noise is so loud that you can scarcely understand each other when you are talking; that the vibration is frequently felt about two minutes before the train passes his place; that the two tunnels at the end of the open cut carry the sound farther, and that the smoke and gas come out of the tunnels; that the vibration and noise are worse in the house than out doors; that the windows clatter and shake, and the shutters make a noise; that often it seems like some one was breaking into the house; that the gas is very

disagreeable. It is also important to note that all the testimony in support of the plaintiff's case was limited to injury and damage to the time between August 4, 1895, when the operation of the road began, and the 8th day of October, 1902, when the suit was brought, and by the prayer granted at the instance of the plaintiff the jury were instructed to limit their finding as to damages to the last-named date. The injury was therefore treated as a temporary, and not a permanent, one, and the case was tried on behalf of the plaintiff upon this conception of the nature of the injury.

3. The mainpoints of controversy turn upon the question of the proof and the measure of damages. Many of the numerous exceptions rest upon identical grounds of objection. There are certain principles applicable to this branch of the case which must be conceded: First, there being no element in the case which would authorize the jury to visit punishment upon the defendant, the damages must be limited to compensation for injury done. In all cases where the facts and circumstances forbid the finding of vindictive damages, the jury must be instructed to allow, and they can only award to the plaintiff, such sum as would compensate or satisfy him for the injury actually received by him from the defendant. This should be precisely commensurate with the injury, nothing more nor less. In *Sutherland on Damages* (2d Ed.) § 12, the rule is thus stated: "The universal and cardinal principle is that the person injured shall receive a compensation commensurate with his loss or injury, and no more, and it is the right of the person who is bound to pay this compensation not to be compelled to pay more, except the cost." This rule has the support of uniform adjudications in this court. In the case of the *Redemptorists v. Wenig*, 79 Md. 355, 29 Atl. 668, *Robinson, C. J.*, in delivering the opinion of the court, said: "In the absence of such facts and circumstances as will entitle one to exemplary damages, the general principle upon which compensation for injuries to real property is given is that the plaintiff shall be reimbursed to the extent of his injury." Secondly. The question as to whether damages were suffered by the plaintiff as a direct consequence of the acts complained of, and the extent of those damages, were questions for the jury, under proper directions by the court. This court, in the case of *Baltimore & Ohio Railroad v. Carr*, 71 Md. 183, 17 Atl. 1052, held that the rule by which damages are to be estimated is, as a general principle, a question of law to be decided by the court; that is to say, the court must decide, and instruct the jury, in respect of what elements, and within what limits, damages may be estimated in the particular action. *Harker et al. v. Dement*, 9 Gill, 7, 52 Am. Dec. 670; *Hadley v. Baxendale*, 9 Exch. 341, 354. Indeed, it is of the utmost importance that

juries should be explicitly instructed as to the rules by which they are to be governed in estimating damages; for, as was justly observed by the court in *Hadley v. Baxendale*, supra, "If the jury are left without a definite rule to guide them, it would, in most cases, manifestly lead to the greatest injustice." Thirdly. The medium by which the jury are to be informed as to the fact of damage and its extent, is the testimony of witnesses offered in evidence at the trial. "Witnesses who are acquainted with the property, and have observed the effects of the alleged tort, have been generally allowed, after giving the facts to the jury, to testify as to the fact of damage." *Baltimore & Ohio Railroad Company v. Sattler*, supra. An expert witness, testifying merely as an expert, is not permitted to testify either as to the fact or the amount of damage resulting from an injurious act, but may give his opinion as to the value of the property before and after the commission of the alleged tort; and he may state to the jury the reasons upon which his opinion is based, in order they may judge of the value of his testimony. In the case of a nuisance to private property there are many elements of damage for which the plaintiff might recover. The interference with the reasonable and comfortable use and enjoyment of the property, and any material injury to the property caused by the nuisance, loss of sales or rental, may be, under the facts of the case, proper items of damage, for which recovery should be had. In order to prove the extent of loss on sales or rental, the plaintiff may be permitted to prove the market value of his property before and after the injury complained of, as that would be the best, and perhaps the most satisfactory, way to enable the jury to judge of the testimony upon a claim for such damages; or such evidence may be receivable to prove the serious nature or character of the wrong complained of, although to introduce such evidence in a case of temporary depreciation in the value of property, when no loss of sales or rental is shown, would tend to complicate the case and confuse the issue.

4. We will now consider the exceptions of the defendants to the refusal of the court to strike out certain testimony, and their exceptions taken to the admissibility of evidence. The plaintiff, in his examination in chief, had given to the jury the facts which induced him to believe that the burning cinders from the defendants' engines had set fire to and burned his stable. On cross-examination he declined to state that he knew as a fact, within his own knowledge, that the burning of the stable was caused by cinders emitted from the engines of the defendants. The defendants' first exception is to the refusal of the court "to strike out the statements of the witness that his stable was set on fire." The plaintiff having testified to facts from which the jury might infer that the burning of the stable

was caused by the burning cinders from the defendants' engines, the testimony could not be excluded. The second exception is the identical one presented and passed on adversely to the defendants in the former case. The third, fourth, and fifth exceptions were taken to the action of the court in permitting the witnesses Marriott, Barker, and Hurst to give to the jury the reasons in support of their opinion as to the value placed by them on the plaintiff's lots. It is proper, as we have said, for the witness to state his reasons for the valuation he has placed upon the property. The sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth exceptions were taken to the action of the court in allowing witnesses who were acquainted with the property, and observed the injurious effects caused thereto by the smoke, gas, cinders, etc., emitted from the defendants' engines, to testify as to the fact of damage thereby caused to the property. This testimony was properly admitted. The sixteenth, seventeenth, and eighteenth exceptions were taken to certain questions asked David Stewart on re-examination, designed to show that the raising of fruit and vegetables was one of the uses which gave a market value to land in Baltimore city, and was one of the most advantageous uses to which property might be applied in the city, and that it is such a use as would measure its market value. We do not find that the court was wrong in refusing this testimony, or that any injury was thereby done the defendants. The evidence was not strictly admissible on re-examination, and it was an attempt to introduce a matter to which no reference was made, either in the examination in chief or in the cross-examination. Moreover, it appears that the witness subsequently testified that the purpose for which the plaintiff was using his lots, viz., "for pleasure grounds, or garden containing shade trees, flowers, shrubs, and generally as a gentleman's garden," in no way affected his opinion as to the value of the property. The nineteenth exception was to the refusal of the court to permit testimony as to the condition of the property at the time the witness was called to testify. This testimony was clearly immaterial and irrelevant, as the injury was treated as temporary, and the claim for damages limited to the institution of the suit. The twentieth exception was to the action of the court in permitting certain questions to be asked the witness Caughey on cross-examination. These questions were designed to test the accuracy and value of the testimony given in the examination in chief, and replies thereto were properly admitted in evidence. The twenty-first, twenty-second, and twenty-third exceptions were taken to certain questions propounded to Mr. Martien, an expert witness called by the defendants. The object of these ques-

tions was to show on cross-examination that the wrong complained of in the declaration affected the value of the plaintiff's property, and the answers of the witness to these questions were clearly admissible.

The defendants' third, fourth, and fifth motions to strike out the testimony of David W. Laws, specified in the motion, were properly overruled. The witness was familiar with the plaintiff's property, and in his evidence described the effects produced by the smoke, gas, vapors, etc., upon the property. We cannot see what possible objection there could be to this evidence. To say that the plaintiff could not prove these facts by a witness who had personal knowledge of the situation and conditions would be to deny to the plaintiff the right to prove the facts which constitute his cause of action. We find no error in any of the rulings of the court on questions of evidence, or on the motions to strike out testimony.

5. We will now examine the rulings of the court on the prayers. The plaintiff having offered evidence tending to support the allegations of the narr., that the defendants had committed the wrongs therein stated, his first and only prayer submitted the finding of those facts, and their injurious effects upon the property of the plaintiff to the jury. It then told the jury that, if they should find the facts recited in the prayer, "then the jury may find for the plaintiff, and may allow him such damages as they may find from the evidence to have been directly caused to his interest in the premises by reason of the said smoke, gas, vapors, noise, and vibration from the time said effect was first produced down to the institution of this suit." This prayer was too general and indefinite. It failed to direct the jury as to the precise elements or items of damage for which the plaintiff was entitled to recover, in case the jury should find the facts recited in the prayer. It was the duty of the court to have directed the jury's attention to these items of loss. If the jury believed the plaintiff's evidence, he was entitled to recover damages for the interference to the reasonable and comfortable enjoyment of his property caused by the defendants, and also for any material injury or destruction of his property. He had testified to the extent of this interference with his use and occupation of the property, and that his fence was destroyed and his fruit, etc., injured. For all such damages he was entitled to recover, but it was the duty of the court to have pointed out and limited the items of loss for which the plaintiff might recover under the testimony. This was not done by the granted prayer, but the jury was left very much at large as to the question of damage. They were told to allow such damages as they might find to have been "directly caused to his interest in the property" by the alleged tort. The plaintiff had offered a great

deal of evidence as to the depreciation of the value of the lots during the period covered by the suit, but he offered no evidence of actual loss, either by sales or rental, by reason of the mere diminution in the market value of the property. But, under the general and unrestrained terms of the prayer, the jury may have felt themselves at liberty, in the light of the evidence, to have assessed substantial damages for this temporary diminution in the market value of the land in addition to damages for interference to the reasonable use and occupation of the property by the plaintiff, as well as damages for such material injury to the property itself as they may have found to have been occasioned by the defendants. The defendants' first prayer was properly refused—first, because it was calculated to mislead the jury as to the real issues involved; secondly, because there was no evidence in the case to support the hypotheses upon which the prayer was based. *Malone's Case*, 73 Md. 268, 20 Atl. 900, 9 L. R. A. 737, 25 Am. St. Rep. 595; *Spangler's Case*, 86 Md. 562, 39 Atl. 270, 63 Am. St. Rep. 533. The defendants' second prayer ought to have been granted, because, as we said in discussing the plaintiff's first prayer, there is no evidence in the case of any loss or damage to the plaintiff caused by the mere diminution in the value of his lots. The defendants' third prayer was properly refused, because it asserted that the plaintiff could not recover, if the jury should find the existence of a certain fact occurring after the institution of the suit, viz., that the drawing of steam engines over the tracks of the railroad had ceased. This was clearly erroneous. For error in granting the plaintiff's first prayer, and refusing the defendants' second prayer, the judgment must be reversed.

Judgment reversed, and a new trial awarded, with costs to the appellants.

CAMPBELL v. McCRELLIS.

(Supreme Court of New Jersey. March 5, 1906.)

APPEAL—HARMLESS ERROR.

The judgment of the district court, supported by direct and uncontradicted testimony, will not be reversed because of the erroneous admission of evidence that added nothing to the strength of the appellee's case.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4153–4160.] (Syllabus by the Court.)

Appeal from District Court of Perth Amboy.

Action by Charles B. Campbell, executor, against Cornelius B. McCrellis. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued November term, 1905, before DIXON, GARRISON, and SWAYZE, JJ.

Adrain, Silzer & Pearse, for appellant.
Beekman & Spencer, for appellee.

GARRISON, J. To sustain an action brought for the contract price of 16 car loads of sand, sold and delivered to the defendant by Thomas Guest in his lifetime, the plaintiff, who is the executor of Guest's will, offered in evidence a book into which his testator's daughter had copied, from certain bills of lading, the amounts of sand stated in the bills to have been shipped by the testator to the defendant. The book was admitted in evidence upon this proof over the objection of the appellant. The bills of lading were also admitted without further proof, although later they were identified by a witness as bills issued by the Pennsylvania Railroad Company.

Both the book and the bills of lading were, we think, improperly admitted.

Later in the trial, however, the wife of the testator testified that she was present when the sand in question was sold to the defendant and the price agreed upon, and that afterward the defendant in her presence had examined the bills of lading offered in evidence and had said that they were all right and that he was ready to pay the bill; and she further testified that the only reason why he did not do so was because the witness' daughter was not present to sign a receipt, witness herself being unable to write. This testimony rendered the bills of lading relevant upon this aspect of the appellee's case, and as the book was avowedly a mere copy of these bills its admission must be deemed harmless in view of the fact that the appellant when on the witness stand did not attempt to deny the admission ascribed to him by the foregoing testimony as to the correctness of the bills and the amount claimed to be due from him.

Under these circumstances the copy of the bills contained in the book was mere surplusage that could add nothing to the strength of the plaintiff's case. The finding of fact by the district court upon which its judgment rests being thus supported by direct and uncontradicted testimony, in no wise connected with or dependent upon the book, is affirmed, notwithstanding the technical error in the admission of the latter in evidence.

The judgment of the district court of Perth Amboy is affirmed, with costs.

NEAFIE v. HOBOKEN PRINTING & PUBLISHING CO.

(Supreme Court of New Jersey. Feb. 28, 1906.)

LIBEL—PUNITIVE DAMAGES.

A corporation publishing a newspaper is not liable to punitive damages for the publication of a libel without the knowledge of the managing editor or any other person entitled to represent the corporation, where, on attention

being called to the article and a request made therefor, a retraction was published.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 168, 350, 351.]

Action by Mary J. Neafie against the Hoboken Printing & Publishing Company. Verdict for plaintiff. Heard on defendant's rule to show cause why the verdict should not be set aside. Rule made absolute.

Argued June term, 1905, before GUMMERE, C. J., and FORT, PITNEY, and REED, JJ.

William D. Edwards, for the rule. William H. Speer, for defendant.

GUMMERE, C. J. This is an action for libel, brought against the defendant, a corporation, for damages caused by a libelous publication printed in the Observer, a daily newspaper published by it in Hoboken. The verdict went for the plaintiff, and the jury assessed her damages at \$5,000. The defendant was allowed a rule to show cause why the verdict should not be set aside, and assigns numerous reasons why the rule should be made absolute. Only one of these reasons, however, needs to be considered in disposing of the case, namely, that the trial justice erred in charging the jury that it might assess exemplary or punitive damages against the defendant.

The charge was that such damages might be recovered, if the jury were satisfied that the publication was malicious on the part of the defendant, and that it was published from actual ill will, or from an intentional disregard of the rights of the plaintiff. In the case of Peterson v. Middlesex & Somerset Traction Co., decided by the Court of Errors and Appeals at the November term, 1904, and reported in 59 Atl. 436, it is declared that in this state the liability to respond in punitive damages is ordinarily limited to the actual wrongdoer, and that those who are only consequentially responsible for the wrongdoer's act, on account of their relation to him, are excluded from such liability, unless they have participated in the act expressly, or impliedly, by conduct authorizing or approving it, either before or after it was committed.

The evidence produced on the part of the defendant, and sent up with the rule, discloses that the libelous article complained of emanated from a reporter on the newspaper, and that it went into the paper after being supervised by the city editor; that it was published without the knowledge of the managing editor, the executive head of the corporation, who was absent from duty on the day of the publication by reason of sickness; and that subsequently, upon his attention being called to the article by a representative of the plaintiff and a request made for a retraction, such retraction was published in the paper. No proof was offered on the part of the plaintiff from which it could be fairly inferred that either the managing

editor, or any other person entitled to represent the corporation, authorized the publication of the libel before its insertion in the paper, or in any way ratified such action subsequently. In this condition of the evidence, there was nothing to justify a finding by the jury that the publication was malicious on the part of the defendant. And this was the situation which the case would have presented, even without the evidence submitted by the defendant for the purpose of rebutting any inference of prior authorization, or subsequent ratification. The right to recover punitive damages rests primarily upon the single ground of wrongful motive, and when such motive is not inherent in the offense which fixes the defendant's legal liability, the burden rests upon the plaintiff of presenting some proof from which such wrongful motive may be inferred. Absence of proof that the employer did not authorize the servant's act before it was done, or did not afterward ratify it, "cannot," to quote the language of Mr. Justice Garrison in *Haines v. Schultz*, 50 N. J. Law, 481, 14 Atl. 488, "be permitted to take the place of evidence that he did authorize it, or did ratify it, without leading to a most dangerous extension of the doctrine respondeat superior." As is pointed out in that case, the doctrine "is a rule of limitation as well as of liability. If a principal must, on the one hand, answer for his agent's wrongdoing, on the other hand, his liability is circumscribed by the scope of his agent's employment, unless there be proof of a ratification by him of his agent's misconduct."

It was error to permit the jury to assess punitive damages against the defendant, and for this reason the rule to show cause must be made absolute.

BOARD OF EDUCATION OF FRELINGHUYSEN TP. v. ATWOOD, County Superintendent of Public Instruction.

(Supreme Court of New Jersey. Feb. 27, 1906.)

SCHOOLS AND SCHOOL DISTRICTS — SCHOOL FACILITIES—FAILURE TO FURNISH.

The failure of the board of education of a township to provide transportation for children living remote from the schoolhouse is not such a failure to provide "suitable school facilities and accommodations" under section 126 of the school law (P. L. 1904, p. 48) as to authorize the county superintendent of schools to transmit to the custodian of the school moneys an order to direct him to withhold from the district all moneys in his hands to the credit of such school district received from the state appropriation or from the state school tax.

(Syllabus by the Court.)

Certiorari by the board of education of Frelinghuysen township against Franklin T. Atwood, county superintendent of public instruction, to review an order of such superintendent. Order set aside.

Argued November term, 1905, before FORT, REED, and GARRETSON, JJ.

William H. Morrow, for prosecutor. The Attorney General, for defendant.

GARRETSON, J. The writ in this case brings up an order of the superintendent of public schools in the county of Warren as follows: "To the Custodian of School Moneys of the School District of Frelinghuysen—Sir: You are hereby directed to withhold the amount of school moneys in your hands from the school moneys appropriated to your school district, because children of ——— residing in the school district of Frelinghuysen are not provided with suitable school privileges. Dated 23d day of Feb. 1905. F. T. Atwood, County Superintendent." This order was approved in writing February 24, 1905, to take effect March 6, 1905, by the State Superintendent of Public Instruction.

This action is claimed to be authorized by section 126 of the school law of 1903 (P. L. 1904, p. 48). This section is as follows: "Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. Whenever such school facilities or accommodations shall be inadequate and unsuited to the number of pupils attending or desiring to attend such schools the county superintendent of schools shall transmit to the custodian of the school moneys of the school district an order directing him to withhold from the district all moneys in his hands to the credit of such school district received from the state appropriation or from the school tax until suitable facilities or accommodations shall be provided, and shall notify the board of education of such district of his action with the reasons therefor. Such order shall not take effect until approved in writing by the State Superintendent of Public Instruction, and said approval shall state when said order shall take effect."

The respect in which the testimony shows the board of education to have been delinquent was in failing to provide transportation for certain children living remote from the schoolhouse. Section 117 (page 45) of the same act provides: "Whenever in any district there shall be children living remote from the schoolhouse, the board of education of such district may make rules and contracts for the transportation of such children to and from school." We do not think that the failure of the board of education to provide transportation for children living remote from the schoolhouse was a failure to provide suitable school facilities and accommodations for all children residing in the district desiring to attend the public schools therein within the meaning of section 126.

Section 126 is the first of six sections which make up "Article 10—School Houses." All the other five sections refer specifically

to school buildings, the manner of their construction, etc., and so we think that "suitable school facilities and accommodations," as used in that section, referred to the buildings mentioned in the article. Besides, the furnishing of transportation to children living remote from schoolhouses is permissive to the board of education, not mandatory upon them. Section 117, which is the second section of article 9 of the school law, which is the article relating to "pupils," says the board of education "may" make rules and contracts for the transportation of children living remote from the schoolhouses, not "must" make them.

The county superintendent of public schools being without power to make the order complained of, there could be no appeal from his order to the State Superintendent, and, the order being outside of the jurisdiction of the county superintendent, it was only remediable by certiorari to this court.

The order complained of is set aside, with costs.

McALLISTER v. McALLISTER.

(Court of Chancery of New Jersey. March 3, 1906.)

DIVORCE—DESERTION—EVIDENCE.

Where parties intermarry clandestinely, without any intention of establishing a matrimonial domicile, and on an agreement to live separately for the present, the separate living of the husband will not be a desertion of the wife until she repudiates the agreement for separate living by offering to live with him and demanding that he should provide for their living together. A demand by the wife that the husband should support her will not be sufficient, unless accompanied by a bona fide offer to live with him.

(Syllabus by the Court.)

Petition by Maria McAllister against Robert Fulton McAllister for divorce. Petition dismissed.

Robert H. McAdams, for petitioner.

MAGIE, Ch. The parties to this cause, while resident in Connecticut, came to Brooklyn, N. Y., and were there married. After marriage, each returned to the residence each had previously occupied. The marriage was clandestine, under an agreement by each not to publicly disclose the fact, and neither expected that a matrimonial domicile would be adopted for the present. The petitioner testifies that after a short time she heard rumors of her husband's attentions to another woman, and threatened to disclose the marriage unless the attentions ceased. She did make a disclosure, and his parents asked her to come and live with them. She declares that her husband then stated that, if she did, he would leave his parents' house. Of this testimony there is no corroboration. She further declares that her husband, having lost his employment in Connecticut, desired

her to go to her parents' house in New Jersey, promising that when he procured employment he would "do the right thing by her." There is, likewise, no corroboration of this evidence.

An agreement of married people to live separately, is contrary to public policy. Either of them may repudiate it, and by a proper demand for a resumption of the marital relation may require the other to perform the marital duties of companionship and support. Such a demand must be accompanied with a bona fide expression of willingness to live in the marital relation. *Currier v. Currier*, 68 N. J. Eq. —, 59 Atl. 4. The master, to whom the cause was referred, has reached a conclusion that such a demand was made and refused, and that a desertion was thereby proved. I am unable to approve that conclusion. Upon petitioner's own evidence, her demand was simply for support. Whether that evidence was corroborated, admits of doubt. If corroborated, it was concededly unaccompanied with any expression of willingness to perform her duty as a wife. The parties had married with no intention of living together. Before the husband could be put in the wrong, the petitioner was bound to express her willingness to live with him and to demand that they should live together.

In my judgment, the evidence is insufficient to support a decree of divorce, and the petition should be dismissed.

HADLEY v. BOARD OF CHOSEN FREEHOLDERS OF PASSAIC COUNTY.

(Supreme Court of New Jersey. Feb. 23, 1906.)

1. EVIDENCE — VALUE OF REAL PROPERTY — SALE OF ADJACENT LAND.

In proceedings to condemn land bordering on a river for the construction of an approach to a bridge, evidence of the price received by the owner of land on the opposite side of the river taken for the other approach to the bridge was admissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 267, 1215.]

2. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In proceedings by the board of freeholders to condemn land for an approach to a bridge, any error in the admission of evidence of the plan of the proposed bridge was not prejudicial to the board, since, in the absence of any proof on the subject, the presumption is that the bridge will be of such a character as to do the most injury to the remaining property of the landowner.

Error to Circuit Court, Passaic County.

Condemnation proceedings by the board of chosen freeholders of the county of Passaic against Mary E. Hadley. From the judgment of the circuit court the board of freeholders brings error. Affirmed.

Argued November term, 1905, before GUMMERE, C. J., and HENDRICKSON and PITNEY, JJ.

Harry Meyers, for plaintiff in error.
John B. Humphreys, for defendant in error.

GUMMERE, C. J. The board of freeholders of Passaic county condemned certain property of Mrs. Hadley, bordering upon the Passaic river, in the city of Passaic, for the purpose of constructing the approach to a bridge over the river thereupon. The commissioners appointed in the proceedings having made their award, an appeal was taken to the Passaic circuit court. This writ of error was sued out to review the judgment entered upon the verdict rendered on that appeal.

The first error assigned is to the admission of the testimony of one Zabriskie as to the price which he received from the board of freeholders of Bergen county for land directly across the river from Mrs. Hadley's, and upon which the other abutment of the bridge, apparently, was to rest. This testimony seems to us to have been competent. In *Laing v. United Railroads & Canal Co.*, 54 N. J. Law, 576, 25 Atl. 409, 33 Am. St. Rep. 682, it is declared that, on an inquiry as to the value of lands, evidence of sales of other land in the neighborhood is competent, where there is a substantial similarity between the properties; and it is said that much must be left to the discretion of the trial judge in the determination of the preliminary question whether the conditions are such as easily to admit of reasonable comparison. The Zabriskie tract was similar in its character to the Hadley tract. Its principal value was as dock property upon a tidal stream. Although not so valuable because further away from the city of Passaic than the Hadley tract, still it afforded some criterion of the value of the latter.

The only other error assigned is to the admission of the plan of the proposed bridge. The ground of the assignment is that there was no testimony that this plan had been finally adopted, and a contract made for the construction of a bridge in accordance therewith. The plan seems to us to have been competent as tending to show what it was proposed to do by the board of freeholders at the time when the land was sought to be taken. But, even if incompetent, the error in admitting it was harmless for this reason. In the absence of any proof on the subject, the presumption is that the bridge to be erected will be of such a character as to do the most injury to the remaining property of the landowner. *National Docks, etc., Co. v. United Companies*, 53 N. J. Law, 217, 21 Atl. 570, 26 Am. St. Rep. 421; *Patereson & Newark R. R. Co. v. Newark*, 61 N. J. Law, 80, 38 Atl. 689.

The judgment under review should be affirmed.

YOUNG v. LANDIS TP. et al.

(Supreme Court of New Jersey. Feb. 28, 1906.)

DEDICATION—LIMITED PUBLIC USE.

Land may be dedicated to a restricted public use, and, if accepted, must be taken for the limited purpose only.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, § 99.]

(Syllabus by the Court.)

Certiorari by George B. Young to review an ordinance of the township of Landis. Ordinance set aside.

Argued November term, 1905, before SWAYZE and DIXON, JJ.

Henry S. Alvord and Howard Carrow, for prosecutor. Royal P. Tuller and Walter H. Bacon, for defendants.

DIXON, J. At the February term, 1902, the court ordered the present writ of certiorari to be dismissed for informality (Young v. Crane, 67 N. J. Law, 453, 51 Atl. 482), but afterwards it was reinstated and amended to comply with the views of the court by bringing in the township of Landis as a defendant. It is now before us for consideration on the merits. The ordinance under review was passed June 11, 1901, and requires that the driveway of Landis avenue between Main avenue and the borough of Vineland be made 70 feet wide, being 35 feet on each side of its center line, and that all poles, posts, and trees within the limits of such driveway be forthwith removed. No proceedings to condemn any part of the proposed driveway are contemplated. One of the reasons assigned by the prosecutor for setting aside this ordinance is that a portion of the avenue to be affected thereby was dedicated specially for purposes inconsistent with its use as a driveway, and therefore the township had no authority to pass the ordinance.

The facts established by proofs recently submitted are that by proceedings taken in this court at the term of June, A. D. 1863, a highway was laid out 3 rods wide and about 18 miles long, extending from the neighborhood of May's Landing, in the county of Atlantic, to the road leading from Camel's Tavern to Bridgeton in the county of Salem; that the center line of this highway is coincident with the center line of Landis avenue; that Charles K. Landis was the owner of the property on both sides of this highway so far as it is now in question; that he, by his conveyances to and agreements with the purchasers of his property, dedicated to public use an additional width of 25 feet on each side of the highway, but subject to certain regulations prescribed by him as to grass and shade trees, which, if observed, would preclude the use of this dedicated land as a driveway; and that these regulations were made known to and concurred in by the public authorities at the time of the dedication and have been substantially

complied with ever since. Similar facts were disclosed in the case of Avls v. Vineland, 56 N. J. Law, 474, 23 Atl. 1039, 23 L. R. A. 685, and are there stated with more detail in the opinion of Mr. Justice Abbott. It is a settled legal rule that land may be dedicated to a restricted public use, and, if accepted, must be taken for the limited purpose only. State v. Society, 44 N. J. Law, 502; Ayres v. Pennsylvania R. R. Co., 52 N. J. Law, 405, 20 Atl. 54. The dedication of the land outside of the original highway was of this restricted character.

It follows that the township had no authority to widen the driveway as proposed in this ordinance, and consequently the ordinance must be set aside, with costs.

MILTON v. STELL.

(Supreme Court of New Jersey. Feb. 28, 1906.)

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—VACATING—EFFECT.

An order of this court, setting aside a certain assessment brought before it by certiorari and directing a new assessment to be made, vacates only the particular apportionment under review, and does not determine that the amount of the assessment on any individual's property should be set aside or reduced.

(Syllabus by the Court.)

Appeal from District Court of Jersey City. Action by John Milton against Charles Stell. Judgment for plaintiff, and defendant appeals. Reversed.

Argued November term, 1905, before GARRISON, SWAYZE, and DIXON, JJ.

John Milton, pro se. J. Merritt Lane, for defendant.

DIXON, J. On April 17, 1903, the defendant and several other persons entered into a written agreement with Messrs. Black & Drayton, attorneys of this court, in the following terms: "We, the undersigned, owners of the property alleged to be liable for an assessment for the opening and improvement of Baldwin avenue, Jersey City, N. J., hereby authorize Messrs. Black & Drayton, counsel, to attack said assessment and to set the same aside, and we agree to pay said counsel 15 per cent. of the amount of any assessment on our respective properties which may be set aside by the courts, or 15 per cent. of any reduction thereof, if not entirely set aside; and, in event of the courts not setting aside or reducing the assessment, the said counsel, Black & Drayton, shall receive no compensation whatsoever." Thereupon the attorneys procured a certiorari to review the assessment mentioned in the agreement, and on June 18, 1904, a judgment was entered upon that writ as follows: "It is ordered that the assessments for the opening, extension, and improvement of Baldwin avenue in Jersey City, brought up by these writs, should be set aside, and the commissioners directed to make a new assessment according

to law, with costs to the prosecutors in said writs."

The question now before us is whether by force of these proceedings Messrs. Black & Drayton, who have assigned their claim to the plaintiff, became entitled to the 15 per cent. provided for in the agreement. We think they did not. The word "assessment" is equivocal. It may mean either the act of apportioning the burden to be borne by the persons or property chargeable or the particular burden assigned to each. It is evident that in the agreement the word was used in the latter sense. This appears in the expressions "the amount of any assessment on our respective properties" and "any reduction thereof." The act of apportioning the burden was not an amount and was not capable of reduction. These terms could apply only to each owner's burden. But in the judgment above recited the word "assessment" was used in the sense first mentioned. The court decided that the particular apportionment under review should be set aside, but that a new apportionment should be made. Whether the burden imposed on the several owners was too large or too small was a matter not determined by the judgment, and would not be determined until the new apportionment appeared. We think the attorneys' right to compensation under this agreement will not accrue until an adjudication is made either that there should be no charge upon the defendant's property or that the charge should be less than the original assessment indicated.

The judgment for the plaintiff must be set aside, and the defendant may enter final judgment in his favor, with costs, under the act of April 3, 1902 (P. L. 1902, p. 565), regulating district court appeals.

WATKINS v. BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY.

(Supreme Court of New Jersey. Feb. 28, 1906.)
COUNTIES—LIABILITY OF BOARD OF FREEHOLDERS—DETENTION OF WITNESSES.

The duty imposed upon the board of freeholders by section 30 of the criminal procedure act (P. L. 1898, p. 877) to take care that witnesses detained in the county jail shall be "comfortably lodged and provided for, and no further restricted of their liberty than is necessary for such detention," is a governmental duty of a purely public character, for neglect of which no private action lies in favor of a person specially damaged, in the absence of a statute conferring such right of action.

(Syllabus by the Court.)

Action by Benjamin F. Watkins against the board of chosen freeholders of the county of Atlantic. Demurrer to declaration sustained.

Argued November term, 1905, before GUMMERE, C. J., and HENDRICKSON and PITNEY, JJ.

Herbert C. Bartlett, for plaintiff. Harry B. Coulomb and E. A. Higbee, for defendant.

PITNEY, J. The plaintiff's declaration seeks to impose upon the county of Atlantic, in its corporate capacity, a liability for the special damage that accrued to him, as is alleged, through a breach of the duty imposed upon the board of freeholders of the county by section 30 of the criminal procedure act (P. L. 1898, p. 877). That section reads as follows: "No person shall be committed to or be detained in the jail of any county for securing his appearance as a witness against any person charged with a crime of misdemeanor, except in cases punishable by imprisonment in the state prison; nor shall persons so detained be kept in the same apartment with or be provided with the same fare as persons charged with or convicted of crime, but the boards of chosen freeholders for each county shall take care that they be comfortably lodged and provided for, and no further restricted of their liberty than is necessary for such detention." It is averred that the plaintiff, having been committed to the common jail of Atlantic county as a witness in behalf of the state against a certain person charged with crime, was for several days and nights detained in the same apartment with persons who were charged with crimes, and that the plaintiff was furnished and provided with only the same fare as prisoners charged with or convicted of crime and therein detained. From other averments it is to be gathered that during his detention the plaintiff was not comfortably lodged and provided for. It is alleged that all this occurred "by reason of the failure and neglect of the defendants to see and take care that the plaintiff was provided with different food than was provided for prisoners charged with or convicted of crime, and to take care that plaintiff was comfortably lodged and provided for, and no further restricted of his liberty than was necessary for his detention." Loss of health is set up as a special damage resulting from the wrong complained of. To this declaration a demurrer is interposed, on the ground that defendant, being a municipal corporation, is not responsible, in law, for the damages alleged to have been sustained by the plaintiff by reason of the alleged neglects and omissions in the declaration mentioned.

The declaration does not aver that plaintiff's incarceration was brought about in any way by the defendants. And it is hardly necessary to mention that, under our system, the boards of freeholders are not the keepers of the jail, nor charged with the personal custody of the prisoners. By the statute (Gen. St. p. 409) the chosen freeholders in the several counties are constituted a body politic and corporate by the name of the "Board of Chosen Freeholders of the County of Atlantic" (or as the case may be), and upon them are conferred certain powers of local government, and especially the ordering of taxes to be raised for county purposes (Gen. St. p. 411, § 12 et seq.; Id. p. 430, § 126 et seq.). The

duty imposed upon the board of freeholders by section 30 of the criminal procedure act of 1898 appears to have originated with the criminal procedure act of 1875 (Gen. St. p. 1123, § 22). The section being in pari materia with the act incorporating the boards of chosen freeholders and prescribing their other duties, we construe its declaration that the freeholders for each county "shall take care" that detained witnesses shall be comfortably lodged and provided for, etc., as meaning that they shall exercise a governmental supervision of the jail in that behalf, and shall see to it that the necessary moneys are provided to furnish for witnesses accommodations of the prescribed kind; not that the freeholders are in any sense constituted the custodians of detained witnesses. It is well settled in this state, as a general rule, that an action will not lie in behalf of an individual who has sustained a special damage through the neglect of a municipal corporation to perform a public duty, unless the right of action is conferred by statute. *Freeholders v. Strader*, 18 N. J. Law, 108, 35 Am. Dec. 530; *Livermore v. Freeholders*, 29 N. J. Law, 245; *Pray v. Jersey City*, 32 N. J. Law, 394. The same rule is applied where the employes or officers of a municipal corporation are negligent in the performance of such duties; it being held that the doctrine of respondeat superior will not operate to create a liability on the part of the corporation in such a case. *Condict v. Jersey City*, 46 N. J. Law, 157; *Wild v. Paterson*, 47 N. J. Law, 406, 1 Atl. 490. See, also, *Tomlin v. Hildreth*, 63 N. J. Law, 438, 47 Atl. 649.

It is, however, ingeniously argued by counsel for the plaintiff in the present case that the duty imposed by section 30 of the criminal procedure act is not a public duty, in the proper sense, but a specific duty owing from the defendant to the plaintiff; it being argued that the statute only relates to a particular class of people—that is, witnesses detained in common jails—from which it is reasoned that the injury in question was to an individual and not to the public, so that no indictment would lie. In our opinion this argument is not sound. Witnesses detained in common jails are not a class of citizens in any such sense that a duty owing to them may be dealt with as a duty owing to individuals. Any person is liable, under certain circumstances, to be detained as a witness, and the duty of providing for the comfort of persons thus detained is in every proper sense a governmental duty, of a purely public nature. For its neglect, therefore, an indictment is the

proper remedy, and no private section lies in favor of a person specially damaged; the Legislature not having seen fit to confer such right of action by statute.

The defendant is entitled to judgment on the demurrer.

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ROCKINGHAM COUNTY LIGHT & POWER CO. v. BATCHELDER et al. (Supreme Court of New Hampshire. Rockingham. Dec. 5, 1905.) Transferred from Superior Court; Stone, Judge. Petition under Laws 1901, p. 678, c. 195, by the Rockingham County Light & Power Company against George N. Batchelder and another for the assessment of damages occasioned by the taking of the right to maintain a line of poles on defendants' premises. Plaintiff excepted to instructions, and the cause was transferred to the Supreme Court. Overruled. *Samuel W. Emery*, for plaintiff. *Page & Bartlett*, for defendants.

YOUNG, J. The plaintiffs have not attempted to sustain their exception in this court. The record does not appear to present any question of law which requires consideration. Exception overruled. All concurred.

NATIONAL LEAD CO. v. DICKINSON, Secretary of State. (Court of Errors and Appeals of New Jersey. Nov. 20, 1905.) Error to Supreme Court. Application by the state, on the relation of the National Lead Company, for writ of mandamus to Samuel D. Dickinson, Secretary of State. From an order denying the application (57 Atl. 138), relator brings error. Affirmed. *Vredenburg, Wall & Van Winkle*, for plaintiff in error. The Attorney General, for defendant in error.

PER CURIAM. The judgment of the Supreme Court is affirmed, for the reasons given in the opinion of Mr. Justice Garretson in that court. 70 N. J. Law, 596, 57 Atl. 138.

SCHWARTZ v. MAYOR, ETC., OF DOVER et al. (Court of Errors and Appeals of New Jersey. June 19, 1905.) Error to Supreme Court. Certiorari by the state, on the relation of Leopold D. Schwartz, against the mayor, aldermen, and common council of Dover and others to review a city ordinance establishing a board of excise commissioners. From a decree affirming the validity of the ordinance (57 Atl. 394), petitioner brings error. Affirmed. *George T. Werts*, for plaintiff in error. *John O. H. Pitney*, for defendants in error.

PER CURIAM. The judgment brought before us by this writ of error is affirmed upon the grounds stated in the opinion of Mr. Justice Pitney, reported in 70 N. J. Law, 502, 57 Atl. 394.

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*An agricultural society, holding a fair for which a fee is charged, is bound to use reasonable care to keep all parts of the grounds free from dangers to its patrons.—*Higgins v. Franklin County Agricultural Soc. (Me.)* 708.

When an agricultural society invites patrons to cross its racing track, it is bound to use reasonable care to keep the track clear of danger of collision during such crossing.—*Higgins v. Franklin County Agricultural Soc. (Me.)* 708.

A patron of an agricultural fair while crossing the racing track by invitation is not bound to be as watchful for teams as he would in crossing a public road.—*Higgins v. Franklin County Agricultural Soc. (Me.)* 708.

In an action by a patron of an agricultural fair for injuries received while crossing the race track, evidence held to warrant findings that plaintiff was invited to cross the track when he did, and that he was not guilty of contributory negligence.—*Higgins v. Franklin County Agricultural Soc. (Me.)* 708.

AIDER BY VERDICT.

In criminal prosecutions, see "Indictment and Information," § 8.

ALIENATING AFFECTIONS.

Examination of witnesses, see "Witnesses," § 2.

ALIENATION.

Suspension of power of alienation of property, see "Perpetuities."

ALIMONY.

See "Husband and Wife," § 6.

ALTERATION.

Of geographical or political divisions, see "Schools and School Districts," § 1.

ALTERATION OF INSTRUMENTS.

See "Reformation of Instruments."

AMENDMENT.

Review of ruling changing nature of action from legal to equitable, see "Appeal and Error," § 3.

Of particular legal proceedings.

See "Indictment and Information," § 5; "Pleading," § 4.

Pleading in condemnation proceedings, see "Eminent Domain," §§ 3, 4.

Pleading in equity, see "Equity," § 3.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see "Appeal and Error," § 1; "Equity," § 1; "Justices of the Peace," § 2.

ANIMALS.

See "Game."

Injuries from operation of railroads, see "Railroads," § 8.

The liability of the owner of bees for an injury done by them to the property of another rests on the doctrine of negligence.—*Petey Mfg. Co. v. Dryden (Del. Super.)* 1056.

*Gen. Laws 1896, c. 111, §§ 3, 5, held not to impose a liability for acts of a dog committed within the inclosure of the owner or keeper except upon proof of knowledge of a vicious propensity.—*Oldham v. Hussey (R. I.)* 377.

*The ownership of wild animals is at most a qualified one, and belongs to all people of the state in common.—*State v. Niles (Vt.)* 795.

ANNULMENT.

Of will, see "Wills," § 4.

ANSWER.

Of garnishee, see "Garnishment," § 3.

ANTENUPTIAL CONTRACTS.

See "Husband and Wife," § 2.

APOTHECARIES.

See "Druggists."

APPEAL AND ERROR.

See "Audita Querela"; "Certiorari"; "New Trial."

Hearing on appeal from agreed case, see "Submission of Controversy."

Review in particular civil actions.

See "Partition," § 2.

Review in special proceedings.

Assessment of taxes, see "Taxation," § 3.

Condemnation proceedings, see "Eminent Domain," § 3.

Election contest, see "Elections," §§ 4, 5.

For assessment of cost of public improvement, see "Municipal Corporations," § 6.

Order of court designating depository of trust funds, see "Trusts," § 4.

Review of criminal prosecutions.

See "Criminal Law," § 15.

Review of proceedings of justice of the peace.

See "Justices of the Peace," § 2.

§ 1. *Decisions reviewable.*

Where a bill was referred without condition, and the referee reported the facts and his conclusions thereon, and his report was accepted, an appeal from a final decree in accordance with the report will be dismissed.—*Piscataquis Sav. Bank v. Herrick (Me.)* 214.

No appeal held to lie from a default judgment.—*Sharp v. Bates (Md.)* 747.

*A motion for a new trial is addressed to the sound discretion of the court, and no appeal will lie from the order granting or refusing the same.—*Whitcomb v. Mason (Md.)* 749.

Under Act May 5, 1899 (P. L. 249), the amount in controversy, where judgment for want of a sufficient affidavit of defense is refused; is the amount alleged to be due in the statement of claim.—*Commonwealth v. Magee (Pa.)* 1108.

§ 2. *Right of review.*

Defendant, by answering as directed, held not to waive appeal from an order overruling her plea to the jurisdiction.—*Duke v. Duke (N. J. Ch.)* 471.

§ 3. *Presentation and reservation in lower court of grounds of review.*

*Defendant, to limit the original complaint and magistrate's record in bastardy, in evidence, to show compliance with the preliminary statutory requirements, should request instructions to disregard that evidence in considering other propositions.—*McLaughlin v. Joy (Me.)* 348.

On report of an action at law, technicalities in pleadings are to be regarded waived unless

* Point annotated. See syllabus.

otherwise stipulated, and the court can decide on the merits the real controversy.—*Hurd v. Chase* (Me.) 660.

A motion for a new trial cannot be made to serve the purpose of bringing before the Court of Appeals for review a matter occurring during the trial, to which no objection was made at the time.—*Whitcomb v. Mason* (Md.) 749.

*By the express provisions of Code Pub. Gen. Laws, art. 5, § 9, no instruction given is deemed defective on appeal because of any assumption of fact, or because of the insufficiency of the evidence to sustain it, unless the record shows that an objection for such defect was taken at the trial.—*Mylander v. Beimschla* (Md.) 1038.

Code Pub. Gen. Laws, art. 5, § 9, in relation to the review of instructions on appeal in the absence of an objection for assumption of facts, *held* not applicable to a rejected prayer.—*Mylander v. Beimschla* (Md.) 1038.

The rule that the failure to except to the ruling of the superior court in proceedings for a writ of habeas corpus for the discharge of the petitioner from state prison prevents the petitioner from raising the same question in the Supreme Court may be waived.—*In re Moebus* (N. H.) 170.

Moot questions in an agreed case which contains no provision for judgment will not be considered.—*Attorney General v. Fogarty* (N. H.) 219.

Defendant *held* not entitled to first complain in the Supreme Court of amendment changing the action from one at law to one in equity.—*Westminster Nat. Bank v. New England Electrical Works* (N. H.) 971.

When, in opposition to a motion of nonsuit, plaintiff bases his action on a particular ground, the court of errors will confine its consideration of the merits of the judgment to that ground.—*Maguth v. Board of Chosen Freeholders of Passaic County* (N. J. Err. & App.) 679.

A judgment entered in pursuance of a question of law, improperly reserved, will be reversed, whether an exception was taken there to or not.—*Cover v. Hoffman* (Pa.) 836.

*Error in the admission of evidence over objection is not before the Supreme Court for review, where no exception was taken to such admission.—*Marcy v. Parker* (Vt.) 19.

§ 4. Parties.

A portion of joint judgment defendants *held* not entitled to appeal from the judgment without the issuance of a summons from the Supreme Court and the granting of a severance.—*Oldenburg & Kelley v. Dorsey* (Md.) 576.

§ 5. Requisites and proceedings for transfer of cause.

*Where the party on appeal from a judgment of the district court fails to have the state of the case settled, as provided by P. L. 1902, p. 565, or to obtain an extension within 15 days after judgment, his right to prosecute the appeal is at an end.—*Franz-Milton Co. v. Hall* (N. J. Sup.) 269.

§ 6. Supersedeas or stay of proceedings.

In a divorce suit, *held*, that defendant would not be granted a stay of proceedings pending her appeal from the order overruling her plea to the jurisdiction.—*Duke v. Duke* (N. J. Ob.) 471.

An injunction restraining a trespass would not be sustained pending appeal under a statute that the appeal should not modify or suspend the injunction without an order of the chancellor, and that a suspension by him should extend only so far as necessary to preserve the status

quo.—*Hoboken & M. R. Co. v. Jersey City, H. & P. Ry. Co.* (N. J. Ch.) 539.

§ 7. Record and proceedings not in record.

Where in an action for injuries no bill of exceptions was filed, the question of defendant's negligence under the facts could not be reviewed.—*Keating v. Hull* (Conn.) 661.

Appeals from two judgments of the register of wills, one removing an administrator and the other appointing another in his stead, will not be dismissed, under Rev. Code 1893, p. 673, c. 89, § 15, for failure to file separate transcripts.—*Boyd v. Cloud* (Del. Super.) 204.

An objection to certain instructions, that they ignored an alleged "paper writing," claimed to constitute a contract under which the property in question was sold, could not be reviewed where such writing was not in the appeal record.—*Oldenburg & Kelley v. Dorsey* (Md.) 576.

On appeal from an order denying an application for appellant's appointment as the executor of an estate, it was improper for appellant to annex the discussion of counsel to the record.—*In re Acker's Will* (N. J. Prerog.) 556.

§ 8. Assignment of errors.

*Assignments of error not referring to printed page of testimony, and embodying alleged error in striking out testimony of several different witnesses, will not be considered.—*Brown v. Forest Water Co.* (Pa.) 1078.

*On appeal the appellate court will not pass upon the correctness of a particular instruction to which no error is assigned, for the purpose of guiding the court below in the event of a retrial.—*Troxell v. Anderson Coal Min. Co.* (Pa.) 1083.

§ 9. Dismissal, withdrawal, or abandonment.

Appeals from the register of wills will not be dismissed for the register's failure to certify the record, but the papers will be returned for certification.—*Boyd v. Cloud* (Del. Super.) 204.

A writ of error will be dismissed when no judgment is returned with it.—*Flanerty v. North Jersey St. Ry. Co.* (N. J. Err. & App.) 425.

*Where a book furnished on a writ of error contains no transcript, no pleadings, and no state of the case, the writ of error will be dismissed.—*Boland v. Kaveny* (N. J. Err. & App.) 552.

That performance of contract to purchase real estate has been rendered impossible by acts of appellant in action to enforce performance *held* not ground for dismissal of appeal.—*Moore v. Galupo* (N. J. Err. & App.) 699.

§ 10. Review—Scope and extent in general.

The question of the admissibility of evidence for a certain purpose is not before the Supreme Court for review, where the offer of the evidence in the trial court obviously indicated that it was made for another purpose.—*Appeal of Melony* (Conn.) 151.

Where the court's findings were sustained by evidence, and supported the judgment, and it did not appear that any fact material to any question of law, admitted or undisputed, was not found, the findings would not be interfered with on appeal.—*Clark v. Fitzsimmons* (Conn.) 342.

In a suit to quiet title under Gen. St. 1902, § 4033, a judgment awarding plaintiff possession and damages *held* not sustainable on the theory that the parties voluntarily submitted their controversies to the court for the purpose of obtaining such a judgment.—*Foote v. Brown* (Conn.) 667.

* Point annotated. See syllabus.

The concession of a prayer by the opposite party makes the legal proposition announced therein the law of the case, regardless of its correctness.—*Gans Salvage Co. v. Byrnes* (Md.) 155.

Denial of a motion to set aside a verdict as against the law and the evidence *held* to raise no question of law reviewable on exceptions.—*Lyman v. Brown* (N. H.) 650.

§ 11. — Presumptions.

Where the jury were not directed to pass on certain evidence, it would be presumed, on appeal, that the evidence was true, and would have established everything it tended to prove.—*Hanson v. Manchester St. Ry.* (N. H.) 595.

In the absence of an appeal from an order allowing probate of a will, it will be presumed on appeal from an order denying petitioner's right to appointment as executor, that the will was properly proved.—*In re Acker's Will* (N. J. Prerog.) 556.

In view of the objection and bill of exceptions it would be presumed, on appeal, that certain testimony as to condition of injured ankle at time of trial was connected with testimony as to the injuries sustained.—*Lewis v. John Crane & Sons* (Vt.) 60.

§ 12. — Discretion of lower court.

Whether the subject-matter of an order or decree is within the discretion of the lower court is open to examination upon an appeal in the case in which the decree is passed.—*Gottschalk v. Mercantile Trust & Deposit Co.* (Md.) 810.

*A decree fixing the fee of a master in partition will not be reversed, where no abuse of discretion is shown.—*Cunningham v. Wallace* (Pa.) 784.

*A departure of the court from the form of a rule is immaterial where the matter is within the court's discretion.—*In re Logan & Moulds' Assigned Estate* (Pa.) 843.

*Discretion of trial court in denying new trial will not be interfered with on appeal.—*Hanforth v. Tarentum Traction Pass. Ry. Co.* (Pa.) 1060.

*The action of the trial court, in sustaining a verdict as not against the weight of the evidence, is discretionary, and not revisable by the Supreme Court.—*Marcy v. Parker* (Vt.) 19.

§ 13. — Questions of fact, verdicts, and findings.

*Where there are no facts from which a conclusive legal presumption arises, and the question presented by the evidence is purely one of fact, the determination of the lower court is conclusive on the Supreme Court.—*Appeal of Melony* (Conn.) 151.

Where there is some evidence tending to support a finding by the court, an exception thereto will be overruled.—*Brookhouse v. Union Pub. Co.* (N. H.) 219.

Whether justice requires an extension of time within which a husband shall be permitted to waive the provisions of his wife's will is a question for the superior court, and presents no question of law for determination on appeal.—*Jacques v. Chandler* (N. H.) 713.

*Findings of fact by a district judge are binding on the Supreme Court unless unsupported by evidence.—*Graves v. Woodbridge Tp.* (N. J. Sup.) 267.

On appeal the Supreme Court will not reverse a judgment of the district court based on its conclusion on a mixed question of law and fact.—*Ruppert v. Zang* (N. J. Sup.) 998.

*Auditor's finding of fact as to trustee's accounts, approved by the court below, will not be disturbed.—*In re Mace's Estate* (Pa.) 370.

*A finding by an auditor based on competent evidence and confirmed by the court below will not be reversed in the absence of manifest error.—*In re Logan & Moulds' Assigned Estate* (Pa.) 843.

*Where plaintiff's evidence is sufficient to support the verdict, it cannot be interfered with on appeal.—*Galligan v. Woonsocket St. Ry. Co.* (R. I.) 376.

*The Supreme Court cannot disturb a verdict based on conflicting evidence.—*Lyndon Sav. Bank v. International Co.* (Vt.) 50.

§ 14. — Harmless error.

The exclusion of proper questions to a witness is not sufficient ground for a new trial, where the witness was subsequently examined fully on the subject.—*In re Nichols* (Conn.) 610.

A bill of exceptions to a refusal to give a requested instruction based on a hypothesis of fact must show that there was evidence in support of the hypothesis.—*Neal v. Rendall* (Me.) 706.

*Exceptions to a ruling cannot be sustained merely because as an academic proposition it was erroneous, unless the ruling was also prejudicial.—*Neal v. Rendall* (Me.) 706.

*Refusing to allow certain cross-examination *held* harmless.—*Baltimore & O. R. Co. v. Deck* (Md.) 958.

A statement by defendant's counsel of a conceded fact *held* not prejudicial.—*Lyman v. Brown* (N. H.) 650.

A judgment of the district court supported by uncontradicted evidence will not be reversed because of the erroneous admission of evidence.—*Campbell v. McCrellis* (N. J. Sup.) 1129.

In proceedings to condemn land for approach to bridge, admission of evidence of plan of proposed bridge *held* harmless error.—*Hadley v. Board of Chosen Freeholders of Passaic County* (N. J. Sup.) 1132.

Error in admitting evidence which could not have prejudiced defendant because of the careful instructions given is not ground for reversal.—*McKee v. Crucible Steel Co.* (Pa.) 921.

Remarks by witnesses as to matters which the court thereafter instructs the jury they cannot consider *held* harmless.—*McGunnegle v. Pittsburgh & L. E. R. Co.* (Pa.) 988.

*That a judge reads to the jury instructions given by another court in order to show that they were found erroneous by the Supreme Court is no ground for reversing the judgment.—*Brown v. Forest Water Co.* (Pa.) 1078.

Error in allowing a question asked of a witness was harmless where the witness answered that he did not know and had never paid much attention to the matter.—*Marcy v. Parker* (Vt.) 19.

*An objectionable statement of plaintiff's counsel in argument, based on an assumption of defendant's misconduct, *held* not reversible error.—*Bushey v. Northrop* (Vt.) 1015.

§ 15. Determination and disposition of cause.

Where defendants were jointly sued as original promisors, and no objection for misjoinder of parties was made, a judgment on a verdict in defendants' favor could not be reversed as to some of the defendants and affirmed as to others.—*East Baltimore Lumber Co. v. Waldeman* (Md.) 575.

* Point annotated. See syllabus.

Rendition of decree by trial court *held* to be further proceeding in conformity with the opinion of the Court of Appeals, notwithstanding Code Pub. Gen. Laws, art. 5, § 36.—*Safe Deposit & Trust Co. of Baltimore v. Gittings* (Md.) 1033; *Gittings v. Safe Deposit & Trust Co. of Baltimore, Id.*

APPEARANCE.

Jurisdiction of orphans' court to inquire into authority of attorney to appear, see "Courts," § 2.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 4.

APPLICATION.

For insurance, see "Insurance," § 2.
Of assets in general, see "Marshaling Assets and Securities."

APPOINTMENT.

Of executor or administrator, see "Executors and Administrators," § 1.
Of public officers in general, see "Officers," § 1.
Of receiver, see "Receivers," § 1.
Of receiver of corporation, see "Corporations," § 6.
Of tax officers, see "Taxation," § 3.
Of trustee, see "Trusts," § 3.

APPROPRIATION.

See "States," § 1.

ARBITRATION AND AWARD.

See "Reference"; "Submission of Controversy."

§ 1. Arbitrators and proceedings.

*That a deposition taken in aid of proceedings before arbitrators was mailed to one of the parties instead of to the arbitrators *held* not to authorize the arbitrators to refuse to consider it.—*Roberts Bros. v. Consumers' Can Co. (Md.)* 585.

§ 2. Award.

Persons by excepting as devisees and legatees to an award of arbitrators *held* given a standing in court without petition to intervene.—*Pepper v. Pepper* (Del. Super.) 232.

The superior court *held* to have jurisdiction of exceptions to award of arbitrators, though based on fraud and collusion.—*Pepper v. Pepper* (Del. Super.) 232.

On exceptions to award of arbitrators based on fraud and collusion, *held* the issue would be submitted to a jury.—*Pepper v. Pepper* (Del. Super.) 232.

*Where parties to an arbitration have had a full hearing, the court will not review the findings of the arbitrators.—*Roberts Bros. v. Consumers' Can Co. (Md.)* 585.

*Where the parties to an arbitration have had a full hearing, every reasonable intentment will be made in support of the award.—*Roberts Bros. v. Consumers' Can Co. (Md.)* 585.

Unauthorized refusal of arbitrators to consider certain depositions *held* such mistake as to authorize a vacation of their award.—*Roberts Bros. v. Consumers' Can Co. (Md.)* 585.

*Failure of party to arbitration to withdraw his submission *held* not a waiver of objection to certain conduct of the arbitrators.—*Roberts Bros. v. Consumers' Can Co. (Md.)* 585.

ARGUMENT OF COUNSEL.

Harmless error, see "Appeal and Error," § 14.
In civil actions, see "Trial," § 3.

ARMY AND NAVY.

Discharge of bail on enlistment of principal in navy, see "Bail," § 1.

ARREST.

See "Bail."

Illegal arrest, see "False Imprisonment."

Privilege of bankrupt from arrest, see "Bankruptcy," § 2.

§ 1. In civil actions.

Where defendant, arrested on a *capias*, gives bond, as provided by Act June 16, 1836 (P. L. 729), to take benefit of insolvent law, and not the bond under Act June 4, 1901 (P. L. 404), and takes the benefit of the act, plaintiff cannot recover on the bond on the ground that the act of 1901 had repealed the act of 1836.—*Mankey v. Stocking* (Pa.) 913.

The court may order a defendant who has been arrested on civil process to be committed for want of bail after his production in court, and such commitment will be deemed to be on the original writ (V. S. 1701, 1703).—*Gibson v. Holmes* (Vt.) 11.

An officer who arrests defendant on civil process does not, by following V. S. 1701, 1703, requiring a defendant arrested on mesne process to be committed to jail, put it out of his power to obey the precept of the writ commanding him to produce defendant at the time and place of trial.—*Gibson v. Holmes* (Vt.) 11.

Justice *held* to be without authority to permit an officer who arrested defendant to amend his return after the justice's jurisdiction in the case had lapsed.—*Gibson v. Holmes* (Vt.) 11.

§ 2. On criminal charges.

*One under sentence for felony and unlawfully at large may be arrested and returned to imprisonment without a warrant, even by a private person.—*In re Moebus* (N. H.) 170.

ASSAULT AND BATTERY.

Assault with intent to kill, see "Homicide," § 4.
Conviction of assault under indictment for assault with intent to murder, see "Indictment and Information," § 7.

Drunkenness as a defense, see "Criminal Law," § 2.

§ 1. Civil liability.

*In an action for a violent, unprovoked assault, plaintiff *held* entitled to punitive damages.—*Hanna v. Sweeney* (Conn.) 785.

The amount of punitive damages, in an action for willful assault, cannot exceed the amount of plaintiff's expenses in the litigation, less his taxable costs.—*Hanna v. Sweeney* (Conn.) 785.

*The owner of personal property *held*, under the circumstances, not justified in employing force and violence to obtain possession of it.—*Stanley v. Payne* (Vt.) 495.

*Point annotated. See syllabus.

§ 2. Criminal responsibility.

*Words, looks, or gestures, however insulting or offensive, *held* insufficient to excuse a slight assault.—State v. Bell (Del. O. & T.) 147.

*An assault is an unlawful attempt by violence to do injury to another, employed with present ability to accomplish the same.—State v. Wilson (Del. Gen. Sess.) 227.

*Assault defined.—State v. Truitt (Del. Gen. Sess.) 790.

ASSESSMENT.

Against members of insurance company, see "Insurance," § 1.

Of compensation for property taken for public use, see "Eminent Domain," § 3.

Of damages, see "Damages," § 5.

Of expenses of public improvements, see "Highways," § 3; "Municipal Corporations," § 6.

Of tax, see "Taxation," § 3.

ASSETS.

Marshaling, see "Marshaling Assets and Securities."

Of estate of decedent, see "Executors and Administrators," § 2.

Of insurance company, see "Insurance," § 1.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 8.

ASSIGNMENTS.

For benefit of creditors, see "Assignments for Benefit of Creditors."

Fraud as to creditors, see "Fraudulent Conveyances."

In bankruptcy, see "Bankruptcy," § 1.

Transfers of particular species of property, rights, or instruments.

Admeasurement or assignment of dower, see "Dower," § 3.

Corporate shares, see "Corporations," § 2.

Income on trust property, see "Trusts," § 2.

Transfer of rights under liquor license, see "Intoxicating Liquors," § 2.

§ 1. Actions.

Where a married woman assigned a claim against her husband to enable the assignee to sue for her benefit, and without consideration, such assignee was not entitled to sue.—Muller v. Witte (Conn.) 756.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy."

Garnishment of assignee, see "Garnishment," § 2.

§ 1. Requisites and validity.

Under Code Pub. Gen. Laws, art. 21, § 9, a deed of trust conveying all the property of the grantors *held* to contain a sufficient description of the property.—Roberts v. Roberts (Md.) 161; Landon v. Shriver's Estate, Id.

§ 2. Construction and operation in general.

A deed of trust for the benefit of creditors, executed by a husband and wife, *held* to convey the individual property of the wife.—Roberts v. Roberts (Md.) 161; Landon v. Shriver's Estate, Id.

* Point annotated. See syllabus.

§ 3. Accounting, settlement, and discharge of assignee.

Where, under the insolvent debtors' act (Gen. St. p. 1728, § 11), the order of discharge recites that the assignment had been filed by the clerk, the file mark of the clerk cannot be considered as countervailing the declaration of the court.—Stokes v. Hardy (N. J. Sup.) 1002.

ASSISTANCE, WRIT OF.

Recovery of possession by purchaser at foreclosure sale, see "Mortgages," § 5.

*A writ of assistance will not be awarded in case of doubt, nor where there is a question of legal title to be tried.—Board of Home Missions of Presbyterian Church in United States of America v. Davis (N. J. Ch.) 447.

Admitted facts set up in affidavit in opposition to petition for writ of assistance would be regarded by the court as true.—Board of Home Missions of Presbyterian Church in United States of America v. Davis (N. J. Ch.) 447.

ASSOCIATIONS.

See "Beneficial Associations"; "Building and Loan Associations"; "Exchanges."

Agricultural societies, see "Agriculture."

ASSUMPSIT, ACTION OF.

See "Account Stated"; "Money Received"; "Work and Labor."

Nature of action as contract or tort, see "Action," § 2.

ASSUMPTION.

Of risk by employé, see "Master and Servant," § 7.

Of risk by passenger, see "Carriers," § 4.

ASYLUMS.

See "Hospitals."

ATTACHMENT.

See "Execution"; "Garnishment."

Affidavits in support of, see "Affidavits."

Exemptions, see "Homestead."

In action against foreign corporation, see "Corporations," § 9.

Of mortgaged chattels, see "Chattel Mortgages," § 1.

Of property in hands of trustee in bankruptcy, see "Bankruptcy," § 1.

To compel restoration of corporate assets, see "Corporations," § 6.

§ 1. Levy, lien, and custody and disposition of property.

Surrender of an officer's special property in iron levied on to a purchaser *held* a sufficient consideration for the latter's promise to pay the price to the officer, entitling the latter to recover the same, though his writs had been otherwise satisfied.—Lamb v. Zundell (Vt.) 33.

ATTORNEY AND CLIENT.

Argument and conduct of counsel at trial in civil actions, see "Trial," § 3.

Harmless error in conduct and argument of counsel, see "Appeal and Error," § 14.

Liability of client for wrongful imprisonment under direction of attorney, see "False Imprisonment," § 1.

ATTORNEY GENERAL.

As proper party to institute suit to cancel certificate to practice dentistry, see "Physicians and Surgeons."

AUDITA QUERELA.

Where a court had no jurisdiction, and the judgment rendered is void, audita querela to vacate the judgment and execution thereon is unnecessary.—French v. White (Vt.) 35.

AUTHORITY.

Of agent, see "Principal and Agent," § 1.
Of court to revoke appointment of committee in partition, see "Partition," § 2.

AWARD.

See "Arbitration and Award," § 2.

AWNINGS.

Municipal regulations, see "Municipal Corporations," § 8.

BAIL.

§ 1. In criminal prosecutions.

Under Pub. St. 1901, c. 252, § 30, sureties on forfeited recognizance held not discharged by voluntary enlistment of principal in United States navy.—Lamphire v. State (N. H.) 786.

State held entitled to except to an order discharging sureties on a forfeited recognizance.—Lamphire v. State (N. H.) 786.

BAILEMENT.

See "Carriers," § 1; "Warehousemen."

BALLOTS.

See "Elections," § 1.

BANKRUPTCY.

See "Assignments for Benefit of Creditors."

Certified copies of docket entries in bankruptcy court as evidence of bankruptcy, see "Evidence," § 5.

Marshaling assets, see "Marshaling Assets and Securities."

§ 1. Assignment, administration, and distribution of bankrupt's estate.

In an action by a trustee in bankruptcy to recover a payment made by the bankrupt on the ground that it was an unlawful preference, evidence held insufficient to show that defendants had reasonable ground to believe that a preference was intended.—Wilson v. Weigle (N. J. Ch.) 458.

Under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], the person receiving a payment from a bankrupt must have had reasonable cause to believe that it was intended thereby to give a preference before he can be held liable to refund.—Wilson v. Weigle (N. J. Ch.) 458.

Corporate stock deposited by a debtor as collateral held not transferred either at common law or under V. S. 3689, and the trustee in bankruptcy of the debtor is entitled thereto, under Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451].—French v. White (Vt.) 35.

*Property which vests in the trustee of a bankrupt under the federal bankruptcy law is not subject to attachment in a state court.—French v. White (Vt.) 35.

§ 2. Rights, remedies, and discharge of bankrupt.

Testimony that plaintiff filed his petition in bankruptcy before his arrest on civil process is insufficient to show that plaintiff was privileged from arrest because of the bankruptcy proceedings, where it is not shown when he filed the petition.—Gibson v. Holmes (Vt.) 11.

BANKS AND BANKING.

Admissions by bank officer, see "Evidence," § 2.
Banking corporations in general, see "Corporations," § 14.

Best and secondary evidence in prosecution for exhibiting false paper to bank examiner, see "Criminal Law," § 8.

Deposit of trust funds, see "Trusts," § 1.

Liabilities of sureties in general on bond of bank officer or employé, see "Principal and Surety," § 1.

Trust in bank stock, see "Trusts," § 5.

§ 1. Functions and dealings.

In an action by a bank on a note, held that it might be presumed that an extension of the time of payment of a note had been accepted by plaintiff and approved by the inspector of finance.—Lyndon Sav. Bank v. International Co. (Vt.) 50.

§ 2. National banks.

National bank may take stock in payment of a loan.—Westminster Nat. Bank v. New England Electrical Works (N. H.) 971.

§ 3. Savings banks.

V. S. 4099 held not violated by an agreement extending the time of payment of a note until the payee is dissatisfied with the security, or until payment was demanded or offered.—Lyndon Sav. Bank v. International Co. (Vt.) 50.

§ 4. Loan, trust, and investment companies.

It is within the power of the Legislature, in enacting a general law for the creation, government, and control of all trust companies, to make it a misdemeanor for the officers to do the things prohibited by the general statute, although the things made misdemeanors by the general law were not such under the act under which the trust company was incorporated.—State v. Twining (N. J. Sup.) 402.

The exhibiting of a false minute of an alleged meeting of the board of directors of a trust company to an examiner appointed by the banking department held a misdemeanor, under section 17 of the general trust company act of 1899 (P. L. 1899, p. 461).—State v. Twining (N. J. Sup.) 402.

Where one of two officers of a trust company produces a false minute to the examiner in the presence of the other, who by his silence acquiesces in such exhibition, although he knows of its falsity, both are guilty of a misdemeanor, under Pub. Laws 1899, p. 450.—State v. Twining (N. J. Sup.) 402.

BAR.

Of dower, see "Dower," § 2.

BASTARDS.

§ 1. Proceedings under bastardy laws.

*The original complaint and magistrate's record in bastardy proceedings may be put in evidence to show a compliance with the preliminary

* Point annotated. See syllabus.

statutory requirements.—*McLaughlin v. Joy* (Me.) 848.

BATTERY.

See "Assault and Battery."

BEES.

Trespass as remedy for injuries caused by, see "Trespass," § 1.

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

A claim for sick benefits due a deceased member of a police association *held* not waived by the intestate's neglect to present them.—*Dary v. Providence Police Ass'n* (R. I.) 513.

Providence Police Association By-Laws 1904, art. xi, § 2, *held* not to govern claims for benefits for sickness originating prior to its adoption.—*Dary v. Providence Police Ass'n* (R. I.) 513.

A beneficial association is not chargeable with interest on claims for sick benefits prior to the date demand was made therefor.—*Dary v. Providence Police Ass'n* (R. I.) 513.

BENEFITS.

Acceptance of, as waiver of right to appeal, see "Appeal and Error," § 2.

BEQUESTS.

See "Wills."

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 1.

In criminal prosecutions, see "Criminal Law," § 8.

BETTING.

See "Gaming."

BIAS.

Of witness, see "Witnesses," § 3.

BILLBOARDS.

Municipal regulations, see "Municipal Corporations," § 7.

BILL OF DISCOVERY.

See "Discovery," § 1.

BILL OF REVIEW.

See "Equity," § 5.

BILLS AND NOTES.

Action on lost check, see "Lost Instruments." Action on note by bank, see "Banks and Banking," § 1.

Extension of time of payment by savings bank, see "Banks and Banking," § 3.

Guaranty of, see "Guaranty," § 3.

New promise after bar by limitations, see "Limitation of Actions," § 3.

Of married woman, see "Husband and Wife," § 4.

Parol evidence, see "Evidence," § 6.

Payment by note, see "Payment," § 1.

Recoupment in action on note, see "Set-Off and Counterclaim," § 1.

Secured by mortgage, see "Mortgages," § 3.

§ 1. Construction and operation.

Finding of jury as to extension of time of payment of a note construed, and *held* not to make the instrument a demand note.—*Lyndon Sav. Bank v. International Co.* (Vt.) 50.

§ 2. Rights and liabilities on indorsement or transfer.

*Where one makes an accommodation note and is compelled to pay it, he may recover the amount, with interest, from the parties for whose accommodation he made it.—*Morgan v. Thompson* (N. J. Err. & App.) 410.

*An extension of the time of payment of a note is sufficient consideration for the indorsement of the note.—*Lyndon Sav. Bank v. International Co.* (Vt.) 50.

§ 3. Payment and discharge.

A foreclosure of a mortgage to secure certain notes *held* to operate as a payment only to the extent of the value of the land.—*McKean v. Cook* (N. H.) 729.

Where, in a suit on the last of a series of three notes, defendant pleaded payment by foreclosure of a mortgage, the burden was on him to prove that the value of the land equaled or exceeded the amount due on all the notes.—*McKean v. Cook* (N. H.) 729.

§ 4. Actions.

In an action on a note evidence considered, and *held* that the nature of defendant's liability on his indorsement, was a question for the jury.—*Lyndon Sav. Bank v. International Co.* (Vt.) 50.

In an action on a note evidence considered, and *held* sufficient to support a verdict finding that plaintiff by receiving dividends from the assets of one of the insolvent makers did not thereby release its right to collect the debt from the indorsers of the note.—*Lyndon Sav. Bank v. International Co.* (Vt.) 50.

BOARD.

Municipal boards, see "Municipal Corporations," § 3.

BONA FIDE PURCHASERS.

Of corporate stock, see "Corporations," § 2.

Of property of insolvent corporation, see "Corporations," § 6.

BONDS.

Corporate bonds, see "Corporations," §§ 2, 5.

Liquidated damages, see "Damages," § 2.

Municipal bonds, see "Municipal Corporations," § 10.

Of liquor dealers, see "Intoxicating Liquors," § 2.

Sureties on bonds, see "Principal and Surety."

Bonds in legal proceedings.

See "Appeal and Error," § 6; "Bail."

BOOKS OF ACCOUNT.

Production by insured, see "Insurance," § 6.

BOROUGHES.

See "Municipal Corporations."

BOUNDARIES.

Of counties, see "Counties," § 1.

Of school districts, see "Schools and School Districts," § 1.

* Point annotated. See syllabus.

§ 1. Description.

*A boundary line is a monument, and would govern the course in a deed unless the intent of the parties would be defeated thereby.—*Chapman v. Hamblet* (Me.) 215.

The word "prolongation," as used in a deed, means a continued or extended line, though consisting of several angles, where such meaning would be consistent with the other words of description.—*Chapman v. Hamblet* (Me.) 215.

BOYCOTT.

Restraining, see "Injunction," § 2.

Restraining anticipated boycott, see "Injunction," § 1.

BREACH.

Of condition, see "Insurance," §§ 3, 4.

Of contract, see "Sales," § 3.

Of covenant, see "Insurance," § 4.

Of warranty, see "Insurance," § 4; "Sales," §§ 5, 7.

BREACH OF MARRIAGE PROMISE.

In an action for breach of marriage promise, it was not error to permit plaintiff to testify that when defendant proposed marriage he stated that he was worth a certain amount of money.—*Massucco v. Tomassi* (Vt.) 57.

In an action for breach of marriage promise, *held* not error to permit plaintiff to testify that excepting a certain invalid ceremony no marriage had been performed.—*Massucco v. Tomassi* (Vt.) 57.

In an action for breach of marriage promise, the parties having been married by religious ceremony in Italy, which ceremony was invalid, certain testimony as to conversations between defendant and a priest *held* properly admitted.—*Massucco v. Tomassi* (Vt.) 57.

In an action for breach of marriage promise, certain testimony of plaintiff as to representations made by defendant *held* properly admitted.—*Massucco v. Tomassi* (Vt.) 57.

In an action for breach of marriage promise, an instruction that the jury could consider the fact that the parties had lived together, with the other elements in the case, *held* not erroneous.—*Massucco v. Tomassi* (Vt.) 57.

BREACH OF THE PEACE.

Examination of witnesses in action for, see "Witnesses," § 2.

BRIBERY.

Of witness as contempt, see "Contempt," § 1.

BRIDGES.

Harmless error in proceedings for condemnation of land for bridge purposes, see "Appeal and Error," § 14.

§ 1. Establishment, construction, and maintenance.

*Road Act March 23, 1859 (P. L. p. 633, § 21; Gen. St. p. 2844), and the supplement of Bridge Act March 15, 1860 (P. L. p. 285; Gen. St. p. 307), *held* not to apply to a case where, by reason of the smallness of a culvert under a bridge, water is backed up on private property.—*Maguth v. Board of Chosen Freeholders of Passaic County* (N. J. Err. & App.) 679.

An award of a contract for a public bridge by the board of freeholders, on a plan sub-

* Point annotated. See syllabus.

mitted by a bidder, and without competitive bidding, *held* not an abuse of discretion.—*Bloomfield v. Board of Chosen Freeholders of Middlesex* (N. J. Sup.) 116.

The power of a board of freeholders in letting contracts for bridge construction is limited only by the rule that their acts must be in good faith and in the exercise of an honest discretion.—*Bloomfield v. Board of Chosen Freeholders of Middlesex* (N. J. Sup.) 116.

BROKERS.

Accrual of right to commissions, see "Limitation of Actions," § 2.

§ 1. Compensation and lien.

*Where a real estate broker was duly licensed at the time negotiations for a sale of real estate were completed, it was no defense to his claim for commissions that he was not licensed at the time the sale was actually made.—*Coates v. Locust Point Co. of City of Baltimore* (Md.) 625.

*That a real estate broker was not licensed, as required by Code Pub. Loc. Laws, art. 4, §§ 658, 659, at the time he made a sale of real estate, *held* not to bar his right to recover commissions.—*Coates v. Locust Point Co. of City of Baltimore* (Md.) 625.

*A broker *held* entitled to recover commissions at least on the amount paid by the purchaser at the time the action was brought.—*Coates v. Locust Point Co. of City of Baltimore* (Md.) 625.

§ 2. Actions for compensation.

In an action for broker's commissions, evidence *held* to warrant a finding that the broker was the procuring cause of the sale.—*Coates v. Locust Point Co. of City of Baltimore* (Md.) 625.

BUILDING AND LOAN ASSOCIATIONS.

Where a building association incorporated under Act April 9, 1875 (Rev. St. 1875, p. 64), has issued shares of stock in different series, under the supplement of that act approved March 29, 1887 (P. L. 1887, p. 62), the holder of shares in a series declared to have matured ceases to be a member and becomes a creditor, entitled to sue for the declared value of the matured shares.—*Cunningham v. Mutual Loan & Building Ass'n of City of Passaic* (N. J. Err. & App.) 307.

BUILDINGS.

License to erect building, see "Licenses," § 1.

BURDEN OF PROOF.

In criminal prosecutions, see "Homicide," § 7.

BY-LAWS.

Of insurance company, see "Insurance," § 8.

CALENDARS.

Computation of time, see "Time."

CANCELLATION OF INSTRUMENTS.

See "Quietting Title"; "Reformation of Instruments."

Cancellation of certificate to practice dentistry, see "Physicians and Surgeons."

Cancellation of deed for invalidity, see "Deeds," § 3.

Depositions in suit for, see "Depositions."

Rescission of contract, see "Contracts," § 3; "Sales," § 2; "Vendor and Purchaser," § 3. Setting aside fraudulent conveyances. see "Fraudulent Conveyances," § 3.

§ 1. Proceedings and relief.

Defendants, in a suit to set aside deeds, *held* required by their answers to meet charges of fraud and undue influence with a full and direct statement of the facts within their knowledge.—*Horner v. Bell* (Md.) 736.

CANDIDATES.

For office, see "Elections," § 4.

CARNAL KNOWLEDGE.

See "Rape."

CARRIERS.

Loss by carrier of goods sold, see "Sales," § 4.

§ 1. Carriage of goods.

*Where an express company furnished plaintiff a book of blank receipts in which to enter their shipments, with statement limiting liability to \$50, unless true value was stated, the company was not liable for a greater amount, though the shipper did not read the terms and conditions.—*Gerry v. American Express Co.* (Me.) 498.

*A common carrier may limit his responsibility for freight by notice containing reasonable restrictions, if brought home to the owner of the goods and assented to.—*Gerry v. American Express Co.* (Me.) 498.

*Where, on delivering to a common carrier a drop curtain, the shipper received an instrument stating that, where the shipper omits to declare the value of the goods, he agrees that it does not exceed \$50, *held*, that the responsibility of the carrier for the real value, in case of loss, was not thereby restricted.—*Hayes v. Adams Express Co.* (N. J. Sup.) 284.

Carrier *held* to have no lien on freight for demurrage for delay in unloading.—*Nicolette Lumbar Co. v. People's Coal Co.* (Pa.) 1060.

§ 2. Carriage of passengers.

Where plaintiff knew that the C. Company acted as to points beyond its own road as agent only the relation of carrier and passenger did not exist between plaintiff and the C. Company after the train left its road.—*McDonald v. Central R. Co. of New Jersey* (N. J. Err. & App.) 405.

*Plaintiff *held* to have a contract right to have the train stop at C., to which he had bought a ticket, and his ejection at the last preceding station was wrongful.—*McDonald v. Central R. Co. of New Jersey* (N. J. Err. & App.) 405.

§ 3. — Personal injuries.

In an action against a railroad for wrongful death, evidence examined, and *held* sufficient to take the case to the jury.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

In an action against a railroad for wrongful death, a question as to the custom of defendant company in keeping a shifting engine at its station *held* inadmissible.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

In an action against a railroad for wrongful death, city ordinances respecting the speed of trains running through the city *held* admissible.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

In an action against a railroad for wrongful death, certain evidence as to the whereabouts of a witness *held* admissible in rebuttal.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

*A railroad company is liable for injuries to a passenger if, notwithstanding any previous negligence of the latter, the company could have prevented the accident by the use of ordinary and reasonable care.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

*Common carriers of passengers are responsible for any negligence resulting in injury to the passengers, and are required in the preparation, conduct, and management of their means of conveyance to exercise every degree of care, diligence, and skill which a reasonable man would use under such circumstances.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

*It is the duty of a railroad company to give timely and sufficient warning, by bell, whistle, or otherwise, of the approach of trains, and to run such trains at a rate of speed proper and reasonable under the circumstances.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

*The term "ordinary care," when applied to the management of railroad engines and cars in motion, imports all care which the peculiar circumstances of the place or occasion reasonably acquire.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

*The violation of a city ordinance respecting the rate of speed at which railroad trains may be run through the city is of itself an act of negligence, proof of which renders a railroad liable for any injury resulting therefrom.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

In an action against a street railway company for injuries to a passenger, an instruction stating that it was the duty of the conductor to exercise great care, without in any way limiting or defining that expression, was erroneous.—*Raymond v. Portland R. Co.* (Me.) 602.

In an action for injuries to a passenger on a street car, defendant's failure to afford him a reasonable opportunity to get into a place of safety before starting the car *held* not the proximate cause of the injury.—*Cumberland & W. Electric Ry. Co. v. Thompson* (Md.) 243.

The breach of duty by a carrier to its passengers constitutes a cause of action for an injury resulting therefrom.—*Philadelphia, B. & W. R. Co. v. Allen* (Md.) 245.

A declaration for injuries to a passenger *held* good at common law and under Code Pub. Gen. Laws 1904, art. 75, § 24, subsec. 36.—*Philadelphia, B. & W. R. Co. v. Allen* (Md.) 245.

*A carrier owes to its passengers the exercise of the utmost care which human foresight can exercise.—*Philadelphia, B. & W. R. Co. v. Allen* (Md.) 245.

*While carriers of passengers are not insurers of absolute safety, yet they are bound to exercise the highest degree of care which is consistent with the nature of their undertaking.—*United Rys. & Electric Co. of Baltimore v. Weir* (Md.) 588.

In an action against a street railroad for injuries to a passenger, evidence *held* sufficient to show negligence on the part of the railroad in suddenly starting the car while plaintiff was alighting.—*United Rys. & Electric Co. of Baltimore v. Weir* (Md.) 588.

* Point annotated. See syllabus.

*Where a railroad stops its cars to allow a passenger to alight, it is bound to stop a sufficient length of time to enable him to alight in safety.—*United Rys. & Electric Co. of Baltimore v. Weir* (Md.) 588.

In an action for injuries to a passenger, the question of defendant's negligence and plaintiff's contributory negligence *held* for the jury.—*Philadelphia, B. & W. R. Co. v. McGugan* (Md.) 752.

*An injury to a passenger *held* not such as to have warranted an inference of negligence.—*Graf v. West Jersey & S. R. Co.* (N. J. Sup.) 833.

*Where it is reasonably inferable from evidence that a passenger was injured through some act or omission of the carrier's servant which might have been prevented by a high degree of care, the question of the carrier's negligence is for the jury.—*Gottlob v. North Jersey St. Ry. Co.* (N. J. Sup.) 1003.

*Presumption of negligence in failure of brakes to work on street car, whereby a passenger was injured, *held* not rebutted by evidence.—*Dougherty v. Pittsburgh Rys. Co.* (Pa.) 926.

*In action against carrier for death of passenger when alighting from train at a place other than a regular station, evidence of custom of railroad to stop at such place *held* inadmissible in absence of evidence that deceased knew of the custom.—*Margo v. Pennsylvania R. Co.* (Pa.) 1079.

In an action to recover for death of plaintiff's husband while alighting from the train of defendant, evidence *held* insufficient to justify verdict for plaintiff.—*Margo v. Pennsylvania R. Co.* (Pa.) 1079.

*A street railway company, accepting a passenger obliged to stand on the running board of the car because he cannot be accommodated inside the car, *held* required to exercise care to prevent injury to him.—*Verrone v. Rhode Island Suburban Ry. Co.* (R. I.) 512.

*In an action for the death of a street car passenger in consequence of being thrown from the car while standing on the running board, the question of the company's negligence in operating the car *held* for the jury.—*Verrone v. Rhode Island Suburban Ry. Co.* (R. I.) 512.

§ 4. — Contributory negligence of person injured.

One approaching a railroad crossing is bound to know that it is a place of danger.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

*When the arrangement of a railroad station is such that a passenger has to cross the track either before entering or after leaving the cars, he has a right to assume that the track may be crossed safely provided he crosses the same at a proper and reasonable time.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

*Persons crossing railroad tracks are bound to reasonably use all of their senses for the prevention of accident, and also to exercise all such reasonable caution as ordinarily prudent and careful person would exercise in like circumstances.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

*A passenger at a railroad station is presumed to have exercised reasonable care and caution to prevent injury from an approaching train.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

*A passenger *held* not guilty of contributory negligence per se in attempting to alight from a slowly moving street car.—*United Rys. & Electric Co. of Baltimore v. Weir* (Md.) 588.

In an action for injuries to a passenger, the question of defendant's negligence and plaintiff's contributory negligence *held* for the jury.—*Philadelphia B. & W. R. Co. v. McGugan* (Md.) 752.

*Passenger injured on running board of street car *held* guilty of contributory negligence.—*Burns v. Johnstown Passenger Ry. Co.* (Pa.) 564.

*Where a passenger stands on the running board of a summer car when there is room inside, he assumes the risk.—*Burns v. Johnstown Passenger Ry. Co.* (Pa.) 564.

*A passenger on a street car, who stands on the running board of the car, assumes only the risk of the ordinary motion of the car.—*Verrone v. Rhode Island Suburban Ry. Co.* (R. I.) 512.

*It is not negligence per se for a passenger on a street car to stand on the running board and hold the post or handle affixed thereto, where the car is so filled that there is no room inside.—*Verrone v. Rhode Island Suburban Ry. Co.* (R. I.) 512.

CASE CERTIFIED OR RESERVED.

For determination of questions of law, see "Appeal and Error," § 3.

CASE ON APPEAL.

Necessity for purpose of review, see "Appeal and Error," § 7.

CATTLE.

See "Animals."

CAUCUS.

See "Elections," § 4.

CAUSA MORTIS.

See "Gifts," § 2.

CAUSE OF ACTION.

See "Action."

CERTIFICATE.

Certified copies, see "Evidence," § 5.
Of case or question of law for determination, see "Appeal and Error," § 3.
Of corporate stock, see "Corporations," § 2.
Of incorporation, see "Corporations," § 1.
Of insurance, see "Insurance," § 8.

CERTIORARI.

Review in criminal prosecution, see "Criminal Law," § 15.
Review of assessments for public improvements, see "Municipal Corporations," § 6.
Review of question as to validity of municipal ordinances, see "Municipal Corporations," § 2.

§ 1. Nature and grounds.

*Certiorari *held* not to lie to review action for a school committee in changing text-books.—*Greenough v. School Committee of Pawtucket* (R. I.) 978.

* Point annotated. See syllabus.

§ 2. Proceedings and determination.

Where, on return of certiorari to set aside municipal action, parties not before the court have acquired rights if such action should be held valid, the court should stay the proceedings until the parties are brought in or dismiss the certiorari.—*Livermore v. City of Millville* (N. J. Err. & App.) 408.

Where the record of a cause removed from the common pleas to the Supreme Court by certiorari has been remitted to the common pleas, such court has authority to proceed therein, though the formal order to remit has not been filed with its clerk.—*Stokes v. Hardy* (N. J. Sup.) 1002.

CHANCERY.

See "Equity."

CHARACTER.

Of accused in criminal prosecutions, see "Criminal Law," § 6.

Of witness, see "Witnesses," § 3.

CHARGE.

By carrier, see "Carriers," § 1.

Of legacies on property by will, see "Wills," § 14.

On trust, see "Trusts," § 2.

To jury in civil actions, see "Trial," § 5.

To jury in criminal prosecutions, see "Criminal Law," § 13.

CHARITIES.

Charitable bequests, see "Wills," § 1.

Inheritance tax, see "Taxation," § 5.

§ 1. Creation, existence, and validity.

*A gift of funds for the erection of a building to be used for a free public library and for industrial education *held* a valid charitable use.—*Board of Trustees of School for Industrial Education v. City of Hoboken* (N. J. Ch.) 1.

*A bequest to a trustee for the purpose of making such distribution among religious, benevolent, or charitable objects as he may select is void as vague and indefinite.—*Hegeman's Ex'rs v. Roome* (N. J. Ch.) 392.

*Under the express provisions of Gen. Laws 1896, c. 36, § 2, towns may take, hold, and manage real and personal estate in trust for any charitable other than religious uses.—*Stearns v. Newport Hospital* (R. I.) 132.

*Scope of an act establishing a public charity should not be constrained by construction of its words so as to forbid the action of the trustee corporation in ways germane to those specified in its charter.—*Stearns v. Newport Hospital* (R. I.) 132.

Hospital corporation organized under Laws 1873, p. 222, *held* authorized to accept and administer a certain trust provided by a will without the aid of amending the act of 1893 (Laws 1893, p. 554).—*Stearns v. Newport Hospital* (R. I.) 132.

§ 2. Construction, administration, and enforcement.

A bill to regulate the use of a public building, erected in part with the proceeds of a charity, *held* within the jurisdiction of equity as a bill to establish and enforce a charitable use.—*Board of Trustees of School for Industrial Education v. City of Hoboken* (N. J. Ch.) 1.

A building having been erected in part with the proceeds of a charity for the use of an industrial school and city library, the "assembly room" *held* for the joint use of both, while the "class room" in the basement was for the exclusive use of the school.—*Board of Trustees of School for Industrial Education v. City of Hoboken* (N. J. Ch.) 1.

Provisions of trust *held* to leave it to the judgment of the trustee to determine in the first instance whether the corpus of the estate might be used to meet current expenses.—*Stearns v. Newport Hospital* (R. I.) 132.

Use of capital of hospital trust fund in the erection of buildings *held* in pursuance of the conditions of the trust.—*Stearns v. Newport Hospital* (R. I.) 132.

The capacity given a municipality by Gen. Laws 1896, c. 36, § 2, to become trustee of a charitable trust does not give such municipality a supervisory jurisdiction over funds intrusted to other trustees.—*Stearns v. Newport Hospital* (R. I.) 132.

Trust imposed on hospital corporation *held* not to require the corporation to maintain a ward for contagious diseases (Gen. Laws 1896, c. 40, § 13, and chapter 94, §§ 15, 16 and 17).—*Stearns v. Newport Hospital* (R. I.) 132.

CHARTER.

Municipal charter, see "Municipal Corporations," § 8.

CHATTEL MORTGAGES.**§ 1. Requisites and validity.**

Under Pub. St. 1901, c. 140, § 6, registration of unverified chattel mortgage *held* not constructive notice of existence of mortgage, and that an attachment of the property while in possession of mortgagors will prevail against mortgagors and mortgagee.—*Tisdale v. John H. Pray Sons Co.* (N. H.) 168.

§ 2. Construction and operation.

*Where a mortgagee permits the mortgagor of chattels to retain them, authority is conferred on the mortgagor to have necessary repairs made, and the lien of an artificer for such repairs will have priority over the lien of the mortgage, though recorded.—*Ruppert v. Zang* (N. J. Sup.) 998.

§ 3. Rights and remedies of creditors.

Under the statute requiring immediate possession as a prerequisite to the validation of an unrecorded chattel mortgage, a chattel mortgage made July 13, 1904, and unrecorded, *held* void where possession of the mortgaged property was not taken thereunder until December 6, 1904.—*Pryor v. Gray* (N. J. Ch.) 439.

Under the chattel mortgage act, an unrecorded mortgage *held* void as to creditors of a purchaser of the property subject to the mortgage.—*Fidelity Trust Co. v. Staten Island Clay Co.* (N. J. Ch.) 441.

CHEAT.

See "False Pretenses"; "Fraud."

CHILD.

See "Adoption"; "Bastards"; "Parent and Child."

Care required as to, see "Negligence," § 1; "Street Railroads," § 2.

Class legislation relating to dependent and delinquent children, see "Constitutional Law," § 8.

*Point annotated. See syllabus.

Competency as witnesses, see "Witnesses," § 1.
 Statute relating to control of dependent and incorrigible children as denying trial by jury, see "Jury," § 1.
 Subject and title of act relating to dependent and incorrigible children, see "Statutes," § 3.

CHOSE IN ACTION.

Assignment, see "Assignments."

CHURCH.

See "Religious Societies."

CITATION.

See "Process."

CITIES.

See "Municipal Corporations."

CITIZENS.

Equal protection of laws, see "Constitutional Law," § 9.

CIVIL RIGHTS.

See "Constitutional Law," §§ 4, 8, 9.

CLAIM AND DELIVERY.

See "Replevin."

CLAIMS.

Against county, see "Counties," § 4.
 Against estate of decedent, see "Executors and Administrators," § 4.
 Against insolvent insurance company, see "Insurance," § 1.

CLASS LEGISLATION.

See "Constitutional Law," § 8.

CLOUD ON TITLE.

See "Quieting Title."

COAL.

See "Mines and Minerals," § 1.

CODICIL.

See "Wills," §§ 5, 8.

COLLATERAL AGREEMENT.

Parol evidence, see "Evidence," § 6.

COLLATERAL ATTACK.

On order for construction of highway, see "Highways," § 2.

COLLATERAL INHERITANCE TAXES.

See "Taxation," § 5.

COLLATERAL UNDERTAKING.

See "Frauds, Statute of," § 1; "Guaranty."

COLLECTION.

Of estate of decedent, see "Executors and Administrators," § 3.

COLLEGES AND UNIVERSITIES.

Condemnation of land for campus, see "Eminent Domain," § 1.

COLLISION.

Injuries to servant, see "Master and Servant," § 3.

COMMERCE.

Carriage of goods and passengers, see "Carriers."

COMMISSION.

Inquisition of lunacy, see "Insane Persons," § 1.
 To take testimony, see "Depositions."

COMMISSIONS.

Of broker, see "Brokers," § 1.
 Of trustee, see "Trusts," § 6.
 On sales of stock by corporate officer, see "Corporations," § 4.

COMMITTEE.

To make partition, see "Partition," § 2.

COMMON CARRIERS.

See "Carriers."

COMMON LAW.

See "Marriage."
 Actions for negligence under common law, see "Negligence," § 2.

COMMON SCHOOLS.

See "Schools and School Districts," § 1.

COMPENSATION.

For property taken for public use, see "Eminent Domain," § 2.
 Of broker, see "Brokers," § 1.
 Of corporate officer, see "Corporations," § 4.
 Of trustee, see "Trusts," § 6.
 On revocation of license under which building was erected, see "Licenses," § 1.
 Review of discretion of court in allowance, see "Appeal and Error," § 12.
 Water rates, see "Waters and Water Courses," § 3.

COMPETENCY.

Of evidence in criminal prosecutions, see "Criminal Law," § 7.
 Of experts as witnesses, see "Evidence," § 7.
 Of witnesses in general, see "Witnesses," § 1.

COMPETITION.

Unfair competition, see "Trade-Marks and Trade-Names," § 3.

COMPLAINT.

See "Pleading."

COMPROMISE AND SETTLEMENT.

See "Accord and Satisfaction"; "Payment."

* Point annotated. See syllabus.

COMPUTATION.

Of interest, see "Interest," § 1.
Of period of limitation, see "Limitation of Actions," § 2.
Of time, see "Time."

CONCLUSION.

Of witness, see "Evidence," § 7.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONAL SALES.

See "Sales," § 8.

CONDITIONS.

In deeds, see "Deeds," § 2.
In insurance policies, see "Insurance," §§ 3-5.
In lease, see "Landlord and Tenant," § 2.
In mortgages, see "Mortgages," § 4.
In wills, see "Wills," § 11.
Precedent to action, see "Action," § 1.
Precedent to condemnation of property, see "Eminent Domain," § 3.

CONFESSION.

Of judgment, see "Judgment," § 1.

CONFIRMATION.

Of proceedings for assessment of damages from public improvements, see "Municipal Corporations," §§ 5, 6.
Of report of viewers in proceedings for assessment of cost of public improvements, see "Municipal Corporations," § 6.

CONFLICT OF LAWS.

Inheritance taxes, see "Taxation," § 5.

CONSIDERATION.

Of contract, see "Contracts," § 1.
Of contract for sale of realty, see "Vendor and Purchaser," § 1.
Of fraudulent conveyance, see "Fraudulent Conveyances," § 1.
Of guaranty, see "Guaranty," § 1.
Of indorsement of bill or note, see "Bills and Notes," § 2.

CONSOLIDATION.

Of actions, see "Action," § 3.
Of corporations, see "Corporations," § 7.

CONSTITUTIONAL LAW.

Provisions relating to particular subjects.

See "Courts," § 1; "Elections," § 4; "Eminent Domain," § 1; "Gas"; "Indictment and Information," § 2; "Jury," § 1; "Municipal Corporations," §§ 5, 6.
Collateral inheritance tax, see "Taxation," § 5.
Enactment and validity of statutes, see "Statutes," § 1.
Special or local laws, see "Statutes," § 2.
Subjects and titles of statutes, see "Statutes," § 3.
Tax officers, see "Taxation," § 3.

§ 1. Construction, operation, and enforcement of constitutional provisions.

The General Assembly has power to enact a primary election law unless deprived thereof by the Constitution.—*Kenneweg v. Allegany County Com'rs* (Md.) 249.

One convicted of selling intoxicating liquor in violation of the license act of 1902 held not entitled to assail the act on the ground of the discriminations made with respect to cider and wines.—*State v. Barr* (Vt.) 43.

*One prosecuted for violation of Acts 1902, p. 92, No. 90, regulating the sale of liquor, held not entitled to question the constitutionality of the search and seizure clauses of the statute.—*State v. Paige* (Vt.) 1017.

§ 2. Distribution of governmental powers and functions.

Act July 6, 1905 (Pub. Acts 1905, p. 413, c. 217), fixing a recovery in pending actions against administrators for failure to file an inventory as provided by law, held not unconstitutional as an encroachment on the judiciary.—*Atwood v. Buckingham* (Conn.) 616.

Under Acts 1904, p. 870, c. 508, a primary election law held not void as contrary to public policy.—*Kenneweg v. Allegany County Com'rs* (Md.) 249.

*Const. art. 5, § 21, exempting judges from the imposition of nonjudicial duties, applies only to judges of the Supreme Court.—*Commonwealth v. Collier* (Pa.) 587.

§ 3. Police power in general.

*The police power reserved by Const. c. 1, art. 5, held a governmental function.—*Carty's Adm'r v. Village of Winooski* (Vt.) 45.

§ 4. Personal, civil, and political rights.

The mechanic's lien law is not unconstitutional as interfering with his right to acquire, possess, and protect property.—*Gardner & Meeks Co. v. New York, C. & H. R. R. Co.* (N. J.) 62.

§ 5. Vested rights.

Act July 6, 1905 (Pub. Acts 1905, p. 413, c. 217), reducing the penalty in pending actions against administrators under Gen. St. 1902, § 324, held not unconstitutional as impairing vested rights.—*Atwood v. Buckingham* (Conn.) 616.

§ 6. Obligation of contracts.

Act July 6, 1905 (Pub. Acts 1905, p. 413, c. 217), providing that the amount recoverable in pending actions against administrators under Gen. St. 1902, § 324, shall not exceed \$1 and costs, held not unconstitutional as impairing the obligation of contracts.—*Atwood v. Buckingham* (Conn.) 616.

*A license to sell intoxicating liquors does not confer a contract or vested right, but a mere permission which may be revoked at any time.—*State v. Corron* (N. H.) 1044.

§ 7. Retrospective and ex post facto laws.

Act July 6, 1905 (Pub. Acts 1905, p. 413, c. 217), regulating the amount recoverable in pending actions against administrators to enforce a penalty under Gen. St. 1902, § 324, held not unconstitutional because retroactive.—*Atwood v. Buckingham* (Conn.) 616.

Acts 1902, p. 44, No. 35, providing that on the death of a judge of the Supreme Court any judge of that court may allow or amend exceptions in the case tried by the deceased judge, held to apply to causes pending at the date the act became effective.—*Johnson v. Smith* (Vt.) 9.

* Point annotated. See syllabus.

§ 8. Privileges or immunities, and class legislation.

Act April 23, 1903 (P. L. 274), providing for the control and treatment of dependent and delinquent children, is not unconstitutional as class legislation.—*Commonwealth v. Fisher* (Pa.) 198.

§ 9. Equal protection of laws.

Act July 6, 1905 (Pub. Acts 1905, p. 413, c. 217), limiting the recovery in pending suits against administrators under Gen. St. 1902, § 324, *held* not unconstitutional as denying to plaintiffs in such suits the equal protection of the laws.—*Atwood v. Buckingham* (Conn.) 616.

The General Assembly has the power to pass a law regulating the primaries of the numerically stronger parties only.—*Kenneweg v. Allegany County Com'rs* (Md.) 249.

Acts 1904, p. 870, c. 508, relating to holding primary elections, *held* not, by reason of section 105, in conflict with Const. Amend. 14.—*Kenneweg v. Allegany County Com'rs* (Md.) 249.

The provisions of federal Constitution, prohibiting a state from denying to any person within its jurisdiction the equal protection of the law, do not require a trial by jury in suits at common law in a state court.—*Gunn v. Union R. Co.* (R. I.) 118.

Acts 1904, p. 167, No. 128, relative to hunting by nonresidents, and Acts of 1896, p. 74, No. 94, as amended by Acts 1898, p. 84, No. 108, relative to hunting in general, *held* not to infringe the equality clause of Const. U. S. Amend. 14.—*State v. Niles* (Vt.) 795.

§ 10. Due process of law.

The mechanics' lien law (P. L. 1898, p. 538) in so far as it allows a lien to the subcontractors is not unconstitutional as depriving the owner of his property without due process of law.—*Gardner & Meeks Co. v. New York Cent. & H. R. R. Co.* (N. J. Err. & App.) 416; *Snyder v. Same* (N. J. Err. & App.) 418.

*Cr. Proc. Act (Laws 1898, p. 878) § 34, permitting amendments of an indictment when the name of any person injured by the commission of an offense is misstated, *held* not violative of the constitutional provision that no person shall be held to answer for any criminal offense except on the presentment or indictment of a grand jury.—*State v. Tolla* (N. J. Err. & App.) 675.

*V. S. 1867, as amended by Acts 1898, p. 34, No. 46, and Acts 1904, No. 64, *held* not unconstitutional as depriving persons charged of noncapital felonies of liberty, except by the "laws of the land," in authorizing prosecution by information instead of by indictment.—*State v. Stimpson* (Vt.) 14; *Same v. Lee*, *Id.*

*The provisions of federal Constitution, prohibiting a state from depriving any person of life, liberty, or property without due process of law, do not require a trial by jury in suits at common law in a state court.—*Gunn v. Union R. Co.* (R. I.) 118.

CONSTRUCTIVE TRUSTS.

See "Trusts," § 1.

CONTEMPT.

Violation of injunction, see "Injunction," § 5.

§ 1. Power to punish and proceedings therefor.

In contempt proceedings for attempting to bribe a witness evidence considered, and *held* sufficient to show guilt.—*White v. White* (N. J. Ch.) 430.

CONTEST.

Of election, see "Elections," § 5.
Of will, see "Wills," § 4.

CONTINGENT REMAINDERS.

Creation, see "Wills," § 10.

CONTINUANCE.

An affidavit for a continuance for an absent witness of issues from the register of wills at the first term *held* not fatally defective.—*Boyd v. Cloud* (Del. Super.) 294.

Questions of continuance, as a rule, rest in the discretion of the trial court.—*Massucco v. Tomassi* (Vt.) 57.

CONTRACTS.

Admissions in action on, see "Evidence," § 2.
Admissions in pleading in action on, see "Pleading," § 2.

Agreements within statute of frauds, see "Frauds, Statute of."

Assignment, see "Assignments."

Cancellation, see "Cancellation of Instruments."

Impairing obligation, see "Constitutional Law," § 6.

Liquidated damages or penalties, see "Damages," § 2.

Nature of action on contract, see "Action," § 2.

Operation and effect of customs or usages, see "Customs and Usages."

Operation and effect of gaming laws, see "Gaming," § 1.

Parol or extrinsic evidence, see "Evidence," § 6.

Plea in action on, see "Pleading," § 2.

Profert in action on, see "Pleading," § 6.

Reformation, see "Reformation of Instruments."

Restraining performance or breach, see "Injunction," § 2.

Specific performance, see "Specific Performance."

Subrogation to rights or remedies of creditors, see "Subrogation."

Contracts of particular classes of parties.

See "Carriers," § 1; "Corporations," § 5; "Counties"; "Husband and Wife," § 3; "Insane Persons," § 2; "Landlord and Tenant"; "Master and Servant"; "Municipal Corporations," §§ 4-6; "Principal and Agent," § 1; "Railroads," §§ 1, 3; "Warehousemen."

Promoters of corporation, see "Corporations," § 1.

Teachers, see "Schools and School Districts," § 1.

Contracts relating to particular subjects.

See "Interest"; "Intoxicating Liquors," § 7; "Mines and Minerals," § 1.

Bridge building, see "Bridges," § 1.

Gas supply, see "Gas."

Ground for mechanics' liens, see "Mechanics' Liens," § 1.

Limitation of liability of carrier, see "Carriers," § 1.

Support of children, see "Parent and Child."

Particular classes of express contracts.

See "Bills and Notes"; "Covenants"; "Guaranty"; "Insurance"; "Partnership"; "Sales."

Agency, see "Principal and Agent."

Employment, see "Master and Servant."

Employment of teachers, see "Schools and School Districts," § 1.

Leases, see "Landlord and Tenant."

*Point annotated. See syllabus.

Marriage settlements, see "Husband and Wife," § 2.
 Mutual benefit insurance, see "Insurance," § 8.
 Sales of realty, see "Vendor and Purchaser."
 Separation agreements, see "Husband and Wife," § 6.
 Suretyship, see "Principal and Surety."

Particular classes of implied contracts.

See "Account Stated"; "Money Received"; "Work and Labor."

Particular modes of discharging contracts.

See "Accord and Satisfaction"; "Payment."

§ 1. Requisites and validity.

The obligation created by an instrument under seal, executed by indorsers on a note, *held* to become operative without acceptance under seal on the performance of the act required in the instrument.—*Sharp v. Bates* (Md.) 747.

Right to recover *held* founded on an instrument under seal, and the question whether the facts set forth in the declaration formed a contract by operation of law was immaterial.—*Sharp v. Bates* (Md.) 747.

A memorandum in writing, under seal, executed by a debtor, whereby a debt is acknowledged to be owing, obligates the debtor to pay it.—*Sharp v. Bates* (Md.) 747.

Where defendants contracted to sell coal under a belief that the purchaser was a corporation, and on ascertaining that he was an individual declined to ship the coal, there was no meeting of minds nor a valid contract of sale.—*Fifer v. Clearfield & Cambria Coal & Coke Co.* (Md.) 1122.

A change of residence at another's request is a valid consideration for a promise to pay money.—*Burgesser v. Wendel* (N. J. Sup.) 994.

*Where plaintiffs by letter offered to install certain grates and blowers under defendant's boilers, and defendant wired acceptance, there was an express contract excluding any contract by implication.—*Beggs v. James Hanley Brewing Co.* (R. I.) 373.

§ 2. Construction and operation.

A contract with reference to subsequent inventions in copper wire made by defendant *held* not complied with by delivering to plaintiff the material comprising the invention ready to be drawn into wire, but that defendant was bound to disclose to plaintiff the formula by which the material was made.—*Driver-Harris Wire Co. v. Driver* (N. J. Ch.) 461.

§ 3. Rescission and abandonment.

A written contract may be waived, and the waiver may be established by express direction or by acts manifesting an intent not to claim the supposed advantage.—*Hilton v. Hanson* (Me.) 797.

§ Actions for breach.

An action on an instrument under seal, executed by certain indorsers on a note, *held* not prematurely brought.—*Sharp v. Bates* (Md.) 747.

Plaintiff *held* entitled to recover on judgment note, notwithstanding breach of agreement by which note was given. Defendant's remedy was by set-off.—*Cover v. Hoffman* (Pa.) 836.

CONTRADICTION.

Of witness, see "Witnesses," § 3.

CONTRIBUTORY NEGLIGENCE.

See "Negligence," §§ 3, 4.

Of passenger, see "Carriers," § 4.

Of person in charge of animals injured by operation of railroad, see "Railroads," § 8.

* Point annotated. See syllabus.

Of person injured by collision on highway, see "Highways," § 4.
 Of person injured by defective street, see "Municipal Corporations," § 9.
 Of person injured by operation of railroad, see "Railroads," § 6.
 Of person injured by operation of street cars, see "Street Railroads," § 2.

CONVERSION.

Wrongful conversion of personal property, see "Trove and Conversion."

Will construed, and *held* to operate as a conversion of the real estate into personalty.—*Stake v. Mobley* (Md.) 963.

Where a will operated as a conversion of testator's realty into personalty as of the date of his death, a subsequent mortgage of a devisee's interest in certain of the land created no lien thereon.—*Stake v. Mobley* (Md.) 963.

CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts."

Conveyances by or to particular classes of parties.

Insolvent corporation, see "Corporations," § 6.

Conveyances of particular species of property.

See "Easements," § 1; "Mines and Minerals," § 1.

Particular classes of conveyances.

See "Assignments"; "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages."

CONVICTS.

Habeas corpus to secure release, see "Habeas Corpus."

Reincarceration after escape, see "Criminal Law," § 16.

CORPORATIONS.

Affidavit of defense in action by foreign corporation, see "Pleading," § 1.

Authority of national bank to take corporate stock in payment of loan, see "Banks and Banking," § 2.

Mandamus, see "Mandamus," § 1.

Subject and title of act relating to, see "Statutes," § 3.

Subrogation of officer making advances, see "Subrogation."

Taxation of corporations and corporate property, see "Taxation."

Particular classes of corporations.

See "Beneficial Associations"; "Building and Loan Associations"; "Exchanges"; "Municipal Corporations"; "Religious Societies"; "Street Railroads."

Agricultural societies, see "Agriculture."

Gas companies, see "Gas."

Insurance companies, see "Insurance."

Telegraph and telephone companies, see "Telegraphs and Telephones."

Trust companies, see "Banks and Banking," § 4.

Water companies, see "Waters and Water Courses," § 3.

§ 1. Incorporation and organization.

*Where a corporation adopts a contract made by its promoters, it must take it with its

obligations and burdens.—*Robbins v. Bangor Ry. & Electric Co. (Me.)* 186.

A company *held* a fully organized active corporation de facto, needing only the filing of its certificate with the Secretary of State to be a corporation de jure.—*McCarter v. Ketcham (N. J. Err. & App.)* 698.

*That an amended certificate of incorporation was not properly acknowledged *held* unimportant in proceedings taken by the corporation to condemn land.—*Philadelphia & C. Ferry Co. v. Intercity Link R. Co. (N. J. Sup.)* 184.

§ 1½. Corporate existence and franchise.

Where a bank attempted to extend its corporate existence, under Gen. St. p. 972, § 302, and was recognized as lawfully existing, a borrower was estopped to defend an action by the bank's receiver to enforce a mortgage on the ground that the bank had no corporate existence.—*Campbell v. Perth Amboy Shipbuilding & Engineering Co. (N. J. Ch.)* 319.

§ 2. Capital, stock, and dividends.

Title of stock passes as between seller and buyer on the consummation of the contract of sale.—*Westminster Nat. Bank v. New England Electrical Works (N. H.)* 971.

Transferee of corporate stock *held* not guilty of laches as a matter of law by reason of delay in instituting suit to compel corporation to transfer stock to him on its books.—*Westminster Nat. Bank v. New England Electrical Works (N. H.)* 971.

Transferee of corporate stock *held* entitled to compel corporation, by suit for specific performance, to transfer the stock to him on the company's books.—*Westminster Nat. Bank v. New England Electrical Works (N. H.)* 971.

The right of transferee of corporate stock to a transfer on the books of the company may be enforced in the courts of a state other than that creating the corporation.—*Westminster Nat. Bank v. New England Electrical Works (N. H.)* 971.

Transferee of stock *held* entitled to have the same transferred to him on the books of the corporation (Civ. Code S. C. 1902, § 1894).—*Westminster Nat. Bank v. New England Electrical Works (N. H.)* 971.

Corporation *held* estopped to deny title of bona fide transferee of stock on the ground that the stockholder transferring the same had not paid therefor.—*Westminster Nat. Bank v. New England Electrical Works (N. H.)* 971.

*Issuance by corporation of bonds convertible into new stock *held* illegal.—*Wall v. Utah Copper Co. (N. J. Ch.)* 533.

A stockholder *held* entitled to sue a former director under the corporation act (P. L. 1896, p. 286), imposing a liability for voting for the payment of a dividend except from surplus or net profits.—*Siegmán v. Kissel (N. J. Ch.)* 941.

Owner of stock transferred with agreement to retransfer on payment of money *held* entitled to redeem on proper tender.—*Eichbaum v. Sample (Pa.)* 837.

One taking stock certificate without signature of transfer agent *held* to take it at his own peril.—*Dollar Sav. Fund & Trust Co. v. Pittsburg Plate Glass Co. (Pa.)* 916.

Holder of stock certificate on which signature of transfer agent was forged *held* not entitled to claim the validity of the certificate as against the corporation.—*Dollar Sav. Fund & Trust Co. v. Pittsburg Plate Glass Co. (Pa.)* 916.

§ 3. Members and stockholders.

A stockholder in a corporation entitled to have a certificate issued to him, but who had

never exercised that right, has a standing to ask the court to prevent such corporation, or one with which it had been consolidated, from voting on shares in such corporation formerly owned by the corporation with which it consolidated.—*O'Connor v. International Silver Co. (N. J. Err. & App.)* 408.

Where corporation A. has acquired all the stock of corporation B., while B. owned shares of the capital stock of corporation A., the officers and directors of neither corporation have the right at a stockholders' meeting of corporation A. to elect directors to vote on the shares of the stock of corporation A. formerly held by corporation B.—*O'Connor v. International Silver Co. (N. J. Err. & App.)* 408.

In a suit to enforce the statutory liability of stockholders, bill *held* demurrable for want of equity.—*Miller v. Willett (N. J. Ch.)* 178.

§ 4. Officers and agents.

In an action by the vice president of a corporation for commissions for selling the stock of another company, *held* error under the evidence to direct a verdict for defendant.—*Waters v. American Finance Co. (Md.)* 357.

The court, entering a decree in favor of the receiver of a corporation suing for assets to pay debts, *held* not entitled to establish the order of liability between defendants pursuant to an agreement between them.—*Mills v. Hendershot (N. J. Ch.)* 542.

In a suit by the receiver of a corporation to recover assets to pay debts, a contract creating a liability in favor of one officer against other officers *held* not enforceable by the former officer.—*Mills v. Hendershot (N. J. Ch.)* 542.

The right to recover dividends paid to a stockholder from the capital of the corporation *held* barred in six years.—*Mills v. Hendershot (N. J. Ch.)* 542.

Equity will not interpose the bar of limitations to prevent a receiver of a corporation from recovering from the directors and officers of the corporation dividends paid to them out of the capital of the corporation.—*Mills v. Hendershot (N. J. Ch.)* 542.

Corporation Act (Laws 1896, p. 286, c. 185) § 30, *held* not to affect the liability of officers of a corporation receiving as stockholders dividends paid from the capital.—*Mills v. Hendershot (N. J. Ch.)* 542.

Officers of a corporation, participating in a fraudulent transfer of corporate assets, *held* liable for the diversion of assets so far as necessary to pay debts.—*Mills v. Hendershot (N. J. Ch.)* 542.

Salary paid to an officer of a corporation *held* not recoverable by other officers under an agreement between them.—*Mills v. Hendershot (N. J. Ch.)* 542.

*Trust company *held* not liable to brewing company for misappropriation of funds by its treasurer, who is also treasurer of the brewing company.—*Elk Brewing Co. v. Neubert (Pa.)* 782.

*Trust company *held* not liable for misappropriation of funds by president of brewing company, who is also director of the trust company with which the funds were deposited.—*Elk Brewing Co. v. Neubert (Pa.)* 782.

§ 5. Corporate powers and liabilities.

Evidence *held* insufficient to show authority of one who is secretary, treasurer, and general manager of a corporation, to contract with its vice president to pay him one-half the commissions accruing from sales of stock of another company by the corporation, whether

* Point annotated. See syllabus.

made by such vice president or by the secretary and treasurer.—*Waters v. American Finance Co.* (Md.) 357.

There is no presumption that the secretary, treasurer, and general manager of a corporation had authority to make a contract with its vice president to have one-half the commissions accruing to the corporation from the sales of stock of another company, whether made by such vice president or by the secretary and treasurer.—*Waters v. American Finance Co.* (Md.) 357.

Under the facts, *held* minority stockholders of a corporation could not intervene to maintain exceptions to a sale under mortgage foreclosure of property of the corporation.—*Bond v. Gray Imp. Co.* (Md.) 827.

A corporation *held* not chargeable with notice of facts coming to its agent in an independent fraudulent transaction.—*Brookhouse v. Union Pub. Co.* (N. H.) 219.

*A corporation *held* estopped after obtaining the benefit of a guaranty of an indebtedness of a third person to plead that the guaranty was *ultra vires*.—*Whitehead v. American Lamp & Brass Co.* (N. J. Ch.) 554.

*Corporation *held* charged with knowledge of agent that company from which secret process was purchased obtained the process by fraudulent methods.—*Vulcan Detinning Co. v. American Can Co.* (N. J. Ch.) 881.

Evidence *held* to show that an agent knew that the company who sold a secret process had obtained it by fraudulent means from the true owner.—*Vulcan Detinning Co. v. American Can Co.* (N. J. Ch.) 881.

Service of notice of condemnation proceedings on the registered agent of a domestic corporation *held* sufficient, under P. L. 1896, p. 291, § 43.—*Philadelphia & C. Ferry Co. v. Inter-city Link R. Co.* (N. J. Sup.) 184.

*Manager of a gas company cannot turn over to himself, as president of a competing gas company, the property of his employer and claim to hold adversely.—*McCullough v. Ford Natural Gas Co.* (Pa.) 521.

Bond of corporation *held* a sealed instrument.—*United States v. Mercantile Trust Co.* (Pa.) 1062.

*A corporation by accepting the benefit of an agreement made by its manager was *held* to be estopped to deny his authority.—*Lyndon Sav. Bank v. International Co.* (Vt.) 50.

§ 6. Insolvency and receivers.

Facts *held* to show a corporation to have been insolvent.—*Mowen v. Nitsch* (Md.) 532.

Limitations begin to run as to unpaid subscriptions to the stock of an insolvent corporation after a call and assessment.—*McCarter v. Ketcham* (N. J. Err. & App.) 693.

Under P. L. 1896, p. 298, § 64, an assignment of credits by a corporation after suspension and while insolvent *held* invalid, though based on a present valuable consideration, and made without notice to the assignee.—*Russell & Erwin Mfg. Co. v. E. C. Faitoute Hardware Co.* (N. J. Ch.) 421, 424.

An assignee of certain credits of a corporation *held* charged with notice of the corporation's insolvency at the time the assignment was delivered.—*Russell & Erwin Mfg. Co. v. E. C. Faitoute Hardware Co.* (N. J. Ch.) 421, 424.

An antecedent debt *held* not a sufficient consideration to sustain an assignment of credits by an insolvent corporation, under P. L. 1896, p. 298, § 64.—*Russell & Erwin Mfg. Co. v.*

E. C. Faitoute Hardware Co. (N. J. Ch.) 421, 424.

Facts *held* to establish the insolvency of a corporation, though the book valuation of its assets exceeded the entire liabilities by about \$4,000.—*Russell & Erwin Mfg. Co. v. E. C. Faitoute Hardware Co.* (N. J. Ch.) 421, 424.

An assignment of credits by a corporation *held* made at the time of the actual delivery thereof to the assignee.—*Russell & Erwin Mfg. Co. v. E. C. Faitoute Hardware Co.* (N. J. Ch.) 421, 424.

Under P. L. 1896, p. 298, § 64, the fact that the suspension of a corporation was under legal proceedings did not affect the invalidity of certain assignments made by it after such suspension.—*Russell & Erwin Mfg. Co. v. E. C. Faitoute Hardware Co.* (N. J. Ch.) 421, 424.

A receiver of an insolvent corporation, praying an accounting by defendant for moneys received at a sale under a void chattel mortgage executed by the corporation to defendant, is not limited in challenging defendant's wrongful acts under such mortgage to those done after complainant's appointment.—*Pryor v. Gray* (N. J. Ch.) 439.

Receiver of a corporation seeking assets to pay debts *held* not entitled to enforce an agreement made by the persons forming the corporation.—*Mills v. Hendershot* (N. J. Ch.) 542.

Salary received by an officer of a corporation after its insolvency *held* not recoverable by the receiver seeking assets to pay debts.—*Mills v. Hendershot* (N. J. Ch.) 542.

Officers of a corporation receiving excessive salaries are liable to refund the same in an action by the receiver of the corporation to recover assets to pay debts.—*Mills v. Hendershot* (N. J. Ch.) 542.

Dividends paid out of the capital of a corporation *held* recoverable by receiver of the corporation on its insolvency as far as may be necessary for the payment of debts.—*Mills v. Hendershot* (N. J. Ch.) 542.

*Transfers of property by an insolvent corporation *held* void under Corporation Act (Laws 1896, p. 298, c. 185) § 64.—*Mills v. Hendershot* (N. J. Ch.) 542.

The granting of leave to a receiver of an insolvent corporation to file a bill to determine the rights of certain stockholders *held* within the discretion of the court.—*McMaster v. Drew* (N. J. Ch.) 559.

A bill by the receiver of an insolvent corporation to determine who the stockholders are need not disclose whether the assets the receiver has reached or may reach are sufficient to satisfy the creditors.—*McMaster v. Drew* (N. J. Ch.) 559.

On demurrer to a bill by the receiver of an insolvent corporation to determine who the stockholders of such corporation are, the court will not consider whether by the proceedings in the original cause it has been made to appear that there are no assets sufficient to satisfy creditors.—*McMaster v. Drew* (N. J. Ch.) 559.

Complainants, who financed a corporation, *held* entitled, on the repudiation of their rights by holder of a majority of the stock, to also repudiate their part in the transaction, and to stand as creditors of the corporation.—*Wood & Nathan Co. v. American Mach. & Mfg. Co.* (N. J. Ch.) 768.

Creditors of, and stockholders in, a corporation, *held* to have sufficient standing to enable them to maintain receivership proceedings.—*Wood & Nathan Co. v. American Mach. & Mfg. Co.* (N. J. Ch.) 768.

* Point annotated. See syllabus.

*It is not necessary to show that a corporation is absolutely insolvent in order to throw it into insolvency and authorize the appointment of a receiver.—*Wood & Nathan Co. v. American Mach. & Mfg. Co.* (N. J. Ch.) 768.

Evidence *held* to show that a corporation was in a condition of insolvency such as to justify the appointment of a receiver.—*Wood & Nathan Co. v. American Mach. & Mfg. Co.* (N. J. Ch.) 768.

Attachment under a decree in creditor's bill *held* properly denied until the required amount defendants were to pay was liquidated.—*First Nat. Bank v. McKinley Coal Co.* (Pa.) 1067.

Attachment to compel officers of corporation to restore corporate assets *held* properly denied.—*First Nat. Bank v. McKinley Coal Co.* (Pa.) 1067.

§ 7. Consolidation.

Under Act May 29, 1901 (P. L. 349), companies organized, one to furnish gas for light, the other for heating purposes, and a third to furnish light, heat, and power by electricity, may be legally merged.—*Motter v. Kennett Tp. Electric Co.* (Pa.) 104.

§ 8. Dissolution and forfeiture of franchise.

Where rights of third persons have arisen, a corporation de facto cannot be dissolved by any acts of the incorporators so as to affect such rights.—*McCarter v. Ketcham* (N. J. Err. & App.) 693.

§ 9. Foreign corporations.

*That a foreign corporation had complied with Act March 23, 1903 (22 Del. Laws, p. 824, c. 395), *held* not to exempt it from liability to be sued by process of foreign attachment.—*Albright v. United Clay Production Co.* (Del. Super.) 726.

*The courts will entertain jurisdiction at the suit of a foreign corporation.—*Westminster Nat. Bank v. New England Electrical Works* (N. H.) 971.

CORRECTION.

Of assessment of taxes, see "Taxation," § 3.

COSTS.

Review of discretion of court in allowance, see "Appeal and Error," § 12.

In actions by or against particular classes of parties.

See "Husband and Wife," § 6.

In particular actions or proceedings.

See "Garnishment," § 3; "Injunction," § 4; "Quieting Title," § 2.

Condemnation proceedings, see "Eminent Domain," § 3.

§ 1. Nature, grounds, and extent of right in general.

*Where in a bill to reform a deed and restrain the violation of an easement both parties were partially successful, no costs will be allowed to either.—*Lengyel v. Meyer* (N. J. Ch.) 548.

§ 2. In criminal prosecutions.

*A person committed to the New Jersey Reformatory under Act March 21, 1901 (P. L. 1901, p. 231), cannot be held therein beyond the maximum term of imprisonment which the statute fixes as the penalty for his offense until costs are paid.—*Perry v. Martin* (N. J. Sup.) 1001.

* Point annotated. See syllabus.

CO-TENANCY.

See "Tenancy in Common."

COUNCIL.

See "Municipal Corporations," § 2.

COUNTERFEITING.

See "Forgery."

COUNTIES.

§ 1. Creation, alteration, existence, and political functions.

The boundary line between York and Lancaster county is not, under Act Aug. 19, 1749 (1 Smith's Laws, p. 198), ordinary low-water mark on the west side of the Susquehanna river, unaffected by extreme drought.—*Appeal of York Haven Water & Power Co.* (Pa.) 97.

§ 2. Government and officers.

While county commissioners should keep minutes of their meetings at which they award road contracts, yet their failure to conduct their deliberations in parliamentary form does not affect the legality of a contract for the construction of a road.—*Le Moyne v. Washington County* (Pa.) 516.

§ 3. Property, contracts, and liabilities.

Acts 1904, pp. 870, 872, c. 508, §§ 105, 109, relating to ballots, etc., at primary elections, and Code Pub. Gen. Laws 1904, art. 33, §§ 2, 5, *held* to require the county commissioners to pay the expenses incurred in holding primary elections.—*Kenneweg v. Allegany County Com'rs* (Md.) 249.

The duty imposed on a board of chosen freeholders by Cr. Proc. Act (P. L. 1898, p. 877) § 30, to take care of witnesses retained in the county jail, is a governmental duty of a public character, for neglect of which no action lies in favor of a person specially damnified, in the absence of statute.—*Watkins v. Board of Chosen Freeholders of Atlantic County* (N. J. Sup.) 1134.

§ 4. Claims against county.

*Where county commissioners have allowed a smaller gross sum in full for an itemized bill, and that sum is drawn from the county treasury, the claim for the remainder of the bill is barred.—*Hunt v. Franklin County Com'rs* (Me.) 213.

COUNTY BOARD.

See "Counties," § 2.

COURTS.

Contempt of court, see "Contempt."

Judges, see "Judges."

Judicial power, see "Constitutional Law," § 2.

Justices' courts, see "Justices of the Peace."

Review of decisions, see "Appeal and Error."

Review of primary elections by, see "Elections," § 4.

Right to trial by jury, see "Jury," § 1.

Jurisdiction of particular actions, proceedings, or subjects.

Accounting by executor, see "Executors and Administrators," § 8.

Exceptions to award of arbitrators, see "Arbitration and Award," § 2.

For violation of liquor laws, see "Intoxicating Liquors," § 5.

Setting aside will, see "Wills," § 4.

§ 1. Establishment, organization, and procedure in general.

*Where a demurrer to a complaint was overruled, the court, as a matter of law, on the final trial, was not required to follow the decision on the demurrer.—*Gerard v. Ives* (Conn.) 607.

Act April 23, 1903 (P. L. 274), defining the powers of the several courts of quarter sessions, is not unconstitutional as creating a new court; such court being already an ancient existing court, and not simply a criminal court recognized by the Constitution, which does not define its jurisdiction.—*Commonwealth v. Fisher* (Pa.) 198.

Act April 18, 1905 (P. L. 1905, 208), authorizing judges of orphans' courts to hear and determine equity proceedings at the request of the judges of common pleas, *held* not repugnant to Const. art. 5, §§ 4, 6, 15, 20, 26.—*Morgan v. Reel* (Pa.) 253.

§ 2. Courts of probate jurisdiction.

The orphans' court is a superior court of general jurisdiction, and has the same authority over its decrees by inquiring into the authority of its attorneys to appear as may be exercised by every court of general jurisdiction.—*Vincent v. Vincent* (N. J. Ch.) 700.

COVENANTS.

As to railroad crossings, see "Railroads," § 1. In deed, see "Deeds," § 2. In insurance policies, see "Insurance," § 4. Restraining breach, see "Injunction," § 3.

§ 1. Construction and operation.

Purchasers of lots *held* entitled to the protection of restrictive covenants, so long as the vendor and his successors saw fit to enforce them.—*Island Heights Ass'n v. Island Heights Water Power, Gas & Sewer Co.* (N. J. Ch.) 773.

Covenants in certain deeds referring to a road and to the construction of houses on lots retained by the grantors *held* personal to the grantees.—*Stevens v. Headley* (N. J. Ch.) 887.

A declaration in certain deeds that an unopened highway shall remain open and be used as a public road by all persons desiring to use the same *held* merely a private covenant or a dedication to the public which could become available to third persons only on acceptance.—*Stevens v. Headley* (N. J. Ch.) 887.

§ 2. Actions for breach.

In an action for breach of covenant that defendant was lawfully seised in fee, a specification that before the execution of the deed defendant had conveyed the premises to another, and delivered the deed therefor, may be true, and yet plaintiffs may have received a good title.—*Glover v. O'Brien* (Me.) 656.

A declaration alleging the breach of covenants against incumbrances is sufficient where the nature of the incumbrances is not stated.—*Glover v. O'Brien* (Me.) 656.

In an action for breach of covenants by prior execution and delivery of another deed, the specification of a breach is insufficient where it does not allege that the deed was recorded.—*Glover v. O'Brien* (Me.) 656.

A specification in an action for breach of covenant alleging that defendant before the date of her deed conveyed the premises to another, but not alleging that the prior deed was delivered or recorded, *held* insufficient.—*Glover v. O'Brien* (Me.) 656.

*Breaches of covenants against incumbrances and covenants of general warranty must be

specifically set forth.—*Glover v. O'Brien* (Me.) 656.

*In an action for breach of covenant that defendant was lawfully seised in fee of the premises and had a good right to sell the same, where plaintiff supplements a general assignment with a specification of grounds, he is confined to the grounds stated.—*Glover v. O'Brien* (Me.) 656.

*Plaintiff, on assignment of breaches of a covenant, may allege the breaches generally, but when general assignment does not necessarily show a breach, special averments are required.—*Glover v. O'Brien* (Me.) 656.

A declaration in an action for breach of covenant in a deed *held* not to state a cause of action.—*Dick v. McPherson* (N. J. Sup.) 383.

COVERTURE.

See "Husband and Wife."

CREDIBILITY.

Of witness, see "Witnesses," § 3.

CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances"; "Marshaling Assets and Securities." Rights as to chattel mortgage by debtor, see "Chattel Mortgages," § 3. Subrogation to rights of creditor, see "Subrogation."

CREDITORS' SUIT.

Against insolvent corporation, see "Corporations," § 6. Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 3.

CRIMINAL CONVERSATION.

See "Husband and Wife," § 7.

CRIMINAL LAW.

See "Jury"; "Malicious Prosecution."

Arrest of accused, see "Arrest," § 2.

Bail, see "Bail," § 1.

Conditions precedent to civil action for damages from criminal acts, see "Action," § 1.

Conviction of offense included in that charged, see "Indictment and Information," § 7.

Costs in criminal prosecutions, see "Costs," § 2.

Credibility of witnesses in criminal prosecutions, see "Witnesses," § 3.

Disqualification as executor on conviction of, see "Executors and Administrators," § 1.

Examination of witnesses in criminal prosecutions, see "Witnesses," § 2.

Fines, see "Fines."

Indictment, information, or complaint, see "Indictment and Information."

Release of accused on habeas corpus, see "Habeas Corpus."

Searches and seizures, see "Searches and Seizures."

Subject and title of statute containing penal clause, see "Statutes," § 3.

Particular offenses.

See "Assault and Battery," § 2; "Contempt";

"Disorderly House"; "False Pretenses";

"Forgery"; "Homicide"; "Libel and Slander,"

§ 4; "Obscenity"; "Perjury"; "Rape."

Against liquor laws, see "Intoxicating Liquors,"

§§ 4, 5.

*Point annotated. See syllabus.

Against Sunday laws, see "Sunday."

Bastardy, see "Bastards," § 1.

Violations of municipal ordinances, see "Municipal Corporations," § 7.

§ 1. Nature and elements of crime and defenses in general.

*Accused must be presumed to have intended the natural and probable consequences of his act.—State v. Truitt (Del. Gen. Sess.) 790.

§ 2. Capacity to commit and responsibility for crime.

*A person may be found guilty of a mere assault, no matter how drunk he was when he committed the offense.—State v. Truitt (Del. Gen. Sess.) 790.

*Where defendant at the time of the commission of an assault with intent to rape knew the character of his act, his drunkenness was no defense.—State v. Truitt (Del. Gen. Sess.) 790.

*Where a person resolves to commit a crime, and then drinks to intoxication and commits the same, the fact of intoxication cannot lessen the degree of the offense.—State v. Truitt (Del. Gen. Sess.) 790.

An intoxicated person who commits a wrongful act willfully and premeditatedly is guilty of crime.—State v. Truitt (Del. Gen. Sess.) 790.

§ 3. Limitation of prosecutions.

A prosecution for obtaining money by false pretenses *held* not barred after one year by Code Pub. Gen. Laws, art. 57, § 11.—Schaumloeffel v. State (Md.) 803.

§ 4. Arraignment and pleas, and nolle prosequi or discontinuance.

Ordinarily a plea of former acquittal raises an issue for the jury, but where upon its face it is insufficient in substance, it may be so adjudged on demurrer.—State v. Rosa (N. J. Err. & App.) 695.

*In a prosecution for killing A., evidence of an acquittal of defendant on the charge of killing B., who was killed at the same time and by the same person as A., *held* properly excluded.—State v. Rosa (N. J. Err. & App.) 695.

*Plea of former acquittal *held* obnoxious to demurrer.—State v. Rosa (N. J. Err. & App.) 695.

Under V. S. 1127, a plea in abatement on the ground that a juror had previously acted as such within two years before the trial *held* demurrable.—State v. Waterman (Vt.) 1016.

§ 5. Evidence—Facts in issue and relevant to issues, and *res gestæ*.

*Where a crime involves a specific intent, evidence of defendant's intoxication is competent on the question of his ability to entertain the required intent.—State v. Truitt (Del. Gen. Sess.) 790.

§ 6. — Other offenses, and character of accused.

*Proof of good or bad character of accused or witnesses is entitled to so much weight as the jury deem just in connection with all the other evidence in the case.—State v. Collins (Del. O. & T.) 224.

On a trial for the carnal abuse of a female child, certain evidence *held* admissible.—State v. Hummer (N. J. Sup.) 388.

On trial for embezzlement in selling certain secondhand bridge plank, evidence that witness had on another occasion bought plank from defendant was improperly admitted.—State v. Newman (N. J. Sup.) 1008.

On a prosecution for keeping for sale intoxicating liquors without a license, it was not error to admit evidence as to the finding of

Jamaica ginger, although conviction was asked because of the finding of alcohol.—State v. Krinski (Vt.) 87.

On a prosecution for keeping intoxicating liquor with intent to sell the same without authority, evidence of a sale of malt extract, for use as a beverage, in March, *held* to show that it was kept for that purpose in June of the same year.—State v. Costa (Vt.) 88.

*On a trial for selling intoxicating liquors, evidence of sales other than those charged in the information *held* admissible.—State v. Barr (Vt.) 43.

In a prosecution for statutory rape, evidence of other acts of intercourse *held* admissible.—State v. Willett (Vt.) 48.

§ 7. — Materiality and competency in general.

Facts learned by competent witnesses will not be excluded because they may have been put on the track of the facts by information derived from the wife of the prisoner.—Commonwealth v. Johnson (Pa.) 1064.

The objections to the plan of a house in a trial for murder because the draftsman obtained some of his information from the prisoner's wife was properly overruled.—Commonwealth v. Johnson (Pa.) 1064.

*On a prosecution for keeping for sale intoxicating liquors without a license, it was proper to admit in evidence liquors which had been seized irrespective of the legality of the warrant.—State v. Krinski (Vt.) 87.

*On a trial for crime, officers may testify as to what they learned while making illegal searches of defendant's premises.—State v. Barr (Vt.) 43.

§ 8. — Best and secondary, and demonstrative evidence.

In a prosecution under P. L. 1899, p. 450, it is not error to permit an examiner of a banking department to testify that he was acting as such examiner when the false paper was exhibited.—State v. Twining (N. J. Sup.) 402.

§ 9. — Admissions, declarations, and hearsay.

*In homicide, whether defendant overheard a certain conversation so as to make such conversation competent evidence against him *held* a question for the jury.—State v. Rosa (N. J. Err. & App.) 695.

*In homicide, conversation had in defendant's presence, embracing a statement prejudicial to defendant, which defendant failed to answer, *held* competent.—State v. Rosa (N. J. Err. & App.) 695.

On a trial for the carnal abuse of a child, admissions made by the child are inadmissible.—State v. Hummer (N. J. Sup.) 388.

On trial for embezzlement, certain evidence *held* inadmissible as hearsay.—State v. Newman (N. J. Sup.) 1008.

§ 10. — Documentary evidence and exclusion of parol evidence thereby.

On a prosecution for keeping intoxicating liquor with intent to sell the same without authority, the return to a search warrant was not admissible against defendant.—State v. Costa (Vt.) 38.

§ 11. — Opinion evidence.

*In weighing the testimony of an expert in a criminal case, the jury should consider his means of knowledge, his reasons for his opinions, and give such credence to his testimony as they find his qualifications sufficient and his reasons satisfactory.—State v. Collins (Del. O. & T.) 224.

*Point annotated. See syllabus.

*A witness *held* competent to testify as to the genuineness of a writing alleged to have been written by another.—*State v. Goldstein* (N. J. Sup.) 1006.

§ 12. — Weight and sufficiency.

*A reasonable doubt, entitling accused to acquittal, *held* a substantial doubt, remaining after a careful consideration of all the facts and circumstances in the case by reasonable, fair-minded, conscientious men.—*State v. Bell* (Del. O. & T.) 147.

*A reasonable doubt entitling accused to an acquittal must not only be reasonable under the facts proved, but must grow out of the evidence, and prevent the jury from reaching an honest conclusion of accused's guilt.—*State v. Collins* (Del. O. & T.) 224.

*Circumstantial evidence sufficient to sustain a conviction must be such as to be inconsistent with any other reasonable conclusion than that the prisoner was the guilty party.—*State v. Collins* (Del. O. & T.) 224.

*A reasonable doubt *held* a substantial doubt which intelligent and impartial men might reasonably entertain on carefully considering all the relevant facts in the case.—*State v. Wilson* (Del. Gen. Sess.) 227.

*Reasonable doubt defined.—*State v. Truitt* (Del. Gen. Sess.) 790.

§ 13. Trial.

*In a prosecution for false pretenses, Code Pub. Gen. Laws, art. 27, § 440, *held* not to limit the state to the use of such witnesses as were disclosed to defendant by list furnished.—*Schaumloeffel v. State* (Md.) 803.

*Instruction on credibility of witness in criminal case *held* proper.—*State v. Rosa* (N. J. Err. & App.) 695.

*A charge in a criminal case, that contradictory testimony of witnesses "must" be considered by the jury as affecting their credibility, was properly excluded as invading the province of the jury.—*State v. Rosa* (N. J. Err. & App.) 695.

The court on admitting evidence for one purpose on a trial for crime *held* required to charge the jury to consider it only for that purpose.—*State v. Hummer* (N. J. Sup.) 388.

On a criminal prosecution, *held* that there was nothing in the nature of corruption or impropriety in permitting the jury to partake of a supper at the expense of the state after having returned their verdict.—*State v. Costa* (Vt.) 38.

On a prosecution for keeping intoxicating liquor with intent to sell the same without authority, it was not error for the court to refuse to define the phrase "reasonable doubt," where the definition would not have aided the jury.—*State v. Costa* (Vt.) 38.

In a prosecution for statutory rape, the matter of election between several acts proved *held* within the discretion of the court.—*State v. Willett* (Vt.) 48.

§ 14. Motions for new trial and in arrest.

An accused is to be awarded a new trial where there is sufficient reason to believe that a verdict has been returned against him in consequence of corruption practiced upon the jurymen by an officer or any one else.—*State v. Costa* (Vt.) 38.

V. S. 1232, making the treating of a jury ground for a new trial, *held* not applicable to a criminal case.—*State v. Costa* (Vt.) 38.

*Point annotated. See syllabus.

§ 15. Appeal and error, and certiorari.
An error in instructions on a trial for the carnal abuse of a female child, *held* not reversible error, under Cr. Proc. Act, § 136 (P. L. 1898, p. 915).—*State v. Hummer* (N. J. Sup.) 388.

On certiorari to review a conviction for violation of an ordinance, Supreme Court will not disturb the decision of the lower court on a question of fact supported by legal evidence.—*Harris v. Atlantic City* (N. J. Sup.) 995.

Under Court and Practice Act 1905, p. 51, c. 10, § 172, and page 135, c. 27, § 475, a district court having no jurisdiction to try a defendant for maintaining a liquor nuisance *held* without jurisdiction to certify a constitutional question in such proceeding to the Supreme Court.—*State v. Collins* (R. I.) 1010.

§ 16. Punishment and prevention of crime.

*An escaped convict returned to prison *held* properly confined in prison until the expiration of the term of the imprisonment.—*In re Moebus* (N. H.) 170.

After conviction on two indictments for breaking with intent, the court can impose a sentence of imprisonment upon one of the convictions, to begin at the expiration of sentence imposed on the other conviction, which right was not affected by Cr. Proc. Act 1898 (P. L. p. 891) § 67.—*State v. Mahaney* (N. J. Sup.) 265.

CROPS.

See "Agriculture."

CROSS BILL.

See "Equity," § 3.

CROSS-EXAMINATION.

See "Witnesses," § 2.

CROSSINGS.

Railroad crossings, see "Railroads," § 2.

CURTESY.

See "Dower."

In ejectment, where the question is whether a husband has maliciously deserted his wife so as to be deprived of curtesy, under Act May 4, 1855 (P. L. 430), the burden is on the husband to show a reasonable cause for his desertion.—*Weller v. Weller* (Pa.) 859.

CUSTODY.

Of property levied on, see "Attachment," § 1.

CUSTOMS AND USAGES.

*In order for a custom to be regarded as part of a contract, it must have been actually or constructively known, and consistent with the contract.—*Denton Bros. v. Gill & Fisher* (Md.) 627.

*A contract for the sale and shipment of corn *held* not such that it could be varied by a certain custom.—*Denton Bros. v. Gill & Fisher* (Md.) 627.

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 2.

Evidence of earning capacity of person killed, see "Death," § 1.
 Excessive damages as ground for new trial, see "New Trial," § 2.
 Opinion evidence, see "Evidence," § 7.
 Recoupment of unliquidated damages, see "Set-Off and Counterclaim," § 1.

Damages for particular injuries.

See "Assault and Battery," § 1; "Death," § 1; "Libel and Slander," § 3; "Trespass," § 1.
 Breach of covenant by railroad company, see "Railroads," § 1.
 Discharge from employment, see "Master and Servant," § 1.
 Injuries caused by public improvements, see "Municipal Corporations," §§ 5, 6.
 Injuries from defective condition of demised premises see "Landlord and Tenant," § 3.

Recovery in particular actions or proceedings.

See "Partition," § 2.

§ 1. Grounds and subjects of compensatory damages.

*Loss of profits in business *held* recoverable as damages in actions of tort, where they can be established with reasonable certainty.—*Bartow v. Erie R. Co.* (N. J. Sup.) 489.

*In actions for personal injuries, damages are not mitigated by insurance paid to the plaintiff under a contract with a stranger.—*Corish v. North Jersey St. Ry. Co.* (N. J. Sup.) 1004.

§ 2. Liquidated damages and penalties.
 The amount of a liquor dealer's bond, given under Laws 1903, p. 81, c. 95, *held* liquidated damages, and not a penalty.—*State v. Corron* (N. H.) 1044.

§ 3. Measure of damages.

*Measure of damages for personal injuries defined.—*Green v. Council of Newark* (Del. Super.) 792.

*The measure of damages for permanent injury to real estate is the resulting depreciation in the value of the property.—*Rabe v. Shoenberger Coal Co.* (Pa.) 854.

*In an action by a father for injuries to his child, the measure of damages stated.—*Galligan v. Woonsocket St. Ry. Co.* (R. I.) 376.

§ 4. Inadequate and excessive damages.
 *Twelve hundred dollars is not excessive damages for a fractured kneecap.—*Galligan v. Woonsocket St. Ry. Co.* (R. I.) 376.

§ 5. Pleading, evidence, and assessment.

Pendency of action by parent for wages of injured son until 21 years of age *held* not to render inadmissible evidence of his earning capacity in action by the son.—*McMahon v. Bangs* (Del. Super.) 1098.

*In action for personal injuries, evidence of plaintiff's expectancy of life, as shown by table of expectancy of life, *held* admissible.—*McMahon v. Bangs* (Del. Super.) 1098.

*Whether damages were suffered by plaintiff as a direct consequence of acts of defendant, and the extent thereof, were questions for the jury.—*Baltimore Belt R. Co. v. Sattler* (Md.) 1125.

*Where the facts forbid the finding of vindictive damages, the jury can only award such sum as would compensate plaintiff for the injury received.—*Baltimore Belt R. Co. v. Sattler* (Md.) 1125.

A declaration alleging injuries to plaintiff *held* broad enough to authorize evidence as to the condition of plaintiff's ankle.—*Lewes v. John Crane & Sons* (Vt.) 60.

* Point annotated. See syllabus.

*In an action for personal injuries, evidence as to defendant's wages *held* admissible on the issue of damages.—*Lewes v. John Crane & Sons* (Vt.) 60.

DAMS.

See "Waters and Water Courses," § 2.

DEATH.

Caused by operation of street cars, see "Street Railroads," § 2.

Liability of carrier for death of passenger, see "Carriers," § 3.

Of beneficiary in will, see "Wills," § 12.

Of employe see "Master and Servant," §§ 6, 8.

Of servant, see "Master and Servant," § 4.

Opinion evidence in action for wrongful death, see "Evidence," § 7.

Photographs as evidence in action for, see "Evidence," § 5.

Suspension of running of statute of limitation, see "Limitation of Actions," § 2.

§ 1. Actions for causing death.

*In an action against a railroad for wrongful death, a question as to the habits of deceased with respect to industry *held* too general.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 808.

*Measure of damages for wrongful death stated.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 808.

Evidence, in an action brought under Pub. St. 1891, c. 191, § 12, for the death of plaintiff's wife, that she never had earned money and probably never would render services calling for pay, while competent as to the question of capacity to earn, *held* not to establish its nonexistence.—*Dillon v. Hudson, P. & S. Electric Ry. Co.* (N. H.) 93.

*Under Pub. St. 1891, c. 191, § 12, evidence tending to show the earning capacity of a person wrongfully killed is competent.—*Dillon v. Hudson, P. & S. Electric Ry. Co.* (N. H.) 93.

In an action brought under Pub. St. 1891, c. 191, § 12, for the death of plaintiff's wife, evidence as to the value of her services as housekeeper in plaintiff's family *held* competent as tending to show her earning capacity.—*Dillon v. Hudson, P. & S. Electric Ry. Co.* (N. H.) 93.

*Where an intestate would have no right of action if death had not ensued, his personal representative *held* not entitled to sue for his death, under V. S. 2451, 2452.—*Carty's Admr v. Village of Winooski* (Vt.) 45.

DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

DECEDENTS.

Estates, see "Descent and Distribution"; "Executors and Administrators."

Testimony as to transactions with persons since deceased, see "Witnesses," § 1.

DECEIT.

See "Fraud."

DECLARATIONS.

As evidence in civil actions, see "Evidence," § 3.

DEDICATION.

§ 1. Nature and requisites.

*Whether an owner dedicated a wharf to the public *held*, under the evidence, a question for the jury.—*Palen v. Ocean City* (N. J. Sup.) 947.

Where owner sells lots according to a plan, that plan is not on city map *held* immaterial as between parties to the sale.—*Garvey v. Harbison-Walker Refractories Co.* (Pa.) 778.

Sale of lots according to plan showing them on a street *held* a dedication of the street to public use.—*Garvey v. Harbison-Walker Refractories Co.* (Pa.) 778.

*Sale of lots according to a plan *held* an irrevocable dedication of the streets and alleys shown on the plat.—*In re Southwestern State Normal School* (Pa.) 908.

§ 2. Operation and effect.

A city ordinance *held* not to operate as an abandonment of the public user of a wharf dedicated to the public.—*Palen v. Ocean City* (N. J. Sup.) 947.

P. L. 1897, p. 69, § 48, par. 1, when construed in connection with section 18, par. 7 (page 52), *held* not to authorize a city council to discharge the public right in a wharf dedicated to the public.—*Palen v. Ocean City* (N. J. Sup.) 947.

*Land dedicated to a restricted public use must be taken for the limited purpose only.—*Young v. Landis Tp.* (N. J. Sup.) 1133

DEEDS.

Absolute deed as mortgage, see "Mortgages," § 1.

As evidence, see "Evidence," § 5.

Best evidence, see "Evidence," § 1.

Cancellation, see "Cancellation of Instruments."

Copies of as exhibits, see "Pleading," § 6.

Covenants in deeds, see "Covenants," § 6.

Depositions in suit to cancel conveyance, see "Depositions."

Description of boundaries, see "Boundaries," § 1.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts."

Reformation, see "Reformation of Instruments."

Reservation of right of flowage, see "Waters and Water Courses," § 2.

Deeds of particular species of property.

See "Easements," § 1; "Mines and Minerals," § 1.

Particular classes of deeds.

Of trust, see "Assignments for Benefit of Creditors," § 1.

Tax deeds, see "Taxation," § 4.

§ 1. Requisites and validity.

Delivery of a deed in escrow *held* a present delivery of the deed.—*Grilley v. Atkins* (Conn.) 337.

*Question of delivery of assignment of interest in land *held* one for the jury.—*Chase v. Clearfield Lumber Co.* (Pa.) 172.

§ 2. Construction and operation.

*A deed deposited in escrow, though voluntary, *held* not subject to revocation by the grantor during her lifetime.—*Grilley v. Atkins* (Conn.) 337.

*A grantee in a deed delivered in escrow *held* to have acquired the title subject to a

life use in the grantor.—*Grilley v. Atkins* (Conn.) 337.

The description of land conveyed is to be interpreted by reference to all the calls in the deed.—*Chapman v. Hamblet* (Me.) 215.

*In cases of ambiguity in a deed, the interpretation is to be sought from the circumstances and intent of the parties.—*Chapman v. Hamblet* (Me.) 215.

A deed conveying all the property owned by the grantor includes a vested remainder in property.—*Roberts v. Roberts* (Md.) 161; *Landon v. Shriver's Estate*, Id.

Deed of lot with double house thereon construed, and *held* that all that was reserved to the grantor was one-half of the double house.—*Hads v. Tiernan* (Pa.) 172.

*Where words in a deed can be construed either as a condition, reservation, or covenant, the latter construction is favored.—*Dempwolf v. Greybill* (Pa.) 645.

*Where the language used in a deed is susceptible of more than one interpretation, the court will look at the circumstances existing at the time of the transaction, such as the situation of the parties, etc.—*Shartenberg & Robinson v. Ellbey* (R. I.) 979.

*Deeds must be so construed as to effectuate the intention of the parties.—*Shartenberg & Robinson v. Ellbey* (R. I.) 979.

*A liberal construction is to be given to deeds inartificially and untechnically drawn.—*Shartenberg & Robinson v. Ellbey* (R. I.) 979.

§ 3. Pleading and evidence.

Evidence in a suit to set aside deeds on the ground that they were not the voluntary act of the grantor *held* to justify a decree setting them aside.—*Horner v. Bell* (Md.) 736.

*In a suit to set aside a deed, evidence *held* to show the existence of confidential relations between the grantor and defendants, so as to place on the latter the burden of proving that the deeds were the voluntary act of the grantor.—*Horner v. Bell* (Md.) 736.

*A purchaser for value has a right to act on the faith of a deed that the deed has been signed, sealed, acknowledged, and delivered as it purports to be, and the presumption is that it has been so executed and delivered by proper parties.—*Dempwolf v. Greybill* (Pa.) 645.

DE FACTO CORPORATIONS.

See "Corporations," § 1.

DEFAMATION.

See "Libel and Slander."

DEFAULT.

Appeal from default judgment, see "Appeal and Error," § 1.

Judgment by, see "Judgment," § 2.

DEFICIENCY.

On foreclosure of mortgage, see "Mortgages," § 5.

DELEGATION.

Of authority of public liquor agent, see "Intoxicating Liquors," § 3.

Of power, see "Municipal Corporations," § 1.

* Point annotated. See syllabus.

DELIVERY.

Of deed, see "Deeds," § 1.
 Of goods sold, see "Sales," § 3.
 Of mortgage, see "Chattel Mortgages," § 1.

DEMURRAGE.

For delay in delivery of goods shipped, see "Carriers," § 1.

DEMURRER.

In pleading, see "Equity," § 3; "Pleading," § 3.
 To plea in criminal prosecution, see "Criminal Law," § 4.
 To warrant for seizure of liquors see "Intoxicating Liquors," § 6.

DENTISTS.

See "Physicians and Surgeons."

DEPOSITARIES.

Designation by court of depositary of trust funds, see "Trusts," § 4.

DEPOSITIONS.

See "Affidavits"; "Witnesses."
 As evidence in proceedings before arbitrators, see "Arbitration and Award," § 1.

*In a suit to set aside a deed, answers to special interrogatories appended to the bill *held* evasive, and not entitled to consideration, under Code Pub. Gen. Laws, art. 16, § 160, unless sustained by proof at the trial.—*Horner v. Bell* (Md.) 736.

DESCENT AND DISTRIBUTION.

See "Curtesy"; "Dower"; "Executors and Administrators"; "Homestead," § 1; "Wills."
 Inheritance and transfer taxes, see "Taxation," § 5.
 Inheritance by adopted child, see "Adoption."
 Property and interests undisposed of by will, see "Wills," § 14.

§ 1. Persons entitled and their respective shares.

A widow has no better rights than any other distributee with reference to her share of her husband's property in excess of dower.—*Appeal of Beard* (Conn.) 704.

Assignment of half of income accruing from trust fund to wife, who agrees to support the children without expense to the husband, *held* to give the children no interest in the fund after the death of the wife.—*Wright v. Leupp* (N. J. Ch.) 464.

*A husband is not only entitled to the administration of his wife's estate, but is also entitled to the whole net personalty of such estate.—*Wright v. Leupp* (N. J. Ch.) 464.

§ 2. Rights and liabilities of heirs and distributees.

*Questions of advancements made by a decedent are always questions of intention.—*Appeal of Melony* (Conn.) 151.

*A loan made by a father to his son may not be converted by the father into an advancement without the consent and against the will of the son.—*Appeal of Melony* (Conn.) 151.

Prior to June 1, 1903, when Pub. Laws 1903, p. 124, c. 160, took effect, a married woman might make such disposition of her personal

property during her lifetime as she wished, though her husband was thereby deprived of his share therein.—*Wright v. Holmes* (Me.) 507.

A conveyance to complainant by her father in his lifetime *held* to constitute an advancement.—*Schlicher v. Keeler* (N. J. Ch.) 4.

DESCRIPTION.

In lien statement, see "Mechanics' Liens," § 2.
 In tax deed, see "Taxation," § 4.
 Of debt secured by mortgage, see "Mortgages," § 3.
 Of devisees or legatees in will, see "Wills," § 6.
 Of property conveyed, see "Boundaries," § 1; "Deeds," § 2.
 Of property devised, see "Landlord and Tenant," §§ 1, 3.
 Of property devised or bequeathed, see "Wills," § 8.
 Of property in deed of assignment for creditors, see "Assignments for Benefit of Creditors," § 1.

DESERTION.

Evidence of in suit for divorce see "Divorce," § 3.
 Ground for divorce, see "Divorce," § 1.

DETINUE.

See "Replevin."

DEVISES.

See "Wills."

DIRECTING VERDICT.

In civil actions, see "Trial," § 4.

DISCHARGE.

From employment, see "Master and Servant," § 1.
 From indebtedness, see "Accord and Satisfaction"; "Bankruptcy," § 2.
 From liability as assignee, see "Assignments for Benefit of Creditors," § 3.
 Of assignee for benefit of creditors, see "Assignments for Benefit of Creditors," § 3.
 Of judgment, see "Judgment," § 8.
 Of sureties on bail bond, see "Bail," § 1.

DISCOVERY.**§ 1. In equity.**

*A bill for discovery in aid of an action for libel to compel defendant to disclose the original libelous article and the names of the persons who procured defendant to publish the same *held* demurrable, as requiring disclosure of matters tending to criminate defendant.—*Noyes v. Thorpe* (N. H.) 787.

A bill for discovery in aid of an action for libel *held* not demurrable for failure to allege a legal cause of action for libel.—*Noyes v. Thorpe* (N. H.) 787.

*Where a bill seeks an accounting and a discovery, if there is no right to an accounting, it is demurrable.—*Elk Brewing Co. v. Neubert* (Pa.) 782.

DISCRETION OF COURT.

Allowance of action by receiver of corporation, see "Corporations," § 6.
 Filing petition to set aside divorce decree, see "Divorce," § 3.

* Point annotated. See syllabus.

Granting or refusing continuance, see "Continuance."
 Review in civil actions, see "Appeal and Error," §§ 1, 12.
 Ruling on motion for nonsuit, see "Trial," § 4.

DISMISSAL AND NONSUIT.

At trial, see "Trial," § 4.
 Dismissal of appeal in partition, see "Partition," § 2.
 Dismissal of appeal or writ of error, see "Appeal and Error," §§ 1, 7, 9.
 Dismissal of certiorari, see "Certiorari," § 2.
 In action for death caused by operation of street cars, see "Street Railroads," § 2.
 Presentation in lower court of grounds of review of rulings on motion for, see "Appeal and Error," § 3.

§ 1. Involuntary.

*Where, in an action for sale of land by tenants in common, defendants couple with their defense a counterclaim, asking affirmative relief, confirming and establishing the title to the land, and it appears that parties necessary to an adjudication are not parties to the action, it should be dismissed.—*Harrison v. International Silver Co. (Conn.)* 342.

Under Code Pub. Gen. Laws, art. 26, § 44, and article 75, § 113, a court *held* required to remove a cause to the proper court.—*Safe Deposit & Trust Co. v. Cahn (Md.)* 819; *Same v. Roberts, Id.*

DISORDERLY HOUSE.

Those who maintain a place where usurious rates of interest are taken, and where Gen. St. p. 3704, § 7, prohibiting usurious interest is habitually violated, are indictable for keeping a disorderly house.—*State v. Dimant (N. J. Sup.)* 286.

DISQUALIFICATION.

Of judge, see "Judges," § 1.

DISSOLUTION.

Of corporation, see "Corporations," § 8.
 Of partnership, see "Partnership," § 4.
 Of school districts, see "Schools and School Districts," § 1.

DISTRIBUTION.

Of estate of decedent, see "Descent and Distribution"; "Executors and Administrators," § 5.

DISTRICT AND PROSECUTING ATTORNEYS.

Misconduct of as ground for new trial in prosecution for homicide, see "Homicide," § 8.

DIVIDENDS.

On corporate stock, see "Corporations," §§ 2, 4.
 Recovery of by receiver of corporation, see "Corporations," § 6.

DIVORCE.

Bill to set aside decree, see "Equity," § 5.
 Competency of witnesses in divorce proceedings, see "Witnesses," § 1.
 Separate maintenance, see "Husband and Wife," § 6.
 Stay pending appeal in divorce suit, see "Appeal and Error," § 6.

§ 1. Grounds.

*A wife's mere absence from her husband, though wrongful, *held* not obstinate desertion, entitling him to divorce, in the absence of a bona fide attempt on his part to induce her to return.—*Ojserkis v. Ojserkis (N. J. Ch.)* 113.

A husband's offer to resume marital relations with his wife *held* not such as to constitute her continued absence obstinate desertion.—*Ojserkis v. Ojserkis (N. J. Ch.)* 113.

§ 2. Defenses.

Where parties intermarry clandestinely without intent of establishing a matrimonial domicile, and on agreement to live separately for the present, the separate living of the husband *held* not a desertion of the wife.—*McAllister v. McAllister (N. J. Ch.)* 1131.

§ 3. Jurisdiction, proceedings, and relief.

A divorce having been obtained by defendant by fraud and without notice to complainant, she was entitled to have the same set aside by petition in the cause.—*Kerans v. Kerans (N. J. Ch.)* 305.

The court may exercise the same discretion on an application to file a petition to set aside a divorce decree for fraud as may be exercised on applications to file a bill of review.—*Kerans v. Kerans (N. J. Ch.)* 305.

*In a suit for divorce on the ground of desertion, petitioner's uncorroborated testimony is insufficient to justify a decree in her favor.—*Wood v. Wood (N. J. Ch.)* 429.

In a suit for divorce, evidence *held* insufficient to establish a desertion by defendant husband.—*Wood v. Wood (N. J. Ch.)* 429.

Under P. L. 1902, p. 503, § 4, par. 1, *held* that mere residence in the state of either party at the times specified gives the chancery court jurisdiction of the subject-matter in a divorce suit for adultery committed out of the state.—*Duke v. Duke (N. J. Ch.)* 466.

Evidence *held* to show a matrimonial domicile in the state, so that jurisdiction of defendant in a divorce suit could be obtained by extra-territorial service.—*Duke v. Duke (N. J. Ch.)* 466.

The cross-bill of defendant in a divorce suit *held* not required to allege jurisdictional facts.—*Duke v. Duke (N. J. Ch.)* 471.

On petition for rehearing after final decree of divorce, affidavits presenting newly discovered evidence *held* insufficient to authorize the granting of the petition.—*Feinberg v. Feinberg (N. J. Ch.)* 562.

Petition of defendant in divorce that the decree for plaintiff awarding alimony should be vacated and bill dismissed on the ground that he had not been served with process in the state denied.—*McGuinness v. McGuinness (N. J. Ch.)* 937.

In divorce evidence *held* insufficient to show desertion.—*Snedaker v. Snedaker (N. J. Ch.)* 942.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 5.

As evidence in criminal prosecutions, see "Criminal Law," § 10.

DOGS.

See "Animals."

*Point annotated. See syllabus.

DOMICILE.

*The domicile of a wife *held* that of her husband, though she owned a separate residence in another state where they resided together the larger part of the time.—*In re Hartman's Estate* (N. J. Prerog.) 500.

DONATIONS.

See "Gifts."

DOWER.

See "Curtesy."

Discretion of trustee as to freeing trust estate of claim for dower, see "Trusts," § 4.

Right of widow to redeem from foreclosure sale, see "Mortgages," § 6.

§ 1. Nature and requisites.

*2 Gen. St. p. 1275, § 1, *held* to entitle a wife to dower in lands standing in the name of a third person, seised to the use of the husband, of which the husband was entitled to a conveyance of the legal estate in actual seisin during his life.—*Radley v. Radley* (N. J. Ch.) 195.

Where a husband conveyed his land in his lifetime, the widow's dower would be measured as at the date of his alienation.—*Turner v. Kuehnle* (N. J. Ch.) 327.

§ 2. Inchoate interest.

Where a deed made to bar dower itself created a trust for the sole benefit of the husband and his heirs, it was ineffective to bar the wife's dower in such equitable estate conferred by 2 Gen. St. p. 1275, § 1.—*Radley v. Radley* (N. J. Ch.) 195.

In a suit by a wife for dower, *held* that a sale of the land under a mortgage was not available as against her.—*Turner v. Kuehnle* (N. J. Ch.) 327.

§ 3. Rights and remedies of widow.

Widow, by consent to administration of trust by the court, *held* not to have waived her right to have dower assigned.—*Shipley v. Mercantile Trust & Deposit Co.* (Md.) 814.

Trustee of estate devised subject to dower *held* entitled to pray for assignment of dower.—*Shipley v. Mercantile Trust & Deposit Co.* (Md.) 814.

A widow cannot be deprived of her right to have her dower assigned if she elects to exercise it.—*Shipley v. Mercantile Trust & Deposit Co.* (Md.) 814.

DRAINS.

In cities, see "Municipal Corporations," § 9.

DRUGGISTS.

Where a complaint in a suit against a druggist alleged in paragraph 3 that he delivered package alleged to contain salts, and in paragraph 4 that the package did not contain salts, defendant under a notice of denial of paragraph 4 was entitled to prove that plaintiff negligently picked up the wrong package.—*Keating v. Hull* (Conn.) 661.

DRUNKENNESS.

As a defense to criminal prosecution, see "Criminal Law," §§ 2, 5.

DUE PROCESS OF LAW.

See "Constitutional Law," § 10.

DUPLICITY.

In indictment, see "Indictment and Information," § 3.

In pleading, see "Pleading," § 8.

DURESS.

Payment under duress, see "Payment," § 2.

EARNINGS.

Of child, see "Parent and Child."

EASEMENTS.

See "Dedication"; "Highways."

Costs in general in action to restrain violation of, see "Costs," § 1.

Of drainage, see "Waters and Water Courses," § 1.

§ 1. Creation, existence, and termination.

The projection of the eaves of a house *held* not sufficient proof of such visible adverse use of an adjoining owner's land as will prohibit such owner from building on the divisional line.—*Puroto v. Chieppa* (Conn.) 664.

*Under Gen. St. 1902, § 4046, an easement of light and air, which will render it unlawful for an adjoining owner to erect a building on his land, cannot be acquired by prescription.—*Puroto v. Chieppa* (Conn.) 664.

*An easement of a longitudinal right of way along the right of way of a railroad will not be presumed from mere user.—*Johnson v. Philadelphia, B. & W. R. Co.* (Del. Ch.) 86.

*A grantee of property including a party wall containing windows overlooking adjoining property *held* to acquire an easement of light and air determinable only on the use of the wall by adjoining owner.—*Lengyel v. Meyer* (N. J. Ch.) 548.

*An easement of a private right of way is not the subject of possession, and can be created only by express or implied grant, adverse user, or estoppel.—*Stevens v. Headley* (N. J. Ch.) 887.

In a suit to quiet title to certain land as against an alleged highway easement, evidence *held* to require a finding that defendant L's grantor and attorney had knowledge of complainant's previous purchase, which included a part of the highway in question.—*Stevens v. Headley* (N. J. Ch.) 887.

A deed to certain land containing a building restriction with reference to a private road ending in a cul-de-sac *held* not to convey by implication a right of way over the road beyond the property conveyed, toward the closed end of the road.—*Stevens v. Headley* (N. J. Ch.) 887.

Where a conveyance by plaintiffs to a defendant in ejectment was made in settlement of the suit for a valuable consideration, and the map of the property had been filed nearly 50 years, and numerous conveyances had been made with reference thereto, *held*, that the reference in the deed to an avenue as a boundary was insufficient to reserve a private easement in the soil of the avenue.—*Young v. Pennsylvania R. Co.* (N. J. Sup.) 529.

Where one maps his land and conveys lots by reference thereto, the question whether he reserves a private easement in the soil of the street depends upon the language of the deed and the circumstances.—*Young v. Pennsylvania R. Co.* (N. J. Sup.) 529.

* Point annotated. See syllabus.

§ 2. Extent of right, use, and obstruction.

An injunction to restrain the obstruction of a way will not be granted until the question of title is determined, where such question is in serious dispute.—*Bernei v. Sappington* (Md.) 365.

A party seeking the aid of equity must show a clear prima facie title and irreparable injury.—*Bernei v. Sappington* (Md.) 365.

Injunction to restrain obstruction of alleged way denied in view of defendants' long-continued possession of the premises and previous obstruction of the way by them.—*Bernei v. Sappington* (Md.) 365.

Temporary injunction pending determination of title in action at law will not be granted unless the threatened mischief is likely to be irreparable.—*Bernei v. Sappington* (Md.) 365.

Certain facts held not to show a threatened violation of easements.—*Forrester v. Island Heights Ass'n* (N. J. Ch.) 775.

An owner of an easement cannot ask the aid of equity to protect the easement against the acts of the owner of the fee until the latter threatens to interfere therewith.—*Forrester v. Island Heights Ass'n* (N. J. Ch.) 775.

A transfer of the fee in land is not an interference with an easement therein, and the owner of the easement cannot require the owner of the fee to continue to hold it.—*Forrester v. Island Heights Ass'n* (N. J. Ch.) 775.

Where a part of a road located along certain lots in a city block had never been dedicated to the public, or worked, the right of a lot owner to have a portion thereof ending in a cul-de-sac kept open was at most a private right of way appurtenant to the lots conveyed to him.—*Stevens v. Headley* (N. J. Ch.) 887.

*A bill held not to authorize a preliminary injunction against obstruction of an alley.—*Savidge v. Merrill* (N. J. Ch.) 946.

EAVES.

Acquirement of easement by projection of eaves on adjoining owner's land, see "Easements," § 1.

EJECTMENT.

See "Real Actions."

Evidence in action of ejectment on issue of husband's right to curtesy, see "Curtesy."

Judgment in ejectment as bar to compensation in condemnation proceedings, see "Eminent Domain," § 2.

Opinion evidence, see "Evidence," § 7.

§ 1. Right of action and defenses.

The grantee of exclusive privilege to prospect for oil held not entitled to maintain ejectment against his grantor or those claiming under him by a subsequent grant.—*Kelly v. Keys* (Pa.) 911.

§ 2. Pleading and evidence.

Sheriff's return and record, in action of ejectment, held to raise no presumption that defendant was in possession of the land described in the writ. Act April 14, 1851 (P. L. 612); Act April 13, 1858 (P. L. 256).—*Kreamer v. Voneida* (Pa.) 518.

§ 3. Trial, judgment, enforcement of judgment, and review.

Evidence in ejectment held to authorize a binding instrument for plaintiff.—*Dempwolf v. Greybill* (Pa.) 645.

ELECTION.

Between counts in indictment, see "Indictment and Information," § 8.

Between testamentary provisions and other rights, see "Wills," § 14.

ELECTION OF REMEDIES.

In action against partners, see "Partnership," § 3.

ELECTIONS.

Determination as to election of municipal officers, see "Municipal Corporations," § 2.

Liability of county for expenses of primary election, see "Counties," § 3.

Mandamus to compel holding, see "Mandamus," § 1.

Of corporate officers, see "Corporations," § 3.

Power in general to enact primary election law, see "Constitutional Law," § 1.

Primary election laws denying equal protection of law, see "Constitutional Law," § 9.

Restraining levy of tax to pay for holding primaries, see "Injunction," § 1.

Service of petition to strike name from list of voters, see "Process," § 1.

Validity of primary election law as against public policy, see "Constitutional Law," § 2.

Violation of election laws as affecting right to institute quo warranto, see "Quo Warranto," § 1.

§ 1. Election districts or precincts and officers.

Election officers held bound to safely keep ballot boxes and to repel any attempt to capture them, with such force as is necessary for the purpose.—*State v. Bell* (Del. O. & T.) 147.

§ 2. Qualifications of voters.

Error of assessor in the form of assessment cannot deprive the elector of his constitutional right to vote as a taxpayer.—*Commonwealth v. Shrontz* (Pa.) 910.

Where land is owned by two members of a firm as tenants in common, payment of the tax qualifies each as an elector within the law.—*Commonwealth v. Shrontz* (Pa.) 910.

§ 3. Registration of voters.

Under Code Pub. Gen. Laws, art. 33, § 24, in relation to elections, and sections 21 and 11, a list of suspected voters held not such as contemplated by the statute.—*Carter v. Applegarth* (Md.) 710.

§ 4. Nominations and primary elections.

Acts 1904, p. 870, c. 508, relating to primary elections, held not void by reason of possibility of a dishonest administration of page 875, § 111, and thereby exclude candidates from the official ballot.—*Kenneweg v. Allegany County Com'rs* (Md.) 249.

Acts 1904, p. 870, c. 508, held not, by reason of page 875, § 112, void as undertaking to add a property qualification for public office not contained in the Constitution.—*Kenneweg v. Allegany County Com'rs* (Md.) 249.

Const. art. 3, § 42, held not to deprive the Legislature of the power to pass a primary election law.—*Kenneweg v. Allegany County Com'rs* (Md.) 249.

Under the primary election statutes, the duty of the courts in reviewing such an election is merely to see that the acting body of the party proceeded regularly according to its own rules.—*In re Chester County Republican Nominations* (Pa.) 238; *Appeal of Garrett*, Id.

* Point annotated. See syllabus.

Action of political committee prior to the expiration of the year for which the members were elected *held* valid, notwithstanding an attempted irregular appointment of the committee by the chairman.—In re Chester County Republican Nominations (Pa.) 258; Appeal of Garrett, Id.

Rule of political party, requiring election of members of county committee for the "ensuing year," *held* to mean calendar year.—In re Chester County Republican Nominations (Pa.) 258; Appeal of Garrett, Id.

Under Pub. Laws 1902, c. 1078, § 8, an elector is not disqualified from signing a nomination paper for a prohibition candidate for Governor, a socialist candidate for the Legislature, and a "good government" candidate for a municipal office, all of whom are to be voted for at the same election.—Attorney General v. Rowe (R. I.) 117.

Under Pub. Laws 1902, p. 35, c. 1078, in relation to the board of canvassers of the city of Providence, *held* that a second or supplementary caucus for misconduct in the original caucus was not authorized.—Greenough v. Whiteley (R. I.) 213.

§ 5. Contests.

Where the facts appear upon the record in an election contest, the Supreme Court may determine whether the judgment is correct upon such facts.—In re Chester County Republican Nominations (Pa.) 258; Appeal of Garrett, Id.

ELECTRICITY.

As motive power of railroad, see "Railroads," § 2.

Consolidation of electric company with other corporation, see "Corporations," § 7.

Where a telephone company maintained a guy wire in such position that it was likely to become crossed with an electric light wire, the telephone company was under a duty to exercise care, though person injured thereby was a trespasser as between himself and the landowner.—Guinn v. Delaware & A. Telephone Co. (N. J. Err. & App.) 412.

A telephone company was not excused for failing to place a guard between a guy wire of a telephone post and an electric light wire because the danger was due to the running of the electric light wire below the guy wire after the construction of the telephone line.—Guinn v. Delaware & A. Telephone Co. (N. J. Err. & App.) 412.

The jury may infer negligence from the omission of a guard between an electric light wire and the guy wire of a telephone post.—Guinn v. Delaware & A. Telephone Co. (N. J. Err. & App.) 412.

Whether a pedestrian was negligent in attempting to cross a street at a place other than the regular crossing is for the jury, in an action for injuries caused by a live electric wire.—Miller v. Lewistown Electric Light, Heat & Power Co. (Pa.) 32.

In an action for injuries by an electric light wire, question of defendant's negligence *held* for the jury.—Miller v. Lewistown Electric Light, Heat & Power Co. (Pa.) 32.

In an action against an electric light company to recover for the death of plaintiff's son, an employe of a telephone company, *held* that the evidence was sufficient to sustain a finding that his death was caused by contact with an iron brace charged with electricity by the negligence of defendant.—Morgan v. Westmoreland Electric Co. (Pa.) 638.

Statement in action against electric light company for damages for personal injuries *held* to give notice to defendant that the plan of construction of the electric line was brought into question.—Morgan v. Westmoreland Electric Co. (Pa.) 638.

EMBEZZLEMENT.

Evidence of other offenses, see "Criminal Law," § 6.

Hearsay evidence, see "Criminal Law," § 9.

EMINENT DOMAIN.

Effect of defective acknowledgment of certificate of incorporation on right to condemn land, see "Corporations," § 1.

Harmless error in condemnation proceedings, see "Appeal and Error," § 14.

Hearsay evidence of value of property taken, see "Evidence," § 4.

Notice to corporation of condemnation proceedings, see "Corporations," § 5.

Public improvements by municipalities, see "Municipal Corporations," §§ 5, 6.

§ 1. Nature, extent, and delegation of power.

*General Street Railway Law, § 4 (Laws 1895, p. 368, c. 27, as amended by Laws 1901, p. 586, c. 93), *held* not to authorize a street railway company to condemn land and water privileges to divert streams and procure power to operate plants erected on its own land.—Claremont Ry. & Lighting Co. v. Putney (N. H.) 727.

*A provision of a charter of a street railway company *held* not to have conferred the power of eminent domain.—Claremont Ry. & Lighting Co. v. Putney (N. H.) 727.

The location of a footpath leading to a ferry *held* not necessary for the purposes of the ferry franchise, so as to be a defense in a proceeding to condemn the same for a railroad.—Philadelphia & C. Ferry Co. v. Intercity Link R. Co. (N. J. Sup.) 184.

*An agreement by a railroad company to pay a certain sum of money to construct cattle guards and make a number of wagon roads over its tracks, in consideration of the grant of a right of way, is severable, so that the right to the wagon roads may be condemned, under Act March 17, 1869 (P. L. 12, 2 Purd. Dig. 1798).—Lilley v. Pittsburg, V. & C. Ry. Co. (Pa.) 852.

*Act July 10, 1901 (P. L. 632), *held* not to authorize state normal school to condemn for a campus streets and alleys.—In re Southwestern State Normal School (Pa.) 908.

§ 2. Compensation.

*A landowner *held* not entitled to compensation in right of way condemnation proceedings by railroad for improvements made by the railroad on prior entry under the owner's deed.—Baltimore & N. Y. R. Co. v. Bouvier (N. J. Ch.) 868.

In condemnation proceedings, a judgment in ejectment *held* not to bar, under Gen. St. p. 1288, § 44, the application of equitable principles in determining a landowner's right to compensation.—Baltimore & N. Y. R. Co. v. Bouvier (N. J. Ch.) 868.

A railroad *held* not debarred of equitable relief by reason of its breach of covenants in a right of way deed.—Baltimore & N. Y. R. Co. v. Bouvier (N. J. Ch.) 868.

The comparative value of land, deeded to a railroad for a right of way, with and without the advantages of certain improvements stipu-

* Point annotated. See syllabus.

lated to be made thereon, *held* determinative of the question of how much of the actual value of the land and the incidental damages to the remaining land was abated or allowed in fixing the price for the land conveyed.—*Baltimore & N. Y. R. Co. v. Bouvier* (N. J. Ch.) 868.

*Where a water company sought to condemn land, the landowner may show that his property was adapted from the natural formation of the land and other causes to reservoir purposes.—*Brown v. Forest Water Co.* (Pa.) 1078.

§ 3. Proceedings to take property and assess compensation.

A resolution of a railroad's board of directors, under 22 Del. Laws, p. 794, c. 394, § 82, for the condemnation of 40 feet of land for right of way, *held* insufficient to sustain commissioners' report, awarding damages for the taking of 41²/₁₀ feet.—*Johnson v. Philadelphia, B. & W. R. Co.* (Del. Ch.) 86.

In proceedings to enjoin condemnation of land for a railroad right of way, complainant *held* not to have sustained the burden of proof that a building on his land affected by such proceedings was of the value of \$300.—*Johnson v. Philadelphia, B. & W. R. Co.* (Del. Ch.) 86.

Where facts are clear, the question whether the place of a proposed crossing of a railroad by a townway is land used for station purposes is generally one of fact.—*In re Atlantic & St. L. R. Co.* (Me.) 141.

A finding of fact by the presiding justice on appeal from the decision of railroad commissioners, as to whether the place of proposed crossing of a railroad by a townway was used for station purposes, will not be disturbed on appeal.—*In re Atlantic & St. L. R. Co.* (Me.) 141.

In condemnation proceedings, complainant railroad *held* entitled to costs.—*Baltimore & N. Y. R. Co. v. Bouvier* (N. J. Ch.) 868.

Under Eminent Domain Act (P. L. 1900, p. 86) § 17, the justice to whom a petition for condemnation is presented can permit amendments of the proceedings and adjourn the hearing on the petition.—*Philadelphia & C. Ferry Co. v. Intercity Link R. Co.* (N. J. Sup.) 184.

Condemnation proceedings are not rendered irregular by the omission to state in the petition and in the proofs matters which are not required to be set forth by P. L. 1900, p. 80, § 2.—*Philadelphia & C. Ferry Co. v. Intercity Link R. Co.* (N. J. Sup.) 184.

In a proceeding to condemn the rights of an abutting owner in a public highway, the municipality in which the highway is situated is not a necessary party.—*Philadelphia & C. Ferry Co. v. Intercity Link R. Co.* (N. J. Sup.) 184.

P. L. 1900, p. 86, § 17, relating to the taking of land for public improvements, *held* not to apply to Phillipsburg.—*Lehigh Valley R. Co. v. Inhabitants of Town of Phillipsburg* (N. J. Sup.) 194.

A proceeding to condemn land for the laying out of new streets, authorized by P. L. 1872, p. 497, art. 5, § 1, revising the charter of Phillipsburg, is superseded by provisions of P. L. 1900, p. 79, regulating the ascertainment of compensation for property taken for public use.—*Lehigh Valley R. Co. v. Inhabitants of Town of Phillipsburg* (N. J. Sup.) 194.

Act March 24, 1892 (P. L. p. 255), providing for permanent commissioners of assessments in cities of the first class, applies to assessment for the taking of land for a public street in the city of Newark, and is not rendered inapplicable by the general condemnation act of 1900 (P. L. p. 79), the charter of the city of New-

ark bringing that city within the exception contained in section 17 (page 86) of the latter act.—*Morris v. City of Newark* (N. J. Sup.) 1006.

Refusal to allow petition in condemnation to be amended by striking therefrom descriptions of certain land *held* not erroneous in view of the instructions given.—*McGunnegle v. Pittsburg & L. E. R. Co.* (Pa.) 988.

*In condemnation proceedings, the railroad company may show that the prices for land in the vicinity were obtained under special circumstances, and were in excess of the market value.—*Henkel v. Wabash Pittsburg Terminal R. Co.* (Pa.) 1085.

EMPLOYÉS.

See "Master and Servant."

ENCROACHMENT.

On highways, see "Highways," § 4.

ENTRY.

Of judgment, see "Appeal and Error," § 1.
Re-entry by landlord, see "Landlord and Tenant," § 5.

ENTRY, WRIT OF.

See "Ejectment"; "Real Actions."

EQUITABLE CONVERSION.

See "Conversion."

EQUITABLE DEFENSES.

In action at law, see "Action," § 2.

EQUITABLE ESTOPPEL.

See "Estoppel," § 1.

EQUITY.

Equitable conversion, see "Conversion."

Equitable defenses in action at law, see "Action," § 2.

Equitable estoppel, see "Estoppel," § 1.

Equities occurring after commencement of action, see "Action," § 4.

Laches in compelling transfer of corporate stock, see "Corporations," § 2.

Laches in suit for injunction, see "Injunction," § 3.

Nature of action as legal or equitable, see "Action," § 2.

Review of ruling changing nature of action from legal to equitable, see "Appeal and Error," § 3.

Review on appeal or writ of error, see "Appeal and Error," § 10.

Right to trial by jury, see "Jury," § 1.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Cancellation of Instruments"; "Discovery," § 1; "Fraudulent Conveyances"; "Injunction"; "Marshaling Assets and Securities"; "Nuisance," § 1; "Partition," § 1; "Quieting Title"; "Receivers"; "Reformation of Instruments"; "Specific Performance"; "Trusts."

Administration of charity, see "Charities," § 2.

Construction of will, see "Wills," § 13.

Injunction to restrain obstruction of easement, see "Easements," § 2.

* Point annotated. See syllabus.

Relief from diversion of park, see "Municipal Corporations," § 4.
 Setting aside will, see "Wills," § 4.
 Unfair competition, see "Trade-Marks and Trade-Names," § 3.

§ 1. Jurisdiction, principles, and maxims.

Under Code Pub. Gen. Laws 1904, art. 16, § 102, a court of equity has no jurisdiction to restrain the collection of 66 cents.—*Kenneweg v. Allegany County Com'rs* (Md.) 249.

Equity, in a suit for the performance of a contract to convey land, *held* required to retain the bill to give plaintiff relief as a licensee.—*Shipley v. Fink* (Md.) 360.

A bill which seeks to enforce a statutory liability by compelling the payment of sums largely in excess of the amount necessary to satisfy the debt is demurrable for want of equity.—*Miller v. Willett* (N. J. Ch.) 178.

A complaint in equity for an accounting, where complainant claims equitable jurisdiction because of the intricacy and complexity of the account, must show that the remedy at law is in fact inadequate.—*Daab v. New York Cent. & H. R. R. Co.* (N. J. Ch.) 449.

A bill for an account *held* not to show equitable jurisdiction on the ground of fraud.—*Daab v. New York Cent. & H. R. R. Co.* (N. J. Ch.) 449.

*The jurisdiction of equity to decree an accounting cannot be sustained merely because the bill prays for a discovery.—*Daab v. New York Cent. & H. R. R. Co.* (N. J. Ch.) 449.

Where complainant waived an answer under oath, as authorized by Laws 1867, p. 166, and failed to require an answer under oath to any interrogatory, the jurisdiction of equity on the discovery could not be sustained.—*Daab v. New York Cent. & H. R. R. Co.* (N. J. Ch.) 449.

Where a transaction in which shares were delivered to defendant was a gambling transaction, unlawful by 2 Gen. St. p. 1806, plaintiff's remedy by an action at law for conversion is adequate.—*Myers v. Fridenberg* (N. J. Ch.) 532.

*An objection to jurisdiction in equity may be raised at any time before findings of fact and conclusions of law.—*Owens v. Goldie* (Pa.) 1117.

Bill in equity for determination of rights of parties in royalties and to purchase money for patents dismissed; plaintiff having an adequate remedy at law.—*Owens v. Goldie* (Pa.) 1117.

§ 2. Parties and process.

Bill in equity *held* demurrable for misjoinder of parties defendant.—*Elk Brewing Co. v. Neubert* (Pa.) 782.

§ 3. Pleading.

*A party seeking equitable relief must specifically demand it.—*Muller v. Witte* (Conn.) 756.

*A bill for specific performance *held* properly amended, so as to set forth the contract with sufficient definiteness.—*White v. Poole* (N. H.) 494.

A cross-bill *held* fatally defective for multifariousness.—*Doremus v. City of Paterson* (N. J. Ch.) 3.

Cross-bill *held* demurrable for misjoinder of parties.—*Doremus v. City of Paterson* (N. J. Ch.) 3.

In a suit to restrain a city from polluting a water course, allegations in a cross-bill that the acts of certain water companies contributed to the nuisance *held* not germane to the bill.—*Doremus v. City of Paterson* (N. J. Ch.) 3.

*Only such new facts are properly pleaded in a cross-bill as are necessary to enable the court to do complete justice to all parties.—*Doremus v. City of Paterson* (N. J. Ch.) 3.

*A cross-bill defined.—*Doremus v. City of Paterson* (N. J. Ch.) 3.

A bill of complaint, stating that complainants jointly have rights of action against several defendants, *held* demurrable for want of equity.—*Miller v. Willett* (N. J. Ch.) 178.

A bill of complaint *held* multifarious in that it subjects unrelated defendant, who is entitled to defend separately, to the embarrassment of defending a suit in which others are defendants with whom he has no common interest.—*Miller v. Willett* (N. J. Ch.) 178.

A defendant demurring to an original bill *held* to have waived any right of objection to the amended bill on grounds not presented on such demurrer to the same extent as if he had pleaded over.—*Pryor v. Gray* (N. J. Ch.) 439.

Bill alleging that defendant, under a void chattel mortgage obtained from an insolvent corporation of which complainant was receiver, by taking possession and sale of the corporation's chattels wrongfully realized unknown sums of money, for which an accounting was prayed, *held* to state a sufficient ground of equitable jurisdiction.—*Pryor v. Gray* (N. J. Ch.) 439.

A bill by the receiver of an insolvent corporation, praying an accounting by defendant for moneys derived from a sale by defendant of property of the corporation under a chattel mortgage alleged to be void, *held* sufficient.—*Pryor v. Gray* (N. J. Ch.) 439.

There is no authority in equity by which a plea is overruled by the filing by defendant of a demurrer which is sustained.—*Love v. Robinson* (Pa.) 1065.

Demurrer to bill in partition on the ground that the court had acquired jurisdiction of the subject-matter in a previous suit *held* not maintainable.—*Love v. Robinson* (Pa.) 1065.

*Question of jurisdiction in equity is properly raised by demurrer.—*Owens v. Goldie* (Pa.) 1117.

§ 4. Hearing, submission of issues to jury, and rehearing.

A rehearing in an equity case will not be granted to enable the applicant to impeach the credit of witnesses.—*Feinberg v. Feinberg* (N. J. Ch.) 562.

*An application for a rehearing before a vice-chancellor is governed by principles applicable to motions for new trials.—*Feinberg v. Feinberg* (N. J. Ch.) 562.

*In order to justify a rehearing in an equity case for newly discovered evidence, the new matter must be of such a character that it would probably have altered the result.—*Feinberg v. Feinberg* (N. J. Ch.) 562.

§ 5. Bill of review.

Refusal of leave to file bill of review after decree in suit for accounting *held* within discretion of trial court.—*Safe Deposit & Trust Co. of Baltimore v. Gittings* (Md.) 1030.

Bill of review *held* allowable after entry of decree in conformity with decree of appellate court.—*Safe Deposit & Trust Co. of Baltimore v. Gittings* (Md.) 1030.

A bill to set aside a divorce decree for fraud *held* a bill of review, demurrable for failure to allege that it was filed by leave of court.—*Kerans v. Kerans* (N. J. Ch.) 305.

*Point annotated. See syllabus.

ERROR, WRIT OF.

See "Appeal and Error."

ESCROWS.

Delivery of deed, see "Deeds," §§ 1, 2.

ESTABLISHMENT.

Of bridges, see "Bridges," § 1.
Of courts, see "Courts," § 1.
Of highways, see "Highways," § 1.
Of railroads, see "Railroads," § 2.
Of trusts, see "Trusts," § 7.

ESTATES.

Created by will, see "Wills," § 9.
Decedents' estates, see "Descent and Distribution"; "Executors and Administrators."
Reservation of rents on conveyance in fee, see "Ground Rents."
Restrictions on creation of future estates, see "Perpetuities."
Tenancy in common, see "Tenancy in Common."
Trusts, see "Trusts," § 2.

Particular estates.

See "Curtesy"; "Dower"; "Life Estates."
Estates for years, see "Landlord and Tenant."

ESTOPPEL.

Acquirement of easement by, see "Easements," § 1.
By judgment, see "Judgment," § 5.
Of executor to deny assets, see "Executors and Administrators," § 5.
To allege ultra vires in transactions of corporation, see "Corporations," § 5.
To avoid or forfeit insurance policy, see "Insurance," § 5.
To deny authority of corporate officer, see "Corporations," § 5.
To deny corporate existence, see "Corporations," § 1½.
To deny title to corporate stock, see "Corporations," § 2.
To enforce forfeiture of lease, see "Landlord and Tenant," § 5.
To take appeal, see "Appeal and Error," § 2.

§ 1. Equitable estoppel.

In partition proceedings, certain parties held estopped from setting up that a master's deed did not pass their interest in the premises.—*Baltimore & N. Y. R. Co. v. Bouvier* (N. J. Ch.) 868.

An owner of land abutting a private way ending in a cul-de-sac held not entitled to object that the owners of the way beyond his land toward the cul-de-sac were estopped to close the same.—*Stevens v. Headley* (N. J. Ch.) 887.

Owner of certain lots held not estopped to compel defendant to remove encroachments on streets shown by the plan under which both parties purchased.—*Garvey v. Harbison-Walker Refractories Co. (Pa.)* 778.

*Release fraudulently procured from plaintiff by her attorney held a bar to the cause of action when accepted and paid for in good faith by defendant.—*Belheimer v. Thomas* (Vt.) 719.

EVIDENCE.

See "Affidavits"; "Depositions"; "Discovery"; "Witnesses."
Admissibility of evidence under pleading, see "Pleading," § 8.

Applicability of instructions to evidence, see "Trial," § 5.
Exceptions for purpose of review, see "Appeal and Error," § 3.
Harmless error in rulings on, see "Appeal and Error," § 14.
In proceedings before arbitrators, see "Arbitration and Award," § 1.
Newly discovered evidence as ground for new trial, see "Homicide," § 8; "New Trial," § 3.
Presumption on appeal or writ of error as to rulings, see "Appeal and Error," § 11.
Questions of fact for jury, see "Trial," § 4.
Reception at trial, see "Criminal Law," § 13; "Trial," § 2.
Review on appeal or writ of error, see "Appeal and Error," §§ 10, 18.
Verdict or findings contrary to evidence, see "New Trial," § 2.
Waiver of objections to rulings, see "Trial," § 8.

As to particular facts or issues.

See "Damages," § 5; "Deeds," §§ 2, 3; "Fraudulent Conveyances," § 3; "Gifts"; "Marriage"; "Partnership," § 1.
Character of instrument as deed or mortgage, see "Mortgages," § 1.
Compensation for property condemned, see "Eminent Domain," § 3.
Construction of will, see "Wills," § 5.
Contributory negligence of passenger, see "Carriers," § 4.
Existence or establishment of street, see "Municipal Corporations," § 8.
Mental capacity of testator, see "Wills," § 2.
Qualifications of trustee, see "Trusts," § 3.
Right to curtesy, see "Curtesy."
Undue influence in execution of will, see "Wills," § 3.

In actions by or against particular classes of parties.

See "Brokers," § 2; "Carriers," §§ 3, 4; "Druggists"; "Master and Servant," § 8; "Municipal Corporations," § 9; "Railroads," §§ 1, 5, 6, 8, 9; "Sheriffs and Constables," § 1.
Trustee, see "Trusts," § 7.
Trustee in bankruptcy, see "Bankruptcy," § 1.

In particular civil actions or proceedings.

See "Breach of Marriage Promise"; "Contempt," § 1; "Divorce," § 3; "Ejectment," § 2; "False Imprisonment," § 1; "Fraud," § 2; "Malicious Prosecution," § 2; "Money Received"; "Negligence," § 4; "Reformation of Instruments," § 2; "Specific Performance," § 3; "Trespass," § 1; "Trove and Conversion," § 1.
Condemnation proceedings, see "Eminent Domain," § 3.
For appointment of trustee, see "Trusts," § 3.
For brokers' commissions, see "Brokers," § 2.
For causing death, see "Death," § 1.
For criminal conversation, see "Husband and Wife," § 7.
For death caused by operation of railroad, see "Railroads," § 6.
For injuries at agricultural fair, see "Agriculture."
For injuries from fire caused by operation of railroad see "Railroads," § 9.
For injuries from flowage, see "Waters and Water Courses," § 2.
For injuries to animals caused by operation of railroads, see "Railroads," § 8.
For personal injuries, see "Carriers," §§ 3, 4; "Electricity"; "Highways," § 4; "Master and Servant," § 8; "Municipal Corporations," § 9; "Railroads," § 5.
For price of goods sold, see "Sales," § 6.
For services, see "Work and Labor."
For unfair competition, see "Trade-Marks and Trade-Names," § 8.

* Point annotated. See syllabus.

For work and labor, see "Work and Labor."
 For wrongful death of passenger, see "Carriers," § 3.
 On bill or note, see "Bills and Notes," § 4.
 On insurance policy, see "Insurance," § 7.
 On quantum meruit, see "Work and Labor."
 To establish trust, see "Trusts," § 7.
 To recover payment, see "Payment," § 2.
 To recover preference by bankrupt, see "Bankruptcy," § 1.
 To restrain collection of municipal taxes, see "Municipal Corporations," § 10.
 To restrain nuisance, see "Nuisance," § 1.

In criminal prosecutions.

See "Criminal Law," §§ 5-12; "Homicide," § 7; "Obscenity"; "Rape," § 2.
 Bastardy proceedings, see "Bastards," § 1.
 For violation of liquor laws, see "Intoxicating Liquors," § 5.

§ 1. **Best and secondary evidence.**

*A question whether certain deed had been made to a third person *held* properly excluded as not the best evidence.—Rollins v. Atlantic City R. Co. (N. J. Sup.) 929.

§ 2. **Admissions.**

A declaration of an employe *held* evidence against his employer that he shot a person.—Baltimore & O. R. Co. v. Deck (Md.) 958.

*In an action on a contract made by the alleged agents of defendant, neither the contract, the agents' letters, nor their declarations or acts in making the contract, were admissible to bind the principal until some proof tending to establish the agency had been introduced.—Fifer v. Clearfield & Cambria Coal & Coke Co. (Md.) 1122.

There is no presumption of law that a vice president and director of a bank is authorized to bind the bank by his admissions.—Westminster Nat. Bank v. New England Electrical Works (N. H.) 971.

Rule as to subsequent declarations of the grantee that the deed was intended as a mortgage.—Wilson v. Terry (N. J. Ch.) 310.

§ 3. **Declarations.**

In an action for criminal conversation, a confession made by the wife, in defendant's absence, concerning past events, *held* inadmissible against him.—Kohlhoss v. Mobley (Md.) 236.

§ 4. **Hearsay.**

*In proceedings to condemn land for approach to bridge, price received by owner of land on opposite side of river *held* admissible in evidence.—Hadley v. Board of Chosen Freeholders of Passaic County (N. J. Sup.) 1132.

§ 5. **Documentary evidence.**

*In an action against a railroad for wrongful death, a photograph, showing the situation of defendant's tracks and the station at which decedent was killed, *held* admissible.—MacFeat v. Philadelphia, W. & B. R. Co. (Del. Super.) 898.

In action for personal injuries, evidence of plaintiff's expectancy of life, as shown by table of expectancy of life, *held* admissible.—McMahon v. Bangs (Del. Super.) 1093.

*In action for personal injuries, record as to plaintiff's condition kept by hospital nurse *held* inadmissible in evidence.—McMahon v. Bangs (Del. Super.) 1093.

*A recital of pedigree in an ancient deed is evidence of the matter recited, if the deed was made by one in the branch of the family which the pedigree concerned.—Rollins v. Atlantic City R. Co. (N. J. Sup.) 929.

* Point annotated. See syllabus.

*A recital of pedigree in an ancient deed is evidential, though not made by one related to the family, if it is supported by long possession consistent with the recital.—Rollins v. Atlantic City R. Co. (N. J. Sup.) 929.

A final decree in a suit between the person named in a will as the executor and the legatees, without the record of the cause, *held* without evidential force on an issue of antagonism between such person and the legatees.—In re Acker's Will (N. J. Prerog.) 556.

*Certified copy of docket entries made in bankruptcy court *held* inadmissible to show bankruptcy.—Gibson v. Holmes (Vt.) 11.

*Certain plan *held* properly admitted in evidence, notwithstanding its failure to show certain matters not in issue.—Marcy v. Parker (Vt.) 19.

§ 6. **Parol or extrinsic evidence affecting writings.**

*Parol evidence of a subsequent waiver of stipulations in a written contract *held* admissible, even when such contract is under seal.—Hilton v. Hanson (Me.) 797.

*Parol evidence is admissible to show the true relation of the maker of a note to the transaction.—Morgan v. Thompson (N. J. Err. & App.) 410.

Parol evidence is admissible to show the real object of a mortgage, and that it was given for a purpose not disclosed in the condition.—Campbell v. Perth Amboy Shipbuilding & Engineering Co. (N. J. Ch.) 319.

*In an action on a written contract *held* error to overrule an offer to prove that the execution of the contract was obtained by fraud.—Sheldon Co. v. Harleigh Cemetery Ass'n (N. J. Sup.) 189.

*As between the immediate parties to a note, it may be proved that it was really given by the maker for the accommodation of her husband.—People's Nat. Bank v. Schepfelin (N. J. Sup.) 333.

*Parol evidence *held* admissible to establish contemporaneous parol agreement entered into at execution of lease.—T. W. Phillips Gas & Oil Co. v. Pittsburg Plate Glass Co. (Pa.) 830.

§ 7. **Opinion evidence.**

In a will contest, where a witness testified to conversations between testator and his brother concerning the execution of the will, *held* proper to permit him to be asked whether there was any act or statement of such brother indicating coercion.—In re Nichols (Conn.) 610.

*In an action against a city for injuries from a defective sidewalk, a witness *held* competent to testify as to whether in his opinion the walk was in a reasonably safe condition for public travel.—Campbell v. City of New Haven (Conn.) 665.

Where handwriting experts testified that anonymous letters showed an apparent attempt to disguise, they were properly asked whether attempts to disguise eradicated from the product peculiarities of the handwriting indicating the producer.—McGarry v. Healey (Conn.) 671.

In an action against a railroad for wrongful death, evidence of a photographer as to the position of a camera used to photograph the scene of the accident *held* inadmissible.—MacFeat v. Philadelphia, W. & B. R. Co. (Del. Super.) 898.

*In an action against a railroad for wrongful death, a question asked a medical expert *held* properly excluded.—MacFeat v. Philadelphia, W. & B. R. Co. (Del. Super.) 898.

In an action against a railroad for wrongful death, a question *held* inadmissible as calling

for a conclusion of fact.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

Witness *held* not competent as an expert as to whether there was any method to protect persons, where blasting was being carried on in a stone quarry, from injury by flying fragments of rock.—*McMahon v. Bangs* (Del. Super.) 1098.

*In an action for injuries to plaintiff's trees, evidence of a witness' estimate or judgment of the damage in exact figures was objectionable as invading the province of the jury.—*Western Union Telegraph Co. v. Ring* (Md.) 801.

*Evidence that a witness knew something about the value of certain trees for wood or timber *held* insufficient of itself to qualify the witness to testify as to such value.—*Western Union Telegraph Co. v. Ring* (Md.) 801.

*In an action for injuries to real property, an expert witness may give his opinion as to the value of the property before and after the alleged tort.—*Baltimore Belt R. Co. v. Sattler* (Md.) 1125.

*In an action for injuries to real property, an expert, testifying as to the value of the property before and after the alleged tort, may state the reasons upon which his opinion is based.—*Baltimore Belt R. Co. v. Sattler* (Md.) 1125.

In an action against a railroad for injuries to plaintiff's property from smoke and cinders, refusal to exclude certain testimony *held* not error.—*Baltimore Belt R. Co. v. Sattler* (Md.) 1125.

That a civil engineer was permitted to testify to the percolating character of certain soil, etc., *held* to imply a finding that he was qualified to testify on the subject.—*Flint v. Union Water Power Co.* (N. H.) 788.

Evidence of a surveyor in an action of ejectment *held* not inadmissible as opinion evidence, but, being testimony, as to a fact.—*Brundred v. McLaughlin* (Pa.) 565.

In an action for injuries *held* proper to permit a witness to testify as to whether a sloping pavement of a certain material and pitch was dangerous.—*Garberg v. Samuels* (R. I.) 211.

*A witness who does not know the ordinary rate of speed of a street car on a particular route is not competent to testify that a car on a particular occasion on that route was run at an extraordinary rate of speed.—*Verrone v. Rhode Island Suburban Ry. Co.* (R. I.) 512.

It was proper to permit an Italian priest to testify that a marriage by religious ceremony alone did not constitute a legal marriage in Italy at the time a certain ceremony was performed; the witness having been shown to be duly qualified.—*Massucco v. Tomassi* (Vt.) 57.

In an action for injuries to a servant, certain evidence *held* admissible and other evidence inadmissible.—*Lewes v. John Crane & Sons* (Vt.) 60.

*In an action for injuries resulting in a stiff ankle, a physician may testify as an expert as to the nature of the stiffness, etc.—*Lewes v. John Crane & Sons* (Vt.) 60.

§ 8. Weight and sufficiency.

*Where testimony is conflicting, the jury should reconcile it, if possible.—*Green v. Council of Newark* (Del. Super.) 792.

EXAMINATION.

Of expert witnesses, see "Evidence," § 7.
Of witnesses in general, see "Witnesses," § 2.

* Point annotated. See syllabus.

EXCEPTIONS.

Necessity for purpose of review, see "Appeal and Error," § 8.

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see "Appeal and Error," § 7.

Necessity of showing prejudice in bill of exceptions, see "Appeal and Error," § 14.

Retroactive operation of statute relating to, see "Constitutional Law," § 7.

EXCESSIVE DAMAGES.

See "Damages," § 4.

As ground for new trial, see "New Trial," § 2.

In action for slander, see "Libel and Slander," § 3.

EXCHANGES.

*Where complainant furnished the money with which to purchase a seat in a stock exchange in the name of his partner, complainant, under the constitution of the exchange, *held* not entitled to restrain a sale of the seat to pay his partner's individual indebtedness to the members.—*Zell v. Baltimore Stock Exch.* (Md.) 808.

EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

EXCUSABLE HOMICIDE.

See "Homicide," § 5.

EXECUTION.

See "Attachment"; "Garnishment."

Exemptions, see "Homestead."

For fines, see "Fines."

Vacation by audita querela, see "Audita Querela."

§ 1. Property subject to execution.

Goods in the hands of a vendee in a conditional sale *held* subject to levy by a creditor of the vendee.—*Duplex Printing Press Co. v. Clipper Pub. Co.* (Pa.) 841.

*Personalty owned by railroad and used for repairs and emergencies cannot be sold under execution.—*Margo v. Pennsylvania R. Co.* (Pa.) 1081.

*Property essential and necessary to the existence of a railroad company and in actual use cannot be sold under an ordinary writ of fieri facias.—*Margo v. Pennsylvania R. Co.* (Pa.) 1081.

§ 2. Lien, levy or extent, and custody of property.

A levy on goods of a judgment debtor while such goods were in the possession of a mortgagee thereof, a list of such goods being annexed to the levy as inventory, *held* sufficient as a constructive seizure for the purpose of a legal levy, although the officer did not see the goods.—*Avon-by-the-Sea Land & Improvement Co. v. McDowell* (N. J. Ch.) 865.

§ 3. Sale.

Where lessors' interest in coal is sold under a judgment, royalties to be paid by lessee *held* the property of the purchaser.—*Coolbaugh v. Lehigh & Wilkes-Barre Coal Co.* (Pa.) 94.

Legal title to coal under mining laws *held* to remain in the lessors until mined.—Coolbaugh v. Lehigh & Wilkes-Barre Coal Co. (Pa.) 94.

EXECUTORS AND ADMINISTRATORS.

See "Descent and Distribution"; "Wills."

Law reducing penalty recoverable against administrator as impairing obligation of contract, see "Constitutional Law," § 6.

Laws limiting recovery in action against administrator for penalty as denying equal protection of law, see "Constitutional Law," § 9.

Laws reducing penalties in actions against as impairing vested rights, see "Constitutional Law," § 5.

Record on appeal in proceedings for appointment or removal, see "Appeal and Error," § 7.

Retroactive operation of law regulating amount of penalty recoverable against administrator, see "Constitutional Law," § 7.

Testamentary trustees, see "Trusts."

Testimony as to transaction with decedents, see "Witnesses," § 1.

Validity of laws relating to inventories as encroaching on judiciary, see "Constitutional Law," § 2.

§ 1. Appointment, qualification, and tenure.

The trustee of an insane person *held* entitled to administer an estate to which the insane person would have been entitled to administer if competent.—Boyd v. Cloud (Del. Super.) 294.

*One convicted of making an overcharge for prosecuting a pension claim in violation of Act Cong. June 27, 1890, c. 634, § 4, 26 Stat. 183 [U. S. Comp. St. 1901, p. 3231], *held* not convicted of an infamous crime within Code Pub. Gen. Laws, art. 93, § 51, relating to the qualifications of executors.—Garitee v. Bond (Md.) 631.

*That the executor named in a will was a non-resident *held* no ground for the court's refusal to grant letters to him.—In re Acker's Will (N. J. Prerog.) 556.

Legatees and next of kin *held* to have waived their right to administration because of the executor's failure to present the will for probate within 40 days, as required by P. L. 1898, p. 724, § 27.—In re Acker's Will (N. J. Prerog.) 556.

§ 2. Assets, appraisal, and inventory.

Act July 6, 1906 (Pub. Acts 1906, p. 413, c. 217), limiting the recovery in actions against administrators for a penalty under Gen. St. 1902, § 324, repealed, *held* retroactive and to apply to pending causes.—Atwood v. Buckingham (Conn.) 616.

Under Gen. St. 1902, § 324, providing a penalty for an administrator's failure to file an inventory, no penalty could be incurred before suit was in fact instituted to recover the same.—Atwood v. Buckingham (Conn.) 616.

*Under Gen. St. 1902, § 1, the repeal of section 324, while preventing the institution of new actions for an administrator's failure to file an inventory within 12 months, whether past or future, did not affect pending actions for such delinquencies.—Atwood v. Buckingham (Conn.) 616.

*An administrator is a proper party to sue for goods which once belonged to his intestate, but were disposed of by him by a fraudulent transfer or gift.—Wright v. Holmes (Me.) 507.

§ 3. Collection and management of estate.

P. L. 1888, p. 395, vesting administrators with the same powers in respect to sales of land

as executors named in the will, does not give a substituted administrator a grant of power to sell lands which are the subject of an express devise to the executor as trustee.—Hegeman's Ex'rs v. Boome (N. J. Ch.) 392.

§ 4. Allowance and payment of claims.

An administrator *held* justified in paying a demand note secured by a mortgage on real estate of his intestate out of the latter's personal assets, though the note secured was not filed as a claim against the estate, and no demand was made by the holder out of the personal assets.—Appeal of Beard (Conn.) 704.

*Gen. St. p. 2368, § 58, *held* to have no application to a case where execution was levied on lands of decedent during his lifetime.—Wright v. Wright (N. J. Ch.) 487.

Where a note is inventoried as an asset of an estate, and is claimed by a third person, his relief is by a bill in equity, and not by a presentation of claim for the note in the probate court.—In re Ferdon's Estate (N. J. Prerog.) 551.

§ 5. Distribution of estate.

Facts *held* not to show that proceedings on distribution in probate court gave a certain person any interest in the estate.—Gerard v. Ives (Conn.) 607.

*Executors *held* estopped to deny that they had received income from which to make payments to beneficiaries, and not entitled to allowance for the payments as against the corpus of the estate.—Woolsey v. Woolsey (N. J. Err. & App.) 686.

§ 6. Sales and conveyances under order of court.

Administrator's sale set aside, because purchaser did not get a building which he had reason to believe was covered by the sale.—Biddison v. Aaron (Md.) 523.

The fact that purchaser at an administrator's sale failed to ask administrator for information as to the premises sold *held* immaterial on his right to have the sale set aside.—Biddison v. Aaron (Md.) 523.

§ 7. Actions.

A count *held* not to state a cause of action against executors; there being no statement of a promise to pay, nor a statement of a delivery of the order on which claim was based.—Haines v. Rogers (N. J. Sup.) 272.

§ 8. Accounting and settlement.

An order of the orphans' court, dismissing a petition of an executor to vacate an account showing that a legacy which had been adeemed was distributable to the legatee without a hearing or submission on the pleadings, *held* error.—Gallagher v. Martin (Md.) 247.

Under Code Pub. Gen. Laws, art. 93, § 234, providing the jurisdiction of the orphans' court, such court has power to hear and determine the question of the ademption of a legacy.—Gallagher v. Martin (Md.) 247.

Though the answer in a suit by legatees against an executor for an accounting admitted culpable negligence, *held* the cause of action, which was for mere nonfeasance, was barred by laches.—Hill v. Hill (N. J. Ch.) 385.

EXEMPTIONS.

See "Homestead."

From inheritance tax, see "Taxation," § 5.

EXHIBITS.

Annexed to pleading, see "Pleading," § 6.

* Point annotated. See syllabus.

EXPECTANCY.

Admissibility of life expectancy tables in evidence, see "Evidence," § 5.
Evidence of life expectancy as affecting damages, see "Damages," § 5.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 7.
In criminal prosecutions, see "Criminal Law," § 11.

EXPRESS COMPANIES.

See "Carriers," § 1.

FACTORS.

See "Brokers."

FAIRS.

Agricultural fairs, see "Agriculture."

FALSE IMPRISONMENT.

See "Malicious Prosecution."

§ 1. Civil Liability.

In an action for false arrest and imprisonment, an instruction as to the awarding of punitive damages *held* erroneous.—*Bernheimer Bros. v. Becker* (Md.) 526.

In an action for arrest and false imprisonment, an instruction as to the authority of defendants' agent and their liability for his acts *held* error.—*Bernheimer Bros. v. Becker* (Md.) 526.

In an action for false arrest and imprisonment of plaintiff charged with stealing goods from defendant partners' store, evidence examined, and *held* insufficient to prove a ratification by one of defendant partners of the action of his copartner in causing the arrest.—*Bernheimer Bros. v. Becker* (Md.) 526.

An agent or employé about an ordinary business has no implied authority to arrest and search customers, suspected of stealing, in the store of his principal.—*Bernheimer Bros. v. Becker* (Md.) 526.

A partner in an ordinary mercantile business has no implied power to bind his copartner by his acts in arresting and searching one suspected of stealing goods in the partnership store.—*Bernheimer Bros. v. Becker* (Md.) 526.

*Any deprivation of the liberty of another without his consent, whether by violence, threats, or otherwise, is an imprisonment.—*Bernheimer Bros. v. Becker* (Md.) 526.

*Under V. S. 1701, 1703, it is the duty of an officer, arresting defendant on civil process, to commit him to jail in the county where the arrest is made, and his act in committing defendant to jail in another county constitutes the officer a trespasser *ab initio*.—*Gibson v. Holmes* (Vt.) 11.

Under V. S. 1075, 1076, certain return of an officer *held* insufficient to enable the officer to justify for making an arrest thereunder.—*Gibson v. Holmes* (Vt.) 11.

Where plaintiff abandons his suit before the entry thereof, he cannot justify under the writ on which defendant was arrested in an action by defendant for false imprisonment.—*Gibson v. Holmes* (Vt.) 11.

*An attorney's action in directing the commitment of his client's debtor to the wrong

prison *held* chargeable to the client, and to render the client a trespasser (V. S. 1701, 1703).—*Gibson v. Holmes* (Vt.) 11.

FALSE PRETENSES.

Limitation of prosecution, see "Criminal Law," § 3.

Right to use witnesses not included in list furnished to accused, see "Criminal Law," § 18.

*Where defendant was charged with obtaining by false pretense \$1,800 "current money," proof of obtaining the money by means of a check *held* not a fatal variance.—*Schaumloeffel v. State* (Md.) 803.

FALSE SWEARING.

See "Perjury."

FEEES.

Review of discretion of court in allowance, see "Appeal and Error," § 12.

FEE SIMPLE.

Created by will, see "Wills," § 9.

FELLOW SERVANTS.

See "Master and Servant," § 6.

FERAE NATURAE.

See "Animals."

FERRIES.

Condemnation of footpath leading to ferry, see "Eminent Domain," § 1.

FIERI FACIAS.

See "Execution."

FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 18.

Setting aside, see "New Trial," § 2.

FINES.

For violation of municipal ordinances, see "Municipal Corporations," § 7.

The fine imposed by a justice in summary proceedings, under Rev. Code 1893, c. 123, § 21, for trespass, *held* to be a judgment.—*Dasey v. State* (Del. Super.) 300.

The fine for trespass in summary proceedings, under Rev. Code 1893, c. 123, § 21, *held* collectible only as provided therein, and not by execution, where defendant does not claim ownership so as to authorize appeal.—*Dasey v. State* (Del. Super.) 300.

FIRES.

Caused by operation of railroad, see "Railroads," § 9.

Variance between pleading and proof as to occurrence of, see "Pleading," § 8.

FLOWAGE.

See "Waters and Water Courses," § 2.

*Point annotated. See syllabus.

FORCIBLE DEFILEMENT.

See "Rape."

FORECLOSURE.

Of lien, see "Railroads," § 3.

Of mortgage, see "Mortgages," § 5; "Railroads," § 3.

FOREIGN CORPORATIONS.

See "Corporations," § 9.

Affidavit of defense in action by, see "Pleading," § 1.

FOREIGN JUDGMENTS.

See "Judgment," § 7.

FORFEITURES.

See "Searches and Seizures."

Of bail, see "Bail," § 1.

Of insurance, see "Insurance," §§ 4, 5.

FORGERY.

Under Acts 1904, pp. 185, 187, No. 115, §§ 22, 24, a physician's prescription for liquor, failing to contain a statement that the liquor was necessary for medicinal use, *held* so invalid that it could not be the subject of forgery at common law.—*State v. McManus* (Vt.) 1013.

FORMER ADJUDICATION.

See "Judgment," § 5.

FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 4.

FORMS OF ACTION.

See "Action," § 2; "Ejectment"; "Replevin"; "Trespass," § 1; "Trove and Conversation."

FRANCHISES.

See "Taxation," § 1.

Corporate franchises, see "Corporations," § 1½.

FRAUD.

See "False Pretenses"; "Fraudulent Conveyances."

Against sureties, see "Principal and Surety," § 1.

Bv or against corporate officers, see "Corporations," § 4.

Ground for equitable jurisdiction, see "Equity," § 1.

In procuring insurance, see "Insurance," § 3.

§ 1. **Deception constituting fraud, and liability therefor.**

*Declaration, in an action for deceit, *held* to state no cause of action for deceit.—*Schrafft v. Fidelity Trust Co.* (N. J. Sup.) 933.

§ 2. **Actions.**

One who perpetrated a fraud on another cannot set up as a defense that the defrauded party should have discovered the fraud and protected himself against it.—*Turner v. Kuehnle* (N. J. Ch.) 327.

In an action for fraud the burden of proof *held* on plaintiff.—*Colston v. Bean* (Vt.) 1015.

* Point annotated. See syllabus.

FRAUDS, STATUTE OF.

Part performance as ground for specific performance, see "Specific Performance," § 2.

§ 1. **Promises to answer for debt, default, or miscarriage of another.**

Where materials for a building were delivered to the contractor on his sole credit, a subsequent oral promise by the owner to see that the contractor was paid was within the statute of frauds.—*East Baltimore Lumber Co. v. Waldeman* (Md.) 575.

*A joint promise by a contractor and the owners of a building to pay for materials furnished, credit being given partly to both, is not within the statute of frauds.—*East Baltimore Lumber Co. v. Waldeman* (Md.) 575.

*An owner's agreement to pay for certain materials purchased by a contractor *held* an original promise not within the statute of frauds.—*Oldenburg & Kelley v. Dorsey* (Md.) 576.

A contract to guaranty the payment of a mortgage debt in consideration of one not the equitable owner of the mortgage forbearing to sue *held* within the statute of frauds.—*Commonwealth Bank of Baltimore v. Kirkland* (Md.) 799.

Act of seller in charging lumber to third persons in accordance with buyer's direction *held* not inconsistent with a claim that the buyer's undertaking was an original one.—*Ridgeway v. Corporation Liquidating Co.* (N. J. Err. & App.) 116.

On the issue of whether a promise to pay for lumber was original or collateral, the fact that the seller charged the lumber to other parties than the promisor is to be considered, but is not conclusive.—*Ridgeway v. Corporation Liquidating Co.* (N. J. Err. & App.) 116.

*Promise of mortgagor's father to pay debt on discontinuance of action against mortgagor for deceit *held* not binding under statute of frauds.—*Bicknell v. Bicknell* (R. I.) 970.

§ 2. **Agreements not to be performed within one year.**

A contract between two municipalities for a supply of water is within the statute of frauds.—*Jersey City v. Town of Harrison* (N. J. Err. & App.) 765; *Matthews v. Same*, *Id.*

A promise to pay a certain sum as long as the promisee resides in a certain place does not require a memorandum under the statute of frauds.—*Burgesser v. Wendel* (N. J. Sup.) 994.

§ 3. **Real property and estates and interests therein.**

Parol agreement relating to land held not enforceable as within the statute of frauds.—*Bryan v. Douds* (Pa.) 828.

§ 4. **Operation and effect of statute.**

In an action for materials sold under an alleged joint contract, an instruction that plaintiff could not recover against the owners of the building unless the materials were sold on their special and exclusive credit *held* properly refused.—*Oldenburg & Kelley v. Dorsey* (Md.) 576.

FRAUDULENT CONVEYANCES.

Recovery of property by administrator, see "Executors and Administrators," § 2.

§ 1. **Transfers and transactions invalid.**

*Where a conveyance leaves the grantor without sufficient property to meet existing debts, it cannot be supported as against creditors, un-

less it is made on a valuable consideration.—*Clarke v. Black* (Conn.) 757.

Certain conveyance from wife to husband *held* based on a valuable and adequate consideration, and not fraudulent as against creditors of the wife.—*Clarke v. Black* (Conn.) 757.

Under 2 Gen. St. pp. 1604, 1605, §§ 11, 12, 15, a fraudulent conveyance to a purchaser with notice *held* void, though full consideration was paid.—*Russell & Erwin Mfg. Co. v. E. C. Faitoute Hardware Co.* (N. J. Ch.) 421, 424.

§ 2. Rights and liabilities of parties and purchasers.

*A conveyance of his property by a debtor *held* valid as between the parties.—*Bouton v. Beers* (Conn.) 619.

§ 3. Remedies of creditors and purchasers.

*Where the facts concerning alleged fraudulent conveyance are found by the court, the conclusion to be drawn from the facts is one of law.—*Clarke v. Black* (Conn.) 757.

The loaning of money to an individual, the same being used by him in the business of a corporation, did not render it the tender's debtor, so as to render a mortgage securing the loan valid against creditors.—*Mowen v. Nitsch* (Md.) 582.

On an issue as to the validity of a mortgage given by a corporation, evidence *held* to show that the mortgage was given to secure the individual indebtedness of one of the officers thereof.—*Mowen v. Nitsch* (Md.) 582.

Money used by husband to pay taxes and mortgage on wife's property *held* the money of the husband, so as to subject the property to that extent to the lien of a judgment against the husband.—*Farr v. Hauenstein* (N. J. Ch.) 383.

FREIGHT.

See "Carriers," § 1.

FUNDS.

School funds, see "Schools and School Districts," § 1.

GAME.

Hunting laws denying equal protection of law, see "Constitutional Law," § 9.

Acts 1896, p. 74, No. 94, as amended by Acts 1898, p. 84, No. 108, relative to hunting deer, *held* not altogether repealed as to non-residents by Acts 1904, p. 167, No. 128, but only repealed in so far as it is inconsistent with the later act.—*State v. Niles* (Vt.) 793.

GAMING.

§ 1. Gambling contracts and transactions.

*A bill requiring defendant to transfer to complainants certain shares of stock, delivered in a transaction claimed to be unlawful, under 2 Gen. St. p. 1606, entitled "An act to prevent gaming," *held* demurrable when not filed until after six months from the delivery of the shares, under section 5 of the act.—*Myers v. Fridenberg* (N. J. Ch.) 532.

GARBAGE.

Municipal regulations, see "Municipal Corporations," § 7.

*Point annotated. See syllabus.

GARNISHMENT.

See "Attachment"; "Execution."

§§ 1, 2. Persons and property subject to garnishment.

That all goods, effects, and credits assigned for the benefit of creditors were taken possession of by an attorney of the assignee, does not relieve the assignee from liability, charged under trustee process.—*Thompson v. Dyer* (Me.) 76.

An assignee for the benefit of creditors and under trustee process will be charged as trustee unless he fully accounts for them.—*Thompson v. Dyer* (Me.) 76.

*A verdict upon which no judgment has been entered is not subject to garnishment.—*Cappelli v. Wood* (R. I.) 978.

§ 3. Proceedings to support or enforce.

The usual statement, that at the time of service of writ the trustee did not have any goods, effects, or credits of the principal defendant, is not the disclosure, but is in the nature of a plea.—*Thompson v. Dyer* (Me.) 76.

*The disclosure of a person summoned as a trustee must be explicit, and under oath that he believes it to be true.—*Thompson v. Dyer* (Me.) 76.

*In making his disclosure, the trustee may refer to books and papers, and make their contents part of his disclosure.—*Thompson v. Dyer* (Me.) 76.

*A trustee may, in his disclosure, under oath, adopt the statement of others, made to him or in their testimony.—*Thompson v. Dyer* (Me.) 76.

Where, before service of the writ upon him, the trustee had in his hands goods and credits intrusted to him by the principal defendant, he must fully account for them.—*Thompson v. Dyer* (Me.) 76.

Where a disclosure of a trustee is not sufficiently full, he must be charged generally the amount to be determined on *scire facias*.—*Thompson v. Dyer* (Me.) 76.

Where a trustee admits that before service of the writ upon him he accepted an assignment of certain goods and credits of the principal defendant, the statement of his attorney cannot be received as evidence for want of the allegation, required by Rev. St. c. 88, §§ 30, 31, to let in evidence other than the disclosure.—*Thompson v. Dyer* (Me.) 76.

Under Rev. St. c. 88, §§ 30, 31, a statement in a trustee disclosure is evidence, and not an allegation; but the allegation which must be made to let in evidence other than the disclosure must be in addition to the disclosure proper.—*Thompson v. Dyer* (Me.) 76.

A statement upon oath by attorney of an assignee for creditors, showing a full accounting for all goods and credits received, cannot be considered on the question of charging the assignee as trustee, unless the latter makes such statement a part of his disclosure.—*Thompson v. Dyer* (Me.) 76.

*One summoned as trustee should file his answer and submit to examination at the return term, and if he fails so to do he is liable to plaintiff for costs.—*Thompson v. Dyer* (Me.) 76.

The liability of a garnishee, imposed by Gen. Laws 1896, c. 254, § 20, *held* a liability to an action only, and he may file the affidavit and refund the fee paid him in his discharge of his liability, as provided by chapter 256, § 21.—*Marshall v. McCormick* (R. I.) 212.

An affidavit of a garnishee, failing to disclose to the court that he had no funds in his hands belonging to defendant, *held* sufficient within Gen. Laws 1896, c. 256, § 21.—*Marshall v. McCormick* (R. I.) 212.

§ 4. Operation and effect of garnishment, judgment, or payment.

An officer, suing to recover the purchase price of property levied on, after satisfaction of his writs, *held* the representative of the attachment defendant, within V. S. 1374, entitling the purchaser to plead payment of a judgment in garnishment proceedings in discharge under the general issue.—*Lamb v. Zundell* (Vt.) 33.

GAS.

See "Mines and Minerals," § 1.

Consolidation of gas companies, see "Corporations," § 7.

Gas companies in general, see "Corporations," § 5.

Act April 8, 1903 (P. L. 1903, p. 359), extending the rights of gas companies in certain respects, *held* not unconstitutional.—*Public Service Corp. of New Jersey v. De Grote* (N. J. Ch.) 65; *Village of Ridgefield Park v. Public Service Corp. of New Jersey*, Id.

P. L. 1903, p. 359, in relation to gas companies, *held* to authorize a company within the statute to lay pipes in the streets of a municipality large enough for the transmission of gas to other municipalities, though the pipes are larger than are required for the needs of the municipality in the streets of which they are laid.—*Public Service Corp. of New Jersey v. De Grote* (N. J. Ch.) 65; *Village of Ridgefield Park v. Public Service Corp. of New Jersey*, Id.

A statute, dividing a township into several townships, none of the original township remaining, *held* of no effect as concerned rights previously granted to a gas company by its charter to conduct a lighting business in the original township.—*Public Service Corp. of New Jersey v. De Grote* (N. J. Ch.) 65; *Village of Ridgefield Park v. Public Service Corp. of New Jersey*, Id.

Contract to furnish natural gas construed, and *held* that the pressure of one pound was all that was required.—*Flaccus v. West Penn Gas Co.* (Pa.) 1111.

GIFTS.

Charitable gifts, see "Charities."

In trusts, see "Trusts," § 1.

Transfer taxes, see "Taxation," § 5.

§ 1. Inter vivos.

Evidence *held* insufficient to show a gift.—*Northwestern Mut. Life Ins. Co. v. Collamore* (Me.) 652.

*Gifts *inter vivos* and *causa mortis* defined.—*Northwestern Mut. Life Ins. Co. v. Collamore* (Me.) 652.

Evidence *held* insufficient to prove a gift of a note.—*In re Ferdon's Estate* (N. J. Prerog.) 551.

§ 2. Causa mortis.

A declaration, made in contemplation of suicide, as to disposition of the property after death, *held* ineffectual to transfer title or create a trust.—*Northwestern Mut. Life Ins. Co. v. Collamore* (Me.) 652.

GRAND JURY.

See "Indictment and Information."

*Point annotated. See syllabus.

GRANTS.

Of public lands, see "Public Lands."

GROUND RENTS.

Payment of ground rent and recitals in deeds *held* sufficient to raise a presumption of the creation of the ground rent.—*Braunstein v. Black* (Del. Super.) 1091.

GUARANTY.

See "Principal and Surety."

Requirements of statute of frauds, see "Frauds, Statute of," § 1.

§ 1. Requisites and validity.

*A guaranty of past indebtedness of a third person, without a consideration to the guarantor, *held* unenforceable.—*Whitehead v. American Lamp & Brass Co.* (N. J. Ch.) 554.

§ 2. Construction and operation.

*A guaranty made August 1, 1903, to secure "any future purchases during this year," *held* in force for the remainder of the year 1903.—*Whitehead v. American Lamp & Brass Co.* (N. J. Ch.) 554.

§ 3. Remedies of creditors.

*Guarantor of payment of note *held* liable without exhaustion of remedies against maker or insolvency of maker.—*Walter A. Wood Reaping & Mowing Mach. Co. v. Ascher* (Md.) 1023.

HABEAS CORPUS.

Exceptions for purpose of review in habeas corpus proceedings, see "Appeal and Error," § 3.

§§ 1, 2. Nature and grounds of remedy.

The failure of the state to prosecute an escaped convict, returned to prison, for the escape, punishable by Pub. St. c. 285, § 13, and chapter 253, § 14, *held* to give him no ground for complaint.—*In re Moebus* (N. H.) 170.

A person confined in state prison on the ground that he is an escaped convict sentenced to a term of imprisonment is entitled to process which will enable him to try the issue of whether he is the convict or not.—*In re Moebus* (N. H.) 170.

§ 3. Jurisdiction, proceedings, and relief.

Where an escaped convict is returned to prison, there is no need of trial, unless the state desires to punish for an escape, under Pub. St. c. 285, § 13, and chapter 253, § 14.—*In re Moebus* (N. H.) 170.

In a petition for a writ of habeas corpus for the discharge of petitioner from state prison, confined on the ground that he is an escaped convict, the court *held* warranted, under the facts, to assume that he is the convict.—*In re Moebus* (N. H.) 170.

HANDWRITING.

Comparison, see "Evidence," § 7.

Expert testimony relating to in criminal prosecution, see "Criminal Law," § 11.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 14.

HAWKERS AND PEDDLERS.

Municipal licenses, see "Municipal Corporations," § 1.

HEARING.

By arbitrators, see "Arbitration and Award," § 1.

In equity, see "Equity," § 4.

In probate proceedings, see "Wills," § 4.

HEARSAY EVIDENCE.

In civil actions, see "Evidence," § 4.

In criminal prosecutions, see "Criminal Law," § 9.

HEIRS.

See "Descent and Distribution."

Meaning of term in will, see "Wills," § 6.

HIGHWAYS.

See "Bridges"; "Dedication," § 1; "Municipal Corporations," §§ 8, 9; "Navigable Waters," § 1.

Accidents at railroad crossings, see "Railroads," § 6.

Construction of by counties, see "Counties," § 2.

Covenants relating to, see "Covenants," § 1.

Liability of town for acts of highway agent, see "Towns," § 1.

Rights of telegraph and telephone companies, see "Telegraphs and Telephones," § 1.

§ 1. Establishment, alteration, and discontinuance.

Where a proposed road crosses land of the state, the consent of the Legislature must be obtained.—*Ludlam v. Swain* (N. J. Sup.) 192.

Where an application for a public road gave its course as southeastwardly from the beginning point, and the surveyors gave the first course as S. 54° W., the variance was fatal.—*Ludlam v. Swain* (N. J. Sup.) 192.

Under Gen. St. p. 2822, § 85, a taxpayer may question the validity of proceedings laying out a road across land of the state without the consent of the Legislature.—*Ludlam v. Swain* (N. J. Sup.) 192.

§ 2. Construction, improvement, and repair.

Act June 26, 1895 (P. L. 336), relative to construction of county roads, leaves to the discretion of the commissioners the character of the road to be built and the cost of building it.—*LeMoyne v. Washington County* (Pa.) 516.

Under Act June 26, 1895 (P. L. 336), it is the duty of the county commissioners, in constructing a county road, to make the improvement in accordance with the survey and plans filed in court.—*LeMoyne v. Washington County* (Pa.) 516.

County commissioners, in constructing a road, are vested with a discretion in determining whether to accept bids for a fixed sum or for piece work.—*LeMoyne v. Washington County* (Pa.) 516.

An order of court of quarter sessions, approving the construction of a county road under Act June 26, 1895 (P. L. 336), cannot be collaterally attacked on the ground of the inaccuracy of the estimate of costs and expenses of the road.—*LeMoyne v. Washington County* (Pa.) 516.

§ 3. Taxes, assessments, and work on highways.

Where a proceeding to improve a public road was initiated by a petition under Act March

22, 1895 (Gen. St. p. 2902), before the passage of Road Improvement Act April 1, 1903 (P. L. 1903, p. 145), the right to assess land bordering on the road for 10 per cent. of the cost, given by the act of 1895, was not affected by the act of 1903.—*Haines v. Board of Chosen Freeholders of Burlington County* (N. J. Sup.) 186.

§ 4. Regulation and use for travel.

Where the declaration alleges that defendant's team ran into plaintiff's team, and the proof is that both teams were in motion, that the team of defendant was much slower than the team of plaintiff does not constitute a fatal variance.—*Neal v. Rendall* (Me.) 708.

*The right of one driving on a highway to use any part of the highway must be exercised with reference to the rights of others.—*Standard Oil Co. v. Hartman* (Md.) 805.

*A traveler on a highway injured in a collision with the vehicle of another traveler can recover if the injuries resulted directly from the want of ordinary care on the part of the latter.—*Standard Oil Co. v. Hartman* (Md.) 805.

In an action for injuries by collision with the vehicle of another traveler, the question of plaintiff's contributory negligence held for the jury.—*Standard Oil Co. v. Hartman* (Md.) 805.

In an action for injuries received by collision with the vehicle of another traveler, the question of defendant's negligence held for the jury.—*Standard Oil Co. v. Hartman* (Md.) 805.

*In an action for injuries to a traveler on a highway in a collision with the vehicle of another, defendant has the burden of proving contributory negligence on plaintiff's part.—*Standard Oil Co. v. Hartman* (Md.) 805.

Owner of lot held entitled to maintain bill against owner of another lot for obstruction in street shown on the plan under which both purchased.—*Garvey v. Harbison-Walker Refractories Co.* (Pa.) 778.

*Purchaser of lots under a plan of the owner held entitled to compel another purchaser to remove encroachments from street shown on the plan.—*Garvey v. Harbison-Walker Refractories Co.* (Pa.) 778.

HOLIDAYS.

See "Sunday."

HOMESTEAD.

§ 1. Rights of surviving husband, wife, children, or heirs.

In the absence of admeasurement of dower to a widow, she was not liable for occupancy of the homestead during her lifetime or for rent received.—*Lloyd v. Turner* (N. J. Ch.) 771.

HOMICIDE.

Admissions as evidence, see "Criminal Law," § 9.

Amendment of indictment, see "Indictment and Information," § 5.

Competency of evidence in general, see "Criminal Law," § 7.

§ 1. The homicide.

Where defendant shot into a room containing several persons without aiming at any particular person, and killed one of them, he was guilty of murder or manslaughter, regardless of his intention toward the person slain.—*State v. Bell* (Del. O. & T.) 147.

§ 2. Murder.

*Murder in the second degree is where the killing was without formed design to take life, or in the perpetration of a crime not punishable with death, and without justification or pro-

*Point annotated. See syllabus.

vocation sufficient to reduce it to manslaughter.—*State v. Bell* (Del. O. & T.) 147.

*Where defendant shot at an election officer with intent to kill him or do him great bodily harm, but shot and killed another, the crime was the same as if he had killed the officer.—*State v. Bell* (Del. O. & T.) 147.

*Express malice as an element of murder is where the prisoner guilty of the killing did so with a sedate, deliberate mind, or formed design to kill, etc.—*State v. Bell* (Del. O. & T.) 147.

*Malice is an essential ingredient of the crime of murder of both degrees.—*State v. Bell* (Del. O. & T.) 147.

*First degree murder is the killing of a human being with express malice aforethought, or in perpetrating or attempting to perpetrate a crime punishable with death.—*State v. Bell* (Del. O. & T.) 147; *Same v. Collins* (Del. O. & T.) 224.

*To constitute murder in the first degree, express malice must be shown, while in murder in the second degree malice may be shown by acts and conduct indicating a reckless disregard of human life only.—*State v. Collins* (Del. O. & T.) 224.

*Second degree murder *held* the killing of a human being with deliberate design to take life or perpetrate a crime punishable with death, but without justification or provocation reducing the killing to manslaughter.—*State v. Collins* (Del. O. & T.) 224.

*Murder in the second degree *held* proved by facts showing a killing with a sedate, deliberate purpose to take life, committed suddenly, without justification and excuse, etc.—*State v. Wilson* (Del. Gen. Sess.) 227.

*Express malice, constituting murder in the first degree, is proved by attending circumstances evidencing a deliberate purpose to kill.—*State v. Wilson* (Del. Gen. Sess.) 227.

*Murder is the unlawful killing of a human being with malice aforethought, either express or implied, committed by a person of sound memory and discretion.—*State v. Wilson* (Del. Gen. Sess.) 227.

§ 3. Manslaughter.

*A slight assault *held* insufficient to reduce the killing of the assailant with a deadly weapon from murder to manslaughter.—*State v. Bell* (Del. O. & T.) 147.

*Manslaughter is the unlawful killing of an individual without malice.—*State v. Bell* (Del. O. & T.) 147; *Same v. Collins* (Del. O. & T.) 224.

§ 4. Assault with intent to kill.

*In a prosecution for assault with intent to murder, the state is bound, not only to prove the assault, but the intent to kill prosecutor, beyond a reasonable doubt.—*State v. Wilson* (Del. Gen. Sess.) 227.

Defendant *held* not entitled to avail himself of the plea of self-defense where he shot prosecutor not for his own protection, but to gratify feelings of revenge or malice.—*State v. Wilson* (Del. Gen. Sess.) 227.

Where defendant was assaulted so fiercely that he could not retreat or escape, he was entitled to use a deadly weapon in defense.—*State v. Wilson* (Del. Gen. Sess.) 227.

*A person assaulted, though not required to wait until he is struck by an impending blow before returning the assault, is not entitled to use more force than is necessary under the circumstances to repel the assault or avert the peril.—*State v. Wilson* (Del. Gen. Sess.) 227.

*Point annotated. See syllabus.

§ 5. Excusable or justifiable homicide. To justify killing in self-defense the prisoner must have reasonably believed that he had no other means of escape from death or bodily harm.—*Commonwealth v. Johnson* (Pa.) 1064.

On trial for murder, rights of a householder against a violent intruder *held* to have no relevancy under the evidence.—*Commonwealth v. Johnson* (Pa.) 1064.

§ 6. Indictment and information.

*Proof that the prisoner held the pistol in his left hand when he shot deceased, instead of in the right hand, as alleged, *held* not a material variance.—*State v. Bell* (Del. O. & T.) 147.

§ 7. Evidence.

*Where a killing was accomplished deliberately, or without adequate cause, the burden is on the prisoner to rebut the inference of malice.—*State v. Bell* (Del. O. & T.) 147.

*Where the life of a person is proved to have been taken by another, it is presumed in law to have been taken with malice aforethought, unless the contrary appears.—*State v. Collins* (Del. O. & T.) 224.

On a trial for homicide, testimony of antecedent threats or acts of violence by the deceased against the defendant are not admissible when at the time of the homicide there was no threat or act by the deceased which could justify the homicide.—*State v. Tolla* (N. J. Err. & App.) 675.

*In homicide, indefinite threats made by defendant previous to the killing *held* admissible.—*State v. Rosa* (N. J. Err. & App.) 695.

*In homicide, threats made by defendant about three weeks before the homicide were not too remote in time to be admissible.—*State v. Rosa* (N. J. Err. & App.) 695.

§ 8. New trial.

*New trial for newly discovered evidence on prosecution for murder *held* properly denied.—*Commonwealth v. Hine* (Pa.) 369.

New trial on conviction of murder in the first degree on the ground that defendant had been misled by statements of district attorney *held* properly denied.—*Commonwealth v. Hine* (Pa.) 369.

HOSPITALS.

Charitable hospitals, see "Charities."

Records as evidence, see "Evidence," § 5.

Mayor of a city and ex officio trustee of hospital as such, or in his individual capacity as a citizen and taxpayer, *held* not a proper party plaintiff in a suit against the trustees to correct abuses of trust.—*Stearns v. Newport Hospital* (R. I.) 132.

Mayor of a city and ex officio trustee of a hospital located in the city should exercise his own judgment without dictation from other branches of the city government in performing his duties as trustee.—*Stearns v. Newport Hospital* (R. I.) 132.

HUSBAND AND WIFE.

See "Curtesy"; "Divorce"; "Dower"; "Marriage."

Assignment by, for benefit of creditors, see "Assignments for Benefit of Creditors," § 2.

Assignment to husband of claim of wife, see "Assignments," § 1.

Competency of evidence on information derived from wife of accused, see "Criminal Law," § 7.

Competency of wife as witness in divorce suit, see "Witnesses," § 1.

Declarations as evidence in action for criminal conversation, see "Evidence," § 8.
 Domicile of wife, see "Domicile."
 Effect of agreement between, to support children, see "Parent and Child."
 Evidence in action for wrongful death of wife, see "Death," § 1.
 Examination of witness in action for alienation of affections, see "Witnesses," § 2.
 Fraudulent conveyances between, see "Fraudulent Conveyances," §§ 1, 3.
 Interest on accounting, see "Interest," § 1.
 Misjoinder of causes of action against, see "Action," § 3.
 Nature of action for damages from loan by wife to husband, see "Action," § 2.
 Nature of estate devised to wife, see "Wills," § 9.
 Review on appeal of ruling as to extension of time for husband to waive provisions of will, see "Appeal and Error," § 13.
 Rights of surviving husband in estate devised by married woman, see "Wills," § 8.
 Rights of survivor, see "Descent and Distribution," § 1; "Homestead," § 1.
 Right to legacy left to widow, see "Wills," § 14.
 Verdict in general in action by, see "Trial," § 7.

§ 1. Mutual rights, duties, and liabilities.

*A husband is liable for suitable clothing purchased for the use of his wife.—Feiner v. Boynton (N. J. Sup.) 420.

*When a husband and wife are living together, in purchasing articles for her own use the wife is presumed to be acting as agent for her husband.—Feiner v. Boynton (N. J. Sup.) 420.

§ 2. Marriage settlements.

An antenuptial agreement executed in the electorate of Hesse Cassel *held* not to have been local, but to have covered real estate thereafter acquired by the spouses in New Jersey.—Kleb v. Kleb (N. J. Ch.) 396.

§ 3. Conveyances, contracts, and other transactions between husband and wife.

Certain transaction between husband and wife *held* to constitute the wife a debtor of the husband.—Clarke v. Black (Conn.) 757.

§ 4. Wife's separate estate.

Nonliability of a married woman on a note executed by her for the accommodation of her husband, under Gen. St. p. 2017, § 5, *held* not affected by the negotiable instruments law (P. L. 1902, p. 583).—People's Nat. Bank v. Schepflin (N. J. Sup.) 333.

*The law merchant *held* inapplicable to a note, executed by a married woman for the accommodation of her husband, which she had no power to make.—People's Nat. Bank v. Schepflin (N. J. Sup.) 333.

A note executed by a married woman *held* for the accommodation of her husband, and, therefore, unenforceable as against her, under Gen. St. p. 2017, § 5.—People's Nat. Bank v. Schepflin (N. J. Sup.) 333.

In a suit on a note executed by a married woman for the alleged accommodation of her husband, whether it was made payable to her own order and by her indorsed before delivery to her husband, or whether it was payable to his order and by him indorsed for discount, *held* immaterial.—People's Nat. Bank v. Schepflin (N. J. Sup.) 333.

*To charge a wife with the price of clothing for her own use purchased by her while living with her husband, it must affirmatively appear that she made the purchases on her

individual credit.—Feiner v. Boynton (N. J. Sup.) 420.

§ 5. Actions.

A married woman, who had not been abandoned by her husband, *held* not entitled to sue him on an alleged indebtedness for money loaned. Gen. St. 1902, § 4543.—Muller v. Witte (Conn.) 756.

Where the husband joins with his wife in an action when she neither must nor may be joined, the error *held* fatal.—Oakley v. Emmons (N. J. Sup.) 996.

§ 6. Separation and separate maintenance.

*Under P. L. 1902, pp. 508, 509, §§ 20, 21, costs may be awarded against wife in suit for separate maintenance.—Harris v. Harris (N. J. Ch.) 703.

§ 7. Criminal conversation.

Connivance on the part of a husband sufficient to bar an action for criminal conversation must show an intent to connive, evidenced by facts warranting an ordinarily prudent person in believing the misconduct of the wife.—Kohlhoss v. Mobley (Md.) 236.

In an action for criminal conversation, evidence *held* to establish the husband's connivance or implied consent to the wife's misconduct as matter of law.—Kohlhoss v. Mobley (Md.) 236.

Where reasonable minds could draw no other conclusion, in a suit for criminal conversation, than that plaintiff consented to the misconduct of his wife, the question of his connivance was for the court.—Kohlhoss v. Mobley (Md.) 236.

ICE.

Liability for injuries from icy sidewalk, see "Municipal Corporations," § 9.

ILLEGITIMATE CHILDREN.

See "Bastards."

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 6.

IMPEACHMENT.

Of witness, see "Witnesses," § 3.

IMPLIED CONTRACTS.

See "Account Stated"; "Money Received"; "Work and Labor."

IMPRISONMENT.

See "Arrest"; "Bail"; "False Imprisonment."

For nonpayment of costs, see "Costs," § 2.
 Habeas corpus, see "Habeas Corpus."

IMPROVEMENTS.

Allowance for improvements in suit for partition, see "Partition," § 2.

Liability of street railroad company for improvement of streets, see "Street Railroads," § 1.

Liens, see "Mechanics' Liens."

Public improvements, see "Municipal Corporations," §§ 5, 6.

IMPUTED NEGLIGENCE.

See "Negligence," § 3.

* Point annotated. See syllabus.

INCOME.

Of trust property, see "Trusts," § 5.

INCOMPETENT PERSONS.

See "Insane Persons."

INCORPORATION.

See "Corporations," § 1.

INCUMBRANCES.

Subrogation on payment, see "Subrogation."

INDECENCY.

See "Obscenity."

INDEMNITY.

See "Guaranty"; "Principal and Surety."
In action on lost check, see "Lost Instruments."

INDICTMENT AND INFORMATION.

Laws authorizing amendment of indictment as denying due process of law, see "Constitutional Law," § 10.

Laws authorizing prosecution by information as denying due process of law, see "Constitutional Law," § 10.

For particular offenses.

See "False Pretenses"; "Homicide," § 6; "Perjury," § 1.

For violation of liquor laws, see "Intoxicating Liquors," § 5.

§ 1. Formal requisites of indictment.

*The Legislature may prescribe the form of indictment, providing it does not contravene the constitutional provisions.—State v. Webber (Vt.) 1018.

§ 2. Requisites and sufficiency of accusation.

An indictment for perjury before the grand jury which does not specify the subject-matter of the investigation is violative of Const. art. 10, guarantying to an accused the right to demand the cause and nature of the accusation against him.—State v. Webber (Vt.) 1018.

§ 3. Joinder of parties, offenses, and counts, duplicity, and election.

A defendant can be charged in the same count with uttering and also exposing to the view of another indecent pictures in violation of P. L. 1898, p. 808, § 53.—State v. Hill (N. J. Sup.) 936.

*On a trial for selling intoxicating liquor, the refusal of the court to require the state to elect on which count it would seek a conviction held reversible error.—State v. Barr (Vt.) 43.

§ 4. Motion to quash or dismiss, and demurrer.

Motion to quash information on the ground that the time of the offense therein alleged was an impossible one held properly refused.—State v. Willett (Vt.) 48.

§ 5. Amendment.

*Where on the trial for killing John Sonta it was disclosed that the person killed was Joseph Sonta, the trial court had power, under Cr. Proc. Act (Laws 1898, p. 878) § 34, to direct an amendment of the indictment.—State v. Tolla (N. J. Err. & App.) 675.

§ 6. Issues, proof, and variance.

*Unless descriptive of the offense the time need not be proved as laid in the information.—State v. Willett (Vt.) 48.

§ 7. Conviction of offense included in charge.

*Under an indictment for assault with intent to murder, defendant may be properly convicted of that offense or of simple assault.—State v. Wilson (Del. Gen. Sess.) 227.

§ 8. Waiver of defects and objections, and aid by verdict.

An information charging the sale of intoxicating liquors held good after a verdict of guilty.—State v. Barr (Vt.) 43.

INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.

INFANTS.

See "Adoption"; "Parent and Child."

Care required as to children, see "Street Railroads," § 2.

Subject and title of act relating to control of dependent and incorrigible children, see "Statutes," § 3.

Validity of statute relating to dependent and incorrigible children as denying trial by jury, see "Jury," § 1.

INFORMATION.

Criminal accusation, see "Indictment and Information."

INFRINGEMENT.

Of trade-mark, see "Trade-Marks and Trade-Names," § 3.

INHERITANCE.

See "Descent and Distribution."

INHERITANCE TAX.

See "Taxation," § 5.

INJUNCTION.

Suspension pending appeal, see "Appeal and Error," § 6.

Verification of pleading in action for, see "Pleading," § 5.

Restraining particular acts or proceedings.

See "Nuisance," § 1.

Collection of municipal taxes, see "Municipal Corporations," § 10.

Condemnation of land, see "Eminent Domain," § 3.

Construction of street railroad in city park, see "Municipal Corporations," § 8.

Infringement or unfair competition, see "Trade-Marks and Trade-Names," § 3.

Interference with tramway across railroad tracks, see "Railroads," § 2.

Obstruction of easement, see "Easements," § 2.

Operation of railroad, see "Railroads," § 1.

Pollution of water course in city, see "Municipal Corporations," § 9.

Shutting off water, see "Waters and Water Courses," § 3.

§ 1. Nature and grounds in general.

An injunction restraining the levy of a tax to pay for holding primary elections, under

* Point annotated. See syllabus.

Acts 1904, p. 870, c. 508, *held* properly denied under the facts.—*Kenneweg v. Allegany County Com'rs* (Md.) 249.

Certain interference of defendants with plaintiff's title *held* not of itself sufficient to authorize the issuance of an injunction.—*Carswell v. Swindell* (Md.) 956.

*Equity will not retain jurisdiction of a bill to enjoin trespass where there is nothing to show the inadequacy of the legal remedy.—*Carswell v. Swindell* (Md.) 956.

*The mere fact that the constitution of an association of undertakers and liverymen contains clauses, the obedience of which would result in a boycotting of complainant, did not entitle him to an injunction.—*Van Der Plaet v. Undertakers' & Liverymen's Ass'n of Passaic County* (N. J. Ch.) 453.

Plaintiff *held* entitled to an injunction restraining defendant company from intervening and with a strong hand preventing plaintiff's workmen from constructing certain work contemplated by a lease which defendant had made to plaintiff.—*Hoboken & M. R. Co. v. Jersey City, H. & P. Ry. Co.* (N. J. Ch.) 539.

Company obtaining secret process from another company, which had procured it fraudulently, *held* not entitled to restrain its use by a third company.—*Vulcan Detinning Co. v. American Can Co.* (N. J. Ch.) 881.

§ 2. Subjects of protection and relief.

*The grantor, in a conveyance of property "for the sole use and behoof of a public park," is entitled to enjoin a violation of the terms of the grant.—*Bayard v. Bancroft* (Del. Ch.) 6.

A complainant who showed no established undertaking business, or the ownership of any appliance used in carrying on such business, cannot obtain an injunction restraining an undertakers' and liverymen's association from boycotting him.—*Van Der Plaet v. Undertakers' & Liverymen's Ass'n of Passaic County* (N. J. Ch.) 453.

A bill in equity at the suit of citizens of Allegheny City will lie to restrain the city of Pittsburgh and its municipal officers from taking any steps to annex the city of Allegheny to the city of Pittsburgh under the unconstitutional act of April 20, 1905 (P. L. 221).—*Sample v. City of Pittsburgh* (Pa.) 201.

*Under bill by railroad company to enjoin another railroad company from entering on its land and tearing up its tracks, injunction *held* properly granted.—*Donora Southern R. Co. v. Pennsylvania R. Co.* (Pa.) 367.

Manufacture of specialties in violation of contract will be enjoined at the suit of the other party to the contract.—*S. Jarvis Adams Co. v. Knapp* (Pa.) 1112.

§ 3. Actions for injunctions.

*Where an injunction is the primary relief demanded, and the bill is not sufficient to sustain the same, it is proper for the court to dismiss the bill on the merits on the hearing of an application to dissolve a preliminary injunction.—*Davis v. Baltimore & O. R. Co.* (Md.) 572.

*Where an allegation of irreparable injury is made in a bill to enjoin a trespass, facts showing that the apprehension of such injury is well founded must also be stated.—*Carswell v. Swindell* (Md.) 956.

Where a corporation leased its business to another, and they were both complainants in a suit for an injunction to restrain interference with such business, the validity of the lease was immaterial.—*Public Service Corp. of New Jersey v. De Grote* (N. J. Ch.) 65; *Village*

of Ridgefield Park v. Public Service Corp. of New Jersey, Id.

The right of a vendor to enforce covenants in a court of equity against a purchaser *held* barred by laches.—*Island Heights Ass'n v. Island Heights Water Power, Gas & Sewer Co.* (N. J. Ch.) 773.

*A party beneficially interested in the enforcement of a restrictive covenant in a deed conveying land for specified purposes only must come into court promptly, in order to obtain equitable relief.—*Island Heights Ass'n v. Island Heights Water Power, Gas & Sewer Co.* (N. J. Ch.) 773.

§ 4. Permanent injunction and other relief.

Complainant in a suit for an injunction *held*, under the facts, entitled to costs, and also on an injunction against such complainant.—*Public Service Corp. of New Jersey v. De Grote* (N. J. Ch.) 65; *Village of Ridgefield Park v. Public Service Corp. of New Jersey*, Id.

§ 5. Violation and punishment.

Under the facts, *held* that certain persons would not be held guilty of a contempt of court by interfering with the enforcement of an injunction.—*Public Service Corp. of New Jersey v. De Grote* (N. J. Ch.) 65; *Village of Ridgefield Park v. Public Service Corp. of New Jersey*, Id.

IN PAIS.

Estoppel, see "Estoppel." § 1.

INQUISITION.

Of lunacy, see "Insane Persons," § 1.

INSANE PERSONS.

Appointment of trustee of insane person as administrator, see "Executors and Administrators," § 1.

§ 1. Inquisitions.

Order superseding inquisition in lunacy will not be granted to supersede proceedings not affecting property rights.—*In re Ellis* (N. J. Ch.) 702.

§ 2. Property and conveyances.

A contract whereby the trustees of a lunatic borrowed moneys *held* such that it would not have been authorized by the court.—*Dulaney v. Devries* (Md.) 743.

§ 3. Actions.

The assignee of a leasehold interest of a lunatic *held* entitled to judgment in ejectment against the lunatic's guardian; a proper tender of consideration, necessary for rescission of the assignment, not having been made.—*Miller v. Barber* (N. J. Sup.) 276.

INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

Of corporation, see "Corporations," § 6.

Of insurance company, see "Insurance," § 1.

INSTRUCTIONS.

In civil actions, see "Trial," § 5.

In criminal prosecutions, see "Criminal Law," § 13.

*Point annotated. See syllabus.

INSURANCE.

Operation of promise to pay insurance loss as accord, see "Accord and Satisfaction."
Pleading limitations in action on policy, see "Limitation of Actions," § 4.
Reduction of damages by insurance, see "Damages," § 1.

§ 1. Insurance companies.

The policy holders of an insurance company are not liable as partners to the creditors, it being a stock company, and the management of its affairs being in the hands of directors and officers chosen by the stockholders.—*Betts v. Connecticut Life Ins. Co. (Conn.)* 345.

Under 10 Sp. Laws, p. 616, and the constitution and by-laws of an insurance company, money derived from judgments against stockholders for the amounts due on their stock *held* to belong to the working capital, and liable for the payment of the claims of policy holders.—*Betts v. Connecticut Life Ins. Co. (Conn.)* 345.

Under Gen. St. 1902, §§ 3607, 3611, on the application of the receiver of an insolvent insurance company, a direction that the accrued interest on the funds received from the State Treasurer and the principal be applied as a trust fund for the policy holders was proper.—*Betts v. Connecticut Life Ins. Co. (Conn.)* 345.

Gen. St. 1902, §§ 3546, 3554, *held* not to authorize the court or the commissioner to apply assets in disregard of the equities created by statute and the charter and by-laws of the insurance company.—*Betts v. Connecticut Life Ins. Co. (Conn.)* 345.

Limitations begin to run in favor of member of mutual insurance company from date of decree authorizing assessment.—*Schofield v. Turner (Pa.)* 1068.

§ 2. The contract in general.

Where an application for life insurance was signed in blank and delivered to the agent of the insurer to be filled in from information contained in a former application, the answers in the second application *held* not such necessary inferences from those contained in the first as to be binding upon the applicant.—*Hewey v. Metropolitan Life Ins. Co. (Me.)* 600.

*Where an application for life insurance was signed in blank and delivered to an agent of the company to be filled out from information contained in a previous application, the applicant was bound by the second application if the agent filled it out in accordance with the first one, but not otherwise.—*Hewey v. Metropolitan Life Ins. Co. (Me.)* 600.

*An application for life insurance, signed in blank, by one desiring insurance, and filled in by the company or its agents, should be construed more favorably to the applicant.—*Hewey v. Metropolitan Life Ins. Co. (Me.)* 600.

Where an insurance company or its agents undertake to fill in an application from a previous application or statement made by applicant, it should be held to the strictest adherence to the terms of such application.—*Hewey v. Metropolitan Life Ins. Co. (Me.)* 600.

§ 3. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

*In order to defeat the claim of an insured on the ground that the insured made misrepresentations, the company must show that the representations were his, and not mistakes or misrepresentations of its own.—*Hewey v. Metropolitan Life Ins. Co. (Me.)* 600.

§ 4. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

Rev. St. 1883, c. 49, declaring that a change in the occupation of the property should not affect a policy of insurance unless it materially increase the risk, was expressly repealed by Laws 1895, p. 19, c. 18, § 3.—*Knowlton v. Patrons' Androskoggin Mut. Fire Ins. Co. (Me.)* 289.

Where the provisions of a standard policy as to the effect of the vacancy of the insured premises for 30 days are modified by a rider attached to the policy, under Rev. St. c. 49, § 4, the contract as shown by the rider governs.—*Knowlton v. Patrons' Androskoggin Mut. Fire Ins. Co. (Me.)* 289.

Under standard policy, as prescribed by Laws 1895, p. 14, c. 18, the question of material increase of the risk from vacancy or nonoccupancy is not open to question.—*Knowlton v. Patrons' Androskoggin Mut. Fire Ins. Co. (Me.)* 289.

Buildings insured *held* "personally unoccupied" without the consent of the company for more than 10 days preceding their destruction within a policy providing that such nonoccupancy should render the policy void.—*Knowlton v. Patrons' Androskoggin Mut. Fire Ins. Co. (Me.)* 289.

*A beneficiary *held* to have no claim under a life policy abandoned by the insured and canceled by the company.—*Price v. Mutual Reserve Life Ins. Co. (Md.)* 1040.

Where the sole owner of an insured dwelling house executed a written agreement to sell the property in fee to the tenant in possession, such act *held* to cause a change in interest, title, and possession sufficient to avoid the policy.—*Grunauer v. Westchester Fire Ins. Co. (N. J. Err. & App.)* 418.

§ 5. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

Forfeiture of plaintiff's policy by nonoccupancy *held* not waived by the company by the acceptance of the payment of certain assessments.—*Knowlton v. Patrons' Androskoggin Mut. Fire Ins. Co. (Me.)* 289.

*An insurance company may waive any condition of the policy inserted therein for its own benefit.—*Graham v. Security Mut. Life Ins. Co. (N. J. Err. & App.)* 681.

The forfeiture of an insurance policy is not favored, and courts are always prompt to seize hold of any circumstance to indicate an election to waive a forfeiture.—*Graham v. Security Mut. Life Ins. Co. (N. J. Err. & App.)* 681.

It is always open on behalf of the insured to show a waiver of the conditions or a course of conduct on the part of the insured showing that a forfeiture would not be exacted.—*Graham v. Security Mut. Life Ins. Co. (N. J. Err. & App.)* 681.

§ 6. Notice and proof of loss.

*Failure to produce books of account *held* no defense to action on insurance policy.—*Seibel v. Firemen's Ins. Co. (Pa.)* 101.

§ 7. Actions on policies.

Evidence *held* insufficient to show transfer of insurance policy by a declaration of trust.—*Northwestern Mut. Life Ins. Co. v. Collamore (Me.)* 652.

A beneficiary under a life policy *held* not entitled to recover for breaches by the insurance company of its contract with insured.—*Price v. Mutual Reserve Life Ins. Co. (Md.)* 1040.

* Point annotated. See syllabus.

*A provision of a policy fixing the time within which an action could not be maintained *held* binding on insured.—*Davis v. United States Health & Accident Co. (N. H.)* 728.

*A provision in a policy that no action could be maintained until three months after proof of loss *held* not waived by a waiver of proof of loss.—*Davis v. United States Health & Accident Co. (N. H.)* 728.

Evidence *held* sufficient to show waiver of forfeiture of policy for nonpayment of premiums.—*Graham v. Security Mut. Life Ins. Co. (N. J. Err. & App.)* 681.

*Whether a binding contract of insurance had been entered into *held* a question for the jury.—*Grossbaum Ceramic Art Syndicate v. German Ins. Co. of Freeport (Pa.)* 1107; *Same v. Potomac Ins. Co. of District of Columbia, Id.*

It was not error for the court to direct the jury to consider the correspondence between plaintiff and defendant's brokers in determining whether a parol contract of insurance had been entered into.—*Grossbaum Ceramic Art Syndicate v. German Ins. Co. of Freeport (Pa.)* 1107; *Same v. Potomac Ins. Co. of District of Columbia, Id.*

§ 8. Mutual benefit insurance.

Beneficial association *held* not authorized to limit by subsequent by-law its original contract with insured by providing that no benefit shall be paid in case he shall commit suicide.—*Sautter v. Supreme Conclave Improved Order of Heptasophs (N. J. Sup.)* 529.

Certificate of benefit society *held* payable on death of member to his heirs.—*In re Harton's Estate (Pa.)* 1058; *Appeal of Orr, Id.*

Change of constitution of benefit society *held* not to affect a change in the beneficiaries of certificate issued before the change.—*In re Harton's Estate (Pa.)* 1058; *Appeal of Orr, Id.*

In action against benefit association on death certificate *held* error not to direct verdict for defendant.—*Dinan v. Supreme Council Catholic Mut. Ben. Ass'n (Pa.)* 1067.

INTENT.

Criminal, see "Criminal Law," § 1.
Of parties to conveyance, see "Deeds," § 2.

INTEREST.

Allowance of, on accounting by partners, see "Partnership," § 2.
Place where usurious interest is taken as disorderly house, see "Disorderly House."

On particular classes of liabilities.

Claims for sick benefits, see "Beneficial Associations."

Legacies, see "Wills," § 14.

Liability for retention of property by junior lien holder on marshaling assets, see "Marshaling Assets and Securities."

Shares in corporation, see "Corporations," § 2.

§ 1. Time and computation.

In suit for accounting for property transferred by wife to husband, interest *held* properly allowed only from date of decree.—*Safe Deposit & Trust Co. of Baltimore v. Gittings (Md.)* 1033; *Gittings v. Safe Deposit & Trust Co. of Baltimore, Id.*

A decree for the payment of a sum of money after complainant had tendered certain security *held* only to carry interest from the date of such tender.—*Moore v. Durnan (N. J. Ch.)* 327.

* Point annotated. See syllabus.

INTERROGATORIES.

To witnesses, see "Depositions."

INTESTACY.

See "Descent and Distribution."

INTOXICATING LIQUORS.

Amount of liquor dealer's bond as liquidated damages, see "Damages," § 2.

Certified questions in prosecution for offense against liquor laws, see "Criminal Law," § 15.
Competency of evidence in general in prosecution for offense against liquor laws, see "Criminal Law," § 7.

Conclusiveness of determination of board of commissioners, see "Judgment," § 5.

Documentary evidence in prosecution for offense against liquor laws, see "Criminal Law," § 10.

Election between counts in prosecution for violation of liquor laws, see "Indictment and Information," § 3.

Evidence of other offenses in prosecution for offense against liquor laws, see "Criminal Law," § 6.

Examination of witnesses in prosecution for violation of liquor laws, see "Witnesses," § 2.

Forgery of prescription for liquor, see "Forgery."

Instructions in general in prosecution for offense against liquor laws, see "Criminal Law," § 13.
Persons entitled to allege invalidity of liquor law, see "Constitutional Law," § 1.

Revocation of license as impairing contract, see "Constitutional Law," § 6.

§ 1. Power to control traffic.

*The right to sell liquor is not a natural right, but one which the state may restrict or absolutely take away.—*State v. Corron (N. H.)* 1044.

§ 2. Licenses and taxes.

Sureties on liquor dealer's bond *held* liable for any judgment enforceable against such dealer.—*State v. Corron (N. H.)* 1044.

*The conviction of a liquor licensee for violating Laws 1903, p. 81, c. 95, *held* not a condition precedent to the right of the state to maintain an action for breach of his bond.—*State v. Corron (N. H.)* 1044.

A resolution of a board of excise commissioners transferring a liquor license to one of its members who was present and voted for the resolution is voidable on certiorari.—*Trefts v. Board of Excise Com'rs of City of Lambertville (N. J. Sup.)* 1004.

Amendment of petition for liquor license *held* error where it would introduce into the petition other facts than those stated at the time of verification.—*In re Matthew (Pa.)* 837; *In re Regan (Pa.)* 841; *In re McIntyre, Id.*; *In re Tressler, Id.*; *In re Kyle, Id.*; *In re Straub, Id.*; *In re Falknor, Id.*; *In re Bloom, Id.*

Bond filed with petition for liquor license *held* not to defeat the application because space for proposed sureties' names is not filled in.—*In re Matthew (Pa.)* 837; *In re Regan (Pa.)* 841; *In re McIntyre, Id.*; *In re Tressler, Id.*; *In re Kyle, Id.*; *In re Straub, Id.*; *In re Falknor, Id.*; *In re Bloom, Id.*

§ 3. Regulations.

Gen. St. 1902, §§ 2722, 2726, *held* to authorize a town agent for the sale of intoxicating liquors to delegate his authority to subagents.—*State v. Marley (Conn.)* 85.

4. Offenses.

*Under Rev. St. 1903, c. 29, § 40, any liquor containing alcohol to such an extent that it may be drunk as a beverage in such quantities as to produce intoxication is intoxicating liquor.—*Heintz v. LePage (Me.)* 605.

A liquor licensee could not be convicted for violating Laws 1903, p. 83, c. 95, where the act constituting such violation was the act of his errand, not authorized nor ratified by him.—*State v. Corron (N. H.)* 1044.

*The act of 1902 held not to exclude from the term "intoxicating liquor" medicinal preparations, fluid extracts, and toilet articles of which alcohol is the solvent principle.—*State v. Krinski (Vt.)* 37.

On a prosecution for keeping intoxicating liquor for sale without authority, as respects extracts, tinctures, essences, and compounds having a legitimate use for medicinal or toilet purposes, the question is not merely whether they contain more than 1 per cent of alcohol, but also whether the articles are sold to be used as a beverage.—*State v. Costa (Vt.)* 38.

5. Criminal prosecutions.

The unlawful sale of liquor to an intoxicated person, prohibited by Laws 1903, p. 92, c. 95, § 15, held within section 33, and not within section 28.—*State v. Corron (N. H.)* 1044.

*Under Gen. Laws, c. 92, § 2, and Court and Practice Act 1905, p. 44, c. 10, § 150, district court held without jurisdiction to try and determine a prosecution for maintaining a liquor nuisance.—*State v. Collins (R. I.)* 1010.

On a prosecution for keeping for sale intoxicating liquors without a license, held proper to permit the state to show that at the time of the search two men under the influence of liquor were wrangling over a bottle.—*State v. Krinski (Vt.)* 37.

On a prosecution for keeping for sale intoxicating liquors without a license, certain testimony as to the kind of bottles in which medicinal Jamaica ginger is commonly sold held proper.—*State v. Krinski (Vt.)* 37.

On a prosecution for keeping for sale intoxicating liquor without a license, an instruction as to a certain preparation found on the premises held not erroneous.—*State v. Krinski (Vt.)* 37.

On prosecution for keeping intoxicating liquor with intent to sell the same without authority, held not error for the officer who searched defendant's premises to testify that he made the search by virtue of a warrant for intoxicating liquor.—*State v. Costa (Vt.)* 38.

On a prosecution for keeping intoxicating liquor with intent to sell the same without authority, held proper to refuse to permit dealers to testify that they kept the malt extract, found in defendant's place of business, for sale openly and visibly.—*State v. Costa (Vt.)* 38.

On a prosecution for keeping intoxicating liquor with intent to sell the same without authority, certain testimony held properly admitted as tending to show defendant's intent in selling the preparation in question.—*State v. Costa (Vt.)* 38.

On a prosecution for keeping intoxicating liquor with intent to sell the same without authority, it was not error to refuse to permit the manufacturer of a malt extract, found in defendant's place of business, to testify as to the percentage of alcohol in the other medicines manufactured by his firm.—*State v. Costa (Vt.)* 38.

On a prosecution for keeping intoxicating liquor with intent to sell the same without author-

ity, held proper to admit evidence as to the use of the malt extract in defendant's place of business for the same purposes as certain proprietary articles, and that such articles were nonintoxicating.—*State v. Costa (Vt.)* 38.

On a prosecution for keeping intoxicating liquor for sale without authority, it was proper to permit the amount of alcohol and the other ingredients of the extract found in defendant's place of business to be shown.—*State v. Costa (Vt.)* 38.

On a prosecution for keeping intoxicating liquor with intent to sell the same without authority, held that defendant's claim as to the medicinal character of the alcoholic preparation found in his place of business was sufficiently presented to the jury.—*State v. Costa (Vt.)* 38.

On a prosecution for keeping intoxicating liquor with intent to sell the same without authority, an instruction that, if the preparation in question was bought and used as a beverage because of the intoxicating ingredients in it, it was a beverage, held not erroneous in view of other instructions.—*State v. Costa (Vt.)* 38.

On a prosecution for keeping intoxicating liquor for sale without authority, an instruction that the question was not as to the possibility of an ordinary man drinking enough of the preparation in question to intoxicate him held not erroneous.—*State v. Costa (Vt.)* 38.

*An information under Acts 1902, p. 92, No. 90, forbidding the sale of intoxicating liquor except in accordance with the provisions of the act, need not show how the liquor was kept or exposed further than by following the language of the statute.—*State v. Paige (Vt.)* 1017.

*An information under Acts 1902, p. 98, No. 90, § 21, for the illegal sale of liquor, need not specify the kinds of liquor kept or exposed.—*State v. Paige (Vt.)* 1017.

*Under Acts 1902, p. 98, No. 90, § 21, an information for the illegal sale of liquor need not negative the exception of the statute.—*State v. Paige (Vt.)* 1017.

§ 6. Searches, seizures, and forfeitures.

A demurrer to a complaint and a search warrant issued thereunder will reach defects in the warrant as well as those in the complaint.—*State v. Duane (Me.)* 80.

§ 7. Rights of property and contracts.

*It is immaterial whether plaintiffs in selling intoxicating liquors had any knowledge for what purpose they were purchased, if they were intended by the purchasers for illegal sale in the state.—*Heintz v. LePage (Me.)* 605.

*An action for the price of intoxicating liquors sold contrary to law cannot, under Rev. St. 1903, c. 29, § 64, be maintained in the courts of the state.—*Heintz v. LePage (Me.)* 605.

INTOXICATION.

As a defense to criminal prosecution, see "Criminal Law," §§ 2, 5.

INVENTORY.

Of estate of decedent, see "Executors and Administrators," § 2.

ISSUES.

In civil actions, see "Pleading," § 8.

In criminal prosecutions, see "Indictment and Information," § 6.

Presented for review on appeal, see "Appeal and Error," § 3.

* Point annotated. See syllabus.

JAILS.

Liability of city for injuries to prisoner, see "Municipal Corporations," § 9.

JEOPARDY.

Former jeopardy as bar to prosecution, see "Criminal Law," § 4.

JOINDER.

Of causes of action, see "Action," § 3.
Of husband and wife in action, see "Husband and Wife," § 5.
Of offenses in indictment, see "Indictment and Information," § 3.
Of parties, see "Equity," § 2.

JOINT LIABILITIES.

New promise after bar by limitations, see "Limitation of Actions," § 3.

JOINT TENANCY.

See "Tenancy in Common."
Creation by will, see "Wills," § 11.

JUDGES.

See "Courts"; "Justices of the Peace."
Power to revoke appointment of committee in partition, see "Partition," § 2.
Retroactive operation of statute relating to allowance or amendment of exceptions on death of judge, see "Constitutional Law," § 7.

§ 1. Disqualification to act.

A register of wills, who was the great-uncle of the wife of one of the petitioners for review, *held* disqualified by relationship and interest to hear the petition.—*Layton v. Jacobs* (Del. Super.) 691.

JUDGMENT.

Award of arbitrators, see "Arbitration and Award," § 2.
Decisions of courts in general, see "Courts," § 1.
In ejectment as bar to compensation in condemnation proceedings, see "Eminent Domain," § 2.
Interest on decree, see "Interest."
On pleadings, see "Pleading," § 7.
Review, see "Appeal and Error"; "Audita Querela."

In particular civil actions or proceedings.

See "Garnishment," § 4.
Foreclosure of railroad mortgage, see "Railroads," § 3.
For redemption, see "Mortgages," § 6.
On appeal or writ of error, see "Appeal and Error," § 15.
Personal judgment for deficiency on foreclosure, see "Mortgages," § 5.

§ 1. By confession.

*Rule to open judgment entered on judgment note given counsel by client when in serious difficulties *held* improperly denied.—*McDermott v. Bennett* (Pa.) 637; *Johnston v. Same*, *Id.*

§ 2. By default.

A judgment by default *held* not a final judgment.—*Sharp v. Bates* (Md.) 747.

A decree admitting a will to probate *held* not a default decree within Gen. Laws 1896, c. 251,

* Point annotated. See syllabus.

§ 2, relating to new trials.—*Seward v. Johnson* (R. I.) 569.

*Where, in attachment against a nonresident, there was no service on the debtor, and no appearance, the suit was in rem, and personal judgment was void.—*French v. White* (Vt.) 35.

§ 3. On trial of issues.

In an action against joint defendants, a judgment by default against one of the defendants vitiates a joint judgment against both.—*Patterson v. Jarmon* (Del. Super.) 8.

*Gen. St. p. 2336, § 2, authorizing plaintiff to proceed to judgment against one of two joint debtors properly brought into court, *held* valid.—*Sayre & Fisher Co. v. Griefen* (N. J. Sup.) 993.

§ 4. Opening or vacating.

A person's failure to contest the probate of a will *held* not the result of accident, mistake, or any unforeseen cause, within Gen. Laws 1896, c. 251, § 2, relating to new trials.—*Seward v. Johnson* (R. I.) 569.

A creditor of an heir who did not become a party to proceedings for the probate of the will of the ancestor, as authorized by Gen. Laws 1896, c. 248, § 7, *held* not a party to the proceedings within chapter 251, § 2, relating to new trials.—*Seward v. Johnson* (R. I.) 569.

A creditor of an absent heir *held* not entitled to represent the heir in a petition for a new trial after the probate of a will disinheriting the heir.—*Seward v. Johnson* (R. I.) 569.

§ 5. Conclusiveness of adjudication.

Facts not made a part of the judgment or the record, but found only for the purpose of enabling an appeal to be taken, are not adjudicated facts, binding in a subsequent action between the same parties.—*In re Nichols* (Conn.) 610.

The appointment of a conservator of a testator in 1803 *held* not conclusive as an adjudication on the question of his capacity to execute a will in 1890.—*In re Nichols* (Conn.) 610.

A determination, in a suit to foreclose a mortgage, as to the superiority of the mortgage to other incumbrances, *held* not to determine the relative priority as to those who might thereafter hold the liens which were the subject of foreclosure.—*Cronan v. Corbett* (Conn.) 662.

In an action on a liquor bond, a determination of the board of commissioners, under Laws 1903, p. 88, c. 95, § 14, that the liquor dealer had violated the act and that his bond should be canceled, *held* conclusive of such fact in an action on the bond.—*State v. Corron* (N. H.) 1044.

Under Laws 1903, p. 81, c. 95, and Laws 1905, p. 532, c. 117, § 10, the acquittal of a liquor dealer for an act alleged to constitute a breach of his bond *held* not res judicata of his liability thereon.—*State v. Corron* (N. H.) 1044.

§ 6. Lien.

Lessors of coal mines *held* to retain an interest in the coal to which a lien of a judgment was attached.—*Coolbaugh v. Lehigh & Wilkes-Barre Coal Co.* (Pa.) 94.

§ 7. Foreign judgments.

*A court is without power to adjudge the decree of any other court binding, or punish for the violation thereof.—*S. Jarvis Adams Co. v. Knapp* (Pa.) 1112.

*A court in Pennsylvania is without jurisdiction to enforce a decree of another state.—*S. Jarvis Adams Co. v. Knapp* (Pa.) 1112.

§ 3. Payment, satisfaction, merger, and discharge.

The failure of a judgment debtor to file a complaint, under Gen. St. 1902, § 654, *held* not to preclude the court from allowing a set-off to the judgment by directing an equitable application of the assets in the hands of a receiver in satisfaction of claims proved against an insolvent insurance company.—*Betts v. Connecticut Life Ins. Co. (Conn.)* 345.

JUDICIAL POWER.

See "Constitutional Law," § 2.

JUDICIAL SALES.

Of land as bar to dower, see "Dower," § 2.
Of land supporting building erected under parol license, see "Licenses," § 1.
Of property of decedent, see "Executors and Administrators," § 6.
On execution, see "Execution," § 3.

JURISDICTION.

Amount in controversy, see "Appeal and Error," § 1; "Equity," § 1; "Justices of the Peace," § 2.
Demurrer for want of, in equity, see "Equity," § 3.

Jurisdiction of particular actions or proceedings.

See "Divorce," § 3.
Accounting by executor, see "Executors and Administrators," § 8.
Appointment of trustee, see "Trusts," § 3.
By or against trustee, see "Trusts," § 4.
For violation of liquor laws, see "Intoxicating Liquors," § 5.
Setting aside will, see "Wills," § 4.

Special jurisdictions.

See "Equity," § 1.
Particular courts, see "Courts."

JURY.

Custody and conduct, see "Criminal Law," § 13; "Trial," § 6.
Disqualification or misconduct ground for new trial, see "Criminal Law," § 14; "New Trial," § 2.
Instructions in civil actions, see "Trial," § 5.
Instructions in criminal prosecutions, see "Criminal Law," § 13.
Plea in abatement on ground of disqualification of juror, see "Criminal Law," § 4.
Questions for jury in civil actions, see "Trial," § 4.
Questions for jury in criminal prosecutions, see "Criminal Law," § 13.
Refusal of jury trial in common law action as denial of due process of law, see "Constitutional Law," § 10.
Refusal of jury trial in common law action as denial of equal protection of law, see "Constitutional Law," § 9.
Taking case or question from jury at trial, see "Trial," § 4.
Verdict in civil actions, see "Trial," § 7.

§ 1. Right to trial by jury.

*A suit *held* one exclusively within the jurisdiction of equity, so that there was no absolute right to a trial by jury.—*Curtice v. Dixon (N. H.)* 492.

Act April 23, 1903 (P. L. 274), providing for the control of dependent and incorrigible children, is not unconstitutional as depriving a

child of the right to trial by jury.—*Commonwealth v. Fisher (Pa.)* 198.

Gen. Laws 1896, c. 251, § 11, authorizing the Supreme Court to direct judgment without any further trial by jury, *held* not violative of Const. art. 1, § 15, declaring that the right of trial by jury shall remain inviolate (R. I. Charter, Pub. Laws R. I. 1636-1705, p. 28, and Dig. 1730, p. 24).—*Gunn v. Union R. Co. (R. I.)* 118.

§ 2. Competency of jurors, challenges, and objections.

That the sheriff in summoning jurors failed to state that they were to serve in the oyer and terminer is no ground for setting aside a conviction.—*Commonwealth v. Johnson (Pa.)* 1064.

JUSTICES OF THE PEACE.

Authority to permit amendment of return of process, see "Arrest," § 1.
Imposition of fines, see "Fines."

§ 1. Procedure in civil cases.

A justice's record should state that the justice heard plaintiff's "proofs and allegations."—*Patterson v. Jarmon (Del. Super.)* 8.

§ 2. Review of proceedings.

That a transcript sent up to the court of common pleas on an appeal from the small cause court fails to show notice of appeal, signed by the appellant, filed with the justice, and an appeal bond filed, is no ground for dismissing the appeal under P. L. 1903, p. 277, § 81.—*Lazarus v. Martling (N. J. Sup.)* 188.

In granting an appeal the justice of the small cause court acts judicially, and if the legality of his adjudication is challenged in the common pleas, he should be ruled to certify the facts to correct any imperfections in the transcript.—*Lazarus v. Martling (N. J. Sup.)* 188.

*Plaintiff in a trustee suit *held* entitled to appeal from a justice's judgment sustaining a claimant's title to credits disclosed, amounting to more than \$20, though the suit was unappealable as between plaintiff and the defendant.—*Howard & Brown v. Gammon (Vt.)* 1014.

JUSTIFICATION.

Of homicide, see "Homicide," § 5.

KNOWLEDGE.

By grantee of fraud in conveyance, see "Fraudulent Conveyances," § 1.

LACHES.

In compelling transfer of corporate stock, see "Corporations," § 2.
In suit for injunction, see "Injunction," § 3.

LANDLORD AND TENANT.

See "Ground Rents."
Enforcement of lease, see "Specific Performance," § 3.
Lease by street railroad company, see "Street Railroads," § 1.
Liability of co-tenant for rents, see "Tenancy in Common," § 1.
Mining leases, see "Mines and Minerals," § 1.
Parol evidence as to lease, see "Evidence," § 6.
Specific enforcement of option to purchase, see "Specific Performance," § 2.

*Point annotated. See syllabus.

§ 1. Leases and agreements in general.

The question as to the meaning of the description of premises in a lease is for the court.—*Needy v. Middlekauff* (Md.) 159.

§ 2. Terms for years.

A waiver by a tenant of notice to quit, demand re-entry, etc., contained in a lease, *held* not to preclude the tenant from relying on a waiver by the landlord of a forfeiture for nonpayment of rent by his accepting rents subsequently accruing.—*Hartford Wheel Club v. Travelers' Ins. Co.* (Conn.) 207.

Where a lease for years contained a provision that it should be void on the nonpayment of rent, such provision did not limit the term, but created a mere condition subsequent for the breach of which the lessor was entitled to terminate the lease at his election.—*Hartford Wheel Club v. Travelers' Ins. Co.* (Conn.) 207.

A tenant in a lease giving him the option to purchase the premises *held* entitled to exercise the same at the end of the year, or during renewals permitted by the lease.—*Thomas v. Gottlieb Bauernschmidt Straus Brewing Co.* (Md.) 633.

Where tenant entered into possession under a lease for five years, and the lessor had a life estate, and on his death the title vested in the remaindermen, who conveyed the land, and the purchasers brought proceedings to dispossess the tenant after one month's notice, *held*, that the fact that the tenant after the death of the life tenant continued the monthly payments did not make him a tenant from month to month.—*Bernstein v. Demmert* (N. J. Sup.) 187.

§ 3. Premises, and enjoyment and use thereof.

A lease of part of a building construed, and *held* not to give exclusive right to a certain room.—*Needy v. Middlekauff* (Md.) 159.

In an action against a landlord for the loss of a tenant's property, owing to his inability to remove the same from the building during a fire, request to take the case from the jury *held* properly denied.—*Whitcomb v. Mason* (Md.) 749.

*A landlord who leases separate portions of the demised premises to different tenants *held* bound to keep the common hallways, etc., free from improper obstructions.—*Whitcomb v. Mason* (Md.) 749.

Landlord *held* not liable for destruction of tenant's property caused by an outer doorway, controlled by landlord, being closed during an unusual fire occurring on Sunday.—*Whitcomb v. Mason* (Md.) 749.

*A landlord is not obliged to make repairs during a tenancy unless he has agreed to do so.—*Mylander v. Beimschla* (Md.) 1038.

*A landlord *held* not liable for damages to an adjoining building by the discharge of water from a defective rain spout on the leased building.—*Mylander v. Beimschla* (Md.) 1038.

In an action for damages to plaintiff's property by the discharge of water thereon from a defective rain spout on defendant's building, an instruction on the measure of damages *held* erroneous as not limiting recovery to damages sustained after the termination of a lease of such building.—*Mylander v. Beimschla* (Md.) 1038.

*Where a landlord lets out portions of a building to several tenants, retaining possession of the stairways, he is bound to see that reasonable care is exercised to have the stairways reasonably safe.—*Siggins v. McGill* (N. J. Err. & App.) 411; *Ryan v. Delaware, L. & W. R. Co.* (N. J. Err. & App.) 412.

*Point annotated. See syllabus.

§ 4. Rent and advances.

Lease of floor space in store construed to provide for an annual rent of \$2,000.—*Shartenberg & Robinson v. Ellbey* (R. I.) 979.

§ 5. Re-entry and recovery of possession by landlord.

Where complainant in summary proceedings to recover real property alleged that defendant was its tenant under a monthly hiring, complainant could not enforce thereunder an alleged forfeiture of a lease executed to defendant by plaintiff's grantor.—*Hartford Wheel Club v. Travelers' Ins. Co.* (Conn.) 207.

In an action for possession of property from a tenant, the latter *held* entitled to an instruction that a forfeiture of the lease for nonpayment of rent might be waived by the payment and acceptance of rent subsequently accruing.—*Hartford Wheel Club v. Travelers' Ins. Co.* (Conn.) 207.

LANDS.

See "Public Lands."

LANGUAGE.

Construction of language in will, see "Wills," § 5.

LARCENY.

See "False Pretenses."

Conditions precedent to civil action for larceny, see "Action," § 1.

LAW OF THE ROAD.

See "Highways," § 4.

LAWS.

Opinion evidence as to foreign laws, see "Evidence," § 7.

LEASES.

See "Landlord and Tenant."

LEGACIES.

See "Wills."

LEGACY TAX.

See "Taxation," § 5.

LEGISLATIVE POWER.

See "Constitutional Law," § 2.

LETTERS PATENT.

For public lands, see "Public Lands," § 1.

LEVY.

Of execution, see "Execution," § 2.

LEWDNESS.

See "Obscenity."

LIBEL AND SLANDER.

Discovery in action for, see "Discovery," § 1.

§ 1. Words and acts actionable, and liability therefor.

*Where slanderous words are used in such a sense as to impute a crime, malice will be implied.—*Gendron v. St. Pierre* (N. H.) 966.

*In an action for slander, alleged slanderous words *held* not rendered harmless because spoken in the form of an opinion, instead of as a fact.—*Gendron v. St. Pierre* (N. H.) 966.

§ 2. Privileged communications, and malice therein.

Publication of report of affidavit filed to procure a writ of *capias ad respondendum held* not privileged within law relating to libel.—*Todd v. Every Evening Printing Co.* (Del. Super.) 1089.

§ 3. Actions.

In an action for libel, refusal of court to charge on issue of privileged communications *held* proper.—*McGarry v. Healey* (Conn.) 671.

In an action for slander, an allegation that the words were spoken of and concerning plaintiff *held* to sufficiently allege that they were spoken concerning plaintiff in his marital relation to his ill wife, and the performance of the legal duties he owed to her by reason of that relation.—*Gendron v. St. Pierre* (N. H.) 966.

In an action for slander, the declaration *held* not defective for failure to allege that plaintiff had the exclusive care of his wife, and, except by innuendo, that plaintiff's negligence caused her death.—*Gendron v. St. Pierre* (N. H.) 966.

In an action for slander, an innuendo *held* not objectionable as extending the sense of the words spoken.—*Gendron v. St. Pierre* (N. H.) 966.

*In an action for slander consisting of words slanderous *per se*, the amount of damages to which plaintiff is entitled depends in part on the effect of the malice on plaintiff's mind.—*Gendron v. St. Pierre* (N. H.) 966.

*In an action for slander, a verdict in favor of plaintiff for \$50 *held* not excessive.—*Gendron v. St. Pierre* (N. H.) 966.

*In an action for libel or slander, damages cannot be assessed for sickness caused thereby.—*Butler v. Hoboken Printing & Publishing Co.* (N. J. Sup.) 272.

*Corporation publishing newspaper *held* not liable, under the circumstances, for punitive damages for the publication of a libel.—*Neafie v. Hoboken Printing & Publishing Co.* (N. J. Sup.) 1129.

§ 4. Criminal responsibility.

*The malicious publication of a libelous article is a common-law crime punishable as a misdemeanor.—*Noyes v. Thorpe* (N. H.) 787.

*Every person who requests, procures, or asks another to publish a libel is answerable as though he published it himself.—*Noyes v. Thorpe* (N. H.) 787.

LIBRARIES.

Charitable gifts for, see "Charities."

Trust for establishment of, see "Trusts," § 1.

LICENSES.

Care required as to licenses, see "Negligence," § 1.

Dentists' licenses, see "Physicians and Surgeons."

*Point annotated. See syllabus.

For sale of intoxicating liquors, see "Intoxicating Liquors," § 2.

Of brokers, see "Brokers," § 1.

§ 1. In respect of real property.

An owner permitting another to erect a building on his land *held* to give the latter only a parol license.—*Shipley v. Fink* (Md.) 360.

A purchaser of land on which a building was erected under a parol license *held* bound to give the owner thereof a reasonable time in which to remove it.—*Shipley v. Fink* (Md.) 360.

*An owner revoking a parol license for the construction of a building after the construction thereof must make compensation to the owner of the building.—*Shipley v. Fink* (Md.) 360.

LIENS.

Liens acquired by particular remedies or proceedings.

See "Judgment," § 6.

Particular classes of liens.

See "Carriers," § 1; "Mechanics' Liens"; "Warehousemen."

Mortgage, see "Chattel Mortgages," § 2; "Mortgages," § 3.

LIFE ESTATES.

See "Curtesy"; "Dower."

Creation by will, see "Wills," §§ 7, 9.

*Life tenant in possession of mortgaged premises, owing part of the mortgage, *held* liable on foreclosure for the amount of interest unpaid on the other portion of the mortgage.—*Stark v. Byers* (Pa.) 371.

LIFE EXPECTANCY.

Admissibility of expectancy tables, see "Evidence," § 5.

As evidence of damages, see "Damages," § 5.

LIFE INSURANCE.

See "Insurance."

LIMITATION OF ACTIONS.

Particular actions or proceedings.

Against corporate officer, see "Corporations," § 4.

Against co-tenant, see "Tenancy in Common," § 1.

Criminal prosecutions, see "Criminal Law," § 3.

Limitations in insurance policy, see "Insurance," § 7.

To collect unpaid subscription to corporate stock, see "Corporations," § 6.

To recover assessments from members of insurance company, see "Insurance," § 1.

§ 1. Statutes of limitation.

*The statute of limitations may be waived by agreement.—*Lyndon Sav. Bank v. International Co.* (Vt.) 50.

§ 2. Computation of period of limitation.

A broker's right to commissions *held* not to have accrued until the purchaser exercised his option to purchase the land on December 31, 1902, and his action brought June 27, 1904, was not, therefore, barred by the three-year statute of limitations.—*Coates v. Locust Point Co. of City of Baltimore* (Md.) 625.

*Under the express provisions of Code Pub. Gen. Laws, art. 57, § 7, limitations are suspended for 18 months from the death of a decedent whose real estate is liable for his debts.—*Eirley v. Eirley* (Md.) 962.

§ 3. Acknowledgment, new promise, and part payment.

A statement by a debtor to a creditor *held* not a sufficient acknowledgment to revive the debt.—*Schuchler v. Cooper* (Del. Super.) 261.

*Where one of the makers of a joint and several note after it is barred by limitations gives his note in payment of interest thereon, it constitutes a new promise on his part.—*Medomak Nat. Bank v. Wyman* (Me.) 658.

§ 3½. Operation and effect of bar by limitation.

*That limitations have run against a debt for which a bond was given as security does not release the surety on the bond.—*United States v. Mercantile Trust Co.* (Pa.) 1062.

§ 4. Pleading, evidence, trial, and review.

*In an action on a life policy, a replication to a plea of limitations *held* insufficient.—*Price v. Mutual Reserve Life Ins. Co.* (Md.) 1040.

LIMITATION OF LIABILITY.

Of carrier, see "Carriers," § 1.

LIMITED PARTNERSHIP.

See "Partnership," § 5.

LIQUIDATED DAMAGES.

See "Damages," § 2.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIVE STOCK.

Injuries from operation of railroads, see "Railroads," § 8.

LOAN ASSOCIATIONS.

See "Building and Loan Associations."

LOANS.

By bank, see "Banks and Banking," §§ 1, 2.

LOCAL LAWS.

See "Statutes," § 2.

LOST INSTRUMENTS.

A decree requiring payment of a lost check on tender of a bond to two defendants *held* not complied with by a bond given to only one.—*Moore v. Durnan* (N. J. Ch.) 327.

LUNATICS.

See "Insane Persons."

MACHINERY.

Production and use of electricity, see "Electricity."

MALICE.

See "Libel and Slander," § 1.
Criminal, see "Homicide," § 2.

MALICIOUS PROSECUTION.

See "False Imprisonment."

§ 1. Nature and commencement of prosecution.

*Where the entry of a *nolle prosequi* is procured by accused or made in consequence of a compromise to which he is a party, it is not such a termination of the case as to enable accused to maintain an action for malicious prosecution.—*Lamprey v. H. P. Hood & Sons* (N. H.) 380.

§ 2. Actions.

In an action for malicious prosecution, the docket entries in the prosecution *held* admissible in evidence.—*Lamprey v. H. P. Hood & Sons* (N. H.) 380.

In an action for malicious prosecution, evidence *held* to warrant a finding that the entry of a *nolle prosequi* in the prosecution was the act of the state solicitor, induced solely by the advice of the court as to the law.—*Lamprey v. H. P. Hood & Sons* (N. H.) 380.

In action for malicious prosecution, failure to instruct as to burden of showing probable cause *held* not error.—*Buel v. Bergman* (Pa.) 927.

MANDAMUS.

§ 1. Subjects and purposes of relief.

Mandamus should not issue at the instance of a city to compel a street railway company to give transfers when the obligation to do so arises from its assent to municipal ordinances having no legislative force.—*City of Newark v. North Jersey St. Ry. Co.* (N. J. Sup.) 1003.

Where members of a county political committee unlawfully postpone an election of committee members to perpetuate their own authority, mandamus will lie to compel them to hold such an election.—*In re Chester County Republican Nominations* (Pa.) 258; *Appeal of Garrett*, *Id.*

§ 2. Jurisdiction, proceedings, and relief.

*Mandamus lies by an individual to compel a water company to supply water.—*Robbins v. Bangor Ry. & Electric Co.* (Me.) 136.

MANDATE.

See "Mandamus."

MANSLAUGHTER.

See "Homicide," § 3.

MARRIAGE.

See "Breach of Marriage Promise"; "Divorce"; "Husband and Wife."

Examination of witness in action for breach of promise, see "Witnesses," § 2.
Opinion evidence as to laws of foreign country, see "Evidence," § 7.

Validity of bequest terminating upon marriage, see "Wills," § 11.

*Facts *held* insufficient to show that a witness was the wife of accused, so as to render her incompetent to testify.—*State v. Wilson* (Del. Gen. Sess.) 227.

*Where a man and woman intend to marry when an impediment to such marriage is re-

*Point annotated. See syllabus.

moved, and thereafter the impediment is removed, the marriage is lawful.—*Chamberlain v. Chamberlain* (N. J. Err. & App.) 680.

*Where a husband disappears and is not heard from for seven years, and his wife meantime marries again, the presumption exists that the second marriage was valid, as not having occurred before the death of the absent husband.—*In re McCausland's Estate* (Pa.) 780; Appeal of Stuart, Id.

*Common-law marriage held valid, not only in Colorado, where it was created, but also in Pennsylvania.—*In re McCausland's Estate* (Pa.) 780; Appeal of Stuart, Id.

MARRIAGE SETTLEMENTS.

See "Husband and Wife," § 2.

MARRIED WOMEN.

See "Husband and Wife."

MARSHALING ASSETS AND SECURITIES.

Where plaintiff prevented the delivery of certain tin plate to a senior lien holder, plaintiff was properly charged with interest on the value thereof during the time it was so retained.—*Pope v. Baltimore Warehouse Co.* (Md.) 1119.

A paramount creditor of a bankrupt held entitled to compromise litigation with reference to a portion of its securities, as against a junior lien holder, without rendering itself liable to the latter for a pro tanto portion of the securities realized by the compromise.—*Pope v. Baltimore Warehouse Co.* (Md.) 1119.

MASTER AND SERVANT.

See "Work and Labor."

Admissions by employé, see "Evidence," § 2.
Liability for false arrest caused by employé, see "False Imprisonment," § 1.

Opinion evidence in action for injuries to servant, see "Evidence," § 7.

Sales of liquor by servant, see "Intoxicating Liquors," § 4.

§ 1. The relation.

*An employé discharged without just cause before the expiration of term held entitled to recover the agreed compensation for the remainder of the term.—*Hitchens v. School Dist. No. 180 in Sussex County* (Del. Super.) 897.

§ 2. Services and compensation.

Employment by company using secret process held to raise an implied agreement on the part of employés not to divulge the secret.—*Vulcan Detinning Co. v. American Can Co.* (N. J. Ch.) 881.

§ 3. Master's liability for injuries to servant—Nature and extent in general.

Plaintiff in action for injuries resulting from blast in stone quarry held a servant of the owner of the quarry.—*McMahon v. Bangs* (Del. Super.) 1098.

Failure of railroad telegraph operator to transmit report of departure of extra train to dispatcher held a proximate cause of a collision between the extra and the regular train.—*Mahoney's Adm'r v. Rutland R. Co.* (Vt.) 722.

*Point annotated. See syllabus.

§ 4. — Tools, machinery, appliances, and places for work.

In an action against a railway company for the death of a car inspector in consequence of a crippled car being improperly placed in a train, the company held not negligent for failing to give additional notice of the crippled car.—*Shuster v. Philadelphia, B. & W. R. Co.* (Del. Sup.) 689.

In an action for injuries to a servant at work on the débris of a building by the collapse of a vault shaft, defendant held not guilty of negligence in failing to provide plaintiff with a safe place in which to work.—*Gans Salvage Co. v. Byrnes* (Md.) 153.

§ 5. — Methods of work, rules, and orders.

*A railway company held not guilty of actionable negligence toward a servant for failing to establish a general rule governing the placing of crippled cars in a train.—*Shuster v. Philadelphia, B. & W. R. Co.* (Del. Sup.) 689.

A railway company held not guilty of actionable negligence for failing to establish a rule prohibiting car inspectors from riding on trains run in on a track for inspection.—*Shuster v. Philadelphia, B. & W. R. Co.* (Del. Sup.) 689.

§ 6. — Fellow servants.

*A yardmaster and a brakeman and conductor are fellow servants of a car inspector.—*Shuster v. Philadelphia, B. & W. R. Co.* (Del. Sup.) 689.

The superintendent of a division of a railway company is not a fellow servant of a car inspector, but is a vice principal.—*Shuster v. Philadelphia, B. & W. R. Co.* (Del. Sup.) 689.

A freight conductor held negligent in putting a crippled car ahead of the cabin car, so as to relieve the company from liability for injuries to a car inspector in consequence thereof.—*Shuster v. Philadelphia, B. & W. R. Co.* (Del. Sup.) 689.

*A servant whose negligence resulted in injury to plaintiff held a fellow servant of plaintiff, so that the master was not liable for the injury.—*McMahon v. Bangs* (Del. Super.) 1098.

*A verdict for an employé suing for personal injuries held justified, though a co-employé's negligence contributed to the injury.—*Hamel v. Newmarket Mfg. Co.* (N. H.) 592.

*Railroad company held not liable for death of employé caused by negligence of fellow servants.—*Spangler v. Baltimore & O. R. Co.* (Pa.) 919.

*A railroad brakeman held not entitled to recover for injuries sustained by the negligence of the fireman in throwing fresh coal into the boiler, contrary to custom, while the train was on a downgrade, etc.—*Johnson v. Boston & M. R. R.* (Vt.) 1021.

§ 7. — Risks assumed by servant.

A servant injured by the collapse of a vault shaft in a building destroyed by fire held to have assumed the risk.—*Gans Salvage Co. v. Byrnes* (Md.) 153.

*An employé who was not aware of the danger to which he was exposed did not assume the risk incident to the work, unless it clearly appeared that he would have known of the danger and appreciated the risk if he had used ordinary care.—*Hamel v. Newmarket Mfg. Co.* (N. H.) 592.

*Plaintiff, injured by fall of stone from a derrick, held to have assumed the risk.—*Talbot v. Sims* (Pa.) 107.

*An employé having notice of danger held not entitled to recover for injuries caused by defect in appliances.—*Lindberg v. National Tube Co. (Pa.)* 985.

*An employé held not entitled to recover for injuries outside scope of his employment.—*Michalofski v. Pittsburg Screw & Bolt Co. (Pa.)* 1112.

*In an action for injuries to a railroad brakeman by striking a low bridge of which he had knowledge, plaintiff held to have assumed the risk.—*Johnson v. Boston & M. R. R. (Vt.)* 1021.

§ 8. — Actions.

*In an action for injuries to servant, evidence as to whether servant had received warning of danger held inadmissible.—*McMahon v. Bangs (Del. Super.)* 1098.

In an action for injuries to a servant by the falling of a vault shaft in the debris of a building destroyed by fire, the mere falling of the shaft held insufficient to create a presumption of negligence on the part of plaintiff's master.—*Gans Salvage Co. v. Byrnes (Md.)* 155.

Whether an employé, injured while at work, was negligent, held for the jury.—*Hamel v. Newmarket Mfg. Co. (N. H.)* 592.

Whether the negligence of an employé resulting in injury to a co-employé was the sole cause of the injury, or only a cause concurring with the negligence of the employer, held under the evidence, a question for the jury.—*Hamel v. Newmarket Mfg. Co. (N. H.)* 592.

In an action for injuries to an employé, evidence held to warrant a finding that the employer was negligent for failure to warn plaintiff of the danger.—*Hamel v. Newmarket Mfg. Co. (N. H.)* 592.

A servant suing for injuries must show that the master failed to perform a legal duty, and that the failure was the legal cause of the injuries.—*Hamel v. Newmarket Mfg. Co. (N. H.)* 592.

In an action for injuries to a street car conductor, held proper to refuse to nonsuit or direct verdict for defendant on the ground that plaintiff assumed the risk.—*Osterhout v. Jersey City, H. & P. St. Ry. Co. (N. J. Sup.)* 190.

*Whether an employé was guilty of contributory negligence held a question for the jury.—*Maines v. Harbison-Walker Co. (Pa.)* 640.

*In an action by the servant to recover for personal injuries, held error to grant a compulsory nonsuit.—*Maines v. Harbison-Walker Co. (Pa.)* 640.

In action by servant against natural gas company to recover for injuries received, evidence held to require submission of question of defendant's negligence to the jury.—*McCoy v. Ohio Valley Gas Co. (Pa.)* 858.

In an action by an employé to recover for injuries caused by defects in appliances which could not have been revealed to plaintiff except by a special investigation, evidence held to sustain verdict for plaintiff.—*McKee v. Crucible Steel Co. (Pa.)* 921.

In an action to recover for injuries to an employé of another company, who was putting up structural work at the plant of defendant company, evidence held to show that the accident was caused by the contributory negligence of plaintiff.—*McNeil v. Clairton Steel Co. (Pa.)* 923.

In an action for injuries to a servant, certain evidence held admissible and other evidence inadmissible.—*Lewes v. John Crane & Sons (Vt.)* 60.

In an action for the death of a railroad engineer caused by a collision, evidence held insufficient to show negligence on the part of the train dispatcher.—*Mahoney's Adm'r v. Rutland R. Co. (Vt.)* 722.

In an action for injuries to a brakeman by being struck by a low bridge, evidence held insufficient to show that he was struck by ice on the bridge, or that more ice than was usual had accumulated thereon.—*Johnson v. Boston & M. R. R. (Vt.)* 1021.

§ 9. Liabilities for injuries to third persons.

*Whether an employé was acting in the scope of his employment when he shot a person held a question for the jury.—*Baltimore & O. R. Co. v. Deck (Md.)* 958.

MEASURE OF DAMAGES.

See "Damages," § 3.

For causing death, see "Death," § 1.
For trespass, see "Trespass," § 1.

MECHANICS' LIENS.

Mechanics' lien laws authorizing the taking of property without due process of law, see "Constitutional Law," § 10.

Validity of mechanics' lien law as interfering with right to acquire, possess and protect property, see "Constitutional Law," § 4.

§ 1. Right to lien.

Under the mechanics' lien law (P. L. 1898, p. 538, § 1), where the building contract is not filed, a lien may be claimed for materials furnished a subcontractor.—*Gardner & Meeks Co. v. New York Cent. & H. R. R. Co. (N. J. Err. & App.)* 416; *Snyder v. Same (N. J. Err. & App.)* 418.

*Where a contractor agrees not to permit any lien on the premises, the provision is, under Act June 4, 1901 (P. L. 431), as amended by Act April 24, 1903 (P. L. 297), binding on subcontractor.—*Glassport Lumber Co. v. Wolf (Pa.)* 1074.

§ 2. Proceedings to perfect.

Description in a certificate of a mechanic's lien held sufficient to support a valid lien.—*Cronan v. Corbett (Conn.)* 662. •

§ 3. Operation and effect.

Where an owner failed to file an improvement contract with the clerk of the county in which the lands were located, as required by Mechanics' Lien Law 1898 (Laws 1898, p. 538, c. 226), she could not limit the liability of the property for liens of workmen and materialmen, to funds in her hands belonging to the contractor.—*Schmidt v. Eitel (N. J. Ch.)* 558.

MEDICINES.

See "Druggists."

MEETINGS.

Of municipal council, see "Municipal Corporations," § 2.

Of stockholders, see "Corporations," § 3.

MINES AND MINERALS.

Lien of judgment on lessor's interest, see "Judgment," § 6.

Sale of coal under execution, see "Execution," § 3.

* Point annotated. See syllabus.

Insufficiency to maintain ejectment, of title of grantee of privilege to prospect for oil, see "Ejectment," § 1.

1. Title, conveyances, and contracts.
Deed construed, and reservation therein of the mineral under the land *held* not to include natural gas.—*Silver v. Bush* (Pa.) 832.

Grant of exclusive right to mine for and produce oil construed.—*Kelly v. Keys* (Pa.) 911.

Lessor in oil lease *held* not entitled to claim that the oil well was not completed as provided or in the lease.—*Hays v. Forest Oil Co.* (Pa.) 072.

Oil lease construed, and *held* that monthly payment provided for was only a condition precedent necessary to maintain the vitality of the lease until the well should be completed.—*Hays v. Forest Oil Co.* (Pa.) 1072.

Coal mining lease construed, and lessee *held* liable for royalties thereunder.—*Troxell v. Anderson Coal Min. Co.* (Pa.) 1083.

MINISTERS.

See "Religious Societies."

MISJOINDER.

Of causes of action in pleading, see "Pleading," § 3.

Of parties, see "Equity," § 2.

MISREPRESENTATION.

See "False Pretenses"; "Fraud."

By insured, see "Insurance," § 3.

Ground for rescission of contract for sale of realty, see "Vendor and Purchaser," § 3.

MISTAKE.

Ground for opening or vacating judgment, see "Judgment," § 4.

MITIGATION.

Of damages, see "Damages," § 1.

MONEY RECEIVED.

Recovery of payment in general, see "Payment," § 2.

Recovery of price paid for goods, see "Sales," § 7.

Where plaintiff acquired an interest in mortgaged premises after decree of foreclosure, and paid the solicitor of the mortgagee a sum for interest, costs, and sheriff's fees, and on a subsequent sale on foreclosure the mortgagee was paid the full amount of the decree, *held*, in a suit against the mortgagee to recover such amount, that plaintiff was entitled to recover as for money had and received.—*Brady v. Franklin Sav. Inst. of Newark* (N. J. Sup.) 277.

Where one having acquired an interest in mortgaged premises after decree on foreclosure paid certain amount for interest, costs, and sheriff's fees, and on subsequent sale the mortgagee was paid the full amount of the decree, that plaintiff applied to the court in chancery for surplus money and his share was decreed to be paid to him did not estop him from thereafter recovering from the mortgagee the amount paid the attorney for the mortgagee.—*Brady v. Franklin Sav. Inst. of Newark* (N. J. Sup.) 277.

In action for money had and received, where defendant by fraud prevents the receipt by him of the money in the hands of a third person, he cannot plead that he has not received it.—*Owens v. Goldie* (Pa.) 1117.

In assumpsit for money had and received under an agreement to invest it, the evidence considered, and *held* not to sustain a judgment against one of the defendants.—*Brady v. Messler* (R. I.) 511.

MONTH.

See "Time."

MONUMENTS.

As charge on legacy, see "Wills," § 14.

MORTALITY TABLES.

Admissibility in evidence, see "Evidence," § 5.

MORTGAGES.

Admissions as to character of instrument, see "Evidence," § 2.

Conclusiveness of judgment, see "Judgment," § 5.

Effect of equitable conversion of property on mortgage of devisee's interest, see "Conversion."

Foreclosure of mortgage as satisfaction of secured note, see "Bills and Notes," § 3.

In fraud of creditors, see "Fraudulent Conveyances," § 3.

Parol evidence, see "Evidence," § 6.

Requirements of statute of frauds as to contracts, see "Frauds, Statute of," § 2.

Requirements of statute of frauds as to guaranty of payment, see "Frauds, Statute of," § 1.

Mortgages by or to particular classes of parties.

See "Corporations," § 5; "Railroads."

Mortgages of particular species of property.

See "Life Estates."

Personal property, see "Chattel Mortgages."

Railroads, see "Railroads," § 3.

§ 1. Requisites and validity.

Where plaintiff reserved in terms an absolute life estate out of a farm conveyed on consideration of bond of the defendant to support plaintiff on the farm, and that the reservation was made to secure the bond, defendant was entitled to retain possession until a breach of his bond.—*Hurd v. Chase* (Me.) 660.

*Since under Rev. St. c. 84, §§ 17-21, the court has full equity powers, it can treat a conveyance or reservation in a conveyance, absolute in terms, as made solely for security.—*Hurd v. Chase* (Me.) 660.

*The court has a power to determine from extrinsic evidence what obligation the deed absolute in form was intended to secure.—*Hurd v. Chase* (Me.) 660.

Where a deed absolute in form, but made as security, contains no description of the obligation, the court can ascertain its full terms from extrinsic evidence.—*Hurd v. Chase* (Me.) 660.

Evidence *held* insufficient to show a deed was intended as a mortgage.—*Wilson v. Terry* (N. J. Ch.) 310.

§ 2. Recording and registration.

*Defeasance not recorded as required by Act June 8, 1881 (P. L. 84), cannot be admitted to convert a title absolute in form into a mortgage.—*Safe Deposit & Title Guaranty Co. of Kittanning v. Linton* (Pa.) 568.

*Point annotated. See syllabus.

§ 3. Construction and operation.

*A mortgage by grantee of land for the purchase money *held* subject to the lien of judgments against grantee.—*Stover v. Hellyer* (N. J. Err. & App.) 698.

Mortgages executed to a bank to secure notes "discounted at three months" *held* to secure notes discounted payable on demand.—*Campbell v. Perth Amboy Shipbuilding & Engineering Co.* (N. J. Ch.) 319.

§ 4. Payment or performance of condition, release, and satisfaction.

In a suit to foreclose certain mortgages given to a bank, evidence *held* insufficient to establish a contract by which the bank agreed to take certain collateral in part payment of the debt.—*Campbell v. Perth Amboy Shipbuilding & Engineering Co.* (N. J. Ch.) 319.

§ 5. Foreclosure by action.

Equity Rules 51, 52, codified in Code Pub. Gen. Laws, art. 16, §§ 178, 179, *held* not to prohibit the circuit court from correcting a clerical error in an order ratifying a sale under a mortgage, on petition of the purchaser, even after the enrollment of the order.—*Primrose v. Wright* (Md.) 238.

An error in an order ratifying a sale under a mortgage foreclosure *held* not to affect its validity.—*Primrose v. Wright* (Md.) 238.

*Defendant in foreclosure proceedings who purchased a paramount title after decree of sale would not be ousted from possession by writ of assistance.—*Board of Home Missions of Presbyterian Church in United States of America v. Davis* (N. J. Ch.) 447.

Satisfaction of mortgage *held* not a discharge of a mortgage bond, unless the debt is satisfied.—*Stricker v. McDonnell* (Pa.) 520.

Sale under mortgage *held*, under the evidence, not a satisfaction of a bond.—*Stricker v. McDonnell* (Pa.) 520.

§ 6. Redemption.

*A widow redeeming from a mortgage in which she joined cannot be required to pay a second mortgage in which she did not join, or to pay an open account due the first mortgagee.—*Hays v. Cretin* (Md.) 1028.

A widow who has joined in a mortgage in release of dower may redeem, though there has been no legal assignment of dower, and though the husband has made a second mortgage in which the wife did not join.—*Hays v. Cretin* (Md.) 1028.

On a bill by a widow to redeem from a mortgage in which she joined, it is not necessary to consider the rights of heirs at law not parties.—*Hays v. Cretin* (Md.) 1028.

Tenant having leased mortgaged property *held* entitled, in an action on the mortgage, to tender amount of mortgage and demand an assignment.—*Wunderle v. Ellis* (Pa.) 106.

MOTIONS.

Continuance in civil actions, see "Continuance."

Direction of verdict in civil actions, see "Trial," § 4.

Dismissal or nonsuit on trial, see "Trial," § 4. New trial in civil actions, see "New Trial," § 3.

New trial in criminal prosecutions, see "Criminal Law," § 14.

Opening or setting aside default judgment, see "Judgment," § 2.

Presentation of objections for review, see "Appeal and Error," § 3.

Quashing indictment or information, see "Indictment and Information," § 4. Relating to pleadings, see "Pleading," §§ 3, 4. Striking out evidence, see "Trial," § 2.

MULTIFARIOUSNESS.

In pleading, see "Equity," § 3.

MUNICIPAL CORPORATIONS.

See "Counties"; "Schools and School Districts," § 1; "Towns."

Condemnation of land for public improvements, see "Eminent Domain," § 3.

Cross bill in suit to restrain pollution of water course, see "Equity," § 3.

Injunctions affecting, see "Injunction," § 2. Mayor as trustee of hospital, see "Hospitals."

Opinion evidence in action for personal injuries, see "Evidence," § 7.

Ordinances relating to intoxicating liquors, see "Intoxicating Liquors."

Regulation of railroads, see "Railroads," § 4.

Review in prosecution for violation of ordinances, see "Criminal Law," § 15.

Right of city council to revoke dedication, see "Dedication," § 2.

Special or local laws, see "Statutes," § 2.

Street railroads, see "Street Railroads."

Town as party entitled to restrain nuisance, see "Nuisance," § 1.

Violation of ordinances by carrier as negligence, see "Carriers," § 3.

Water supply, see "Waters and Water Courses," § 3.

§ 1. Governmental powers and functions in general.

Under the provisions of P. L. 1898, p. 155, providing for the summary investigation of county and municipal expenditures, the justice of the Supreme Court, who has appointed experts to prosecute such investigation, is not required to institute an inquiry into the truth of the facts sworn to in the jurisdictional affidavit.—*Borough of Park Ridge v. Reynolds* (N. J. Sup.) 190.

*Where a charter of a city authorizes an ordinance to license hawkers and peddlers, an ordinance enacted in pursuance thereof, delegating to the city magistrate the power to fix the penalty for its violation, *held* an unauthorized delegation of legislative discretion.—*City of Lambertville v. Applegate* (N. J. Sup.) 270.

§ 2. Proceedings of council or other governing body.

A village ordinance, requiring permission of the street commissioner as a condition precedent to the right to lay gas pipes in the streets, *held* repealed by another ordinance.—*Public Service Corp. of New Jersey v. De Grote* (N. J. Ch.) 65; *Village of Ridgely Park v. Public Service Corp. of New Jersey*, Id.

*The session of a city council, convened in pursuance of a special motion adopted at a regular meeting to adjourn the meeting to a stated time, is a continuation of the regular meeting, and council can do anything that it could have done at the earlier session.—*Stiles v. City of Lambertville* (N. J. Sup.) 288.

*A city council may reconsider and annul a vote previously taken at the same meeting.—*Stiles v. City of Lambertville* (N. J. Sup.) 288.

Proceedings of a city council setting aside an election of a member thereof *held* not justified by the evidence.—*Meachem v. Common Council of City of New Brunswick* (N. J. Sup.) 303.

*Act of common council of a city in declaring vacant a seat of one of its members *held*

* Point annotated. See syllabus.

subject to the supervisory jurisdiction of the Supreme Court.—*Meachem v. Common Council of City of New Brunswick* (N. J. Sup.) 303.

*An ordinance not entirely void cannot be questioned on certiorari by a person not affected by its provisions.—*Morwitz v. Atlantic City* (N. J. Sup.) 996.

3. Officers, agents, and employes.

An ordinance abolishing the office of roundsman *held* within the power of the council and valid.—*McCann v. City of New Brunswick* (N. J. Sup.) 191.

When relator was appointed a police officer in 1897, and in 1902 was made roundsman, and in 1905 the office of roundsman was abolished, *held*, that the relator did not cease to be a policeman, and could only be removed from his employment as policeman after conviction, pursuant to Act 1885 (P. L. p. 163), and Gen. St. p. 1534, pl. 328.—*McCann v. City of New Brunswick* (N. J. Sup.) 191.

The action of a de facto board of police commissioners expelling a patrolman from the police force was as to him valid.—*Lang v. City of Bayonne* (N. J. Sup.) 270.

*The common council of the city of New Brunswick *held* authorized by Act March 27, 1873, § 16 (P. L. p. 456), which was a supplement to Act March 18, 1863 (P. L. p. 347), to remove from office water commissioners who failed to comply with the requirements of P. L. 1904, p. 259, regulating the receipt and disbursement of money.—*Cohn v. Common Council of City of New Brunswick* (N. J. Sup.) 285.

Where a board of police commissioners is composed of four members, three members are sufficient to constitute a quorum.—*McManus v. Board of Police Com'rs of City of Newark* (N. J. Sup.) 997.

4. Contracts in general.

*Landowner who receives some special tangible damage from the diversion of a public park from the purposes of its dedication is entitled to invoke the intervention of equity.—*Bayard v. Bancroft* (Del. Ch.) 6.

*Where a town council directed by resolution execution of a contract with a city for a supply of water, and the resolution was not communicated by the town to the city, it did not constitute a proposal which the city might accept and thereby bind the town.—*Jersey City v. Town of Harrison* (N. J. Err. & App.) 765; *Matthews v. Same*, *Id.*

*A resolution of a town council, directing the president to contract with a city for a supply of water on certain terms, *held* to create no contract, where the paper executed by the city did not conform to the resolution.—*Jersey City v. Town of Harrison* (N. J. Err. & App.) 765; *Matthews v. Same*, *Id.*

Gen. St. p. 622, § 4, *held* not to authorize a contract between a municipality and a town through whose streets a tidal sewer was laid regulating the use of a collection chamber in another municipality.—*Belleville Tp., Essex County, v. City of Orange* (N. J. Ch.) 331.

Under Gen. St. p. 622, § 4, a contract between a city and a person or municipal authority having public rights to protect, for the regulation of a tidal sewer chamber, is not *ultra vires*.—*Belleville Tp., Essex County, v. City of Orange* (N. J. Ch.) 331.

A town *held* not entitled to enforce specific performance of that part of a contract relating to the maintenance of a sewer to tide water through its streets as regulated the use of a tidal collection chamber in another municipal-

ity.—*Belleville Tp., Essex County, v. City of Orange* (N. J. Ch.) 331.

§ 5. Public improvements.

*An ordinance of a borough, making it lawful for the borough council to require the construction of sidewalks by resolution when necessary, *held* invalid, as the council must proceed in accordance with P. L. 1897, p. 301, § 33, pt. 3, by general or special ordinance.—*Sproul v. Borough of Stockton* (N. J. Sup.) 275.

*Contract for construction of street construed, and *held* that delay by failure of city to obtain complete right of way was not within its terms.—*Sheehan v. City of Pittsburg* (Pa.) 642.

City contractor *held* entitled to either abandon the work or claim damages caused by fault of city.—*Sheehan v. City of Pittsburg* (Pa.) 642.

On dispute between city and its contractor as to amount due under contract, question *held* one for the jury.—*Sheehan v. City of Pittsburg* (Pa.) 642.

Refusal of court to rescind order of confirmation in a road case *held* not error.—*In re Tioga St.* (Pa.) 926.

*Failure to give notice, under Act May 16, 1891 (P. L. 79) § 10, within 10 days of the passage of a borough ordinance for improving street, *held* not fatal to an assessment for the cost.—*Duquesne Borough v. Keeler* (Pa.) 1071.

*Failure to have report of viewers of street improvement confirmed nisi *held* immaterial.—*In re Marshall Avenue* (Pa.) 1085.

*Act April 18, 1899 (P. L. 57), known as the "Curative Act," and providing that, where a street has been improved by a municipality under an invalid law or ordinance, such law shall be valid and binding, is unconstitutional.—*In re Marshall Avenue* (Pa.) 1085.

A failure to advertise a grading contract, as required by Act May 22, 1895 (P. L. 105), is cured by Act April 18, 1899 (P. L. 57).—*In re Marshall Avenue* (Pa.) 1085.

§ 6. — Assessments for benefits, and special taxes.

Under Act March 24, 1897 (P. L. 1897, p. 70) § 48, cl. 3, the common council of a city has authority to assess the costs of an improvement on the owners of the property benefited to the extent of the peculiar benefits received.—*Tusting v. City of Asbury Park* (N. J. Sup.) 183.

Under Act March 24, 1897 (P. L. 1897, p. 70) § 65, certiorari to review an assessment for a public improvement, applied for after 60 days from the confirmation of the assessment, will be dismissed.—*Tusting v. City of Asbury Park* (N. J. Sup.) 183.

Where a landowner has notice of street proceedings for which the law authorizes an assessment, and refrains from applying for a writ of certiorari until the improvement is completed and an assessment levied he will be allowed only to question the validity of the assessment.—*Tusting v. City of Asbury Park* (N. J. Sup.) 183.

An order of the Supreme Court, setting aside an assessment and directing a new assessment, vacates only the particular apportionment under review, and does not determine that the amount of the assessment on any individual's property should be affected.—*Milton v. Stell* (N. J. Sup.) 1133.

Where ordinance provides for construction of sewers on a certain plan, a deviation from the plan *held* to render assessment for benefits in-

*Point annotated. See syllabus.

valid.—In re Scranton Sewer (Pa.) 173; Appeal of Lackawanna Iron & Steel Co., Id.

Time to appeal from confirmation of report of viewers, given by Act May 16, 1891 (P. L. 75), and repeated in Act April 2, 1903 (P. L. 124), does not take away the right to appeal given by Act May 19, 1897 (P. L. 67).—In re Scranton Sewer (Pa.) 173; Appeal of Lackawanna Iron & Steel Co., Id.

Where a whole improvement of a street was provided for by one ordinance, and done under one contract, an assessment for damages held not invalid.—In re Wilmington Ave. (Pa.) 848.

On appeal from a report of viewers in proceedings under Act May 16, 1891 (P. L. 75), the report is not prima facie evidence of the benefits, as provided for such reports made under Act April 2, 1903 (P. L. 124).—Carson v. Allegheny City (Pa.) 1070.

Where an appeal is taken in a road case from viewers' report, the contract for the improvement is inadmissible in evidence for defendant.—Carson v. Allegheny City (Pa.) 1070.

On appeal from report of viewers assessing damages for improving street, damages for widening under another ordinance cannot be set off.—Duquesne Borough v. Keeler (Pa.) 1071.

§ 7. Police power and regulations.

A city ordinance, requiring bill-boards to be constructed not less than 10 feet from the street, cannot be justified as an exercise of the police power.—City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co. (N. J. Err. & App.) 267.

A fine of \$20 imposed by an ordinance for the refusal of an omnibus driver to convey any passenger was not excessive.—Atlantic City v. Brown (N. J. Err. & App.) 428.

An ordinance permitting an omnibus driver to charge only 10 cents for carrying a passenger, irrespective of the distance, held not unreasonable.—Atlantic City v. Brown (N. J. Err. & App.) 428.

Provision of an ordinance requiring an omnibus driver to convey any one tendering himself as a passenger held not wholly void.—Atlantic City v. Brown (N. J. Err. & App.) 428.

The fact that an ordinance requires omnibus drivers to carry any person tendering himself as a passenger, whether the driver desires to carry him or not, held not to render it invalid.—Atlantic City v. Brown (N. J. Err. & App.) 428.

An ordinance forbidding any person to hire or offer for hire rolling chairs on a board walk along the ocean in front of the city is valid.—Harris v. Atlantic City (N. J. Sup.) 995.

The words "to hire," as used in an ordinance forbidding any person to hire rolling chairs, means to grant the temporary use for compensation.—Harris v. Atlantic City (N. J. Sup.) 995.

*An ordinance which limits the use of the public streets for the collection of garbage to the duly authorized contractor of the city held a valid exercise of the police power.—Atlantic City v. Abbott (N. J. Sup.) 999.

§ 8. Use and regulation of public places, property, and works.

Owner of land abutting on park held not entitled to enjoin construction of street railroad through the park, where the only injury claimed is to his artistic sensibilities.—Bayard v. Bancroft (Del. Ch.) 6.

Evidence held insufficient to establish the taking of land for an extension of a street

over line claimed by defendant railroad company for a right of way.—Johnson v. Philadelphia, B. & W. R. Co. (Del. Ch.) 86.

Where, by virtue of condemnation proceedings, complainant ceased to be a landowner abutting a street on which the tracks of defendant railroad were laid, complainant had no right to raise the question of the extension of the street over a portion of the railroad's right of way.—Johnson v. Philadelphia, B. & W. R. Co. (Del. Ch.) 86.

Baltimore City Charter (Acts 1898, p. 296, c. 123) § 37, as amended by Acts 1900, p. 117, c. 109, held to supersede prior ordinance of city as to grant of right to erect awning in street.—Preston v. Likes, Berwanger & Co. (Md.) 1024.

Application for permit to erect awning held not within ordinance authorizing inspector of buildings to grant permit to erect awning covered with wood, iron, tin, or canvas.—Preston v. Likes, Berwanger & Co. (Md.) 1024.

A borough ordinance which makes it the duty of any person having trees in a street to cut down and remove the same after notice is not authorized by P. L. 1897, p. 296, § 2, pt. 1, giving the council power to regulate the planting and protection of shade trees.—Sprent v. Borough of Stockton (N. J. Sup.) 275.

§ 9. Torts.

In an action against a city for injuries from a defective sidewalk, a finding held not susceptible of the interpretation that it held defendant to the duty of maintaining the walk in a safe condition.—Campbell v. City of New Haven (Conn.) 665.

*It is the duty of municipal corporations to keep streets or highways in a reasonably safe condition for the use of travelers.—Green v. Council of Newark (Del. Super.) 792.

*A traveler on a street who has knowledge of obstructions must take due precaution to avoid injury.—Green v. Council of Newark (Del. Super.) 792.

*In the absence of knowledge to the contrary, a traveler on a street may presume that it is in a safe condition.—Green v. Council of Newark (Del. Super.) 792.

*In an action against a city for injuries caused by a defective crossing, the burden is on plaintiff to prove defendant's negligence.—Green v. Council of Newark (Del. Super.) 792.

*In an action against a city for injuries to a pedestrian by falling on a defective footway, whether plaintiff was guilty of contributory negligence held a question for the jury.—Green v. Council of Newark (Del. Super.) 792.

*Where plaintiff fell on the ice on the sidewalk in front of defendant's house, to recover for injuries received she must show that the icy condition resulted from water artificially conducted on the sidewalk.—Greenlaw v. Milliken (Me.) 145.

In an action for injuries received by falling on the ice on the sidewalk in front of defendant's house, evidence held to show plaintiff guilty of contributory negligence.—Greenlaw v. Milliken (Me.) 145.

The word "railings," in Laws 1893, p. 47, c. 59, relating to liability of towns for defective railings, held to mean railings necessary to guard travelers from going over embankments.—Wentworth v. Town of Pittsfield (N. H.) 218.

In a suit to restrain the pollution of a water course, it was no defense that the acts of certain others contributed to the nuisance.—Doremus v. City of Paterson (N. J. Ch.) 8.

*Point annotated. See syllabus.

In a suit to restrain the pollution of a water course by a city, an answer *held* defective for failure to state whether the taking of complainant's property rights was to be perpetual or temporary.—*Doremus v. City of Paterson* (N. J. Ch.) 3.

*A city *held* bound to construct and maintain a sidewalk only in a reasonably safe condition.—*Reed v. Borough of Tarentum* (Pa.) 928.

*An instruction in an action for injuries caused by alleged defects in the sidewalk, allowing the jury to set up a standard of care required by the city in that respect, *held* erroneous.—*Reed v. Borough of Tarentum* (Pa.) 928.

*Person injured by defect in a sidewalk of which he was ignorant *held* not guilty of contributory negligence.—*Steck v. City of Allegheny* (Pa.) 1115.

*Person *held* not necessarily guilty of contributory negligence in using a street known to be defective.—*Steck v. City of Allegheny* (Pa.) 1115.

*Whether plaintiff was guilty of contributory negligence when injured by a fall on a sidewalk because of ice thereon *held* under the evidence a question for the jury.—*Steck v. City of Allegheny* (Pa.) 1115.

*Where all the streets were icy at the time plaintiff fell on a sidewalk, the question as to whether there was a safer road which plaintiff could have taken is for the jury.—*Steck v. City of Allegheny* (Pa.) 1115.

*Whether injured party used due care in traveling on a known dangerous street *held* a question for the jury.—*Steck v. City of Allegheny* (Pa.) 1115.

*Where a person uses a defective street, whether he was guilty of contributory negligence in not using another street was a question for the jury.—*Steck v. City of Allegheny* (Pa.) 1115.

*A municipality constructing and maintaining a jail, as authorized by V. S. 5302-5304, *held* not liable for negligence to one committed herein, as provided by section 5305.—*Carty's Adm'r v. Village of Winoski* (Vt.) 45.

*Adjoining owner *held* liable for injuries to a pedestrian by a defect in the covering of a hole in the sidewalk in front of his property only on proof of negligence.—*Mixer v. Herrick* (Vt.) 1019.

Allegations of a declaration in an action or injuries to a pedestrian by an alleged defective covering of a hole in a sidewalk *held* sufficient to show notice to defendants of the defect.—*Mixer v. Herrick* (Vt.) 1019.

10. Fiscal management, public debt, securities, and taxation.

A bill to enjoin the collection of municipal taxes as fraudulently assessed with intent to compel payment by complaint of an undue portion of the public taxes *held* to state grounds or equitable relief.—*National Tube Co. v. Shearer* (Del. Ch.) 1093.

In a suit to restrain the collection of certain city taxes, evidence *held* insufficient to show that complainant's property had been fraudulently overvalued.—*National Tube Co. v. Shearer* (Del. Ch.) 1093.

Under Acts 1888, p. 127, c. 98, § 19, and Acts 1902, p. 199, c. 130, relating to taxation of territory annexed to city of Baltimore, alley graded and paved *held* sufficient to form boundary of block as therein described, though not curbed.—*City of Baltimore v. Rosenthal* (Md.) 579.

Alley paved with cobble stones *held* graded within the meaning of Acts 1888, p. 127, c. 98, § 19, and Acts 1902, p. 199, c. 130, relating to taxation of territory annexed to city of Baltimore.—*City of Baltimore v. Rosenthal* (Md.) 579.

Act March 7, 1901 (P. L. 40), repeals Act June 14, 1887, § 24 (P. L. 398), as amended by Act Feb. 13, 1895, § 1 (P. L. 13), relating to an increase of the bonded indebtedness of cities of the second class, and authorizing an election.—*Jermyn v. City of Scranton* (Pa.) 29.

Ordinance of city of the second class, providing for the issue of bonds, *held* valid.—*Jermyn v. City of Scranton* (Pa.) 29.

Under Act March 7, 1901 (P. L. 40), as amended by Act June 20, 1901 (P. L. 586), relating to the issue of bonds by cities of the second class, bonds for the creation of new debts or for payment of contemplated improvements are payable annually, funding bonds payable in 5 to 30 years.—*Jermyn v. City of Scranton* (Pa.) 29.

Cities of the second class may classify real estate for purposes of legislation, and levy a different rate on each class of property.—*Jermyn v. City of Scranton* (Pa.) 29.

§ 11. Actions.

Mistake of city surveyor in establishing grade of street *held* not to create a right of action running with the land in favor of grantee.—*Moore v. City of Lancaster* (Pa.) 100.

MURDER.

See "Homicide."

MUTUAL AID SOCIETIES.

See "Beneficial Associations."

MUTUAL BENEFIT INSURANCE.

See "Insurance," § 8.

MUTUAL INSURANCE COMPANIES.

See "Insurance," § 1.

MUTUALITY.

Of contract, see "Specific Performance," § 2.

NAMES.

See "Trade-Marks and Trade-Names."

Amendment of indictment as to names, see "Indictment and Information," § 5.

NATIONAL BANKS.

See "Banks and Banking," § 2.

NAVIGABLE WATERS.

§ 1. Rights of public.

*An owner of land abutting on a navigable river cannot place any structure or filling between high-water and low-water mark which would obstruct the river for navigation.—*McGunnegle v. Pittsburg & L. E. R. Co.* (Pa.) 988.

NAVIGATION.

See "Navigable Waters," § 1.

* Point annotated. See syllabus.

NECESSARIES.

Of wife, see "Husband and Wife," § 1.

NEGLIGENCE.

Causing death, see "Death," § 1.

Measure of damages, see "Damages," § 3.

By particular classes of parties.

See "Carriers," §§ 1, 3; "Municipal Corporations," § 9; "Street Railroads," § 2; "Towns," § 1.

Agricultural societies, see "Agriculture."

Employers, see "Master and Servant," §§ 3-8.

Partners, see "Partnership," § 3.

Railroad companies, see "Railroads," §§ 4-9.

Condition or use of particular species of property, works, or machinery.

See "Electricity"; "Highways," § 4; "Railroads," §§ 4-9; "Street Railroads," § 2.

Demised premises, see "Landlord and Tenant," § 3.

Production, supply, and use of gas, see "Gas."

Contributory negligence.

Of passenger, see "Carriers," § 4.

Of person in charge of animals injured by operation of railroad, see "Railroads," § 8.

Of person injured by collision on highway, see "Highways," § 4.

Of person injured by defective street, see "Municipal Corporations," § 9.

Of person injured by operation of railroad, see "Railroads," § 6.

Of person injured by operation of street car, see "Street Railroads," § 2.

§ 1. Acts or omissions constituting negligence.

*In an action for an injury to a child while on defendant's land, *held* that defendant was not guilty of negligence in failing to guard against injuries to children.—*Fitzmaurice v. Connecticut Ry. & Lighting Co.* (Conn.) 620.

*Obstructions and unfinished condition of a walk on defendant's premises *held* a plain indication that it was not open for travel, and plaintiff in going upon it was a mere licensee, to whom the defendant owed no duty except not to wantonly injure her.—*McClain v. Caribou Nat. Bank* (Me.) 144.

The legal measure of duty, except that made absolute by law, is better expressed by the phrases "due care," "reasonable care," or "ordinary care," used interchangeably.—*Raymond v. Portland R. Co.* (Me.) 602.

*Reasonable care is such care as an ordinarily reasonable and prudent person exercises with respect to his own affairs under like circumstances.—*Raymond v. Portland R. Co.* (Me.) 602.

*Railroad company *held* not liable where certain trespassers come upon its property and push a fence over onto a traveler on the sidewalk.—*Grogan v. Pennsylvania R. Co.* (Pa.) 924.

§ 2. Proximate cause of injury.

*In an action for injuries resulting from negligence, defendant is liable only for such negligence as constituted the proximate or immediate cause of the injury.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

*A pure accident without negligence on the part of the party responsible therefor is not actionable.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

* Point annotated. See syllabus.

*To sustain a common-law action for negligence, it is not necessary to prove that defendant's negligence was the sole cause of plaintiff's injury.—*Neal v. Rendall* (Me.) 703.

If a person is injured in part by the negligence of a third person, and in part by the insufficiency of the injured person's driver, horse, or carriage, due to his own want of care in selection, he cannot recover.—*Hanson v. Manchester St. Ry.* (N. H.) 595.

*Where an express wagon struck a wagon at the sidewalk, and the horse attached took fright and ran away, and to avoid being struck by the horse plaintiff jumped aside and broke his leg, and thereupon sued the owner of the express wagon, a nonsuit was erroneous.—*Collins v. West Jersey Express Co.* (N. J. Err. & App.) 675.

§ 3. Contributory negligence.

Where the driver of a private conveyance is not employed by the person riding therein, the negligence of the driver cannot be imputed to such person.—*Little v. Central District & Printing Telegraph Co.* (Pa.) 848.

§ 4. Actions.

In an action for injuries while using a walk on defendant's premises, evidence *held* to show plaintiff guilty of contributory negligence.—*McClain v. Caribou Nat. Bank* (Me.) 144.

*Where the nature of an act relied on to show negligence contributing to a personal injury can only be determined by considering all the circumstances, it is the province of the jury to pass on and characterize it.—*United Rys. & Electric Co. of Baltimore v. Watkins* (Md.) 234.

*The question of negligence is ordinarily one of fact, but may be one of law when a decisive act of negligence has been committed.—*United Rys. & Electric Co. of Baltimore v. Weir* (Md.) 583.

In an action for injuries to a pedestrian through the fall of a brick from a building, the question as to the party having complete control of the bricklaying *held* one for the jury.—*Decola v. Cowan* (Md.) 1026.

In an action for injuries to a pedestrian from the fall of a brick from a building, the taking of the case from the jury *held* error.—*Decola v. Cowan* (Md.) 1026.

*Where doubt exists as to whether a person is guilty of contributory negligence, it is a question for the jury whether his act in connection with the other facts is or is not contributory negligence.—*Schramm v. Parker* (N. J. Err. & App.) 410.

*Nonsuit cannot be granted in an action for negligence on the ground of failure to prove want of reasonable care, unless from the evidence no other legitimate conclusion can be reached by the jury.—*King v. Zierz* (N. J. Sup.) 287.

In an action against a coal company for injuries to a child two years old struck by an electric car operated by defendant, evidence *held* to require the granting of nonsuit.—*Estep v. Webster Coal & Coke Co.* (Pa.) 1062.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEWLY DISCOVERED EVIDENCE.

Ground for new trial, see "Homicide," § 8; "New Trial," § 3.

Ground for rehearing after decree of divorce, see "Divorce," § 3.

NEW PROMISE.

Within statute of limitations, see "Limitation of Actions," § 8.

NEW TRIAL.

Application for relief from submission of cause, see "Submission of Controversy."

In criminal prosecutions, see "Criminal Law," § 14; "Homicide," § 8.

Opening or vacating judgment, see "Judgment," § 4.

Presentation of objections for review by motion for new trial, see "Appeal and Error," § 3.

Review of rulings on motion for, see "Appeal and Error," § 1.

§ 1. Nature and scope of remedy.

*The denial of a motion to set aside a verdict *held* to preclude defendant from making a subsequent motion for similar relief on the same grounds, without an application for rehearing by reason of accident, mistake, or misfortune.—*Gendron v. St. Pierre* (N. H.) 966.

§ 2. Grounds.

In trespass the denial of a motion to set aside an adverse verdict because one of the jurors expressed an opinion in favor of boundary claimed by defendant, and because others had made remarks in the presence of the jury, *held* properly denied.—*Lyman v. Brown* (N. H.) 650.

*On rule to show cause, a new trial may be granted for a verdict for excessive damage, not excepted to at the trial.—*Butler v. Hoboken Printing & Publishing Co.* (N. J. Sup.) 272.

*A verdict otherwise liable to reversal cannot be sustained on the theory of the law contrary to that on which the case was submitted to the jury.—*Oakley v. Emmons* (N. J. Sup.) 996.

*A verdict based on a finding without evidence to sustain it is ground for new trial.—*Oakley v. Emmons* (N. J. Sup.) 996.

*It is reversible error for judge to fail to set a verdict aside which was "shocking to every fair sense of justice and right."—*Dinan v. Supreme Council Catholic Mut. Ben. Ass'n* (Pa.) 1067.

*The fact that in estimating damages the jury disregarded an erroneous instruction is not ground for a new trial, the verdict being justified by the evidence.—*Galligan v. Woonsocket St. Ry. Co.* (R. I.) 376.

*In an action by a father for injuries to his son, the fact that the verdict for \$400 was \$1.50 in excess of the damage proven did not require the granting of a new trial.—*Galligan v. Woonsocket St. Ry. Co.* (R. I.) 376.

*Misconduct of defendant and jurors in conversing together *held* not available to defendant as ground for setting aside the verdict, where he did not disclose the circumstance to the court until after the rendition of verdict.—*Jennett v. Patten* (Vt.) 33.

A defendant *held* entitled to a new trial on the ground of accident, under V. S. 1662.—*Massucco v. Tomassi* (Vt.) 57.

§ 3. Proceedings to procure new trial.

*Under District Court Act (P. L. 1898, p. 559) § 17, the district court has no authority to grant a new trial on an application made more than 30 days after judgment, unless for newly discovered evidence.—*Flaherty v. Pack* (N. J. Sup.) 269.

*Point annotated. See syllabus.

NEXT OF KIN.

See "Descent and Distribution."

NOMINATION.

For office, see "Elections," § 4.

NONRESIDENCE.

Appointment as executors, see "Executors and Administrators," § 1.

NONSUIT.

Before trial, see "Dismissal and Nonsuit."

In action for death caused by street cars, see "Street Railroads," § 2.

On trial, see "Trial," § 4.

NOTARIES.

See "Officers," § 1.

*Notaries public are governmental officers.—In re Opinion of the Justices (N. H.) 969.

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

Of ordinance for public improvement, see "Municipal Corporations," §§ 5, 6.

Of probate proceedings, see "Wills," § 4.

To corporations, see "Corporations," § 5.

NUISANCE.

Pollution of water course in city, see "Municipal Corporations," § 9.

§ 1. Public nuisances.

*A railroad switch or siding is not a nuisance per se, and can only become such by circumstances connected with its construction, location, or the manner of its use.—*Davis v. Baltimore & O. R. Co.* (Md.) 572.

*Complainant's injury from the maintenance of a railroad switch along a public road *held* not different in kind from the inconvenience sustained by the general public, precluding her from maintaining a suit to enjoin the construction of the switch.—*Davis v. Baltimore & O. R. Co.* (Md.) 572.

*A railroad company *held* not a necessary party to a suit by an adjoining property owner to restrain the construction of a switch for the benefit of another.—*Davis v. Baltimore & O. R. Co.* (Md.) 572.

*A bill to restrain the construction of a switch track along a county road in front of plaintiff's premises *held* insufficient to justify the issuance of an injunction.—*Davis v. Baltimore & O. R. Co.* (Md.) 572.

Evidence *held* insufficient to entitle a property owner to restrain the maintenance of a railroad switch along a public road near her property as a nuisance.—*Davis v. Baltimore & O. R. Co.* (Md.) 572.

A town independent of contract *held* not entitled to file a bill for protection against a public nuisance common to all its citizens.—*Belleville Tp., Essex County, v. City of Orange* (N. J. Ch.) 331.

OBJECTIONS.

For purpose of review, see "Appeal and Error," § 3.
To conduct of arbitrators, see "Arbitration and Award," § 2.
To jurisdiction, see "Equity," § 1.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 6.

OBSCENITY.

Duplicity in indictment, see "Indictment and Information," § 3.

*Evidence of either uttering or exposing to view of another indecent pictures will support a general verdict of guilty upon a count charging both.—State v. Hill (N. J. Sup.) 936.

Evidence held sufficient to support a charge of exposing to view indecent pictures, but not charge of uttering.—State v. Hill (N. J. Sup.) 936.

*On a trial for indecent exposure, the place where the exposure was made held a public place as a matter of law.—State v. Goldstein (N. J. Sup.) 1006.

OBSTRUCTIONS.

Of easements, see "Easements," § 2.
Of highways, see "Highways," § 4.
Of navigation, see "Navigable Waters," § 1.

OFFICERS.

Best and secondary evidence of official capacity, see "Criminal Law," § 8.
Examination as witnesses, see "Witnesses," § 2.
Injunctions affecting, see "Injunction," § 2.
Quo warranto, see "Quo Warranto."

Particular classes of officers.

See "Judges"; "Justices of the Peace"; "Notaries"; "Receivers"; "Sheriffs and Constables."
Assessors of taxes, see "Taxation," § 3.
Committees in partition, see "Partition," § 2.
Corporate officers, see "Corporations," §§ 3-5.
Election officers, see "Elections," § 1.
Municipal officers, see "Municipal Corporations," § 3.

§ 1. Appointment, qualification, and tenure.

*Women held disqualified from appointment as notaries public.—In re Opinion of the Justices (N. H.) 969.

OILS.

See "Mines and Minerals," § 1.

OMNIBUSES.

Municipal regulations, see "Municipal Corporations," § 7.

OPENING.

Judgment, see "Judgment," §§ 2, 4.
Judgment on confession, see "Judgment," § 1.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 7.
In criminal prosecutions, see "Criminal Law," § 11.

OPINIONS.

Of courts, see "Courts," § 1.

OPTIONS.

To purchase or sell demised premises, see "Landlord and Tenant," § 2.

ORDER OF PROOF.

At trial, see "Trial," § 2.

ORDERS.

Review of appealable orders, see "Appeal and Error."

ORDINANCES.

See "Street Railroads," § 2; "Waters and Water Courses," § 3.
Municipal ordinances, see "Municipal Corporations," §§ 2, 5-7, 10.
Review in prosecution for violation, see "Criminal Law," § 15.
Violation of by carrier as negligence, see "Carriers," § 3.

ORPHANS' COURTS.

See "Courts," § 2; "Executors and Administrators," § 8.

OUSTER.

Right to partition by person ousted from possession, see "Partition," §§ 1, 2.

PARENT AND CHILD.

See "Adoption"; "Bastards."
Advancements to child, see "Descent and Distribution," § 2.
Class legislation relating to delinquent and dependent children, see "Constitutional Law," § 8.
Evidence of damages from injuries to child, see "Damages," § 5.
Measure of damages for injuries to child, see "Damages," § 3.
New trial in action for injuries to child, see "New Trial," § 2.
Services rendered by stepchild, see "Work and Labor."

A voluntary settlement by a father on the children of his first wife after his second marriage held not subject to revocation at his instance as improvident.—James v. Aller (N. J. Err. & App.) 427.

Agreement between husband and wife for support of children by the latter held not to affect the husband's duty, as between himself and the children, to support the children.—Wright v. Leupp (N. J. Ch.) 464.

*A father is presumptively entitled to the earnings of an infant son.—Galligan v. Woodsocket St. Ry. Co. (R. I.) 376.

PARKS.

See "Municipal Corporations," §§ 4, 8.

PAROL EVIDENCE.

In civil actions, see "Evidence," § 6.

*Point annotated. See syllabus.

PARTIES.

Dismissal for defect in, see "Dismissal and Nonsuit," § 1.
Persons affected by estoppel, see "Estoppel," § 1.

In actions by or against particular classes of parties.

Hospital trustees, see "Hospitals."

In particular actions or proceedings.

See "Equity," § 2; "Judgment," § 3.
Condemnation proceedings, see "Eminent Domain," § 3.
Limited partnership, see "Partnership," § 5.
On appeal or writ of error, see "Appeal and Error," §§ 4, 15.
Probate proceedings, see "Wills," § 4.
Proceedings before arbitrators, see "Arbitration and Award," § 2.
To cancel certificate to practice dentistry, see "Physicians and Surgeons."
To construe will, see "Wills," § 13.
To restrain nuisance, see "Nuisance," § 1.
To particular classes of conveyances, contracts, or transactions.
See "Fraudulent Conveyances," § 2.

PARTITION.

Demurrer to bill for, see "Equity," § 3.
Review of discretion of court in fixing fees of master in partition, see "Appeal and Error," § 12.

§ 1. Actions for partition.

*One claiming to own land as tenant in common with others, and actually ousted, must establish a unity of possession before asking partition.—*Harrison v. International Silver Co.* (Conn.) 342.

Under Gen. St. 1888, § 1307 (Gen. St. 1902, § 1037), considered with reference to its form before modified (Laws 1848, p. 49, c. 59; Comp. St. 1854, p. 480), and subsequent modifications up to Rev. St. 1875, p. 481, a person actually ousted of possession by his alleged tenant in common cannot seek a court of equity for the purpose of establishing his title and regaining possession, and thereupon obtaining a decree of partition and sale.—*Harrison v. International Silver Co.* (Conn.) 342.

An appeal to the superior court from an order of the probate court revoking the appointment of a committee to make partition *held* improperly dismissed.—*Hood v. Montgomery* (N. H.) 651.

Where objection to a committee to make partition was seasonably made, the probate court had authority to revoke the appointment after the committee had reported.—*Hood v. Montgomery* (N. H.) 651.

Under Pub. St. 1901, c. 243, §§ 10, 20, *held* that a probate judge had power to revoke the appointment of a committee to make partition.—*Hood v. Montgomery* (N. H.) 651.

Parties to a partition suit *held*, under the facts, not equitably entitled to the benefit of Gen. St. p. 2368, § 58, in relation to certain preferences against the estate of a decedent.—*Wright v. Wright* (N. J. Ch.) 487.

*In partition allowance will be made for taxes paid by parties and for improvements upon the premises.—*White v. Smith* (N. J. Ch.) 560.

*In partition, complainants *held* not required to account for rents and profits.—*White v. Smith* (N. J. Ch.) 560.

*Point annotated. See syllabus.

*Unliquidated claims for damages done to premises *held* not cognizable in suit for partition.—*White v. Smith* (N. J. Ch.) 560.

*Where in partition premises are not susceptible to division, the property will be ordered sold and the proceeds divided.—*White v. Smith* (N. J. Ch.) 560.

Demurrer to bill in partition because it did not include all the property *held* in common by the parties will not lie.—*Love v. Robinson* (Pa.) 1065.

PARTNERSHIP.

Liability for false imprisonment caused by partner, see "False Imprisonment," § 1.

§ 1. The relation.

*Where two or more persons engage in a business under an agreement, express or implied, to share its profits and losses, a partnership exists between them.—*Jones v. Purnell* (Del. Super.) 149.

*What is a partnership is a question for the court, but whether a partnership exists is a question of fact for the jury.—*Jones v. Purnell* (Del. Super.) 149.

*A partnership may be proved by direct evidence, or by evidence of the acts, conduct, and declarations of the alleged partners.—*Jones v. Purnell* (Del. Super.) 149.

*A partnership as between the alleged partners must be shown by proof of the actual existence of the partnership.—*Jones v. Purnell* (Del. Super.) 149.

§ 2. Mutual rights, duties, and liabilities of partners.

Where liquidating partner has made no demand for interest on moneys withdrawn by a copartner none should be allowed on an accounting.—*Goodwill v. Heim* (Pa.) 24.

*Before a settlement of partnership accounts, interest is not chargeable unless demanded by the equities of the case.—*Goodwill v. Heim* (Pa.) 24.

§ 3. Rights and liabilities as to third persons.

In an action for negligence, brought against defendants "as individuals or as partners," defendants are not entitled to have plaintiff elect whether he will proceed against them as individuals or as partners.—*Lewes v. John Crane & Sons* (Vt.) 60.

In an action for negligence, brought against defendants as individuals or as partners, plaintiff may inquire into the business relations of defendants between themselves.—*Lewes v. John Crane & Sons* (Vt.) 60.

§ 4. Dissolution, settlement, and accounting.

Bill filed by individual creditors of deceased partner against members of new partnership for an accounting *held* properly denied.—*Milleman v. Kavanaugh* (Pa.) 907.

§ 5. Limited partnership.

Under Code Pub. Gen. Laws, art. 73, § 4, a limited partnership *held* not converted into a general one.—*Safe Deposit & Trust Co. v. Cahn* (Md.) 819; *Same v. Roberts, Id.*

The business of a stockbroker may be carried on by a limited partnership, within Code Pub. Gen. Laws, 1904, art. 73, § 1.—*Safe Deposit & Trust Co. v. Cahn* (Md.) 819; *Same v. Roberts, Id.*

Under Code Pub. Gen. Laws, art. 73, § 2, a special partner *held* liable only to the extent of his cash contribution to the firm.—*Safe De-*

posit & Trust Co. v. Cahn (Md.) 819; Same v. Roberts, Id.

The liability assumed by a limited partnership held to include a general partnership's liability for wrongfully aiding a trustee to misappropriate trust funds.—Safe Deposit & Trust Co. v. Cahn (Md.) 819; Same v. Roberts, Id.

A suit by a substituted trustee to compel restitution to the trust of funds misappropriated by the trustee held properly brought against the individuals of a firm aiding the trustee, and of a firm assuming the former firm's liability.—Safe Deposit & Trust Co. v. Cahn (Md.) 819; Same v. Roberts, Id.

Code Pub. Gen. Laws, art. 73, § 19, held to apply only to suits against limited partnerships while the same are going concerns, and while its special partners' contributions form a part of the assets.—Safe Deposit & Trust Co. v. Cahn (Md.) 819; Same v. Roberts, Id.

Under Code Pub. Gen. Laws, art. 73, §§ 13, 19, 20, a substituted trustee in a suit to compel restitution to the trust estate properly joined the general and special partners of a limited partnership.—Safe Deposit & Trust Co. v. Cahn (Md.) 819; Same v. Roberts, Id.

PARTY WALLS.

Right of grantee of party wall to easement of light and air, see "Easements," § 1.

PASSENGERS.

See "Carriers," §§ 2-4.

PATENTS.

Adequacy of remedy at law as ground for denial of equitable relief as to royalties, see "Equity," § 1.

Construction of contract relating to subsequent inventions, see "Contracts," § 2.

For public lands, see "Public Lands," § 1.

PAYMENT.

See "Accord and Satisfaction."

By garnishee, see "Garnishment," § 4.

Subrogation on payment, see "Subrogation."

Of particular classes of obligations or liabilities.

See "Mortgages," § 4.

Bill of exchange or promissory note, see "Bills and Notes," § 3.

Claims against estate of decedent, see "Executors and Administrators," § 4.

Tuition, see "Schools and School Districts," § 1.

§ 1. Pleading, evidence, trial, and review.

In an action for assault, a request to charge that a note given and received in payment thereof is "prima facie payment" held properly refused.—Belknap v. Billings (Vt.) 56.

§ 2. Recovery of payments.

*Where one with a full knowledge of the facts or with means of knowledge voluntarily pays money under a claim of right, he cannot recover it back.—Ash v. McLellan (Me.) 598.

Where one demands money under a claim of right and a threat of litigation and the one of whom the money is demanded has time for deliberation, and the money is then paid, it cannot be recovered back, though the demand is illegal.—Ash v. McLellan (Me.) 598.

*Point annotated. See syllabus.

*Evidence held to show a payment voluntarily made.—Ash v. McLellan (Me.) 598.

PEDIGREE.

Recital of, in deed, see "Evidence," § 5.

PENALTIES.

Equitable jurisdiction, see "Equity," § 1.

Failure of administrator to file inventory, see "Executors and Administrators," § 2.

Practicing dentistry without license, see "Physicians and Surgeons."

Under contracts, see "Damages," § 2.

PENSIONS.

Competency as executor of person convicted of making overcharge for prosecuting pension claim, see "Executors and Administrators," § 1.

PERJURY.

Requisites and sufficiency of indictment in general, see "Indictment and Information," § 2.

§ 1. Prosecution and punishment.

*An indictment for perjury in the form prescribed by V. S. 5417, form 49, held not demurrable for failing to allege that defendant was sworn by a person legally qualified to administer the oath.—State v. Webber (Vt.) 1018.

PERPETUITIES.

An attempted disposition of a remainder held void as a perpetuity under the statute in force in 1871.—Gerard v. Ives (Conn.) 607.

*The fact that an annuity given by a will to a charitable corporation may continue perpetually does not affect its validity.—Merrill v. American Baptist Missionary Union (N. H.) 647.

Will construed, and devise to grandchildren held within the rule against perpetuities.—In re Kountz's Estate (Pa.) 1103; Appeal of Jones, Id.

PERSONAL INJURIES.

See "Assault and Battery," § 1; "Negligence"; "New Trial," § 2.

Caused by placing telephone poles on highway, see "Telegraphs and Telephones," § 1.

Documentary evidence, see "Evidence," § 5.

Excessive damages, see "Damages," § 4.

Measure of damages, see "Damages," § 3.

Mitigation of damages, see "Damages," § 1.

Opinion evidence, see "Evidence," § 7.

To employé, see "Master and Servant," §§ 3-8.

To passenger, see "Carriers," § 3.

To person on or near railroad tracks, see "Railroads," § 7.

To person on or near street railroad track, see "Street Railroads," § 2.

To traveler on highway, see "Highways," § 4;

"Municipal Corporations," § 9.

To traveler on highway crossing railroad, see "Railroads," § 6.

To trespasser, see "Railroads," § 5.

PETITION.

For liquor license, see "Intoxicating Liquors," § 2.

PHOTOGRAPHS.

As evidence, see "Evidence," § 5.

PHYSICIANS AND SURGEONS.

Forgery of prescription, see "Forgery."
Opinion evidence, see "Evidence," § 7.

*Under Pub. St. 1901, c. 134, relative to state board of dentistry, license issued by one member of the board *held* void.—*Brown v. Grenier* (N. H.) 590.

Under Pub. St. 1901, c. 204, § 2, Supreme Court has jurisdiction to entertain a bill in equity to cancel a certificate to practice dentistry unauthorizedly issued by a single member of the state dental board.—*Brown v. Grenier* (N. H.) 590.

A proceeding on behalf of the state to cancel a license to practice dentistry must be brought by the Attorney General, and the state dental board is a necessary party defendant.—*Brown v. Grenier* (N. H.) 590.

Under P. L. 1898, p. 123, § 8, regulating the practice of dentistry, *held*, that to exempt defendant from the penalties of the act for practicing dentistry without a license, his practice must have consisted in assisting his preceptor under his direct and personal supervision.—*State Board of Registration and Examination in Dentistry v. Terry* (N. J. Sup.) 193.

PLANS.

Admissibility in evidence, see "Evidence," § 5.

PLEA.

In civil actions, see "Pleading," § 2.
In criminal prosecutions, see "Criminal Law," § 4.

PLEADING.

Pleas in abatement, see "Abatement and Revival," § 1.
Waiver of right to appeal from rulings on, see "Appeal and Error," § 2.

Allegations as to particular facts, acts, or transactions.

See "Damages," § 5.
Statute of limitations, see "Limitation of Actions," § 4.

In actions by or against particular classes of parties.

See "Carriers," § 3; "Druggists"; "Municipal Corporations," § 9.
Partners, see "Partnership," § 3.
Stockholders, see "Corporations," § 3.

In particular actions or proceedings.

See "Cancellation of Instruments," § 1; "Discovery," § 1; "Equity," § 3; "Injunction," § 3; "Libel and Slander," § 3; "Partition," § 2; "Quieting Title," § 2; "Replevin," § 1; "Specific Performance," § 3; "Trespass," § 1.

Before referee, see "Reference," § 1.
Condemnation proceedings, see "Eminent Domain," §§ 3, 4.

For breach of covenant, see "Covenants," § 2.
For causing death, see "Death," § 1.
For injuries from flowage, see "Waters and Water Courses," § 2.

For personal injuries, see "Carriers," § 3; "Highways," § 4.

Indictment or criminal information or complaint, see "Indictment and Information."
Pleas in criminal prosecutions, see "Criminal Law," § 4.

To enforce stockholders liability, see "Corporations," § 3.

To recover demised property, see "Landlord and Tenant," § 5.

To recover stock transferred in gaming transaction, see "Gaming," § 1.

To restrain nuisance, see "Nuisance," § 1.

To restrain pollution of water course in city, see "Municipal Corporations," § 9.

§ 1. Form and allegations in general.

*An affidavit of defense to an action by a foreign corporation *held* insufficient as against a motion for judgment.—*Mobile Cotton Mills v. Smyrna Shirt & Hosiery Co.* (Del. Super.) 146.

*A declaration which sets forth the facts constituting the cause of action without detailing the circumstances constituting the evidence of them is sufficient.—*Philadelphia, B. & W. R. Co. v. Allen* (Md.) 245.

§ 2. Plea or answer, cross-complaint, and affidavit of defense.

An application to extend the time within which to file an affidavit of defense must be made by the first Friday of the term.—*Melvin v. Conner* (Del. Super.) 264.

Affidavit of defense *held* insufficient in failing to state the nature and character of defense, as required by Rev. Code 1893, p. 789, c. 106, § 4.—*Melvin v. Conner* (Del. Super.) 264.

The implied admission of the execution of a contract as alleged, contained in a plea that it was obtained by fraud, *held* ineffective to disprove the issues presented by other disconnected pleas.—*Fifer v. Clearfield & Cambria Coal & Coke Co.* (Md.) 1122.

*Under Code Pub. Gen. Laws 1888, art. 75, § 23, subsec. 108, defendant's failure to deny the execution of a contract sued on *held* not an admission that certain agents who executed the contract were defendant's agents or had authority to bind it.—*Fifer v. Clearfield & Cambria Coal & Coke Co.* (Md.) 1122.

§ 3. Demurrer or exception.

A demurrer covering a general claim that the facts alleged in the complaint were insufficient to support the action against defendants was too general.—*Foot v. Brown* (Conn.) 667.

A bill should not be dismissed on demurrer if by any reasonable construction a case is stated entitling plaintiff to the relief sought.—*Shipley v. Fink* (Md.) 390.

*That a count of a declaration does not specify with sufficient particularity alleged breaches of a contract *held* not ground for demurrer, but for motion to strike out.—*Harper v. Essex County Park Commission* (N. J. Sup.) 384.

*A general demurrer to a declaration containing counts in replevin and counts in trover for misjoinder of causes of action is good.—*King v. Morris* (N. J. Sup.) 1006.

After general demurrer to a declaration for misjoinder, plaintiff cannot obviate the objection by abandoning one of the counts.—*King v. Morris* (N. J. Sup.) 1006.

*Duplicitly in a count of a declaration is ground for demurrer, but not for a motion to compel an election.—*Lewes v. John Crane & Sons* (Vt.) 60.

§ 4. Amended and supplemental pleadings and repleader.

In trespass, where title to disputed territory was tried under a plea of general issue, defendant was entitled, if necessary, to file a special plea of soil and freehold to conform to the proof after verdict.—*Lyman v. Brown* (N. H.) 630.

§ 5. Signature and verification.

*In a suit to restrain the construction of a switch by a railroad company for the benefit of

*Point annotated. See syllabus.

a gravel company, it was no objection to the answer of the railroad company that it was based on facts verified by an officer of the gravel company.—*Davis v. Baltimore & O. R. Co. (Md.)* 572.

§ 6. Profert, oyer, and exhibits.

Under Prac. Act, § 119 (P. L. 1903, p. 570), the court on determining what covenants are contained in a deed will consider the copy of the deed made a part of the declaration.—*Dick v. McPherson (N. J. Sup.)* 383.

*Under Prac. Act, § 119 (P. L. 1903, p. 570), formal profert of a contract sued on need not be made, a copy being annexed to the declaration, and referred to therein as so annexed.—*Harper v. Essex County Park Commission (N. J. Sup.)* 384.

§ 7. Motions.

An affidavit of defense in an action of book account *held* sufficient.—*Scott Fertilizer Co. v. Maloney (Del. Super.)* 223.

The proceeding authorized by Baltimore City Charter, § 312, for the recovery of judgment in actions on contract, must be strictly complied with in order to entitle plaintiff to judgment thereunder.—*Commonwealth Bank of Baltimore v. Kirkland (Md.)* 799.

A receipt claimed to have been signed by defendant *held* not to constitute a guaranty of a mortgagor's indebtedness, so that the filing thereof entitled plaintiff to judgment, under Baltimore City Charter, §§ 312, 313.—*Commonwealth Bank of Baltimore v. Kirkland (Md.)* 799.

§ 8. Issues, proof, and variance.

*The date when a fire occurred having been laid under a videlicet, there was no error in permitting it to be proved as on another date.—*Rollins v. Atlantic City R. Co. (N. J. Sup.)* 929.

§ 9. Defects and objections, waiver, and aid by verdict or judgment.

*After trial on the merits *held* too late to question sufficiency of averment of issue determined in such trial.—*Morgan v. Westmoreland Electric Co. (Pa.)* 638.

PLEDGES.

Enforcement of agreement to pledge, see "Specific Performance," § 2.

Of corporate stock, see "Corporations," § 2.
Rights of trustee in bankruptcy as to collateral security held by debtor, see "Bankruptcy," § 1.

POLICE.

See "Municipal Corporations," § 3.

Beneficial associations of, see "Beneficial Associations."

POLICE POWER.

See "Constitutional Law," § 3.

Of municipality, see "Municipal Corporations," § 7.

POLICY.

Of insurance, see "Insurance."

POLITICAL PARTIES.

Mandamus to compel holding of election by political committee, see "Mandamus," § 1.

POLITICAL RIGHTS.

Suffrage, see "Elections."

POLLUTION.

Of water course in city, see "Municipal Corporations," § 9.

POSSESSION.

Of demised premises, see "Landlord and Tenant," §§ 3, 5.

Recovery by purchaser at mortgage foreclosure sale, see "Mortgages," § 5.

Right of person ousted from possession to obtain partition, see "Partition," § 1.

To support action to quiet title, see "Quieting Title," § 1.

Writ of assistance, see "Assistance, Writ of."

POWERS.

Creation by wills, see "Wills," § 12.

PRACTICE.

Procedure of particular courts, see "Courts."

Prosecution of actions in general, see "Actions," § 4.

In particular civil actions or proceedings.

See "Contempt," § 1; "Divorce," § 3; "Ejectment"; "Habeas Corpus," § 3; "Mandamus," § 2; "Real Actions"; "Replevin"; "Trespas," § 1.

Accounting by executor or administrator, see "Executors and Administrators," § 8.

Condemnation proceedings, see "Eminent Domain," § 3.

Particular proceedings in actions.

See "Abatement and Revival"; "Affidavits"; "Assistance, Writ of"; "Continuance"; "Costs"; "Damages," § 5; "Depositions"; "Dismissal and Nonsuit"; "Evidence"; "Execution"; "Judgment"; "Jury"; "Limitation of Actions"; "Pleading"; "Process"; "Reference"; "Trial."

Nonsuit, see "Trial," § 4.

Verdict, see "Trial," § 7.

Particular remedies in or incident to actions.

See "Arrest," § 1; "Attachment"; "Discovery"; "Garnishment"; "Injunction"; "Receivers."

Search warrant, see "Searches and Seizures."

Procedure in criminal prosecutions.

See "Bail," § 1; "Criminal Law."

Bastardy proceedings, see "Bastards," § 1.

For offenses against liquor laws, see "Intoxicating Liquors," § 5.

Procedure in exercise of special jurisdictions.

In equity, see "Equity."

In justices' courts, see "Justices of the Peace," § 1.

Procedure on review.

See "Appeal and Error"; "Audita Querela"; "Certiorari," § 2; "Justices of the Peace," § 2; "New Trial."

PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 1.

PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," § 14.

* Point annotated. See syllabus.

PRELIMINARY INJUNCTION.

In suit to restrain shutting off water supply, see "Waters and Water Courses," § 3.

PREMIUMS.

For insurance, see "Insurance," § 4.

PRESCRIPTION.

Acquirement of easement by, see "Easements," § 1.

PRESENTMENT.

Of claims against estate of decedent, see "Executors and Administrators," § 4.

PRESUMPTIONS.

On appeal or error, see "Appeal and Error," § 11.

PRIMARY ELECTIONS.

See "Elections," § 4.

PRINCIPAL AND AGENT.

See "Brokers."

Admissions by agent, see "Evidence," § 2.

Authority of agent to cause arrest, see "False Imprisonment," § 1.

Corporate agents, see "Corporations," §§ 4, 5.

Wife as agent of husband, see "Husband and Wife," § 1.

§ 1. Rights and liabilities as to third persons.

In an action on a contract made by an alleged agent, evidence tending to show the existence of such agency *held* sufficient to require submission of such question to the jury.—*Fifer v. Clearfield & Cambria Coal & Coke Co. (Md.)* 1122.

Collecting agent, *held*, in the absence of any personal fraud or guaranty of the validity of the claim, not answerable to the plaintiff for the amount collected, on proof that the claim was invalid.—*Hauenstein v. Ruh (N. J. Sup.)* 184.

*A contract made with an authorized agent of a known principal binds the principal only.—*Colloty v. Schuman (N. J. Sup.)* 186.

PRINCIPAL AND SURETY.

See "Bail"; "Guaranty."

Bonds of liquor dealers, see "Intoxicating Liquors," § 2.

Effect of limitations against principal on liability of surety, see "Limitation of Actions," § 3½.

§ 1. Creation and existence of relation.

*Failure of directors of a bank to inform sureties on the bond of the bank treasurer of prior embezzlements by him *held* not to have amounted to fraud releasing the sureties.—*Watertown Sav. Bank v. Mattoon (Conn.)* 622.

*Fraud of directors of a savings bank in accepting a bond required by Gen. St. 1902, § 3445, *held* not to have released the sureties.—*Watertown Sav. Bank v. Mattoon (Conn.)* 622.

PRIORITIES.

Of mortgages, see "Chattel Mortgages," § 2; "Mortgages," § 3.

PRISONS.

Liability of city for injury to person in city jail, see "Municipal Corporations," § 9.

PRIVATE ROADS.

Rights of way, see "Easements."

PRIVILEGED COMMUNICATIONS.

Defamatory communications, see "Libel and Slander," §§ 2, 3.

PROBATE.

Of will, see "Wills," § 4.

PROBATE COURTS.

See "Courts," § 2.

PROCESS.

Justification for arrest, see "False Imprisonment," § 1.

To sustain judgment, see "Judgment," § 2.

In actions against particular classes of parties.

See "Corporations," § 5.

In particular actions or proceedings.

On appeal or writ of error, see "Appeal and Error," § 4.

Probate proceedings, see "Wills," § 4.

Particular forms of writs or other process.

See "Arrest"; "Assistance, Writ of"; "Execution"; "Garnishment"; "Injunction"; "Mandamus"; "Quo Warranto"; "Replevin." Search warrant, see "Searches and Seizures."

§ 1. Service.

Code Pub. Gen. Laws 1904, art. 33, § 24, in relation to service on a petition to strike a name from the list of qualified voters, *held* to mean that the summons shall be left at the voter's place of residence.—*Carter v. Applegarth (Md.)* 710.

Under Code Pub. Gen. Laws 1904, art. 33, § 24, in relation to elections, *held* that constructive service on a petition to strike a name from the list of qualified voters was properly made.—*Applegarth v. Carter (Md.)* 712.

PROFERT.

In pleading, see "Pleading," § 6.

PROFITS.

Accounting for rents and profits in suit for partition, see "Partition," § 2.

In suit for unfair competition, see "Trade-Marks and Trade-Names," § 3.

Lost profits as element of damages, see "Damages," § 1.

PROHIBITION.

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

PROMISE OF MARRIAGE.

See "Breach of Marriage Promise."

PROMISSORY NOTES.

See "Bills and Notes."

* Point annotated. See syllabus.

PROMOTERS.

Of corporation, see "Corporations," § 1.

PROOF.

Of loss insured against, see "Insurance," § 6.

PROPERTY.

Abandonment, see "Abandonment."
Constitutional guaranties of rights of property, see "Constitutional Law," §§ 5, 10.
Dedication to public use, see "Dedication."
Licenses in respect to real property, see "Licenses," § 1.
Protection of rights of property by injunction, see "Injunction," § 2.
Taking for public use, see "Eminent Domain."

Particular species of property.

See "Animals"; "Ground Rents"; "Intoxicating Liquors," § 7; "Mines and Minerals"; "Trade-Marks and Trade-Names."
Church property, see "Religious Societies."
Seat in stock exchange, see "Exchanges."

PROVINCE OF COURT AND JURY.

In criminal prosecutions, see "Criminal Law," § 18.

PROXIMATE CAUSE.

Direct or remote consequences of injury, see "Damages," § 1.
Of injury see "Negligence," § 2.
Of injury to passenger, see "Carriers," § 3.
Of injury to servant, see "Master and Servant," § 3.

PUBLIC DEBT.

See "Municipal Corporations," § 10; "Schools and School Districts," § 1; "States," § 1.

PUBLIC FUNDS.

See "Schools and School Districts," § 1.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," §§ 5, 6.

PUBLIC LANDS.

Abandonment of lands granted by state, see "Abandonment."

§ 1. Survey and disposal of lands of United States.

*The effect of a patent in passing title may be questioned in a suit at law.—*Carswell v. Swindell* (Md.) 956.

PUBLIC NUISANCE.

See "Nuisance," § 1.

PUBLIC POLICY.

Affecting right to maintain quo warranto, see "Quo Warranto," § 1.

PUBLIC SCHOOLS.

See "Schools and School Districts," § 1.

PUBLIC USE.

Dedication of property, see "Dedication."
Taking property for public use, see "Eminent Domain."

PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 3.

PUNISHMENT.

See "Criminal Law," § 16.
Fines, see "Fines."
For violation of injunction, see "Injunction," § 5.

PUNITIVE DAMAGES.

In action for assault, see "Assault and Battery," § 1.
In action for libel, see "Libel and Slander," § 3.

PUPILS.

See "Schools and School Districts," § 1.

QUANTUM MERUIT.

See "Work and Labor."

QUARRIES.

See "Master and Servant," § 3.

QUASHING.

Indictment or information, see "Indictment and Information," § 4.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 4.
In criminal prosecutions, see "Criminal Law," § 13.

QUIETING TITLE.

Scope of review on appeal or writ of error, see "Appeal and Error," § 10.
To land subject to easement, see "Easements," § 1.

§ 1. Right of action and defenses.

A suit in equity to quiet title *held* not maintainable, under Gen. St. 1902, § 4053, by an owner of land who had been in possession, to recover possession and damages against defendants, alleged to have unlawfully entered and occupied the land.—*Foot v. Brown* (Conn.) 667.

Certain decision of commissioner of land office *held* not an adjudication of title to land.—*Carswell v. Swindell* (Md.) 956.

*In order to maintain a bill for the removal of a cloud from title, plaintiff must show possession of the property.—*Carswell v. Swindell* (Md.) 956.

Person in occupation of land under contract for the owner to will it *held* entitled on the owner's death to bring suit to quiet title, under Act June 10, 1893 (P. L. 415).—*Smith v. Hibbs* (Pa.) 834.

§ 2. Proceedings and relief.

In a suit to quiet title under Gen. St. 1902, § 4053, no judgment for costs can be properly rendered against a defendant who disclaims all interest in the land.—*Foot v. Brown* (Conn.) 667.

* Point annotated. See syllabus.

*Bill to quiet title *held* defective in failing to show that plaintiff's possession was actual as distinguished from constructive.—*Carswell v. Swindell* (Md.) 956.

QUO WARRANTO.

§ 1. Nature and grounds.

A writ of quo warranto, applied for by a private prosecutor who had had liquor furnished to voters at the polls, would be denied on the ground of public policy.—*Pomeroy v. Kelton* (Vt.) 56.

RACE COURSES.

Liability for injuries on race track at agricultural fair, see "Agriculture."

RAILROADS.

See "Street Railroads."

As employers, see "Master and Servant."

Carriage of goods and passengers, see "Carriers."

Evidence of habits of deceased in action for death caused by, see "Death," § 1.

Examination of witnesses in action for injuries caused by operation of, see "Witnesses," § 2.

Exercise of power of eminent domain by, see "Eminent Domain," §§ 1-3.

Liability for flogage, see "Waters and Water Courses," § 2.

Negligence of in general, see "Negligence," § 1. Property subject to execution, see "Execution," § 1.

Railroad switch as nuisance, see "Nuisance," § 1.

Verification of pleading in suit to restrain construction of switch, see "Pleading," § 5.

§ 1. Right of way and other interests in land.

The land and right of way of railroad corporations used for "station purposes" within Rev. St. 1853, c. 18, § 29, or Rev. St. 1903, c. 23, § 31, defined.—*In re Atlantic & St. L. R. Co.* (Me.) 141.

Under a covenant by a railroad company to maintain a certain crossing, company *held* to have no absolute right to maintain sliding bars at the crossing.—*Speer v. Erie R. Co.* (N. J. Ch.) 943.

Under a covenant by a railroad company to construct a crossing, the grantees of portions of the covenantee's land *held* entitled to use the crossing.—*Speer v. Erie R. Co.* (N. J. Ch.) 943.

Under a covenant in a deed of a right of way to a railroad company, the grantor and his successors in interest *held* entitled to use a certain crossing for any purpose to which the grantor's land might become adapted.—*Speer v. Erie R. Co.* (N. J. Ch.) 943.

In a suit to enjoin the maintenance by a railroad company of an embankment, destroying a crossing to which complainant was entitled under a covenant in his grantor's deed to the railroad company, evidence *held* to show that complainant was damaged to the extent of \$3,000.—*Speer v. Erie R. Co.* (N. J. Ch.) 943.

The presumption is that a contract by a railroad company was not intended to barter away its right to make necessary improvements, as contemplated by Act March 17, 1869 (P. L. 12; 2 *Purd. Dig.* 1798).—*Lilley v. Pittsburg, V. & C. Ry. Co.* (Pa.) 852.

Where railroad company had built a track in good faith on lands of the decedent under a deed of persons without authority, bill by de-

visees to compel removal of track retained to enforce agreement as to railroad crossings, if necessary for injunction to restrain operation of road, denied.—*McClane v. McClane* (Pa.) 861.

§ 2. Construction, maintenance, and equipment.

*Railroad incorporated under Act April 4, 1868 (P. L. 62), with the powers given by Act Feb. 19, 1849 (P. L. 79), can use electricity as a motive power.—*Howley v. Central Valley R. Co.* (Pa.) 109.

A railroad company, where it is not limited as to the power to be used, is required to use that which is best and most convenient for its operation, having due regard to the safety of the public.—*Howley v. Central Valley R. Co.* (Pa.) 109.

Act June 19, 1871 (P. L. 1361), relating to railroad crossings, *held* to have no application where a crossing has been established, nor to crossings of railroads over ordinary streets and highways.—*Park Steel Co. v. Allegheny Valley Ry. Co.* (Pa.) 920.

A manufacturing company *held* entitled to enjoin a railroad company from interfering with a tramway erected across a railroad company's tracks.—*Park Steel Co. v. Allegheny Valley Ry. Co.* (Pa.) 920.

§ 3. Indebtedness, securities, liens, and mortgages.

A railroad company *held* not to have received a direct benefit from a contract guarantying payment of interest and dividends on the bonds and stock of a hotel company, precluding it from claiming that the contract was ultra vires and void.—*Western Maryland R. Co. v. Blue Ridge Hotel Co. of Washington County* (Md.) 351.

A contract by a railroad company, whose powers were conferred by Acts 1852, c. 304, §§ 14, 15, 18, Acts 1872, p. 102, c. 71, and Acts 1884, p. 209, c. 153, to pay "commissions" out of its earnings to make up a deficiency in the earnings of a hotel so as to enable it to pay interest and dividends on its bonds and stock, *held* ultra vires and void.—*Western Maryland R. Co. v. Blue Ridge Hotel Co. of Washington County* (Md.) 351.

On foreclosure of railroad mortgage, bondholders *held* to have no standing long after the sale had been consummated to petition the court to change the decree.—*Real Estate Trust Co. v. Perry County R. Co.* (Pa.) 25, 27.

§ 4. Operation—Statutory, municipal, and official regulations.

*A railroad company has power to determine for itself the particular means employed to protect the public at street or highway crossings.—*In re Pennsylvania R. Co.* (Pa.) 986.

*A borough organized under Act April 3, 1851 (P. L. 320), has no power to require a railroad company, at its expense, to maintain safety gates at street crossings.—*In re Pennsylvania R. Co.* (Pa.) 986.

§ 5. — Injuries to licensees or trespassers in general.

An instruction stating defendants' liability, if a certain thing, of which there was no evidence, was found, *held* erroneous.—*Baltimore & O. R. Co. v. Deck* (Md.) 958.

Evidence *held* immaterial and irrelevant.—*Baltimore & O. R. Co. v. Deck* (Md.) 958.

§ 6. — Accidents at crossings.

*One who, without stopping, looking, and listening, drove upon railroad tracks where his view was obstructed, *held* guilty of contributory negligence as a matter of law.—

* Point annotated. See syllabus.

State v. Western Maryland R. Co. (Md.) 754.

*The presumption that one about to cross a railroad track stopped to look and listen can only be overcome by evidence that he failed so to do.—Hanna v. Philadelphia & R. Ry. Co. (Pa.) 643.

In action to recover for the death of plaintiff's husband at a grade crossing, *held* error to enter a compulsory nonsuit.—Hanna v. Philadelphia & R. Ry. Co. (Pa.) 643.

In an action for an injury at a railroad crossing, facts considered, and *held* that no negligence appeared.—Guilmont's Adm'r v. Central Vermont Ry. Co. (Vt.) 54.

*In an action for an injury at railroad crossing, facts considered, and *held* that the injured person was guilty of contributory negligence.—Guilmont's Adm'r v. Central Vermont Ry. Co. (Vt.) 54.

§ 7. — Injuries to persons on or near tracks.

That a railroad company does not prosecute persons walking upon its track in violation of Rev. St. c. 52, § 77, does not authorize persons to so use its tracks.—Copp v. Maine Cent. R. Co. (Me.) 735.

*An engineer *held* not guilty of negligence in not sooner apprehending that person on track would not leave it.—Copp v. Maine Cent. R. Co. (Me.) 735.

*Where an engineer sees a person on the track, and makes every effort to stop the locomotive as soon as he has reason to believe that the person is not aware of its approach, he is not guilty of negligence.—Copp v. Maine Cent. R. Co. (Me.) 735.

*Engineers may ordinarily assume that persons walking on the track are aware of the approach of the locomotive.—Copp v. Maine Cent. R. Co. (Me.) 735.

*Persons walking on railroad tracks are bound to be on the watch for locomotives, and leave the track in season to avoid collision.—Copp v. Maine Cent. R. Co. (Me.) 735.

§ 8. — Injuries to animals on or near tracks.

In an action against a railroad company for injuries to a team at a railroad crossing, evidence *held* to show the driver thereof guilty of contributory negligence, so that the owner of the team could not recover for the damages done.—Brennan v. Pennsylvania R. Co. (N. J. Sup.) 177.

§ 9. — Fires.

In an action for injuries to property by smoke and cinders from defendant railroad's engines, evidence as to the condition of the property at the time the witness was called to testify *held* inadmissible.—Baltimore Belt R. Co. v. Sattler (Md.) 1125.

In an action against a railroad for injuries to property from the discharge of smoke, etc., from defendant's engines, evidence as to the effects produced by the smoke, etc., on the property, *held* admissible.—Baltimore Belt R. Co. v. Sattler (Md.) 1125.

In an action against a railroad for damages to plaintiff's property from smoke and cinders, certain evidence *held* admissible.—Baltimore Belt R. Co. v. Sattler (Md.) 1125.

In an action for injuries to property from smoke and cinders from defendant's engines, an instruction that plaintiff could not recover if after the institution of the suit the drawing of engines over the tracks of the railroad had

ceased was erroneous.—Baltimore Belt R. Co. v. Sattler (Md.) 1125.

In an action for injuries to plaintiff's property resulting from smoke and cinders, an instruction as to damages *held* too indefinite.—Baltimore Belt R. Co. v. Sattler (Md.) 1125.

Where it was shown that plaintiff's goods were fired by defendant's engine, the question whether the fire was first ignited on or outside of defendant's right of way *held* immaterial.—Rollins v. Atlantic City R. Co. (N. J. Sup.) 929.

*Statement of liability of a railroad company for fire set by a locomotive through the use of an inferior spark arrester.—Vallaster v. Atlantic City R. Co. (N. J. Sup.) 993.

RAPE.

Credibility of witness in prosecution for, see "Witnesses," § 3.

Declarations as evidence, see "Criminal Law," § 9.

Drunkenness as a defense, see "Criminal Law," § 2.

Election between acts charged, see "Criminal Law," § 13.

Evidence of other offenses, see "Criminal Law," § 6.

Harmless error, see "Criminal Law," § 15.

§ 1. Offenses and responsibility therefor.

*Rape is the carnal knowledge of a woman above the age of 10 years against her will.—State v. Truitt (Del. Gen. Sess.) 790.

§ 2. Prosecution and punishment.

*To authorize a conviction of assault with intent to rape the evidence must show that if defendant had consummated his intent he would have been guilty of rape.—State v. Truitt (Del. Gen. Sess.) 790.

In a prosecution for statutory rape, testimony as to complaint of the prosecutrix *held* not erroneous as in effect naming the respondent as the person complained of.—State v. Willett (Vt.) 48.

In a prosecution for statutory rape, the refusal of an instruction asked and the giving of another instruction as to proof of alibi *held* proper.—State v. Willett (Vt.) 48.

RATE.

Water rates, see "Waters and Water Courses," § 3.

REAL ACTIONS.

See "Ejectment."

An owner of land is not obliged to begin an action for its recovery as soon as he is aware of defendant's occupation.—Cote v. Leterneau (Me.) 734.

That plaintiff in a real action was aware of defendant's occupation, and made no objection until his suit, does not bar his claim for rents and profits.—Cote v. Leterneau (Me.) 734.

REAL-ESTATE AGENTS.

See "Brokers."

REBUTTAL.

Evidence, see "Trial," § 2.

* Point annotated. See syllabus.

RECEIPTS.

Issuance by express companies, see "Carriers," § 1.

RECEIVERS.

Of corporations, see "Corporations," § 6.
Of insurance companies, see "Insurance," § 1.

§ 1. Appointment, qualification, and tenure.

*A decree appointing a receiver without any findings of fact on which the decree was based will be reversed.—*Jones v. Weir* (Pa.) 643.

§ 2. Management and disposition of property.

Receiver's sale of goods sold conditionally held to pass good title, notwithstanding purchaser's notice of vendor's rights.—*Duplex Printing Press Co. v. Clipper Pub. Co.* (Pa.) 841.

RECITALS.

In affidavits, see "Affidavits."

RECORDS.

Of justice, see "Justices of the Peace," § 1.
Of mortgages, see "Chattel Mortgages," §§ 1, 3;
"Mortgages," § 2.
On appeal from justice, see "Justices of the Peace," § 2.
Transcript on appeal or writ of error, see "Appeal and Error," § 7.

RECOUPMENT.

See "Set-Off and Counterclaim."

REDEMPTION.

From mortgage, see "Mortgages," § 6.
Of pledged corporate stock, see "Corporations," § 2.

REFERENCE.

See "Arbitration and Award."

Review of findings of auditor, see "Appeal and Error," § 13.

§ 1. Referees and proceedings.

In a suit by an officer for the price of property levied on, it was immaterial that general assumption would not lie; the declaration being adaptable by amendment to the facts found.—*Lamb v. Zundell* (Vt.) 33.

§ 2. Report and findings.

*Objections to the report of a referee for fraud, prejudice, or mistake must be made when the report is offered for acceptance.—*Piscataquis Sav. Bank v. Herrick* (Me.) 214.

*A referee has full power to decide all questions, both of law and fact, and in the absence of fraud or mistake his decision is final.—*Piscataquis Sav. Bank v. Herrick* (Me.) 214.

REFORMATION OF INSTRUMENTS.

See "Cancellation of Instruments."

Costs in general, see "Costs," § 1.

§ 1. Right of action and defenses.

Equity will reform a deed in respect to a mistake in description.—*Abbott v. Flint's Adm'r* (Vt.) 721.

§ 2. Proceedings and relief.

Equity will not correct a mistake in a written instrument, except on clear and undoubted testimony.—*Abbott v. Flint's Adm'r* (Vt.) 721.

* Point annotated. See syllabus.

REFORMATORIES.

Nonpayment of costs as ground for holding in reformatory beyond term of imprisonment, see "Costs," § 2.

REGISTER OF WILLS.

See "Judges," § 1.

REGISTRATION.

Of mortgage, see "Chattel Mortgages," §§ 1, 3.
Of trade-mark, see "Trade-Marks and Trade-Names," § 2.
Of voters, see "Elections," § 3.

REHEARING.

See "New Trial."

In equity, see "Equity," § 4.

RELEASE.

See "Accord and Satisfaction"; "Payment."
Estoppel to assert invalidity, see "Estoppel," § 1.
Obligation of surety, see "Principal and Surety," § 1.
Of dower, see "Dower," § 2.
Of surety by limitations against principal, see "Limitation of Actions," § 3½.

RELEVANCY.

Of evidence in criminal prosecutions, see "Criminal Law," § 5.

RELIGIOUS SOCIETIES.

Inheritance tax, see "Taxation," § 5.

Where the constitution of a religious corporation provided for majority rule, the fact that the constitution vested the management of the corporation's affairs in the "whole" congregation did not require the assent of every member to every vote.—*Duessel v. Proch* (Conn.) 152.

The use of property conveyed to trustees for the benefit of a certain Lutheran church by a subsequent corporation, organized by the members of such church, adhering to the same faith, confession, etc., held proper.—*Duessel v. Proch* (Conn.) 152.

The deposed pastor of a church having a congregational government held not entitled to maintain a bill to prevent the use of the church building under the ministry of any other pastor, and to secure its use for services held under his charge.—*Duessel v. Proch* (Conn.) 152.

REMAINDERS.

See "Life Estates."

Invalid disposition of as creating perpetuity, see "Perpetuities."

REMEDY AT LAW.

Effect on jurisdiction of equity see "Equity," § 1; "Injunction," § 1; "Specific Performance," § 1.

REMOVAL.

Of municipal officers or employés, see "Municipal Corporations," § 3.
Of trustee, see "Trusts," § 3.

REMOVAL OF CLOUD.

See "Quieting Title."

RENEWAL.

Of lease, see "Landlord and Tenant," § 2.

RENT.

See "Ground Rents"; "Landlord and Tenant," § 4.

Accounting for rents in suit for partition, see "Partition," § 2.

REPAIRS.

Of premises demised, see "Landlord and Tenant," § 3.

Of streets, see "Municipal Corporations," § 9.
On mortgaged chattels, see "Chattel Mortgages," § 2.

REPEAL.

Of municipal ordinances, see "Municipal Corporations," § 2.

Of statute, see "Executors and Administrators," § 2.

REPLEVIN.

Joinder of counts in replevin and trover, see "Pleading," § 3.

§ 1. Pleading and evidence.

It is not permissible to declare in trover when the action is in replevin.—*King v. Morris* (N. J. Sup.) 1008.

§ 2. Trial, judgment, enforcement of judgment, and review.

Reservation of a point whether there is any evidence upon which plaintiff can recover held improper in form.—*Duplex Printing Press Co. v. Clipper Pub. Co.* (Pa.) 841.

REPORTS.

On reference, see "Reference," § 2.

REQUESTS.

For instructions in civil actions, see "Trial," § 5.

RESCISSION.

Cancellation of written instrument, see "Cancellation of Instruments."

Of contract, see "Contracts," § 3.

Of contract for sale of goods, see "Sales," § 2.

Of contract for sale of land, see "Vendor and Purchaser," § 3.

RESIDENCE.

See "Domicile."

RESIDUARY CLAUSE.

See "Wills," §§ 8, 14.

RES JUDICATA.

See "Judgment," § 5.

RESTRICTIONS.

In deeds, see "Deeds," § 2.

In wills, see "Wills," § 11.

RETROSPECTIVE LAWS.

Constitutional restrictions, see "Constitutional Law," § 7.

RETURN.

Of record of proceedings for purpose of review, see "Appeal and Error," § 7.

REVENUE.

See "Taxation."

REVIEW.

See "Appeal and Error"; "Audita Querela"; "Certiorari"; "Criminal Law," § 15; "Justices of the Peace," § 2.

Bill in equity, see "Equity," § 5.

REVOCATION.

Of appointment of committee in partition, see "Partition," § 2.

Of deed, see "Deeds," § 2.

Of license, see "Licenses," § 1.

Of settlement on child, see "Parent and Child."

RIGHT OF WAY.

See "Easements."

Of railroads, see "Railroads," § 1.

RISKS.

Assumed by employé, see "Master and Servant," § 7.

Assumed by passenger, see "Carriers," § 4.

ROADS.

See "Highways."

Streets in cities, see "Municipal Corporations," §§ 8, 9.

ROYALTIES.

Under coal mining lease, see "Mines and Minerals," § 1.

RULES.

For government of employer, see "Master and Servant," § 5.

SALES.

Argument and conduct of counsel in action for price of goods, see "Trial," § 3.

By warehousemen, see "Warehousemen."

Execution against property conditionally sold, see "Execution," § 1.

In partition, see "Partition," § 2.

Instructions in general in action for price of goods, see "Trial," § 5.

Of corporate stock, see "Corporations," § 2.

Of intoxicating liquors, see "Intoxicating Liquors."

Of land supporting building erected under parol license, see "Licenses," § 1.

Of realty, see "Vendor and Purchaser."

Of realty under mortgage as bar to dower, see "Dower," § 2.

Of seat in stock exchange, see "Exchanges."

On execution, see "Execution," § 3.

On foreclosure of mortgage, see "Mortgages," § 5.

Operation and effect of customs or usages on contract of sale, see "Customs and Usages."

* Point annotated. See syllabus.

Power under will, see "Executors and Administrators," § 3.
 Receiver's sales, see "Receivers," § 2.
 Reception of evidence in action for price of goods, see "Trial," § 2.
 Recoupment in action for price, see "Set-Off and Counterclaim," § 1.
 Requirements of statute of frauds, see "Frauds, Statute of," § 1.

§ 1. Requisites and validity of contract.

Mere delivery of an estimate of materials by a contractor to a materialman, and the latter's acceptance thereof, *held* insufficient to constitute a contract requiring the latter to deliver the materials, regardless of the contractor's ability to pay, etc.—*Oldenburg & Kelley v. Dorsey* (Md.) 576.

§ 2. Modification or rescission of contract.

*Contract of sale *held* mutually rescinded by the parties thereto, so that the buyer was entitled to recover back the money paid thereon.—*Pierce v. Staub* (Conn.) 760.

*Buyer of horse, by use thereof after discovering fraud of seller, *held* to have waived his right to rescind the contract.—*Ward v. Marvin* (Vt.) 46.

*Evidence *held* to present question to the jury whether buyer rescinded contract for false representations by seller within a reasonable time.—*Ward v. Marvin* (Vt.) 46.

§ 3. Performance of contract.

*Evidence *held* to show a valid delivery to purchaser of goods sold.—*Riggs v. Bair* (Pa.) 1086.

§ 4. Operation and effect.

*As between consignee and consignor the loss of goods by a common carrier falls on the consignor when the carrier was selected by him to make delivery to the consignee.—*Conn v. Reed, Dawson & Co.* (N. J. Sup.) 271.

§ 5. Warranties.

Statement in letter offering to sell and install certain grates and blowers *held* not a warranty that the operation of the buyer's plant will not be delayed after the apparatus was installed.—*Beggs v. James Hanley Brewing Co.* (R. I.) 373.

A statement in a letter offering to sell certain grates and blowers *held* not a warranty that the buyer's plant would, after the apparatus had been installed, produce as much steam as it did before.—*Beggs v. James Hanley Brewing Co.* (R. I.) 373.

*Where a known article is ordered of a manufacturer, there is no implied warranty that it shall answer the particular purpose intended by the purchaser.—*Beggs v. James Hanley Brewing Co.* (R. I.) 373.

§ 6. Remedies of seller.

In an action for the price of certain grates and blowers installed by plaintiff under defendant's boilers, evidence *held* to show that the apparatus was "adapted to the burning of fine anthracite fuel" as represented.—*Beggs v. James Hanley Brewing Co.* (R. I.) 373.

§ 7. Remedies of buyer.

*Where defendant gave plaintiffs notes for goods sold, and plaintiffs gave defendant a written guaranty, in an action on the notes any breach of the guaranty is a good defense.—*Pratt v. Johnson* (Me.) 242.

*A vendee *held* under the facts entitled to recover of his vendor for a shortage in the amount of corn delivered.—*Denton Bros. v. Gill & Fisher* (Md.) 627.

§ 8. Conditional sales.

Under Pub. St. 1901, p. 62, c. 2, § 2, pianos *held* household goods, within the meaning of Pub. St. 1901, p. 448, c. 140, § 23, relative to the filing of conditional sale contracts.—*Lamb v. King* (N. H.) 493.

*Seller of horse, retaining title till balance due thereon was paid, *held* entitled to recover such balance, notwithstanding death of the horse in the meantime.—*Lavalley v. Ravenna* (Vt.) 47.

SATISFACTION.

See "Accord and Satisfaction"; "Payment." Of legacy, see "Wills," § 14.

SAVINGS BANKS.

See "Banks and Banking," § 3.

SCHOOLS AND SCHOOL DISTRICTS.

Certiorari to school committee, see "Certiorari," § 1.

Charitable schools, see "Charities."
 Condemnation of land for campus, see "Eminent Domain," § 1.

§ 1. Public schools.

On the abolition of school districts in a town by an affirmative vote, pursuant to Gen. St. 1888, §§ 2193, 2198, the town became liable for the debts of the district, though no equitable adjustment of property rights, liabilities, etc., was had, as provided by sections 2198, 2206.—*Winsted Sav. Bank v. Town of New Hartford* (Conn.) 81.

A town, on abolishing the district school system, having neglected to make an adjustment of property rights and liabilities as between taxpayers of several districts, under Gen. St. 1888, §§ 2198, 2206, *held* not thereafter entitled to object to the payment of interest on district indebtedness during the time the town constituted a consolidated district.—*Winsted Sav. Bank v. Town of New Hartford* (Conn.) 81.

Where it was intended that school orders containing no time of payment should be continuing obligations, to be held by plaintiff, they drew interest at the contract rate until demand for payment, suit or payment.—*Winsted Sav. Bank v. Town of New Hartford* (Conn.) 81.

A holder of school orders drawing 4 per cent. interest before maturity, sued on, *held* entitled to interest at the rate of 6 per cent. from the commencement of the action to the date of the judgment.—*Winsted Sav. Bank v. Town of New Hartford* (Conn.) 81.

A contract employing a teacher *held* binding on the district.—*Hitchens v. School Dist. No. 180 in Sussex County* (Del. Super.) 897.

Under Rev. St. c. 15, § 63, a minor, residing with his father, who never undertook to contract in his own behalf as to his tuition at a school attended by him, cannot recover the amount voluntarily paid as tuition for him by his father.—*Goodwin v. Inhabitants of Charleston* (Me.) 606.

The general school law of October 19, 1903 (P. L. 1903, Sp. Sess. pp. 14, 15, §§ 32, 34), together with the validating act approved on the same day (Id. p. 96), *held* not to disturb pending proceedings for the assessment and collection of taxes already ordered to be raised to meet school bonds maturing during the school year.—*Woolley v. Hendrickson* (N. J. Sup.) 278.

General School Law (P. L. 1903, Sp. Sess. p. 15) § 33, postpones the operation of the act with respect to all fiscal adjustments between

* Point annotated. See syllabus.

the new school districts and the former school districts until the end of the then current school year.—*Woolley v. Hendrickson* (N. J. Sup.) 278.

Act Oct. 19, 1903 (P. L. 1903, Sp. Sess. p. 96), validating school taxes heretofore levied, validates all appropriations, taxes, and assessments theretofore made, and all other acts theretofore passed, for school purposes, under the general school laws of 1900 and 1902, which laws respectively were declared unconstitutional.—*Woolley v. Hendrickson* (N. J. Sup.) 278.

Act Oct. 19, 1903 (P. L. 1903, Sp. Sess. p. 96), entitled "An act to validate taxes heretofore levied for school purposes," is constitutional.—*Woolley v. Hendrickson* (N. J. Sup.) 278.

Failure of the board of education of a township to provide transportation for children living remote from the school is not such a failure to provide suitable school facilities, under School Law (P. L. 1904, p. 48) § 126, as to authorize the county superintendent of schools to order the withholding from the district of all moneys to the credit of such district received from the state appropriation or the state school tax.—*Board of Education of Frelinghuysen Tp. v. Atwood* (N. J. Sup.) 1130.

SEARCHES AND SEIZURES.

Competency of evidence obtained by illegal seizure, see "Criminal Law," § 7.

Under laws relating to intoxicating liquors, see "Intoxicating Liquors," § 6.

Use of return to search warrant to refresh recollection of witness, see "Witnesses," § 2.

*A single search warrant cannot be lawfully issued to search more than one place, under Const. art. 1, § 5.—*State v. Duane* (Me.) 80.

Where a warrant in describing the place to be searched describes three places, each occupied by a different person, the court cannot read into the warrant words to show the other two places were named simply as boundaries.—*State v. Duane* (Me.) 80.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 1.

In criminal prosecutions, see "Criminal Law," § 8.

SECRET PROCESS.

Divulging by employé, see "Master and Servant," § 2.

Restraining use, see "Injunction," § 1.

Wrongful divulgence of by corporate officer, see "Corporations," § 5.

SEIZURE.

See "Searches and Seizures."

SELF-DEFENSE.

See "Homicide," §§ 4, 5.

SENTENCE.

Punishment for crime, see "Criminal Law," § 16.

SEPARATE ESTATE.

Of married women, see "Husband and Wife," § 4.

SEPARATION.

See "Husband and Wife," § 6.

SERVICE.

Of process, see "Process," § 1.

SERVICES.

See "Master and Servant," § 2; "Work and Labor."

SERVITUDES.

See "Easements."

SET-OFF AND COUNTERCLAIM.

Cross-bill in divorce suit, see "Divorce," § 3. Dismissal for defect of parties necessary to adjudication of counterclaim, see "Dismissal and Nonsuit," § 1.

In proceedings for assessments for public improvements, see "Municipal Corporations," § 6. Set-off of judgments, see "Judgment," § 8.

§ 1. Subject-matter.

*In an action for the price of goods, a certain claim for damages held not a proper subject for recoupment.—*Edgemoor Iron Co. v. Brown Hoisting Mach. Co.* (Del. Sup.) 1054.

*In an action on a note, unliquidated damages arising out of an independent tort cannot be recouped.—*Roth v. Reiter* (Pa.) 1063.

SETTLEMENT.

See "Accord and Satisfaction"; "Payment."

By assignee for benefit of creditors, see "Assignments for Benefit of Creditors," § 3.

By executor or administrator, see "Executors and Administrators," § 8.

By partners, see "Partnership," § 4.

Marriage settlements, see "Husband and Wife," § 2.

On child, see "Parent and Child."

SEVERANCE.

As condition precedent to appeal by portion of joint defendants, see "Appeal and Error," § 4.

SEWERS.

See "Municipal Corporations," §§ 4, 9.

SHERIFFS AND CONSTABLES.

Presumptions from sheriff's return to writ of entry, see "Ejectment," § 2.

§ 1. Powers, duties, and liabilities.

In trover against a sheriff for the conversion of lumber standing in the yard of a third person, a certain contract, leases, and deed between the third person and plaintiff held admissible in evidence.—*Marcy v. Parker* (Vt.) 19.

In trover for the conversion of lumber, evidence held sufficient to show that plaintiff was in actual possession of the lumber at the time of the conversion.—*Marcy v. Parker* (Vt.) 19.

SIDEWALKS.

See "Municipal Corporations," § 9.

* Point annotated. See syllabus.

SIDING.

Of railroad as nuisance, see "Nuisance," § 1.

SLANDER.

See "Libel and Slander."

SPECIAL LAWS.

See "Statutes," § 2.

SPECIFIC PERFORMANCE.

Amendment of bill, see "Equity," § 8.
Dismissal of appeal in action for, see "Appeal and Error," § 9.

Of transfer of corporate stock, see "Corporations," § 2.

Retention of jurisdiction acquired, see "Equity," § 1.

§ 1. Nature and grounds of remedy in general.

Owner of stock pledged or sold with option to repurchase *held* entitled to maintain bill in equity for retransfer to himself.—Eichbaum v. Sample (Pa.) 837.

§ 2. Contracts enforceable.

Relief by way of specific performance is not a matter of right, and to warrant the granting of it the contract must be fair, certain, founded on an adequate consideration, and free from suspicion as to its bona fides.—Thomas v. Gottlieb Bauernschmidt Straus Brewing Co. (Md.) 633.

Equity will not compel one to perform a contract which he did not intend to make, and which he would not have entered into had its true effect been understood.—Thomas v. Gottlieb Bauernschmidt Straus Brewing Co. (Md.) 633.

The stipulation in a lease giving the lessee the option to purchase the premises *held* to become a mutual obligation on the lessee announcing his intention to purchase.—Thomas v. Gottlieb Bauernschmidt Straus Brewing Co. (Md.) 633.

*An oral contract to convey land *held* sufficiently performed, so as to take it out of the statute of frauds.—White v. Poole (N. H.) 494.

Party purchasing interest in real estate transaction *held* entitled to require a formal assignment of such interest, though transaction will not be closed for 25 years.—Dilworth v. Nicola (Pa.) 909.

*Bill *held* to lie to enforce agreement of a third person to pledge his property to secure certain named creditors.—Morris v. McCutcheon (Pa.) 982; Armstrong v. Same, Id.

Written contract for the sale of real estate, made by an alleged agent of the owner, will not be enforced where such contract was unauthorized.—Trau v. Sloan (Pa.) 984.

*Specific performance of parol contract to purchase land decreed, where part of the price was paid and the purchaser had entered on the property.—In re Fay's Estate (Pa.) 991.

§ 3. Proceedings and relief.

A bill for the specific performance of a contract for the sale of land *held* good as against a demurrer.—Shipley v. Fink (Md.) 360.

In a suit to compel performance of a contract, evidence *held* not to prove the contract.—Shipley v. Fink (Md.) 360.

A stipulation in a lease *held* not inserted through misapprehension on the lessor's part, essential to justify equity in refusing to enforce

it.—Thomas v. Gottlieb Bauernschmidt Straus Brewing Co. (Md.) 633.

In a suit for the specific performance of an alleged contract, whereby complainants advanced moneys to the trustees of a lunatic, the moneys to be repaid from sale of his real estate, evidence *held* insufficient to show the contract.—Dulaney v. Devries (Md.) 743.

The proof necessary to sustain a bill to enforce a contract, whereby complainants advanced moneys to the trustees of a lunatic and for the sale of the incompetent's real estate to repay same, determined.—Dulaney v. Devries (Md.) 743.

SPEED.

Opinion evidence as to rate of, see "Evidence," § 7.

Regulations as to street railroads, see "Street Railroads," § 2.

SPENDTHRIFTS.

Spendthrift trust, see "Trusts," § 2; "Wills," § 12.

SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

STARE DECISIS.

See "Courts," § 1.

STATEMENT.

By witness inconsistent with testimony, see "Witnesses," § 3.

Of case or facts for purpose of review, see "Appeal and Error," § 7.

Of facts agreed on for submission to court, see "Submission of Controversy."

Of lien claim, see "Mechanics' Liens," § 2.

STATES.

Abandonment of lands granted by state, see "Abandonment."

Courts, see "Courts."

Legislative power, see "Constitutional Law," § 2.

Opinion evidence as to foreign laws, see "Evidence," § 7.

§ 1. Fiscal management, public debt, and securities.

Appropriations made by Acts 1902, p. 912, c. 625, §§ 5, 6, and Acts 1904, p. 951, c. 557, § 4, *held* not forfeited by failure to draw the same during the fiscal year for which they were appropriated.—Maryland Agricultural College v. Atkinson (Md.) 1035.

STATUTES.

Laws impairing obligation of contracts, see "Constitutional Law," § 5.

Validity of retrospective or ex post facto laws, see "Constitutional Law," § 7.

Provisions relating to particular subjects.

See "Animals"; "Assignments for Benefit of Creditors," § 1; "Bastards," § 1; "Beneficial Associations"; "Bridges," § 1; "Building and Loan Associations"; "Charities," § 1; "Chattel Mortgages," § 3; "Corporations," §§ 7, 9; "Costs," § 2; "Counties," § 3; "Courts," § 1; "Dedication," § 2; "Descent and Dis-

*Point annotated. See syllabus.

tribution"; "Dower," § 1; "Elections," § 4; "Eminent Domain," § 3; "Game"; "Gas"; "Highways," §§ 1, 2; "Husband and Wife," § 6; "Indictment and Information," § 1; "Insurance," § 4; "Intoxicating Liquors"; "Limitation of Actions"; "Mechanics' Liens"; "Municipal Corporations," §§ 3, 5, 6, 9, 10; "New Trial," § 3; "Partnership," § 5; "Physicians and Surgeons"; "Pleading," §§ 2, 6, 7; "Process," § 1; "Quieting Title," § 1; "Railroads," §§ 1-4; "Schools and School Districts," § 1; "Taxation"; "Trusts," § 3.

Certified questions in criminal prosecution, see "Criminal Law," § 15.

Claims against decedents' estates, see "Executors and Administrators," § 4.

Judgment on pleading, see "Pleading," § 7.

Penalty for failure of administrator to file inventory, see "Executors and Administrators," § 2.

Statute of frauds, see "Frauds, Statute of."

Trust companies, see "Banks and Banking," § 4.

§ 1. Enactment, requisites, and validity in general.

*Whether a public law is invalid because approved by the Governor after adjournment of the Legislature is not to be determined on the stipulation of parties as to the facts.—*Morris v. City of Newark* (N. J. Sup.) 1005.

§ 2. General and special or local laws.

Act March 30, 1905, supplement to Act May 2, 1885, entitled "An act to remove the fire and police departments in the cities of this state from political control," held a special act regulating the internal affairs of cities, and unconstitutional.—*State v. Nealon* (N. J. Sup.) 182.

Act April 20, 1905 (P. L. 221), providing for the annexation of one city by another, is a law "regulating the affairs" of cities within Const. art. 3, § 7, subd. 2, prohibiting the passage of a local act for that purpose.—*Sample v. City of Pittsburg* (Pa.) 201.

*Act April 20, 1905 (P. L. 221), providing for annexation of cities in the same county, held unconstitutional as a local law.—*Sample v. City of Pittsburg* (Pa.) 201.

§ 3. Subjects and titles of acts.

A penal clause in a general statute, embracing a given subject, which simply provides for the punishment of the violation of the provisions of such act, is not the intermixing in such act of things which have no proper relation to each other.—*State v. Twining* (N. J. Sup.) 402.

Section 17 of the act entitled "An Act concerning Trust Companies" (Revision 1899, P. L. 1899, p. 461), which makes it a misdemeanor for any director, officer, agent, or clerk of any trust company to knowingly subscribe or exhibit any false paper with intent to deceive any person authorized to examine as to the condition of such trust company, is not in conflict with Const. art. 4, § 7, subd. 4.—*State v. Twining* (N. J. Sup.) 402.

*Act April 23, 1903 (P. L. 274), relating to the care and control of dependent and incorrigible children, contains only one subject, expressed in the title.—*Commonwealth v. Fisher* (Pa.) 198.

§ 4. Construction and operation.

*Object of statutory construction is to ascertain the legislative intent.—*Maryland Agricultural College v. Atkinson* (Md.) 1035.

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STREET RAILROADS.

Carriage of passengers, see "Carriers," §§ 2-4.

Construction of in city park, see "Municipal Corporations," § 8.

Exercise of power by, see "Eminent Domain," § 1.

Mandamus to compel issuance of transfers, see "Mandamus," § 1.

§ 1. Establishment, construction, and maintenance.

*A lease of certain land by a street railway company for the extension of a tunnel by the lessee, another connecting railway, held not ultra vires.—Hoboken & M. R. Co. v. Jersey City, H. & P. Ry. Co. (N. J. Ch.) 539.

Street railway company held liable for the expense of improvements between its tracks and lines of tracks and one foot on each side thereof.—City of McKeesport v. Pittsburg, M. & C. Ry. Co. (Pa.) 1075.

§ 2. Regulation and operation.

*Wilmington City Ordinances, p. 376, c. 7, § 12, limiting the speed of railroads, locomotives, cars, and vehicles in the city to six miles an hour, held not to apply to street cars.—Licznanski v. Wilmington City Ry. Co. (Del. Super.) 1057.

*The rights of a street railway company and of an individual to the use of the streets are equal.—United Rys. & Electric Co. of Baltimore v. Watkins (Md.) 234.

*An individual who in disregard of his own safety undertakes to cross a street car company's track when no prudent person would do so cannot recover for injuries sustained.—United Rys. & Electric Co. of Baltimore v. Watkins (Md.) 234.

*It is not negligence as a matter of law for a traveler driving a four-horse wagon to attempt to cross a street car track when a car approaching is a block distant.—United Rys. & Electric Co. of Baltimore v. Watkins (Md.) 234.

Whether a street railway company was guilty of actionable negligence in a collision with a traveler on the track held for the jury.—United Rys. & Electric Co. of Baltimore v. Watkins (Md.) 234.

*Where defendant street car company could have prevented injury to plaintiff notwithstanding the negligence of plaintiff in employing a negligent driver and the negligence of such driver at the time of the accident, plaintiff was entitled to recover, notwithstanding such negligence.—Hanson v. Manchester St. Ry. (N. H.) 595.

In an action for injuries to a person, while being driven in a carriage, by a collision with a street car, an instruction held objectionable as misleading the jury on the issue of the proximate cause of the injury.—Hanson v. Manchester St. Ry. (N. H.) 595.

*Street railroad company held not liable for injuries to a child, stepping suddenly in front of a car.—Leitzel v. Harrisburg Traction Co. (Pa.) 102.

*Evidence, in an action against street railway company for death of a child on the track, held insufficient to show negligence.—Sontgen v. Kittanning & F. C. St. Ry. Co. (Pa.) 523.

In an action against a street railroad company for injuries by collision between a car of defendant and the team which plaintiff was driving, evidence held to authorize nonsuit.—Wright v. Monongahela St. Ry. Co. (Pa.) 918.

Nonsuit in action to recover for person killed on track of street railway company held proper.—Mulvaney v. Pittsburgh Rys. Co. (Pa.) 926.

STREETS.

See "Dedication," § 1; "Highways"; "Municipal Corporations," §§ 8, 9, 11.

* Point annotated. See syllabus.

SUBMISSION OF CONTROVERSY.

Consideration of theory of voluntary submission of controversy on appeal, see "Appeal and Error," § 10.

An application by a party to an agreed case to be relieved from his agreement and for a trial of the questions of fact is to be considered as a petition for a new trial.—*Dame v. Woods* (N. H.) 379.

Where questions were decided on appeal on the assumption that the facts were found and not agreed, the only remedy of the defeated party was by an application to the superior court for a trial of the questions of fact.—*Dame v. Woods* (N. H.) 379.

Where an appeal is presented on an agreed case, the court cannot amend the case to remove ambiguity, but can only decline to consider the questions of law until the facts are clearly presented.—*Dame v. Woods* (N. H.) 379.

SUBROGATION.

A creditor of an estate for whose benefit certain land was sold *held* subrogated to the vendor's lien of the administratrix to secure the purchase price.—*Campbell v. Perth Amboy Shipbuilding & Engineering Co.* (N. J. Ch.) 319.

An officer of an insolvent corporation who paid debts in consideration of the transfer of assets to him *held* entitled to be subrogated to the rights of the creditor.—*Mills v. Hendershot* (N. J. Ch.) 542.

A purchaser of property subject to incumbrances *held* not entitled, on payment of prior incumbrances, to subrogation as against subsequent incumbrance.—*Avon-by-the-Sea Land & Improvement Co. v. McDowell* (N. J. Ch.) 865.

SUBSTITUTED SERVICE.

See "Process," § 1.

SUBSTITUTION.

Of devisees or legatees, see "Wills," § 7.

SUICIDE.

Gift in contemplation of, see "Gifts," § 2.
Of assured, see "Insurance," § 8.

SUIT.

See "Action."

SUMMARY PROCEEDINGS.

Recovery of possession by landlord, see "Landlord and Tenant," § 5.

SUMMONS.

See "Process."

SUNDAY.

An affidavit of complaint for violating the Sunday law (Rev. Code 1893, p. 953, c. 131, § 4), failing to negative the exceptions of the statute, *held* fatally defective.—*Mott v. State* (Del. Super.) 301.

SUPERSEDEAS.

On appeal or writ of error, see "Appeal and Error," § 6.

SUPPORT.

Of child, see "Parent and Child."

SURETYSHIP.

See "Principal and Surety."

SURFACE WATERS.

See "Waters and Water Courses," § 1.

SURRENDER.

Of written instrument for cancellation, see "Cancellation of Instruments."

SWINDLING.

See "False Pretenses."

SWITCHES.

Of railroad as nuisance, see "Nuisance," § 1.

TAXATION.

Allowance for taxes paid in suit for partition, see "Partition," § 2.
Restraining levy, see "Injunction," § 1.
Right of taxpayer to vote, see "Elections," § 2.
Taxpayers' action to prevent laying out road, see "Highways," § 1.

Local or special taxes.

See "Highways," § 3; "Municipal Corporations," § 10; "Schools and School Districts," § 1.
Assessments for municipal improvements, see "Municipal Corporations," § 6.

Occupation or privilege taxes.

See "Intoxicating Liquors," § 2.

§ 1. **Liability of persons and property.**
A corporation *held* liable, under P. L. 1901, p. 31, for a franchise tax, no return having been made, though it was insolvent and had ceased to do business.—*King v. American Electric Vehicle Co.* (N. J. Ch.) 381.

§ 2. Place of taxation.

Act June 1, 1883 (P. L. 51), relating to assessments of land divided by county lines, *held* not to apply where a power house is erected on the farm by an electric power company.—*Appeal of York Haven Water & Power Co.* (Pa.) 97.

§ 3. Levy and assessment.

Stock owned by the corporation which issued it should not be considered in determining the amount of the franchise tax or license fee, under the corporation tax act (Gen. St. p. 3335, P. L. 1901, p. 31).—*Knickerbocker Importation Co. v. State Board of Assessors* (N. J. Sup.) 266.

*The findings of fact by the lower court on appeal from the tax assessment will not be set aside unless clearly erroneous.—*Appeal of York Haven Water & Power Co.* (Pa.) 97.

Act March 24, 1905 (P. L. 47), authorizing the appointment by the courts of common pleas of certain counties of a board for the assessment and revision of taxes, *held* not repugnant to Const. art. 14, § 2, providing for election of county officers.—*Commonwealth v. Collier* (Pa.) 567.

* Point annotated. See syllabus.

§ 4. Tax titles.

*A description in a tax deed from the State Treasurer *held* insufficient to pass any title.—*Powers v. Sawyer* (Me.) 349.

Act March 29, 1824 (P. L. 168), *held* without application, where defendant voluntarily appears without service of process in an action of ejectment, and in such case plaintiff must prove defendant's possession to be entitled to judgment.—*Kreamer v. Voneida* (Pa.) 518.

§ 5. Legacy, inheritance, and transfer taxes.

Personal property is transmitted by will according to the law of testator's domicile.—*In re Hartman's Estate* (N. J. Prerog.) 560.

*The situs of a testatrix' personal property for the purpose of assessing a legacy or succession tax is her domicile at the time she died, regardless of the statutes of foreign states also subjecting property of nonresidents therein to similar taxation.—*In re Hartman's Estate* (N. J. Prerog.) 560.

Collateral inheritance taxes *held* properly assessed in New Jersey against a testatrix domiciled in such state, though her will was not probated there.—*In re Hartman's Estate* (N. J. Prerog.) 560.

Const. c. 1, art. 9, providing for proportionate contributions to the expense of the protection which the state affords, *held* not contravened by Acts 1896, p. 38, No. 46, which taxes collateral inheritances.—*In re Hickok's Estate* (Vt.) 724.

*Foreign corporations *held* not within the exemption, relative to charitable, educational, and religious societies, in Acts 1896, p. 38, No. 46, which taxes collateral inheritances.—*In re Hickok's Estate* (Vt.) 724.

TEACHERS.

See "Schools and School Districts," § 1.

TELEGRAPHS AND TELEPHONES.

Liability for injuries caused by electric wire crossing telephone wire, see "Electricity."

§ 1. Establishment, construction, and maintenance.

*Under Act April 29, 1874, § 33 (P. L. 92), a telegraph and telephone company, in using the highways of the state for its poles, must act in subordination to the rights of the public.—*Little v. Central District & Printing Telegraph Co.* (Pa.) 848.

*The right of a telegraph and telephone company, conferred by Act April 29, 1874, § 33 (P. L. 92), to place its poles on public highways, must be exercised within the statutory limitations.—*Little v. Central District & Printing Telegraph Co.* (Pa.) 848.

Telephone company *held* liable for injuries to a person, riding on a wagon, caused by the telephone poles being placed too close to the highway.—*Little v. Central District & Printing Telegraph Co.* (Pa.) 848.

Whether a person, riding on a wagon, whose feet came in contact with a telephone pole at the side of the highway, was guilty of contributory negligence, *held* for the jury.—*Little v. Central District & Printing Telegraph Co.* (Pa.) 848.

TENANCY IN COMMON.

Dismissal of action for sale of land by tenants in common, see "Dismissal and Nonsuit," § 1. Right of co-tenant to partition, see "Partition," §§ 1, 2.

§ 1. Mutual rights, duties, and liabilities of co-tenants.

*A tenant in common *held* bound to account to her co-tenants for rents received less reasonable expenditures.—*Lloyd v. Turner* (N. J. Ch.) 771.

*A tenant in common of certain property, in the absence of special agreement, *held* not bound to pay rent for the part occupied by her.—*Lloyd v. Turner* (N. J. Ch.) 771.

In partition, evidence *held* insufficient to show the possession by certain co-tenants to the exclusion of remaining co-tenants, entitling the latter to an accounting for the use of the premises.—*Rose v. Cooley* (N. J. Ch.) 867.

*Evidence *held* to show adverse possession by tenant in common.—*Rohrbach v. Sanders* (Pa.) 27.

Action by grantee of purchaser at execution sale to recover the premises *held* barred by limitations.—*Rohrbach v. Sanders* (Pa.) 27.

TERMINATION.

Of tenancy, see "Landlord and Tenant," § 2.

TERMS.

Of leases, see "Landlord and Tenant," § 2.

TESTAMENT.

See "Wills."

TESTAMENTARY CAPACITY.

See "Wills," § 2.

TESTAMENTARY POWERS.

Creation, see "Wills," § 12.

Restrictions on power to devise or bequeath, see "Wills," § 1.

THEATERS AND SHOWS.

Agricultural fairs, see "Agriculture."

THREATS.

By deceased or accused in prosecution for homicide, see "Homicide," § 7.

TIME.

For affidavit of defense, see "Pleading," § 2.

For application for new trial, see "New Trial," § 3.

For bringing action for breach of contract, see "Contracts," § 4.

For commencement of interest on legacy, see "Wills," § 14.

For election to take under or against will, see "Wills," § 14.

For exercise by tenant of option to purchase premises, see "Landlord and Tenant," § 2.

For payment of interest, see "Interest," § 1.

For performance of contract for sale of realty, see "Vendor and Purchaser," § 2.

For removal of building erected on land under parol license, see "Licenses," § 1.

For taking appeal or suing out writ of error, see "Appeal and Error," § 5.

Of execution of will, see "Wills," § 1.

Review on appeal of ruling as to extension of, see "Appeal and Error," § 13.

To sue for construction of will, see "Wills," § 13.

* Point annotated. See syllabus.

Variance between pleading and proof as to name in indictment, see "Indictment and Information," § 6.

*A calendar month is not one of any given number of days throughout the entire year, but varies in length according to the Gregorian calendar.—*In re Gregg's Estate* (Pa.) 856; *Appeal of Washington Hospital, Id.*

TITLE.

As affected by abandonment, see "Abandonment."

As affected by dedication, see "Dedication," § 2.
As affected by receiver's sale, see "Receivers," § 2.

Of statutes, see "Statutes," § 3.

Removal of cloud, see "Quieting Title."

Sufficiency of title to maintain trover, see "Trover and Conversion," § 1.

Tax titles, see "Taxation," § 4.

TOOLS.

Liability of employer for defects, see "Master and Servant," § 4.

TORTS.

Causing death, see "Death," § 1.

Measure of damages, see "Damages," § 3.

By particular classes of parties.

See "Counties," § 3; "Municipal Corporations," § 9; "Towns," § 1.

Employees, see "Master and Servant," § 9.

Particular remedies for torts.

See "Arrest," § 1; "Trespass," § 1; "Trover and Conversion," § 1.

Particular torts.

See "Assault and Battery," § 1; "False Imprisonment," § 1; "Fraud"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Nuisance"; "Trespass"; "Trover and Conversion."

TOWNS.

See "Counties"; "Municipal Corporations"; "Schools and School Districts," § 1.

Effect of division of on rights of gas companies, see "Gas."

Right to hold property in trust for charity, see "Charities," § 1.

Town agent for sale of liquor, see "Intoxicating Liquors," § 3.

§ 1. Property, contracts, and liabilities.

*A town held not liable for injury to property by the negligent blowing up of ice in a river by its highway agent for the purpose of draining a highway.—*Wheeler v. Town of Gilsun* (N. H.) 597.

A town held under no duty to the owner of a mill to remove a nuisance threatening its destruction, and caused by negligence of its highway agent in blowing up ice in a river, under the direction of a selectman, to drain a highway.—*Wheeler v. Town of Gilsun* (N. H.) 597.

TRADE-MARKS AND TRADE-NAMES.

§ 1. Marks and names subjects of ownership.

*Any words, letters, figures, marks, or devices affixed to a commercial article primarily to indicate the origin or ownership of it, must be recognized as a valid trade-mark.—*W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.* (Me.) 499.

*Point annotated. See syllabus.

*A geographical name which has long been used to indicate a particular manufactured article may acquire a secondary meaning as the designation of a particular class of such articles, and thus become entitled to protection as a trade-mark, or serve as the basis of a proceeding to prevent unfair competition.—*W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.* (Me.) 499.

§ 2. Registration, regulation, and offenses.

*One filing label in patent office held to acquire no right as against another transacting business in the same state.—*Periberg v. Smith* (N. J. Ch.) 442.

§ 3. Infringement and unfair competition.

*One person will not be permitted, by imitating a distinctive name or mark already employed by another, to impose upon the public an article of his own manufacture as the genuine article of another.—*W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.* (Me.) 499.

An original device bearing the words "Auburn Lynn Shoes, Auburn, Maine" is an arbitrary, composite name, constituting an impersonal trade-mark, and is infringed by the adoption of the phrase "Auburn Lynn Shoe Co." as a trade-mark and corporate name.—*W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.* (Me.) 499.

In contemplation of law, two trade-marks are substantially the same if the resemblance between them is so close that it deceives a customer exercising ordinary caution in his dealing, and induces him to purchase the goods of one manufacturer for those of another.—*W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.* (Me.) 499.

*Unfair competition does not necessarily involve the violation of any exclusive right of the plaintiff to the use of the names or symbols employed by the defendant, but there may be unfair competition, although the plaintiff has no property right in them as a trade-mark.—*W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.* (Me.) 499.

*Any conduct designed and having a natural tendency to deceive the public, and enable one man to dispose of his goods for those of another, may be enjoined, although it is not shown that any particular person has been actually deceived.—*W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.* (Me.) 499.

*In suits for infringement of trade-marks, fraudulent intent is presumed, but, in actions based on unfair competition, the plaintiff must prove this intent.—*W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.* (Me.) 499.

The profits recoverable in equity for unfair competition are governed by the same rules as in cases of the infringement of trade-marks.—*W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.* (Me.) 499.

Where a trade-mark has been infringed, the wrongdoer must account for all profits.—*W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.* (Me.) 499.

*The owner of a shoe store using the mark "Eagle Shoes" on all he sold, such mark not indicating any particular brand or make, held not entitled to protection in the use thereof.—*Periberg v. Smith* (N. J. Ch.) 442.

*Prior user of name "Eagle Shoes" held not entitled to enjoin the sale of shoes by another using the same name, in the absence of attempt to deceive the public.—*Periberg v. Smith* (N. J. Ch.) 442.

*Complainant held not entitled to enjoin the use of the name "Eagle Shoes" by one who had first commenced such use.—*Periberg v. Rosentone* (N. J. Ch.) 446.

TRADE SECRETS.

Divulging by employé, see "Master and Servant," § 2.
Trust in secret process, see "Trusts," § 1.

TRANSCRIPTS.

Of record for purpose of review, see "Appeal and Error," § 7.
On appeal from justice, see "Justices of the Peace," § 2.

TRANSFERS.

Of rights under liquor license, see "Intoxicating Liquors," § 2.

TRANSFER TAX.

See "Taxation," § 5.

TREES.

Municipal regulations, see "Municipal Corporations," § 8.

TRESPASS.

Amendment of pleading, see "Pleading," § 4.
Injuries to trespassers, see "Railroads," §§ 5, 7.
Liability of third persons for acts of trespassers in general, see "Negligence," § 1.
New trial in general, see "New Trial," § 2.
Restraining by injunction, see "Injunction," §§ 1-3.
To the person, see "Assault and Battery," § 1; "False Imprisonment."

§ 1. Actions.

The extension of a flashboard one inch over a divisional line in the erection of a building is a trespass on the adjoining owner, entitling him to nominal damages, though no specific damage results from such injury.—*Puroto v. Chiappa* (Conn.) 664.

Trespass quare clausum fregit is an inappropriate remedy to recover for injuries done by bees to the property of another.—*Petey Mfg. Co. v. Dryden* (Del. Super.) 1056.

In an action for injuries to plaintiff's property by the cutting of certain of his trees, evidence of a loss of the sale of a portion of the property by reason of such fact held inadmissible.—*Western Union Telegraph Co. v. Ring* (Md.) 801.

In an action for injuries to plaintiff's trees, the question as to whether certain trees, which plaintiff alleged two years before another had damaged, were of the value of \$2,000, as then claimed, held inadmissible.—*Western Union Telegraph Co. v. Ring* (Md.) 801.

*In trespass, location of disputed boundary may be determined under a plea of general issue.—*Lyman v. Brown* (N. H.) 650.

Measure of damage for destruction of spring by mining company determined.—*Rabe v. Shoenberger Coal Co.* (Pa.) 854.

Measure of damage in an action against mining company for injury to surface only determined.—*Rabe v. Shoenberger Coal Co.* (Pa.) 854.

TRESPASS TO TRY TITLE.

See "Ejectment."

TRIAL.

See "New Trial"; "Reference"; "Witnesses."

Admission by silence as question for jury in criminal prosecution, see "Criminal Law," § 9.

Contributory negligence of passenger as question for jury, see "Carriers," § 4.
Dedication as question for jury, see "Dedication," § 1.
Delivery of deed as question for jury, see "Deeds," § 1.
Exceptions to rulings as to submission of case to jury, see "Appeal and Error," § 3.
Existence of partnership as question of law or fact, see "Partnership," § 1.
Instructions as to mental capacity of testator, see "Wills," § 2.
Instructions as to payment, see "Payment," § 1.
Objections to instructions for purpose of review, see "Appeal and Error," § 3.
Questions for jury in proceedings for assessment of damages, see "Damages," § 5.
Suits to try tax titles, see "Taxation," § 4.

Proceedings incident to trials.

See "Continuance."
Entry of judgment after trial of issues, see "Judgment," § 3.
Right to trial by jury, see "Jury," § 1.

Trial of actions by or against particular classes of parties.

See "Carriers," §§ 3, 4; "Master and Servant," § 8; "Municipal Corporations," §§ 5, 6, 9; "Principal and Agent," § 1; "Railroads," §§ 5, 6, 9; "Street Railroads," § 2.
Telephone company, see "Telegraphs and Telephones," § 1.

Trial of particular civil actions or proceedings.

See "Account Stated"; "Breach of Marriage Promise"; "Ejectment," § 3; "False Imprisonment," § 1; "Libel and Slander," § 3; "Malicious Prosecution," § 2; "Negligence," § 4; "Replevin," § 2.

Condemnation proceedings, see "Eminent Domain," § 3.

For criminal conversation, see "Husband and Wife," § 7.

For death caused by operation of railroad, see "Railroads," § 6.

For death of passenger, see "Carriers," § 3.

For injuries from fire caused by operation of railroad, see "Railroads," § 9.

For personal injuries, see "Carriers," §§ 3, 4; "Electricity"; "Highways," § 4; "Landlord and Tenant," § 3; "Master and Servant," §§ 8, 9; "Municipal Corporations," § 9; "Railroads," § 5; "Street Railroads," § 2; "Telegraphs and Telephones," § 1.

For rescission of contract, see "Sales," § 2.

On bill or note, see "Bills and Notes," § 4.

On insurance policy, see "Insurance," §§ 7, 8.

Probate proceedings, see "Wills," § 4.

Suits in equity, see "Equity," § 4.

Suits to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 3.

To recover demised property, see "Landlord and Tenant," § 5.

Trial of criminal prosecutions.

See "Criminal Law," § 13; "Obscenity"; "Rape," § 2.

For violation of liquor laws, see "Intoxicating Liquors," § 5.

§ 1. Course and conduct of trial in general.

In an action for alleged illegal flowage, it was not error to call the jury's attention during a view to a newly dug hole in the ground and to the height of the water therein as compared with that in the river.—*Flint v. Union Water Power Co.* (N. H.) 788.

*Point annotated. See syllabus.

§ 2. Reception of evidence.

*Where no objection to the reception of evidence is made, a motion to strike out the same must be made at or about the time the evidence is given.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

In an action for the price of a cash register, defendant *held* not entitled to testify, either in rebuttal or surrebuttal, that at the time of certain alleged conversations with plaintiff's agent there was no money in the cash register, and that no customer bought a cigar, as stated by the agent.—*Hallwood Cash Register Co. v. Rollins* (N. H.) 380.

In an action for the price of a cash register, defendant *held* not entitled to show in rebuttal the time of day a certain conversation occurred.—*Hallwood Cash Register Co. v. Rollins* (N. H.) 380.

Objection to inquiry as to what a conversation between plaintiff and defendant was, on the ground that it was not established that the person whom the witness heard in conversation with plaintiff was the defendant, *held* to present a question of fact and not of law.—*Prior v. Fuller* (N. H.) 716; *Reardon v. Same*, *Id.*

Admission of evidence over objection *held* error where ground of offer was not stated.—*Burns v. Pennsylvania R. Co.* (Pa.) 845.

Admission of evidence over objections of defendant *held* error.—*Burns v. Pennsylvania R. Co.* (Pa.) 845.

§ 3. Arguments and conduct of counsel.

*In an action for the price of a cash register it was not error for plaintiff's counsel to operate the machine before the jury, and to comment in his argument on the manner in which defendant tried to operate it.—*Hallwood Cash Register Co. v. Rollins* (N. H.) 380.

*Erroneous statements of an alleged fact by attorney, when withdrawn and corrected by charge, *held* not ground for reversal.—*Dougherty v. Pittsburgh Rys. Co.* (Pa.) 926.

Action of plaintiff's counsel in making statements of law to the jury in his opening statement *held* not ground of exception.—*Lewes v. John Crane & Sons* (Vt.) 60.

Evidence *held* to authorize argument that defendant had failed to produce papers that were or ought to have been in his possession, and that it might be inferred therefrom that there was something wrong with the transaction.—*Bushey v. Northrop* (Vt.) 1015.

§ 4. Taking case or question from jury.

*An exception does not lie to the court's ruling on a motion for a nonsuit; the question being one entirely within the discretion of the court.—*MacFeat v. Philadelphia, W. & B. R. Co.* (Del. Super.) 898.

*The benefit of an exception to the court's refusal to take the case from the jury at the close of plaintiff's testimony *held* lost to defendant.—*Bernheimer Bros. v. Becker* (Md.) 526.

*The court in passing upon defendant's prayers for a directed verdict must assume the truth of plaintiff's testimony.—*United Rys. & Electric Co. of Baltimore v. Weir* (Md.) 588.

Question reserved by points for a charge asking for binding instructions because plaintiff was not entitled to the verdict, etc., *held* bad.—*Cover v. Hoffman* (Pa.) 836.

Rule for reserving question of law on the trial stated.—*Cover v. Hoffman* (Pa.) 836.

*Reservation of question of law *held* inappropriate to the facts.—*Riggs v. Bair* (Pa.) 1086.

A verdict will not be directed for defendants if one count of the declaration is good, and there is evidence to support it.—*Lewes v. John Crane & Sons* (Vt.) 60.

§ 5. Instructions to jury.

*Request to charge *held* properly refused where the court stated the issues to the jury and properly presented the principles of law necessary for their determination.—*McGarry v. Healey* (Conn.) 671.

Where the bill of exceptions does not show that requests to charge, based on hypothesis relating to the facts, were sustained by evidence, they were properly refused.—*Neal v. Rendall* (Me.) 706.

In an action for the price of certain building materials, a request that if plaintiff contracted to furnish the materials to the owners of the building as rapidly as wanted, but failed to do so, they could offset any sum "the defendants" (which included the contractor as well as the owners) lost by reason of the delay, was properly refused.—*Oldenburg & Kelley v. Dorsey* (Md.) 576.

Instruction referring to only part of the testimony on the point in issue *held* error.—*Burns v. Pennsylvania R. Co.* (Pa.) 845.

Instruction not based on the evidence *held* improperly given.—*Burns v. Pennsylvania R. Co.* (Pa.) 845.

*Where defendant desired fuller instructions, it was his duty to request the same of the court.—*Grossbaum Ceramic Art Syndicate v. German Ins. Co. of Freeport* (Pa.) 1107; *Same v. Potomac Ins. Co. of District of Columbia*, *Id.*

*An instruction correctly stating the law is not erroneous because not in the exact language of a requested instruction.—*McGowan v. Court of Probate of City of Newport* (R. I.) 571.

§ 6. Custody, conduct, and deliberations of jury.

Presence in jury room of certain models, which had not been received in evidence, *held* not ground for discharging the jury, or setting aside the verdict.—*Lewes v. John Crane & Sons* (Vt.) 60.

§ 7. Verdict.

*Where jury returned a single sum as damages, when the declaration contained a claim by a husband in his own right, added to a claim of the husband and wife, *held*, that the court, on application of the plaintiff, will award a writ of venire de novo.—*Spencer v. Haines* (N. J. Sup.) 1009.

*Affidavits of jurors will not be received to impeach their verdict.—*Marcy v. Parker* (Vt.) 19.

§ 8. Waiver and correction of irregularities and errors.

*Plaintiff's failure to call certain misconduct of the jury to the attention of the trial court before verdict for defendant *held* a waiver thereof.—*Lyman v. Brown* (N. H.) 650.

*Where defendant submitted the case to the court on its merits without a motion for nonsuit or for an order of judgment in his favor, he waived the right to object to the insufficiency of the evidence to support the declaration.—*Gendron v. St. Pierre* (N. H.) 966.

Where, after bill of exceptions to refusal to nonsuit plaintiff, a witness for defendant testified to facts tending to show negligence of defendant, the refusal to nonsuit the plaintiff for failure of proof is not reversible error.—*Van Cott v. North Jersey St. Ry. Co.* (N. J. Err. & App.) 407.

* Point annotated. See syllabus.

TROVER AND CONVERSION.

Conversion by sheriff, see "Sheriffs and Constables," § 1.

Joinder of counts in trover and replevin, see "Pleading," § 3.

§ 1. Actions.

*A person having actual possession of chattels has sufficient title thereto to enable him to maintain trover against a stranger for their conversion.—*Marcy v. Parker* (Vt.) 19.

*In trover, burden *held* on defendant to show title in some other person and connect himself with such person.—*Marcy v. Parker* (Vt.) 19.

TRUST COMPANIES.

See "Banks and Banking," § 4.

TRUSTEE PROCESS.

See "Garnishment."

TRUSTS.

Charitable trusts, see "Charities."

Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."

Creation by will, see "Wills," § 12.

Review of findings as to accounts of trustees, see "Appeal and Error," § 13.

Trust deeds, see "Chattel Mortgages"; "Mortgages."

§ 1. Creation, existence, and validity.

Defendant company, permitting its officer to deposit and check out his own funds through the medium of the company's bank account, *held* not bound to see to proper application of trust funds so deposited; the presumption being in favor of good faith.—*Brookhouse v. Union Pub. Co.* (N. H.) 219.

Defendant company, not having used funds deposited in a bank with its own funds by its officer, *held* not chargeable for misapplication of trust funds so deposited and checked out by said official.—*Brookhouse v. Union Pub. Co.* (N. H.) 219.

Defendant company, permitting its officer to deposit and check out his own funds through the medium of the company's bank account, *held* not liable as trustee for trust funds evidenced by negotiable instruments payable to the officer as guardian, and so deposited and checked out by him.—*Brookhouse v. Union Pub. Co.* (N. H.) 219.

A city *held* to have taken title to certain land conveyed for a library site on trusts expressed in an offer of donation.—*Board of Trustees of School for Industrial Education v. City of Hoboken* (N. J. Ch.) 1.

Procurement of license by employes from original owner of secret process, which they had procured from their employes fraudulently, *held* not to raise trust in favor of employer.—*Vulcan Detinning Co. v. American Can Co.* (N. J. Ch.) 881.

§ 2. Construction and operation.

Under deed of trust, specific advancement to child *held* to have no priority as charge against his share of estate as against the general advancements by the grantor.—*Jacob Tome Institute v. Shipley* (Md.) 1042; *Shipley v. Same, Id.*

Under deed of trust, advancements *held* a charge on the life estate only of one of the children of the grantor.—*Jacob Tome Institute v. Shipley* (Md.) 1042; *Shipley v. Same, Id.*

Beneficiary of trust, who had merely a life estate therein, could not assign any interest in the income of the trust fund which might accrue and be payable after his death.—*Wright v. Leupp* (N. J. Ch.) 464.

Spendthrift trust *held* not to preclude beneficiary from assigning part of the income for the support of beneficiary's wife and minor children.—*Wright v. Leupp* (N. J. Ch.) 464.

§ 3. Appointment, qualification, and tenure of trustee.

Under Pub. St. 1901, c. 205, § 1, the superior court may reduce the number of trustees named by the creator of the trust.—*Barker v. Barker* (N. H.) 166.

It is no objection to removal of a trustee that he will thereby be deprived of the right to determine whether he has performed conditions named by the creator of the trust, upon which the gift to such trustee is predicated.—*Barker v. Barker* (N. H.) 166.

Mere fact that testator made it the duty of the probate court to approve trustees named in accordance with will *held* not to make it illegal for court to approve them, so that a contention that, if it was the intention of testator that the probate court should approve, the power of appointment failed as an attempt to confer on the court a jurisdiction not conferred by law, was untenable.—*Carr v. Corning* (N. H.) 168.

Provision in will for approval of appointment of trustee by judge of probate of a certain county for the time being *held* to raise presumption that probate court was intended, which was not rebutted by the addition of the words "for the time being," in view of Pub. St. 1901, c. 182, § 2, chapter 185, § 2, cl. 12, and chapter 198, relating to probate courts.—*Carr v. Corning* (N. H.) 168.

Suitability of trustee to be appointed by probate court, *held* a fact that must be proved in every case, so that evidence was admissible to show suitability of proposed appointee in behalf of those empowered by will creating a trust to appoint on approval of the probate court.—*Carr v. Corning* (N. H.) 168.

*The court on the failure of a testator to name a trustee will appoint one to carry out the trusts created by the will.—*Hiles v. Garrison* (N. J. Ch.) 865.

§ 4. Management and disposal of trust property.

Under a trust deed the grantee *held* entitled after the grantor's death to a one-fifth part only of the proceeds of a sale of the property made by him.—*Jones v. Day* (Md.) 364.

*Where a court of equity assumes jurisdiction of a trust, the trustees must secure its sanction for their acts.—*Gottschalk v. Mercantile Trust & Deposit Co.* (Md.) 810.

*Where jurisdiction of certain trust was assumed by court of equity, it was within the power of the court to select the depository of current balances of cash trust funds.—*Gottschalk v. Mercantile Trust & Deposit Co.* (Md.) 810.

Order selecting depository of trust funds *held* discretionary, and not subject to appellate review.—*Gottschalk v. Mercantile Trust & Deposit Co.* (Md.) 810.

Will creating trust subject to widow's dower *held* to leave the disbursement of the estate from dower to the discretion of the trustee.—*Shipley v. Mercantile Trust & Deposit Co.* (Md.) 814.

*Point annotated. See syllabus.

A person abetting a defaulting trustee becomes by participation in the breach of trust a trustee, and amenable to the jurisdiction of a court of equity in a suit by a substituted trustee.—*Safe Deposit & Trust Co. v. Cahn* (Md.) 819; *Same v. Roberts*, Id.

The fact that a substituted trustee holds the legal title to the trust estate, and that he seeks to recover money due to the trust estate, *held* not to deprive equity of jurisdiction to compel restitution.—*Safe Deposit & Trust Co. v. Cahn* (Md.) 819; *Same v. Roberts*, Id.

A suit by a substituted trustee to recover trust funds misappropriated through the aid of defendant *held* within the jurisdiction of equity.—*Safe Deposit & Trust Co. v. Cahn* (Md.) 819; *Same v. Roberts*, Id.

§ 5. Execution of trust by trustee or by court.

*A dividend on certain bank stock constituting a trust fund *held* income, and to belong to the life tenant and not to the remaindermen.—*Boardman v. Boardman* (Conn.) 339.

*Discretionary appropriations of principal by trustees for the benefit of present necessities of beneficiaries *held* part of their income, for which neither they nor their representatives were bound to account.—*Sterling v. Ives* (Conn.) 948.

§ 6. Accounting and compensation of trustee.

In an action involving the proper construction of a deed of trust, the allowance of a commission of 2½ per cent. to a trustee under a deed as compensation *held* not error.—*Jones v. Day* (Md.) 364.

§ 7. Establishment and enforcement of trust.

A purchaser of trust property *held* to hold the same subject to the trust.—*Safe Deposit & Trust Co. v. Cahn* (Md.) 819; *Same v. Roberts*, Id.

Evidence *held* admissible on attempt to establish a constructive trust.—*Brookhouse v. Union Pub. Co.* (N. H.) 219.

ULTRA VIRES.

Acts of corporation, see "Corporations," § 5; "Municipal Corporations," § 4; "Railroads," § 3; "Street Railroads," § 1.

UNDERTAKERS.

Restraining boycotting, see "Injunction," § 2.

UNDUE INFLUENCE.

Procuring making of will, see "Wills," § 3.

UNFAIR COMPETITION.

See "Trade-Marks and Trade-Names," § 3.

UNITED STATES.

Public lands, see "Public Lands," § 1.

UNITY.

Necessity of unity of possession as condition precedent to action for partition by co-tenant, see "Partition," § 2.

USAGES.

See "Customs and Usages."

*Point annotated. See syllabus.

USURY.

Place where usury is taken as disorderly house, see "Disorderly House."

VACANCY.

Of insured buildings, see "Insurance," § 4.

VACATION.

Vacating particular proceedings.

See "Judgment," §§ 2, 4.

Accounting of executor, see "Executors and Administrators," § 8.

Award of arbitrators, see "Arbitration and Award," § 2.

Sale by administrator, see "Executors and Administrators," § 6.

VALUE.

Limits of jurisdiction, see "Appeal and Error," § 1; "Equity," § 1; "Justices of the Peace," § 2.

Opinion evidence, see "Evidence," § 7.

VARIANCE.

Between pleading and proof in civil actions see "Pleading," § 8.

Between pleading and proof in criminal prosecutions, see "Indictment and Information," § 6.

VENDOR AND PURCHASER.

See "Sales."

Contract for sale of insured property as change in title, see "Insurance," § 4.

Easement of drainage over lands of vendor, see "Waters and Water Courses," § 1.

Purchasers at sale on execution, see "Execution," § 3.

Requirements of statute of frauds, see "Frauds Statute of," § 3.

Sale of land supporting building erected under parol license, see "Licenses," § 1.

Specific performance of contract, see "Specific Performance."

Subrogation to vendor's lien, see "Subrogation."

§ 1. Requisites and validity of contract.

*A promise to convey land *held* supported by a sufficiently definite consideration.—*White v. Poole* (N. H.) 494.

§ 2. Construction and operation of contract.

*Where, in an agreement to convey land, no time is fixed in which the conveyance is to be made, the grantor has a reasonable time in which to make it.—*White v. Poole* (N. H.) 494.

§ 3. Modification or rescission of contract.

A statement of the number of rooms in a building in a written contract for sale of real estate is so material that its falsity will justify the vendee in rescinding the contract.—*Davis v. Scher* (N. J. Sup.) 193.

VERDICT.

As subject to garnishment before judgment, see "Garnishment," § 1.

Directing verdict in civil actions, see "Trial," § 4.

In civil actions, see "Trial," § 7.

Operation and effect as curing defects in pleading, see "Indictment and Information," § 8.

Review on appeal or writ of error, see "Appeal and Error," § 13.
Setting aside, see "New Trial," § 2.

VERIFICATION.

Of chattel mortgage, see "Chattel Mortgages," § 1.
Of pleading, see "Pleading," § 5.

VESTED REMAINDERS.

Creation, see "Wills," § 10.

VESTED RIGHTS.

Protection, see "Constitutional Law," § 5.

VICE PRINCIPALS.

See "Master and Servant," § 6.

VINDICTIVE DAMAGES.

See "Damages," § 5.

VOTERS.

See "Elections."

WAGERS.

See "Gaming," § 1.

WAIVER.

See "Estoppel."

Of rule that failure to except in lower court prevents raising of question in appellate court, see "Appeal and Error," § 3.

Of objections to particular acts or proceedings.

See "Jury," § 2; "Limitation of Actions," § 1; "Pleading," § 9; "Trial," § 8.

Conduct of arbitrators, see "Arbitration and Award," § 2.

Pleading in equity, see "Equity," § 3.

Of rights or remedies.

See "Contracts," § 3.

Contract for services, see "Work and Labor."

Forfeiture of insurance, see "Insurance," § 5.

Forfeiture of lease, see "Landlord and Tenant," §§ 2, 5.

Limitations in insurance policy, see "Insurance," § 7.

Right to administration, see "Executors and Administrators," § 1.

Right to appeal, see "Appeal and Error," § 2.

Right to have dower assigned, see "Dower," § 3.

Right to notice to quit, see "Landlord and Tenant," § 2.

Right to rescind contract, see "Sales," § 2.

WAREHOUSEMEN.

Where in May, 1904, a warehouseman petitioned for process of sale under Rev. St. 1883, c. 91, §§ 48-56 and Rev. St. 1903, c. 93, §§ 67-75, and sold the goods, the sale was invalid; Laws 1897, c. 304, re-enacted in Revision 1903, c. 33, § 10, relating to warehousemen, containing the only provision under which the goods could have been legally sold.—*Stoddard v. Crocker* (Me.) 241.

WARRANT.

Search warrant, see "Searches and Seizures."

*Point annotated. See syllabus.

WARRANTY.

By insured, see "Insurance," § 4.
On sale of goods, see "Sales," §§ 5, 7.

WATERS AND WATER COURSES.

See "Navigable Waters."

As county boundaries, see "Counties," § 1.
Contracts for municipal water supply, see "Municipal Corporations," § 4.

Exercise of power of eminent domain by water company, see "Eminent Domain," § 2.
Mandamus to water company, see "Mandamus," § 2.

View of premises by jury in action for flowage, see "Trial," § 1.

Water courses in cities, see "Municipal Corporations," § 9.

§ 1. Surface waters.

Purchaser of lot *held* to acquire no easement of drainage over other land owned by his grantor and used by him to drain the lot conveyed.—*Biddison v. Aaron* (Md.) 523.

§ 2. Artificial ponds, reservoirs, and channels, dams, and flowage.

A complaint for flowage not inserted in a writ of attachment may, under Rev. St. c. 94, § 6, be presented to the court in term time, or filed with the clerk; but before it can be served there must be an order of service by the court in term time, or by some justice thereof in vacation, under Rev. St. c. 84, § 1.—*Wyman v. Piscataquis Woolen Co.* (Me.) 655.

In an action for injuries to plaintiff's land by flowage, evidence *held* admissible as bearing on the question of plaintiff's damages.—*Flint v. Union Water Power Co.* (N. H.) 788.

In an action for alleged illegal flowage, plaintiff's engineer *held* improperly permitted to testify that he dug a hole in the land, and that water stood therein on a level with the stream.—*Flint v. Union Water Power Co.* (N. H.) 788.

A deed conveying certain land and a right of flowage by certain dams *held* limited to the right to flow as exercised at the time the deed was executed.—*Flint v. Union Water Power Co.* (N. H.) 788.

That plaintiff stacked his grain on a knoll which he had never known to be flooded *held* not to raise a conclusive presumption that defendant railroad company could not have anticipated that its fill over a water course as built would be likely to flood the knoll.—*Perrine v. Pennsylvania R. Co.* (N. J. Err. & App.) 702.

A railroad company constructing a fill over a water course *held* bound to exercise reasonable care to ascertain the character of the stream for the construction of a proper culvert, but no such duty rested on an upper property owner.—*Perrine v. Pennsylvania R. Co.* (N. J. Err. & App.) 702.

§ 3. Public water supply.

A house occupied as a boarding house *held* not a dwelling house containing a family, within a water contract fixing rate for dwelling houses containing families.—*Robbins v. Bangor Ry. & Electric Co.* (Me.) 136.

Where a corporation as a consideration for the making of a hydrant contract with a town engages to supply water to the inhabitants, the contractor is under obligation to fulfill the agreement.—*Robbins v. Bangor Ry. & Electric Co.* (Me.) 136.

In case of unnecessary waste, a water company may apply a meter, and charge reasonable water rates.—*Robbins v. Bangor Ry. & Electric Co.* (Me.) 136.

A public service water corporation may revise its rates, provided the new rates are reasonable, and change from an annual to a meter rate.—*Robbins v. Bangor Ry. & Electric Co. (Me.)* 136.

*A public service corporation may require payment for water for a reasonable time in advance, and cut off water from a customer who refuses to pay.—*Robbins v. Bangor Ry. & Electric Co. (Me.)* 136.

An obligation to make compensation to the owners of water *held* implied from its reception and the conduct of the municipality receiving it.—*New Jersey Suburban Water Co. v. Town of Harrison (N. J. Err. & App.)* 490; *Same v. Borough of East Newark, Id.*

The property which a water company acquired in water *held* not devoted by its delivery to, or transmission through, the pipes of a city.—*New Jersey Suburban Water Co. v. Town of Harrison (N. J. Err. & App.)* 767.

A water company which was the sole source of supply to a borough *held* a quasi public corporation bound to furnish water to the borough at reasonable prices, to be fixed by a competent tribunal in the absence of agreement.—*Borough of Washington v. Washington Water Co. (N. J. Ch.)* 390.

A borough *held* entitled to an injunction pendente lite restraining a water company from cutting off the borough's supply for nonpayment of past service.—*Borough of Washington v. Washington Water Co. (N. J. Ch.)* 390.

In a suit by a borough to restrain a water company from cutting off its supply, the jurisdiction of equity *held* to extend merely to the determination of whether the price demanded was unreasonable, and, if so, to enjoin the cutting off of the supply.—*Borough of Washington v. Washington Water Co. (N. J. Ch.)* 390.

In a suit to restrain a water company from cutting off a borough's supply, complainant *held* entitled to a preliminary injunction on certain conditions.—*Borough of Washington v. Washington Water Co. (N. J. Ch.)* 390.

In a suit to restrain a water company from shutting off a borough's supply, defendant *held* not entitled to a condition of a preliminary injunction requiring payment of any portion of the service rendered prior to the filing of the bill.—*Borough of Washington v. Washington Water Co. (N. J. Ch.)* 390.

Rule for the establishment of reasonable rates to be charged by a water company for furnishing water to a city applied, and rates fixed for the various services performed.—*Long Branch Commission v. Tintern Manor Water Co. (N. J. Ch.)* 474.

The rates at which a water company should be required to furnish water to a city for public and private consumption should be such as would afford the company a fair income, based on the fair value of its property at the time, considering the cost of maintenance, depreciation, current expenses, etc.—*Long Branch Commission v. Tintern Manor Water Co. (N. J. Ch.)* 474.

A municipal corporation, independent of statute, has power to compel a private corporation furnishing water for public and private consumption to do so at reasonable rates.—*Long Branch Commission v. Tintern Manor Water Co. (N. J. Ch.)* 474.

A municipality *held* authorized to revise its contracts with a water company organized under P. L. 1876, p. 318 (Revision 1877, p. 1365), at the end of every decade.—*Long Branch Commission v. Tintern Manor Water Co. (N. J. Ch.)* 474.

*Where a water company was organized under P. L. 1876, p. 318 (Revision 1877, p. 1365), to furnish water to a municipality, the municipality had power to impose terms as to rates to be charged both for public and private consumption.—*Long Branch Commission v. Tintern Manor Water Co. (N. J. Ch.)* 474.

*Under P. L. 1876, p. 371, § 10 (Gen. St. p. 649), and P. L. 1885, p. 68, § 1 (Gen. St. p. 655), where a city had a claim against plaintiff's property for water rents when she purchased, she could not compel the city to furnish her with water until such arrears were paid.—*Howe v. City of Orange (N. J. Ch.)* 777.

Under borough ordinance, a water company *held* required to apply to town council for permission to lay mains through the streets.—*Beaver Valley Water Co. v. Conway Borough (Pa.)* 844.

A borough ordinance requiring a water company to apply for permission to lay mains in the streets to the town council is a reasonable regulation.—*Beaver Valley Water Co. v. Conway Borough (Pa.)* 844.

WAYS.

Private rights of way, see "Easements."
Public ways, see "Highways"; "Municipal Corporations," §§ 8, 9.

WELLS.

Oil and gas wells, see "Mines and Minerals," § 1.

WHARVES.

Dedication to public use, see "Dedication," §§ 1, 2.

WIDOWS.

Dower, see "Dower."
Rights under statutes of descent and distribution, see "Descent and Distribution," § 1.
Right to redeem from foreclosure sale, see "Mortgages," § 6.

WILD ANIMALS.

See "Animals."

WILLS.

See "Descent and Distribution"; "Executors and Administrators."
Charitable bequests and devises, see "Charities."
Conclusiveness of determination as to testamentary capacity, see "Judgment," § 5.
Construction and execution of trusts, see "Trusts."
Courts of probate, see "Courts," § 2.
Dismissal of appeals from register of wills, see "Appeal and Error," § 9.
Disqualification of register of wills, see "Judges," § 1.
Equitable conversion, see "Conversion."
Examination of witnesses in will contest, see "Witnesses," § 2.
Legacy and succession taxes, see "Taxation," § 5.
Opening decree admitting will to probate, see "Judgment," §§ 2, 4.
Opinion evidence in will contest see "Evidence," § 7.
Power of administrator under will, see "Executors and Administrators," § 3.
Presumptions on appeal in probate proceedings, see "Appeal and Error," § 11.
Restrictions on perpetuities, see "Perpetuities."

* Point annotated. See syllabus.

Review on appeal of ruling as to extension of time to waive provisions of, see "Appeal and Error," § 13.

§ 1. Nature and extent of testamentary power.

*Charitable bequest *held* invalid, under Act April 26, 1855 (P. L. 328), as executed within one calendar month from the death of testator.—*In re Gregg's Estate* (Pa.) 856; Appeal of Washington Hospital, Id.

§ 2. Testamentary capacity.

*In a contest of a will, certain facts considered, and *held* to afford no legal reason why testator might not have had sufficient mental capacity to execute a will at the time it was executed.—*In re Nichols* (Conn.) 610.

In a contest of a will, evidence considered, and *held* to justify a finding that testator possessed sufficient mental capacity to make the will.—*In re Nichols* (Conn.) 610.

The execution of a will in reliance on the assurance of counsel, containing expressions which can only be understood by those acquainted with the law, *held* not evidence of unsoundness of mind.—*Havens v. Mason* (Conn.) 615.

An instruction as to mental competency of testatrix *held* erroneous as imposing too severe a test of capacity.—*Havens v. Mason* (Conn.) 615.

On an issue *devisavit vel non* on the ground of want of testamentary capacity, evidence reviewed, and *held* that the issue was properly refused.—*Masseth v. Masseth* (Pa.) 1076.

§ 3. Requisites and validity.

In a contest of a will evidence considered, and *held* to justify a finding that testator was not induced to make it by undue influence.—*In re Nichols* (Conn.) 610.

*The presumption in favor of the validity of a will with all the formalities required by law does not arise where it was executed under circumstances which might amount to undue influence.—*Edgerly v. Edgerly* (N. H.) 716.

*On an application for probate of a will, the mere absence of evidence on the issue of undue influence is fatal; the burden being on proponent to show that the will was not the result of such influence.—*Edgerly v. Edgerly* (N. H.) 716.

*In proceeding to determine the validity of a will, evidence *held* insufficient to sustain a finding that a will had been procured by undue influence.—*In re Keisler's Estate* (Pa.) 108; Appeal of Merwine, Id.

*The fact that a will was not read over to testatrix at the time she signed was immaterial where there was no doubt that it correctly expressed testatrix' intent.—*In re Masseth's Estate* (Pa.) 640; Appeal of Campbell, Id.

§ 4. Probate, establishment, and annulment.

*In probate proceedings all the parties must be in court either by citation or voluntary appearance.—*Layton v. Jacobs* (Del. Super.) 691.

Order of orphans' court dismissing caveat to will after trial of issues by jury *held* conclusive on the questions covered by the issues.—*Struth v. Decker* (Md.) 709.

*On an application for probate of a will, evidence *held* to require submission of the question of undue influence to the jury.—*Edgerly v. Edgerly* (N. H.) 716.

*A court of equity will not entertain jurisdiction to set aside a will or the probate thereof.—*Vincent v. Vincent* (N. J. Ch.) 700.

On a *devisavit vel non*, evidence *held* insufficient to raise a question for the jury on the

issue of petitioner's legitimacy as a daughter of testator such as to entitle petitioner to contest the will.—*In re Wilkinson's Estate* (Pa.) 567; Appeal of Scott, Id.

Refusal of issue *devisavit vel non held* not error.—*In re Masseth's Estate* (Pa.) 640; Appeal of Campbell, Id.

§ 5. Construction—General rules.

*Declarations of testator as to the meaning of the words used in his will are inadmissible on the issue of the proper construction of the will.—*Shipley v. Mercantile Trust & Deposit Co.* (Md.) 814.

*Extrinsic evidence cannot be resorted to in construing a will in the absence of some ambiguity or difficulty of construction.—*Shipley v. Mercantile Trust & Deposit Co.* (Md.) 814.

In construing a will, the words and expressions used are to be taken in their ordinary grammatical sense, unless such sense is modified by the context.—*Shipley v. Mercantile Trust & Deposit Co.* (Md.) 814.

Where testatrix bequeathed to her infant daughter all her residuary estate, with a provision that if she should die before arriving of age, or without disposing of the same, or without having made a last will, then over, in construing the proviso, "and" could not be substituted for "or."—*In re Polley's Estate* (N. J. Prerog.) 553.

*A codicil will not be allowed to vary a will unless such was the plain intent of the testator.—*In re Sigel's Estate* (Pa.) 175, 176; Appeal of Schudt, Id.

§ 6. — Designation of devisees and legatees and their respective shares.

*The word "heirs" in a will *held* used in its ordinary legal sense, and not to mean either the children of the devisee or her heirs living at the death of testator.—*Gerard v. Ives* (Conn.) 607.

Will construed, and *held*, that estate did not vest in the grandchildren at the testator's decease, but at the death of the testator's daughter, under the conditions named.—*Stoors v. Burgess* (Me.) 730.

*The law favors early vesting of an estate, when such construction will not defeat the intent of the testator.—*Stoors v. Burgess* (Me.) 730.

*Widowed daughter of testator *held* an "unmarried" daughter, within the meaning of a clause of the will making a bequest to testator's unmarried daughters.—*Trenton Trust & Safe Deposit Co. v. Armstrong* (N. J. Ch.) 456.

*Will construed, and devisees thereunder determined.—*Bealafeld v. Slaughenhaupt* (Pa.) 1113.

§ 7. — Survivorship, representation, and substitution.

Will construed, and *held* that testator's grandson acquired, on testator's death, an absolute title to one-half of the residuary estate subject to a life interest in his father.—*Hull v. Holmes* (Conn.) 705.

The phrase "die leaving no living issue," when used in a will, is equivalent to the phrase "die leaving no surviving issue."—*Hull v. Holmes* (Conn.) 705.

Where a will provides for a bequest to testator's brother or sister, or the children of any deceased brother or sister, the interest of the children is transmissible to their heirs at law.—*Dilts v. Clayhaunce* (N. J. Ch.) 672.

Under a will providing that on the death of a devisee without issue the property devised

* Point annotated. See syllabus.

should be divided among testator's brothers and sisters and children of deceased brother or sister, children of any brother or sister who had died leaving children, and the grantee, devisee, or heir at law of any brother or sister who had died leaving no child, were entitled to share in the bounty.—*Dilts v. Clayhaunce* (N. J. Ch.) 672.

§ 8. — Description of property.

Will construed, and *held* that the trustee therein mentioned was entitled to the absolute property in the residue after making payments provided for.—*State v. Sliney* (Conn.) 621.

A married woman, under Gen. St. p. 2014, who devises all her estate to another, subject to the legal rights of her husband if he survives her, does not give any right to the husband to the personality so bequeathed.—*In re Folwell's Estate* (N. J. Err. & App.) 414.

Beneficiaries in a bequest in a will of a trustee *held* not to have taken thereunder as his legatees.—*Hegeman's Ex'rs v. Roome* (N. J. Ch.) 392.

Codicil construed, and *held* not to bar legatees mentioned therein from sharing in the residue of the estate.—*In re Sigel's Estate* (Pa.) 175, 176; Appeal of Schudt, Id.

§ 9. — Nature of estates and interests created.

Will giving wife "dower and thirds" *held* to give her merely a life interest in the one-third of the realty.—*Shipley v. Mercantile Trust & Deposit Co.* (Md.) 814.

A devise *held* void as an attempt to create a conditional fee or fee tail, and the devisees to have taken an absolute fee.—*Merrill v. American Baptist Missionary Union* (N. H.) 647.

A residuary clause of a will *held* to have amounted to an absolute gift to the executor.—*Manson v. Jack* (N. J. Ch.) 394.

Where testatrix bequeathed all her estate to her daughter, with provision that if she should die before attaining majority, or without disposing of the same, or without leaving a last will, then over, the power of disposal given to the first taker will not avoid the gift over if the death of the infant during minority shall happen.—*In re Polley's Estate* (N. J. Prerog.) 553.

Will construed, and *held* to show an intent to make the first contingency applicable to the period of minority of infant legatee, and the two other contingencies to the infant's life after coming of age.—*In re Polley's Estate* (N. J. Prerog.) 553.

Will construed, and widow *held* to take a defeasible fee-simple estate in an undivided one-half of the property.—*Roehrbach v. Sanders* (Pa.) 27.

Will construed, and *held* that, on the death of the husband of the daughter of testatrix, the daughter acquired title in fee simple to the land devised.—*Sanders v. Mamolen* (Pa.) 981.

*Where testator gave "to my son and his heirs after him all my real estate," the son took an estate in fee simple.—*Nesbit v. Skelding* (Pa.) 1062.

Will construed, and nature of estate devised determined.—*Todd v. Armstrong* (Pa.) 1114.

§ 10. — Vested or contingent estates and interests.

*Under a will containing a testamentary trust surviving children of a beneficiary *held* vested at his death with their interest, subject only to be divested by their death before arriving at age.—*Sterling v. Ives* (Conn.) 948.

*Where there are in a will no words importing a gift to a class, except in the direction to make division at a period after the testator's death, the members of that class are to be ascertained as of the time fixed for the division.—*Stoors v. Burgess* (Me.) 730.

Will construed, and *held* that the remainder thereby created vested in the remaindermen at the death of the testator.—*Roberts v. Roberts* (Md.) 161; *Landon v. Shriver's Estate*, Id.

Will construed, and *held* to create a remainder which vested on testator's death, and took effect on the death or marriage of the life tenants.—*Trenton Trust & Safe Deposit Co. v. Armstrong* (N. J. Ch.) 456.

Where a devise to a widow for life and to a stepson in fee is followed by a direction that, if the stepson should die without issue, then to others, upon the happening of the contingency the estate of the stepson was divested.—*Dilts v. Clayhaunce* (N. J. Ch.) 672.

Will construed, and estate devised to grandchildren *held* a contingent remainder.—*In re Kountz's Estate* (Pa.) 1103; Appeal of Jones, Id.

*Vested remainder defined.—*In re Kountz's Estate* (Pa.) 1103; Appeal of Jones, Id.

§ 11. — Conditions and restrictions.

*A provision in a will for the support of daughters so long as they continue unmarried and need support *held* a valid bequest.—*Trenton Trust & Safe Deposit Co. v. Armstrong* (N. J. Ch.) 456.

Will construed, and *held* to create a trust for the benefit of testator's unmarried daughters as joint tenants, with right of survivorship between them, so long as any should remain alive and unmarried.—*Trenton Trust & Safe Deposit Co. v. Armstrong* (N. J. Ch.) 456.

*Bequest to a legatee for life, or so long as she remains unmarried, *held* not invalid as a condition in restraint of marriage.—*In re Holbrook's Estate* (Pa.) 368.

§ 12. — Estates in trust and powers.

*Under the provisions of a trust, on the death of one of the beneficiaries leaving surviving issue, the income of such beneficiary's share previously payable to him was payable in like manner for the benefit of his widow and surviving issue until they came of age.—*Sterling v. Ives* (Conn.) 948.

The phrase "in like manner," used in a provision in a trust for the payment of income of a beneficiary "in like manner" to his widow for life, remainder to the beneficiary's lawful issue, etc., *held* to describe the mode in which the recipients were to be benefited, and not to describe such recipients.—*Sterling v. Ives* (Conn.) 948.

*Recipients of a remainder of a trust fund *held* the issue of the beneficiary living at the death of the beneficiary's widow.—*Sterling v. Ives* (Conn.) 948.

*Provisions made for the family of a particular beneficiary of a trust *held* inoperative on the death of such beneficiary.—*Sterling v. Ives* (Conn.) 948.

Under the provisions of a trust, the share of a beneficiary *held* not subject to reduction by appropriations made after his death for the benefit of other beneficiaries.—*Sterling v. Ives* (Conn.) 948.

A spendthrift trust created in a will *held* to apply to testator's grandchildren.—*Sterling v. Ives* (Conn.) 948.

The death of one of testator's children, who were beneficiaries of a trust for the ultimate

*Point annotated. See syllabus.

benefit of testator's grandchildren, *held* to operate as a severance of such child's share from the trust fund.—*Sterling v. Ives* (Conn.) 948.

*A provision in a will *held* sufficient to create a spendthrift trust.—*Sterling v. Ives* (Conn.) 948.

Devises in a will *held* to have taken certain property impressed with a trust to pay an annuity from the income.—*Merrill v. American Baptist Missionary Union* (N. H.) 647.

A will construed, and *held* to create a trust during the life or widowhood of the testator's widow.—*Hiles v. Garrison* (N. J. Ch.) 865.

§ 13. — Actions to construe wills.

In a suit for the construction of a will, the question whether a certain secret trust had been created by communications of testatrix to the executor was not open to consideration.—*Manson v. Jack* (N. J. Ch.) 394.

A contention that a clause of a will together with certain directions by testatrix to the executor created a trust for certain persons, and that the same being void for uncertainty the estate was distributable among the heirs, cannot be considered in a suit to which such alleged beneficiaries were not parties.—*Manson v. Jack* (N. J. Ch.) 394.

A suit by an administrator with the will annexed for instructions as to the disposition of certain property brought before the property came into his hands *held* premature.—*Norris v. Beardsley* (N. J. Ch.) 425.

*An administrator with the will annexed has no right to institute a suit to construe the will where the case is clear and there is no reasonable doubt as to his duty.—*Norris v. Beardsley* (N. J. Ch.) 425.

*A bill to construe an ambiguous devise will not lie on behalf of an administrator with the will annexed where he was charged with no duty with respect to the land.—*Norris v. Beardsley* (N. J. Ch.) 425.

A suit by an administrator with the will annexed to construe an ambiguous devise *held* not maintainable in a court of chancery, where it did not appear that the administrator either had or could obtain possession of personal property belonging to testatrix to the jurisdictional amount.—*Norris v. Beardsley* (N. J. Ch.) 425.

*A suit for the construction of a will and the appointment of a trustee *held* properly brought in chancery.—*Hiles v. Garrison* (N. J. Ch.) 865.

§ 14. Rights and liabilities of devisees and legatees.

Where testatrix after bequeathing a legacy during her lifetime paid the amount thereof to the legatee in full satisfaction of the legacy, the legacy was thereby adeemed.—*Gallagher v. Martin* (Md.) 247.

A change in the situation of the estate of petitioner's deceased wife after the expiration of a year *held* not to require as a matter of law an extension of time within which he was entitled to waive the provisions of the wife's will.—*Jaques v. Chandler* (N. H.) 713.

On an application by a husband for an extension of time to waive the provisions of his wife's will, under Pub. St. 1901, c. 186, § 13, and chapter 195, § 14, the burden is on him to show that justice requires such extension.—*Jaques v. Chandler* (N. H.) 713.

The words "for good cause shown," used in Pub. St. 1901, c. 186, § 13, and chapter 195, § 14, authorizing the extension of time within which a husband may waive the provisions of his wife's will, *held* to mean when "justice re-

quires" such extension.—*Jaques v. Chandler* (N. H.) 713.

Administrator of widow *held* entitled to a legacy of interest left to the widow in lieu of dower, and not paid during the widow's lifetime.—*Plum v. Smith* (N. J. Ch.) 763.

Will *held* to create a charge on testator's real estate without the aid of a mortgage.—*Plum v. Smith* (N. J. Ch.) 763.

*A legacy given in lieu of dower will not abate, if, at the time of the making of the will the wife had an inchoate right to dower out of the testator's estate.—*Plum v. Smith* (N. J. Ch.) 763.

Legacies bequeathed to collateral relatives pass on the death of the testatrix, and are not postponed or suspended for want of probate of the will.—*In re Hartman's Estate* (N. J. Prerog.) 560.

*Will construed, and monument provided for by the will *held* not a charge on testator's land.—*Stark v. Byers* (Pa.) 371.

Will construed, and *held* that, on failure of residuary gift to grandchildren, property covered by an attempted trust passed to the heirs under the intestate laws.—*In re Kountz's Estate* (Pa.) 1103; *Appeal of Jones*, *Id.*

*Pecuniary legacies draw interest after one year from the death of the testator, unless the will provides otherwise.—*Woodward's Estate v. Holton* (Vt.) 718.

WITNESSES.

See "Affidavits"; "Depositions"; "Evidence."

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Liability of board of chosen freeholders for

failure to take care of witnesses retained in

county jail, see "Counties," § 3.

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§ 1. Competency.

Under Rev. Code 1893, p. 798, c. 537, § 1, a

defendant in an action by an administrator *held*

not competent to testify to transactions with

decedent.—*Jones v. Purnell* (Del. Super.) 149.

*Under Code Pub. Gen. Laws, art. 35, § 2,

as amended by Laws 1904, p. 1163, c. 661, a

wife cannot testify, in a suit involving the con-

struction of the will of her deceased husband,

to conversations with her husband.—*Shipley*

v. Mercantile Trust & Deposit Co. (Md.) 814.

*The law fixes no precise age within which

children are absolutely excluded from giving

evidence.—*State v. Tolla* (N. J. Err. & App.)

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Testimony as to transaction with decedent

held inadmissible under Evidence Act (P. L.

1900, p. 363) § 4.—*Wilson v. Terry* (N. J. Ch.)

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*In a suit for divorce petitioner is a compe-

tent witness in her own behalf.—*Wood v. Wood*

(N. J. Ch.) 429.

*Under Evidence Act (P. L. 1900, p. 363) § 4,

a witness *held* not competent to testify to trans-

actions with a decedent.—*Mills v. Hendershot*

(N. J. Ch.) 542.

* Point annotated. See syllabus.

§ 2. Examination.

In an action for alienation of the affections of plaintiff's wife, plaintiff *held* entitled to testify on redirect examination as to a conversation with his wife to support his testimony that they had had no marital relations during the preceding eight months.—*Engel v. Conti* (Conn.) 210.

In a will contest, the exclusion of questions to an attesting witness on cross-examination as to how many years he had been identified in business relations with testator *held* erroneous.—*In re Nichols* (Conn.) 610.

In a will contest, *held* error to exclude on redirect examination a question as to mental condition of testator's brother when he manifested peculiarities similar to the testator.—*In re Nichols* (Conn.) 610.

*A certain question *held* improper on cross-examination.—*Baltimore & O. R. Co. v. Deck* (Md.) 958.

*In an action against a railroad for injuries to plaintiff's property from smoke and cinders from defendant's engines, defendant *held* not injured by the exclusion of certain evidence.—*Baltimore Belt R. Co. v. Sattler* (Md.) 1125.

*Any question tending to show that the real import of the testimony of a witness in chief is materially different from its original aspect is legitimate cross-examination.—*Collyer v. Schuman* (N. J. Sup.) 186.

On a prosecution for keeping intoxicating liquor with intent to sell the same without authority, the officer who searched defendant's premises might use the return to the search warrant to refresh his recollection.—*State v. Costa* (Vt.) 38.

On a prosecution for keeping intoxicating liquor with intent to sell the same without authority, defendant may cross-examine the officer who made the search from the return to the search warrant.—*State v. Costa* (Vt.) 38.

In an action for breach of marriage promise, *held* not error to permit plaintiff to testify on redirect examination that she did not claim to be defendant's legal wife, having been married only in church in Italy.—*Massucco v. Tomassi* (Vt.) 57.

*A party cannot object to the re-examination of a witness on matters which he himself has brought out on cross-examination.—*Lewes v. John Crane & Sons* (Vt.) 60.

§ 3. Credibility, impeachment, contradiction, and corroboration.

It is not competent to impeach a witness by proof of prior statements, the making of which he does not deny when testifying.—*State v. Hummer* (N. J. Sup.) 388.

Where testimony is introduced to show a contemporaneous parol agreement made at the time of the execution of a lease, evidence of prior conversations and transactions is admissible in corroboration.—*T. W. Phillips Gas & Oil Co. v. Pittsburg Plate Glass Co.* (Pa.) 830.

Witness for plaintiff may testify to conversation for purpose of contradicting a son of plaintiff, one of the parties defendant.—*Weller v. Weller* (Pa.) 859.

*In a prosecution for rape, defendant *held* not entitled to show, to affect prosecutrix's

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*Under V. S. 1246, plaintiff may call defendant as his first witness and then examine other witnesses, although their testimony contradicts that given by defendant.—*Jennett v. Patten* (Vt.) 33.

*The hostility of a witness by proving statements out of court *held* not provable unless a proper foundation is laid by inquiring of him whether he made the statements.—*State v. Barditti* (Vt.) 44.

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*One furnishing board and services in the absence of an express contract is entitled to recover their reasonable worth.—*Schuchler v. Cooper* (Del. Super.) 261.

*Where a written contract has been waived, an action of quantum meruit will lie for work and labor done.—*Hilton v. Hanson* (Me.) 797.

In an action to recover on a quantum meruit, evidence *held* to show that the written contract under which the work was begun was waived by defendant.—*Hilton v. Hanson* (Me.) 797.

Evidence *held* to show that domestic services rendered by plaintiff to defendant's ancestor were rendered under promise of payment.—*Eirley v. Eirley* (Md.) 962.

*Services rendered by a stepdaughter to her stepfather, in whose family she was not living, are not presumed to be gratuitous.—*Brown v. Cummings* (R. I.) 378.

*Where a stepdaughter sued for services rendered to her stepfather at his request, the question whether the circumstances were such as to show a reasonable expectation that the services would be paid for should have been submitted to the jury.—*Brown v. Cummings* (R. I.) 378.

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